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<tr><td>COLORADO SUPREME COURT
101 W. Colfax, # 800
Denver, Colorado 80202</td><td rowspan="3">DATE FILED: February 21, 2023 10:57 PM

COURT USE ONLY</td></tr>
<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Board</td></tr>
<tr><td>In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative #3 - Establishment of a New Attainable Housing Fee

Petitioner: Rebecca R. Sopkin,

v.

Respondents: Dalton Kelley, Dee Wisor

and

Title Board: Jason Gelender, Melissa Kessler and David Powell</td></tr>
<tr><td>Rebecca R. Sopkin (Atty. Reg. No. 20998)
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grsop@msn.com</td><td>Case No.:
2023SA000015</td></tr>
<tr><td colspan="2">ANSWER BRIEF IN SUPPORT OF PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE #3 - ESTABLISHMENT OF A NEW ATTAINABLE HOUSING FEE</td></tr>
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CERTIFICATE OF COMPLIANCE

I hereby certify that this Answer 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:

1. The brief complies with C.A.R. 28(g) and contains 2713_words.

2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b). The brief contains, under a separate heading before the discussion of the issue It contains under separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

/s/ Rebecca R. Sopkin
Rebecca R. Sopkin

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On my own behalf, as a registered elector of the State of Colorado, the undersigned hereby respectfully submits to this Court the following Answer Brief as authorized by the Court's Order dated January 13, 2023 in support of my Petition to review the actions of the Ballot Title Setting Board with respect to Proposed Initiative 2023-2024 #3 - Establishment of a New Attainable Housing Fee, pursuant to Section 1-40-107, C.R.S.

STATEMENT OF THE ISSUES

All parties agree that whether the Title Board correctly determined that Proposed Initiative 2023-2024 #3 (hereinafter the "Proposed Initiative") contains a single subject is at issue.

The parties use different language to summarize the remaining issues. The Petitioner maintains that whether the language in the Title set is misleading is at issue and the Proponents' Opening Brief addresses this issue in substance (see Proponents' Opening Brief, pp. 6, 7, 11-24.)

While the Title Board is correct in stating that it does not review or address the constitutionality of any proposed initiative, (Title Board Opening Brief, pg. 6) in this matter the issue is whether the language of the Proposed Initiative, and therefore of the title set for the Proposed Initiative, is misleading as it uses the term "fee" in an effort to conceal from voters the fact that it is actually proposing a "tax," which it cannot do through this process due to constitutional constraints.

SUMMARY OF ARGUMENTS

I. **THE PROPOSED INITIATIVE CONTAINS MORE THAN A SINGLE SUBJECT DUE TO ITS MISLEADING USE OF THE TERM "FEE," WHEN WHAT IT IS PROPOSING IS ACTUALLY A "TAX."**

II. **THE PROPOSED TITLE IS UNFAIR AND DOES NOT EXPRESS THE TRUE MEANING AND INTENT OF THE PROPOSED STATE LAW, SINCE THE PROPOSED INITIATIVE ATTEMPTS TO IMPOSE AN IMPERMISSIBLE "TAX," MISLEADINGLY CALLING IT A "FEE."**

ARGUMENT

I. THE PROPOSED INITIATIVE CONTAINS MORE THAN A SINGLE SUBJECT DUE TO ITS MISLEADING USE OF THE TERM "FEE," WHEN WHAT IT IS PROPOSING IS ACTUALLY A "TAX."

A. Standard of Review and Preservation for Appeal

The Petitioner agrees with the Title Board and the Proponents' characterizations of the appropriate standard of review and that the single subject issue was appropriately preserved for appeal.

B. Multiple subjects concealed by the misleading use of the term "fee," rather than the accurate term "tax."

While the Title Board is not required to rule on the constitutionality of state laws affected by proposed initiatives, the issue in this case is whether the term "fee" in the Proposed Initiative is misleading.

The single subject requirement is violated when an initiative "relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or connected with each other." *Hayes v. Spalding*, 369 P. 3d 565, 568 (Colo. 2016). In order to determine whether the Proposed Initiative has a single subject, and is therefore, an initiative for which the Title Board can validly set a title we must do as the law says and look to the "the true meaning and intent" of the proposed law, Colo. Rev. Stat. § 1-40-107(1)(b). The court has expressly noted that the single subject requirement is "intended to prevent voter surprise or uninformed voting caused by items concealed" within a proposed initiative. *In re Title,* 898 P.2d 1076, 1079 (Colo. 1995).

The Title Board is charged with the difficult task of producing a title which "will enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such proposal." *In re Proposed Initiative Concerning the "State Personnel System,"* 691 P.2d 1121, 1123 (Colo. 1984). One of the difficulties of setting a title in this particular case is that the rather innocuous-appearing term "fee" is actually a legal term of art which has a significant amount of constitutional significance, which is not immediately apparent to the voter who

is unfamiliar with the legal distinction between a "fee" and a "tax." The court has previously recognized the importance of informing voters of a legal definition which is "new and likely to be controversial," yet is "of significance to all concerned with the issues" in a proposed initiative. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

The Proposed Initiative contains several distinct and separate purposes: (1) the imposition of a "fee" upon the recording of every real property conveyance deed, unless specifically excepted, is a direct violation and, thus, an implicit amendment of the Colorado constitution's provision forbidding the imposition of "new or increased transfer tax rates on real property" (Colo. Const. art 10, § 20(8)(a)); (2) the use of a novel meaning for the term "fee," which would go against established Colorado law would be an implicit amendment to the Colorado Constitution (Colo. Const. art. 10, § 20(3)); (3) the Proposed Initiative then provides for the clerk and recorder to retain five percent of the amount collected in the new charge for the recording of deeds as a "fee for collection" (Proposed Initiative § 29-4-1203(3)); and then (4) the Proposed Initiative then creates and funds the Colorado Attainable Housing Fund with the remaining ninety-five percent of the amount collected (Proposed Initiative § 29-4-1203(1)(d)).

Each of these purposes is distinct and separate. They are not "dependent upon or connected with each other." *In re Title,* 898 P.2d at 1078-79. It is not hard to envision how each could be drafted as a separate initiative with no need for the other purposes.

The Title Board argues, rightly, that it is not its role to opine on the constitutionality of proposed initiatives, however, that is not what the Petitioner is asking the Title Board to do. Rather, it is the implicit and unstated constitutional significance of the terms used in the Proposed Initiative which the Petitioner asks this court, and the Title Board on any remand, to recognize. Regardless of whether the Proposed Initiative is ultimately found to be constitutional or not, the voters cannot make an informed decision on the Proposed Initiative without being apprised of the implicit issues contained within the terms used. The constitutional issues are vital and significant subjects of this Proposed Initiative, as both the Legislative Declarations of the Proposed Initiative (Proposed Initiative §§ 29-4-1201(10-13)) and the Respondents' Brief, pgs. 11-20, recognize.

The Respondents first argue that the charge imposed on the recording of deeds of conveyance is not a "new or increased transfer tax rate on real property" as prohibited by Colo. Const. art 10, § 20(8)(a). This assertion is contravened by the many state laws, including Colorado law, which consider a fee on instruments conveying property to be a real estate transfer tax, especially when the amount of said fee is based on the consideration named in the instrument. See Ark. Code Ann. § 26-60-105; Cal. Rev. & Tax. Code, §§ 11911, 11912; Colo. Rev. Stat. §39-13-102(2)(b); Conn. Gen. Stat. § 12-494; Del. Code Ann. tit. 30 §§ 5401, 5402, etc.

The analysis now turns more broadly to the issue of whether the charge at issue is a "tax" or "fee." The first case cited by the Respondents, *Chronos Builders, L.L.C. v. Dep't*

of Lab. & Emp., 512 P.3d 101 (Colo. 2022), is inapplicable on the issue of determining what is appropriately termed as a "fee" rather than a "tax," since the plaintiff had conceded that the charge was a fee in that case. *Id.* at 106. The premium at issue in that case was also materially different since businesses could decline to pay the premium if they were offering a comparable service to their employees. *Id*. at 103, citing Colo. Rev. Stat. § 8-13.3-521(1).

The Respondents misunderstand Colorado caselaw, stating that a charge is a tax only when it "is imposed to raise revenue for general governmental spending" rather than when "the primary purpose is to defray the reasonable direct and indirect costs of providing a service (a fee)." Respondents' Opening Brief, pg. 11. Many laws provide "a service," however the case cited, *Colorado Union of Taxpayers Foundation v. City of Aspen*, 418 P.3d 506 (Colo. 2018), is explicit that the courts look to the "cost to the government of providing the product or activity assessed" and then review whether the charge is reasonably related to that cost. *Id*. at 512. Thus, the Respondents are missing the requirement that the service being assessed is the same service being provided, not merely "a service" in the general sense.

The U.S. Supreme Court has stressed the need for particularity in a finding of a fee, that a particular government service is being provided which benefits the party paying the fee in a manner "not shared by other members of society." *National Cable Television Ass'n v. United States*, 415 U.S. 336, 341 (1974). Colorado caselaw also requires that a

fee be “designed to defray the cost of the service provided by the municipality,” *Bloom v. City of Fort Collins*, 784 P.2d 304, 311 (Colo. 1989), and notes that a purported “fee” may be invalidated “on the basis that the service was not sufficiently particularized” to justify imposing the costs upon a “limited group of persons liable . . . rather than the general public." *Id.* at 309. Again, in another case cited by the Respondents, the court notes that a “fee” is “a charge imposed on persons or property to defray costs of a particular government service” and that the primary purpose of a fee is “to defray the cost of services provided to those charged.” *Barber v. Ritter*, 196 P.3d 238, 250 (Colo. 2008)

While the language used by a statute’s drafters is relevant, the court has recognized that the “core inquiry” is focused on the “practical realities of the charge’s operation to determine whether the charge’s primary purpose is in fact to raise revenue for general governmental use.” *Colorado Union of Taxpayers v. City of Aspen*, 418 P.3d at 514. The court looks to whether “there is a reasonable relationship between the direct or indirect cost to the government of providing the product or activity assessed and the amount being charged.” *Id.*

Here the proposed law actually carves out a portion, five per cent, to “defray the cost of computing and collecting” the fee. Proposed Initiative § 29-4-1203(2)(a). The remaining ninety-five per cent of the alleged fee has no connection whatsoever to the government service being provided. The mere fact that the funds thus collected cannot be poured-over

into any government spending besides the newly created fund does not in any way tie the fund created back to the actual government service being provided to the payor.

All of this analysis is necessary to determine whether the term "fee," as used in the Proposed Initiative, is being used to describe something that is quite different from what the legally accepted definition of a "fee" is. This is extremely important in the review of the Title Board's action as the law requires that the title board "consider the public confusion that might be caused by misleading titles" and that the title set must "correctly and fairly express the true intent and meaning" of the proposed initiative. Colo. Rev. Stat. § 1-40-106(3)(b). The law also requires the Title Board to "avoid confusion between a proposition and an amendment" by clearly stating that an amendment is an "amendment to the Colorado constitution." Colo. Rev. Stat. § 1-40-106(3)(c). The law further requires that measures increasing tax revenue, as the Proposed Initiative would, include specific language. Colo. Rev. Stat. § 1-40-106(3)(g).

All of these issues are implicit in the use of the term "fee" in a way which is contrary to Colorado law. The fact that these issues are not explicitly stated or discussed increases the likelihood that the average voter will be confused or misled rather than fairly and succinctly advised of the import of the proposed law. *In re Title,* 823 P. 2d 1353, 1355 (Colo. 1991); *Matter of Title, Ballot Title and S. Clause*, 872 P.2d 689, 694 (Colo. 1994). The entire goal is to "enable informed voter choice." *In re Title*, 972 P.2d 257, 266 (Colo. 1999); *Outcelt v. Bruce*, 977 P.2d 845, 846 (Colo. 1999).

The court has dealt with the difficulty of implicit multiple subjects before. In the case of *In re Title*, 961 P.2d 456 (Colo. 1998), the court found that "voters would be surprised to learn that by voting for local tax cuts they also had required the reduction, and possible eventual elimination, of state programs." 961 P.2d at 460-461. This type of implicit and "hidden subject" caused the proposed initiative to violate the single subject rule. *Id.* at 461. In another case, the court addressed a proposed initiative which seemed "on its face, to concern only a single purpose or object." *In re Title*, 136 P.3d 237, 241 (Colo. 2006). The court was concerned that the voters might "be receptive" to the language of the proposed initiative, but "they may not realize that they will be simultaneously limiting" other municipal abilities which were not mentioned in the initiative. *Id.*

In short, the Proposed Initiative would result in significant changes to the law as it currently stands interpreting the Colorado Constitution. These implicit amendments to our constitution are subjects present within the Proposed Initiative and thus cause the Proposed Initiative to violate the single subject rule making it impossible for the Title Board to set an appropriate title. The Title Board does not have jurisdiction to set a title when a proposed initiative contains multiple subjects. Colo. Const. art V, § 1(5.5).

III. THE PROPOSED TITLE IS UNFAIR AND DOES NOT EXPRESS THE TRUE MEANING AND INTENT OF THE PROPOSED STATE LAW, SINCE THE PROPOSED INITIATIVE ATTEMPTS TO IMPOSE AN IMPERMISSIBLE "TAX," MISLEADINGLY CALLING IT A "FEE."

A. Standard of Review and Preservation for Appeal

The Petitioner agrees with the Title Board and the Proponents' characterizations of the appropriate standard of review. Respondents agree that the issue of whether the title was clear was appropriately preserved for appeal.

The Title Board disagrees and asserts that Petitioner has not preserved the challenge that the Proposed Initiative should say that it is amending the Colorado Constitution. The Petitioner's suggestion that the title should clearly state that the Proposed Initiative is amending the Colorado Constitution is only one possible way to clarify the Proposed Initiative for title setting purposes. As discussed above, the Proposed Initiative contains implicit and hidden issues which make setting a clear title very difficult. The issue of the misleading nature of the Proposed Initiative's language was raised in Sections I and II of the Petitioner's Motion for Rehearing.

B. The misleading use of the term "fee," rather than the accurate term "tax," causes the proposed title to be unfair and to fail to express the true meaning and intent of the Proposed Initiative.

The discussion above addresses the legal significance of the misleading term "fee" rather than "tax" in the Proposed Initiative.

Besides creating multiple hidden and implicit subjects within the Proposed Initiative the use of the term "fee" has also made it difficult, if not impossible, for the Title Board to fairly and clearly express the true meaning and intent of the Proposed Initiative. While it is not the Title Board's role to address or rule on the constitutionality of the Proposed Initiative, it is necessary for the Title Board to insure that any title set avoids confusion or deception of voters and to fairly and accurately express the actual meaning and operation of a Proposed Initiative. *In re Title*, 961 P.2d 1092, 1096 (Colo. 1998), *as modified on denial of reh'g* (Aug. 1998).

In this case, this has not been done.

PRAYER FOR RELIEF

Petitioner respectfully requests that, after consideration of the parties' briefs, this Court determine that the Proposed Initiative is facially invalid as violating the Colorado Constitution or, in the alternative, that the Title Board was without jurisdiction to set a title for this Proposed Initiative as it is currently written and direct the Title Board to return the initiative to the designated representative for lack of jurisdiction, due to violation of the constitutional single subject requirement, or. in the alternative, to correct the title to address the deficiencies outlined in Petitioner's briefs.

Respectfully submitted this 21st day of February, 2023.

<u>/s/Rebecca R. Sopkin</u>

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing ANSWER BRIEF IN SUPPORT OF PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE #3 - ESTABLISHMENT OF A NEW ATTAINABLE HOUSING FEE was served via LexisNexis File and Serve, or e-mail as noted, on this 21st day of February, 2023 upon the following:

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