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Colorado Secretary of State

COLORADO TITLE BOARD

In the Matter of:

**TITLE, BALLOT TITLE & SUBMISSION CLAUSE FOR PROPOSED INITIATIVE
2019-2020 # 120: "PROHIBITION ON LATE-TERM ABORTIONS"**

MOTION FOR REHEARING

In accordance with C.R.S. § 1-40-107 (1) (a) (I), and by and through undersigned counsel, Colorado registered electors Sarah Taylor-Nanista and John Teter (the "Movants") hereby request a rehearing before the Colorado Title Board (the "Board") with respect to Proposed Initiative 2019-2020 No. 120, regarding "Prohibition on Late-Term Abortions" (the "Initiative"). As set forth below, Movants respectfully object to the title, ballot title, and submission clause approved by the Board based upon the following:

I. BACKGROUND

Following a hearing held August 21, 2019, the Board designated and fixed the following title for the Initiative:

A change to the Colorado Revised Statutes concerning prohibiting an abortion when the probable gestational age of the fetus is at least twenty-two weeks, except when the abortion is immediately required to save the life of the pregnant woman when her life is physically threatened, and, in connection therewith, defining terms related to the measure including "abortion," "probable gestational age," and "twenty-two weeks"; making it a misdemeanor punishable only by fine to perform or attempt to perform a prohibited abortion; requiring the Colorado medical board to suspend the license of a physician whom the board finds performs or attempts to perform a prohibited abortion; specifying that a woman on whom an abortion is performed may not be charged with a crime in relation to a prohibited abortion; and excepting medical procedures relating to miscarriage or ectopic pregnancy.

Likewise, the Board designated and fixed the following ballot title and submission clause:

Shall there be a change to the Colorado Revised Statutes concerning prohibiting an abortion when the probable gestational age of the fetus is at least twenty-two weeks, except when the abortion is immediately required to save the life of the pregnant woman when her life is physically threatened, and, in connection therewith, defining terms

related to the measure including “abortion,” “probable gestational age,” and “twenty-two weeks”; making it a misdemeanor punishable only by fine to perform or attempt to perform a prohibited abortion; requiring the Colorado medical board to suspend the license of a physician whom the board finds performs or attempts to perform a prohibited abortion; specifying that a woman on whom an abortion is performed may not be charged with a crime in relation to a prohibited abortion; and excepting medical procedures relating to miscarriage or ectopic pregnancy?

(together, the “Title”).

II. GROUNDS FOR RECONSIDERATION

A. The Title omits material features of the Initiative, does not fairly and accurately represent the Initiative’s true intent and meaning, and may confuse and mislead voters.

A measure’s title and submission clause must “correctly and fairly express the true intent and meaning” of the measure. See C.R.S. §1-40-106(3)(b). The title and submission clause 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 Title, Ballot Title & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010). “[A] material omission can create misleading titles.” *In re Title, Ballot and Submission Clause 1999-2000 #258A*, 4 P.3d 1094, 1098 (Colo. 2000).

1. The initiative provides only a limited “exception” to its criminalization of physicians who perform, or attempt to perform, abortions beyond the twenty-second week of pregnancy. As set forth in proposed Section 18-6-903 (3), this “exception” applies only in the following, expressly defined circumstances:

Exception. If, in the reasonable medical judgement of the physician, an abortion is immediately required, rather than an expedited delivery of the fetus, to save the life of a pregnant woman who is threatened by a physical disorder, physical illness, or physical injury, not including psychological or emotional conditions, such an abortion is not unlawful.

As set forth above, the Initiative’s “exception” becomes available, if at all, only when a physician has determined that an abortion is “immediately required,” and only when a woman is suffering a *physical* disorder, illness, or injury that is *not* accompanied by psychological or emotional conditions. See Proposed § 18-6-903 (3) (“Exception” applicable only where pregnant woman “is threatened by a physical disorder, physical illness, or physical injury, not including psychological or emotional conditions.”). The fact that a woman suffers from mental illness that puts her life in jeopardy is, according to the proponents, of no concern. Likewise, the fact that a woman is unlikely to die absent immediate provision of an abortion, yet will be at risk of death if her pregnancy continues to term, excludes access to the Affirmative Defense and, thus, to mid-

pregnancy abortion care. Finally, only where a woman's life-threatening ailment or injury does not include some form of psychological or emotional condition may her treating physician even consider providing her a life-saving, mid-pregnancy abortion. Thus, a patient diagnosed with a potentially terminal malignancy during the twenty-third week of her pregnancy who is also under the care of a treating psychiatrist for clinical depression would have no access to a lawful abortion, even where carrying her pregnancy to term could result in her death.

Both the requirement that a physician may only proceed where her patient will die absent immediate intervention, and the exclusion of mental illness as a cause of, or an accompaniment to, life-threatening circumstances, radically alter existing Colorado law regarding the availability of abortion care. Yet, the Title makes little, if any, mention of this material feature of the Initiative. It thereby deprives voters of a clear understanding of what their votes in the affirmative could cause. As a consequence, the Title should be reconsidered.

2. The Title fails to adequately advise voters as to the circumstances under which individuals, including non-physicians, are subject to prosecution under the Initiative.

a. The Initiative would impose criminal liability not only where a physician "performs" or "induces" an abortion, but also where a physician "attempts to perform or induce an abortion." Existing Colorado criminal law explains that a person commits "criminal attempt" where, acting with the required state of mind, the person takes "a substantial step toward the commission of the offense." *See* C.R.S. § 18-2-101 (1). Thus, a physician who set an appointment to provide a patient a mid-pregnancy abortion; performed an ultrasound examination and interpreted the results; drew and analyzed the patient's blood; set an intravenous line; and did nothing more would be just as culpable as a physician who terminated the twenty-third week pregnancy of a patient experiencing chronic suicide ideation, but no physical illness. The Title, as set, offers voters no indication that a "yes" vote will obtain this result.

b. The Initiative would also impose criminal sanctions upon *any* individual, regardless of licensure or position, who assists a physician in providing a mid-pregnancy abortion for a patient. Proposed Section 18-6-903 (5) expressly provides that:

[a]ny person who intentionally or recklessly . . . **attempts** to perform or induce an abortion in violation of [the Initiative] is guilty [of violating the Initiative].

Section 18-2 101 (2) of the Criminal Code explains that:

[a] person who engages in conduct intending to aid another to commit an offense commits **criminal attempt** if the conduct would establish his [or her] complicity under section 18-1-603 were the offense committed by the other person, even if the other person is not guilty of committing or attempting the offense.

See id. (emphasis added). Section 18-1-603 then defines “complicity” as aiding, abetting, advising, or encouraging another in planning or committing [an] offense. *See id.*

Perhaps inadvertently, the Title, as drawn, would completely mislead voters into believing that only a physician could be the subject of prosecution and conviction under the terms established by the Initiative. To the contrary, *every* person who engaged in intentional conduct that served to assist that physician in any way – from the receptionist who set the patient’s appointment; to the unlicensed medical assistant who checked the patient in and reviewed her medical history forms with her; to the registered nurse who checked her blood pressure and drew her blood for testing; to the advanced practice nurse who established an intravenous line; to the certified nurse anesthetist who administered, monitored, and reversed her anesthetic treatment; to the physician assistant who monitored her post-procedure vital signs, reviewed her follow-up and after-care instructions, and discharged her from care, could, at the whim of a prosecutor, be arrested, charged, tried, and convicted for criminal attempt under proposed Section 18-6-903 (5). Yet, nowhere does the Title make voters aware that their “yes” vote will bring about this result.

B. The Initiative impermissibly addresses multiple subjects.

The Initiative addresses at least two separate and distinct subjects. It is therefore prohibited by article V, section 5 of the Colorado Constitution and the Board should decline to fix a title for it.

Each initiative that proposes an amendment to the State Constitution shall contain only one subject, clearly expressed in the title set for that initiative. *See* Colo. Const. Art. V., § 1(5.5) (the “Single Subject Rule”); *see* also C.R.S. § 1-40-106.5 (single-subject requirements for initiated measures); *In re Title, Ballot Title, Submission Clause*, 974 P.2d 458, 463 (Colo. 1999) (proposed initiative violates single subject rule where it “has at least two distinct and separate purposes which are not dependent upon or connected with each other.”).

The Movants agree with the both the July 31, 2019 review and comment Memorandum, which states at page 2, under the heading “Purposes”:

The *major purposes* of the [Initiative] appear to be:

1. To make it unlawful for a person to perform or attempt to perform an abortion if the gestational age of the fetus is at least twenty-two weeks [and]
2. To define unprofessional conduct by a physician to include performing or attempting to perform an abortion when the gestational age of the fetus is at least twenty-two weeks.

In a nutshell, the Initiative seeks to create a high-level felony, punishable by a lengthy term of imprisonment, with which to charge and convict physicians who provide medically indicated care to their patients. Separately, the Initiative seeks to amend the Colorado Medical Practice Act through the addition of a new definition of “unprofessional conduct,” together with a mandatory sanction.

The Single Subject Rule prohibits attempts to roll together multiple subjects in order to attract the votes of those who would favor one of those subjects, but would oppose the others. *See, e.g., In re Proposed Initiative for 2005-2006 #74*, 136 P.3d 237, 242 (Colo. 2006); *In re Proposed Initiative for 1997-1998 #84*, 961 P.2d 456, 458 (Colo. 1998). The Initiative combines the two subjects identified in the Memorandum, potentially attracting voters who might support the Initiative, even though they support only one. Specifically, some voters may favor imposing professional discipline upon a physician who performs a mid-pregnancy abortion under some of the circumstances described in the Initiative, but would not vote for the criminal provision standing alone. Therefore, the Board should determine that the Initiative violates the Single Subject Rule and that a title cannot be set for it.

Respectfully submitted this 28th day of August, 2019.

RANGE PC



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ATTORNEYS FOR MOVANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of August, 2019, a true and correct copy of the **MOTION FOR REHEARING** was filed with the Colorado Secretary of State and served via U.S. mail, postage prepaid, to the following:

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