

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020, #295</p> <p>Petitioner: WILLIAM HUNTER RAILEY</p> <p>v.</p> <p>Respondents/Proponents: MICHAEL FIELDS and LINDSEY SINGER</p> <p>and</p> <p>Ballot Title Board: THERESA CONLY, DAVID POWELL, and JASON GELENDER</p>	<p style="text-align: center;">Supreme Court Case No.: 2020SA328</p>
<p>Attorneys for Respondents/Proponents:</p> <p>Suzanne Staiert, Reg. No. 23411 MAVEN LAW GROUP 1800 Glenarm Place, Suite 950 Denver, CO 80202 Phone: (303) 263-0844 Email: sstaiert@mavenlawgroup.com</p>	<p style="text-align: center;">RESPONDENTS'/PROponents' OPENING BRIEF</p>

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 3,078 words.

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The brief complies with C.A.R. 28(k):

It contains under a separate heading a concise statement of the applicable standard of appellate review with citation to authority.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Suzanne Staiert

Suzanne Staiert

Attorney for the Respondents/Proponents

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Michael Fields and Lindsey Singer (“Respondents/Proponents”), through the undersigned counsel, hereby respectfully submit this Opening Brief in support of the title, ballot title and submission clause set by the Title Board for Proposed Initiative 2019-2020 #295 (the “Initiative” or “Measure”).

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Title Board erred in ruling that the measure contains a single subject as required by Article V, § 1(8) of the Colorado Constitution and C.R.S. §1-40-105(4).
 - a. Whether the measure contains multiple subjects because the measure requires voter approval at a statewide general election for newly created or qualified enterprises that collect \$100 million in their first five years, and the effect of the measure might impose reductions in state spending on state programs when an enterprise exceeds the threshold and may be awaiting or has been denied voter approval.
 - b. Whether the measure was incomprehensible and therefore the Title Board lacked jurisdiction to set a title.
2. Whether the Title Board erred in ruling that the measure satisfies the clear title requirement in Colo. Rev. Stat. § 1-40-106(3)(b) and fairly advises voters of the central features of the measure.

- a. Whether the Title must describe the measure’s requirement of specific language required in the ballot title.
- b. Whether the Title properly describes the enterprises which would be voter consideration under the measure subject to the measure.

STATEMENT OF THE CASE

Petitioner William Hunter Railey brings this original proceeding pursuant to section 1-40-107(2), C.R.S., as an appeal of the Title Board’s decision to deny Petitioner’s Motion for Rehearing and set title for Proposed Initiative 2019-2020 #295.

Proposed Initiative 2019-2929 #295 amends Colorado statute and seeks to require a vote for any enterprise that is projected to, or does, collect \$100,000,000 in fees and surcharges in its first five years.

The measure, in full, states:

24-77-108. Creation of a new fee-based Enterprise. In order to provide transparency and oversight to government mandated fees the People of the State of Colorado find and declare that:

- (a) After January 1, 2021, any state enterprise qualified or created, as defined under Colo.Const. Art. X, section 20(2)(d) with projected or actual revenue in fees and surcharges of over \$100,000,000 total in its first five fiscal years must be approved at a statewide general election. Ballot titles for enterprises shall begin, “SHALL AN ENTERPRISE BE CREATED TO

COLLECT REVENUE TOTALING (full dollar collection for first five fiscal years) IN ITS FIRST FIVE YEARS...?”

- (b) Revenue collected for enterprises created simultaneously or within the five preceding years serving primarily the same purpose shall be aggregated in calculating the applicability of this section.

Respondents/Proponents Michael Fields and Lindsey Singer filed an original draft of the measure on March 6, 2020. The Respondents/Proponents filed an original and final draft of the Initiative with the Title Board on March 12, 2020. The Title Board considered the Initiative on April 1, 2020 and determined that it had jurisdiction to set title and set the following title:

A change to the Colorado Revised Statutes requiring statewide voter approval at the next even-year election of any newly created or qualified state enterprise that is exempt from the Taxpayer’s Bill of Rights, Article X, Section 20 of the Colorado constitution, if the projected or actual combined revenue from fees and surcharges of the enterprise, and all other enterprises created within the last five years that serve primarily the same purpose, is greater than \$100 million within the first five fiscal years of the creation or qualification of the new enterprise.

At the April 15, 2020 Rehearing, the Title Board denied the Petitioner Railey’s Motion for Rehearing. Petitioner Railey subsequently filed a timely petition for review in this Court on April 22, 2020.

SUMMARY OF ARGUMENT

The Title Board properly found the initiative contained a single subject. The initiative simply requires a vote for any enterprise that is projected to, or does, collect \$100,000,000 in fees and surcharges in its first five years. Currently, Colo.Const. Art. X, section 20 exempts enterprises from a vote of the people. This initiative seeks to modify that provision to require a vote in limited circumstances. All components of the initiative are connected to this purpose. The scope of the measure is narrow as it only applies to enterprises that collect over \$100,000,000 in fees and surcharges over a five-year period. The measure is clear, and voters would not be surprised by its application. Any effects of the measure are a necessary result of the measure's purpose and is not a separate subject.

The ballot Title properly notifies voters of the central aspects of the measure. The Title notifies voters of the specific voting requirements including types of enterprises, threshold amount, aggregation, and timing of the vote.

STANDARD OF REVIEW

The Court has the authority to review the Title Board's single-subject and clear-title findings. *In the Matter of the Title, Ballot Title and Submission Clause for 2017-2018 No. 4*, 395 P.3d 318, 323 (Colo. 2017). When reviewing a challenge to the Title Board's decision on single subject and clear title, this Court

“employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s action.” *In the Matter of Title, Ballot Title, and Submission Clause for 2013-2014 No. 89*, 328 P.3d 172, 176 (Colo. 2014); *In the Matter of the Title, Ballot Title and Submission Clause for 2017-2018 No. 4*, 395 P.3d at 323.

Provisions relating to the initiative should be liberally construed to permit the exercise of the electors of this most important privilege. *See Brownlow v. Wunch*, 83 P. 2d 775, 777 (Colo. 1938). Only in a clear case should this Court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

LEGAL ARGUMENT

I. THE TITLE BOARD PROPERLY FOUND THE MEASURE CONTAINS A SINGLE SUBJECT.

Article V, § 1(5.5) of the Colorado Constitution requires that “[n]o measure shall be proposed by petition containing more than one subject...” No title can be set and submitted to the people for adoption or rejection at the polls if a measure contains more than one subject and has at least two distinct and separate purposes not dependent upon or connected with each other. *People ex rel. Elder v. Sours*, 74 P. 167, ¶ 177 (Colo. 1903); Colo. Const. Art. V, § 1(5.5); *see also* C.R.S. § 1-40-106.5 (statutory single-subject requirement).

The single-subject requirement serves two functions. First, it prohibits incongruous subjects in the same measure that have no necessary or proper connection for the purpose of enlisting support of a measure that could not be passed on its own merits. § 1-40-106.5(1)(e)(I).

A proposed initiative cannot seek to accomplish multiple, discrete, unconnected purposes. *See In re Title, Ballot Title, Submission Clause, & Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rights in Waters II*, 898 P.2d 1076, 1080 (Colo.1995) (“*Waters II*”). If the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law. *In re Title, Ballot Title & Submission Clause 2015–2016 #73*, 369 P.3d 565, 568, ¶ 17 (Colo. 2016); *Matter of Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶¶ 11-16, 442 P.3d 867, 869–70. Implementation details that are directly tied to the initiative's central focus do not constitute a separate subject. *See In re Title, Ballot Title & Submission Clause 1999-2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000). Even an initiative that proposes a comprehensive framework can satisfy single subject if all its provisions are related. *See In re Title, Ballot Title, & Submission Clause for 2009–2010 No. 91*, 235 P.3d 1071, 1076 (Colo.2010); *In re Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 12, 328 P.3d 172, 176–77.

Here the initiative does not seek to gain support from various factions by combining unrelated subjects in a single proposal. Rather, the proposal is singular, and all provisions relate to its implementation. Because each part of the measure is related to the accomplishment of a single purpose, the proposal will pass or fail on its own merits and does not run the risk of garnering support from factions with different or conflicting goals. Voters will either be in favor of requiring a vote for enterprises that collect over \$100,000,000, or they will not.

The second function of the single-subject requirement is “[t]o prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.” § 1-40-106.5(1)(e)(II). This voter surprise occurs with the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *In re Proposed Initiative 2001–02*, 46 P.3d 438, 442 (Colo. 2002); see § 1–40–106.5(1)(e)(II), C.R.S.

In order to determine whether an initiative carries out a single purpose, the Court reviews the initiative as a whole rather than piecemeal and examines individual statements in light of their context. *In re Title, Ballot Title & Submission Clause #24*, 21 P.3d 350, 353 (Colo. 2009). The single-subject

requirement is construed liberally to avoid unduly restricting the initiative process.

Id.

The second risk, that voters may be surprised by effects that are hidden in the body of an initiative or are misleading or overly complex, is also not present. This only exists where an initiative, although claiming to have a single subject, in reality has multiple purposes, and as a result, voters would not expect that passing the initiative would lead to one or more of the initiative's outcomes. *See In re Title, Ballot Title & Submission Clause 2011–2012 No. 3*, 274 P.3d 562, ¶ 19 (Colo. 2012).

There is no risk here that the voters will be unaware of the primary effects of initiative because the initiative is brief and narrow in its application. A review of the plain language does not reveal any embedded provisions that would lead to voter surprise or fraud. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 438, 442 (Colo. 2002). Rather, the plain language of the measure is unambiguous and has a limited purpose.

This initiative establishes a voting requirement on enterprises created under Article X, Section 20 of the Colorado Constitution. The Article already requires a vote for an increase in debt, increase in taxes or to keep excess revenue above the growth cap. The Court has ruled that voting requirements in these areas can be

repealed as a single subject. *In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #3*, 442 P.3d 867 (Colo.2019). If an initiative that seeks to repeal voting requirements in these three circumstances satisfies single subject, then an initiative that seeks to establish voting requirements in one circumstance must likewise satisfy single subject.

a. Whether the measure violates single subject by imposing a reduction in state spending on state programs when an enterprise exceeds the threshold and may be awaiting or has been denied voter approval.

Petitioner argues the initiative contains two subjects: 1) voter approval at a statewide general election for newly created or qualified enterprises that collect \$100 million in their first five years; and 2) reductions in state spending on state programs when an enterprise exceeds the threshold and may be awaiting or has been denied voter approval.

Petitioner Railey's argument strings together a series of assumptions which even if they were to occur simply describes one possible effect of the measure. The argument assumes enterprises will qualify toward the end of a five-year window, *but before* a general election year *and* that voters will turn down an enterprise creation *and* the state will be at the spending cap when either of these things happen. Only when these happen in combination would a reduction in state

spending occur. However, Petitioner Railey impermissibly asks this Court to consider the possible effects of an initiative, i.e. “reductions in state spending.” This Court has “never held that just because a proposal may have different effects ... it necessarily violates the single-subject requirement.” *In re Title, Ballot Title & Submission Clause 1999–2000 No. 256*, 12 P.3d 246, 254 (Colo. 2000). This speculation about future effects is beyond this Court’s scope of review. *Id.* at 257.

b. The Title Board did not lack jurisdiction to set a title where a measure’s purpose carries out one general purpose.

Petitioner Railey claims the Title Board lacked jurisdiction to set a title because the initiative is incomprehensible. In looking at the plain language, it is clear how the measure operates and most importantly, voters would not be confused that by voting “yes” they would be required to require certain enterprises to come before the voters in a statewide general election.

Petitioner Railey would like the Court to find more than one subject by suggesting that the measure also seeks to reduce state spending. Here the purpose of the initiative is the same as the subject: to require a vote for any enterprise that is projected to, or does, collect \$100,000,000 in fees and surcharges in its first five years. All provisions are necessarily connected to the purpose. This Court has held

that “implementation details that are directly tied to the initiative’s central focus do not constitute a separate subject”. *In re 1999-2000 No. 200A*, 992 P.2d at 30.

The measure requires that an, “enterprise qualified or created, as defined under Colo.Const. Art. X, section 20(2)(d) with projected or actual revenue in fees and surcharges of over \$100,000,000 total in its first five fiscal years must be approved at a statewide general election.” Petitioner argues the measure must further specify how an initiative becomes “qualified” for consideration by voters during a statewide general election. This is unambiguous. An enterprise is qualified when its projected or actual revenue in fees and surcharges is over \$100,000,000 in its first five fiscal years.

In reviewing a measure, the Court does not determine the initiative’s efficacy, construction, or future application, which is properly determined if and after the voters approve the proposal. *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #258(A) (English Language Educ. in Pub. Schs.)*, 4 P.3d 1094, 1097-98 (Colo. 2000).

II. THE TITLE FAIRLY ADVISES VOTERS OF THE CENTRAL FEATURES OF THE MEASURE.

Titles and submission clauses should “enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re #24*, 218 P.3d at

356 (quoting *In re Title, Ballot Title & Submission Clause for Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo.1990)). “The purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose.” *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010).

The responsibility of the Title Board is “set[ting] fair, clear and accurate titles that do not mislead the voters through a material omission or misrepresentation.” *In re 1999–2000 No. 256*, 12 P.3d at 256. This requirement, however, does not mean that the title needs to contain every detail of the proposal. *Id.* Also, the title is not required to explain every possible effect of enacting the initiative. *In re Title Ballot Title, & Submission Clause for 2007–2008 No. 61*, 184 P.3d 747,752 (Colo. 2008).

The Title Board has considerable discretion in drafting the title. *In re 1999–2000 No. 256*, 12 P.3d at 255. Unless a title is insufficient, unfair, or misleading, the Court defers to the Title Board's drafting authority. *See In re Title, Ballot Title & Submission Clause for #62*, 184 P.3d 52, 60 (Colo. 2008). In this Court’s limited review of the Title Board's actions, it does not address the merits of the

proposed initiative nor suggest how they might be applied if enacted. *In re 2011–2012 No.3*, 274 P.3d at 565.

For purposes of a voter determining whether to vote “yes” or “no,” this Title is clear and it is not likely to mislead voters as to the initiative purpose or effect, nor does the Title conceal some hidden intent. *See In re #24*, 218 P.3d at 356.

a. The Title is not required to describe the measure’s requirement of specific language in the ballot title.

Titles need not contain every feature of the proposed measure. *In re Title, Ballot Title, Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colo. Adding Section 2 to Article VII*, 907 P.2d 586, 592 (Colo. 1995). Not every detail must be set out in the title. *In re Proposed Initiatives 2001–2002 #21 & #22*, 46 P.3d 438, 443 (Colo. 2002).

The Title informs voters that the measure requires “statewide voter approval at the next even-year election.” Petitioner Railey argues that the title must contain the details of the required ballot language, but this is not central to the measure. It is an implementation detail that would not affect a voter’s choice to vote “yes” or “no” on the measure.

b. The Title properly describes the enterprises which would be subject to voter consideration under the measure.

The title is intended to be a “relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters,” rather than “an item-by-item paraphrase of the proposed constitutional amendment or statutory provision.” *In re Proposed Initiative 1997–1998 #62 In re Proposed Initiative 1997–1998 #62* 961 P.2d 1077, 1083 (Colo. 1998).

Petitioner Railey argues that the Title does not adequately describe the enterprises subject to the Title. However, the Title includes all the central features of the measure, including the aggregation provision, “all other enterprises created within the last five years that serve primarily the same purpose.”

Further, this provision’s purpose is to block circumvention of the primary provision of the measure. It is will not be confusing or misleading to voters to know that the measure has a provision to carry through the purpose of the measure. *See In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #73*, 135 P.3d 736 (Colo. 2006).

CONCLUSION

Respondents/Proponents respectfully request the Court affirms the Title Board's determination that the measure satisfies the single-subject and clear title requirements.

Respectfully submitted this 6th day of May 2020.

MAVEN LAW GROUP

/s/ Suzanne Staiert

Suzanne Staiert

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CERTIFICATE OF SERVICE/MAILING

I hereby certify that on 6th day of May, 2020 a true and correct copy of the **RESPONDENTS’/PROPONENTS’ OPENING BRIEF** was served via the State of Colorado's ICCES File and Serve e-filing system, email and United States mail, postage prepaid, properly addressed to the following:

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