

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: April 12, 2024 1:11 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2023) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #148</p> <p>Petitioner: Peter Simmons</p> <p>v.</p> <p>Title Board: Theresa Conley, Jeremiah Barry, and Kurt Morrison</p>	<p>▲ COURT USE ONLY ▲</p>
<p>PHILIP J. WEISER, Attorney General HARLAN NORBY, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 8th Floor Denver, CO 80203 Telephone: 720.508.6771 E-Mail: harlan.norby@coag.gov Registration Number: 54136 <i>*Counsel of Record for the Title Board</i></p>	<p>Case No. 2024SA86</p>
<p>THE TITLE BOARD'S AMENDED OPENING BRIEF</p>	

CERTIFICATE OF COMPLIANCE

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

The brief complies with the word limits set forth in C.A.R. 28(g).

It contains 2,612 words.

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

s/ Harlan Norby

HARLAN NORBY, 54136*
Assistant Attorney General

TABLE OF CONTENTS

ISSUE ON REVIEW	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	3
I. Proposed Initiative #148 violates the single-subject requirement.....	3
A. Standard of review and preservation.	3
B. Proposed Initiative #148 contains at least three subjects.	5
C. The multiple subjects in Proposed Initiative #148 present the dangers that the single-subject requirement attempts to prevent.....	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<i>Gilpin Cnty. Bd. of Equalization v. Russell</i> , 941 P.2d 257 (Colo. 1997)	6
<i>In re Interrogatory on House Bill 21-1164 Submitted by Colo. General Assembly</i> , 2021 CO 34	6, 7
<i>In re Title, Ballot Title & Submission Clause, & Summary for 1997–1998 #64</i> , 960 P.2d 1192, 1197 (Colo. 1998)	10
<i>In re Title, Ballot Title & Submission Clause, & Summary for 1997–1998 #84</i> , 961 P.2d 456, 460 (Colo. 1998)	10
<i>In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #200A</i> , 992 P.2d 27, 30 (Colo. 2000).....	7
<i>In re Title, Ballot Title & Submission Clause, & Summary for 2005-2006 #73</i> , 135 P.3d 736, 739 (Colo 2006)	7
<i>In re Title, Ballot Title, & Submission Clause for 2011-2012 #3</i> , 2012 CO 25	11
<i>In re Title, Ballot Title, & Submission Clause for 2013- 2014 #90</i> , 2014 CO 63	5, 10
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #76</i> , 2014 CO 52	4, 5, 7
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #89</i> , 2014 CO 66	7, 11, 13
<i>In re Title, Ballot Title, & Submission Clause for 2019-2020 #3</i> , 2019 CO 57	4, 8

In re Title, Ballot Title, & Submission Clause for 2021-2022 #16,
2021 CO 55 passim

Mesa Cnty Bd. of Cnty. Comm’rs v. Colorado, 203 P.3d 519 (Colo.
2009) 12

CONSTITUTIONS

COLO. CONST. art. V, § 1(5.5) 3

COLO. CONST. art. X, § 20(1) 13

COLO. CONST. art. X, § 20(4) 9

STATUTES

§ 1-40-106.5(1)(e)(I), C.R.S 11

§ 1-40-106.5(1)(e)(II), C.R.S 11

§ 1-40-107(1)(a)(I), C.R.S 1

ISSUE ON REVIEW

Whether the Title Board correctly determined that Proposed Initiative 2023-2024 #148 violates the single-subject requirement.

STATEMENT OF THE CASE

Proposed Initiative 2023-2024 #148 seeks to reduce residential real property taxes in Colorado. If enacted, #148 would reduce residential real property taxes by setting the actual value of residential real property as the amount of the property's most recent sale; amending the assessment rate for residential real property to 6.7%; and amending the mill rate for residential real property to the mill rate that was in effect for that property on January 1, 2021. *See Record*, pp 2-4.

The measure contains at least two additional subjects. By providing that “[e]ach property tax levy shall be uniform upon all real and personal property,” #148 would also reset the mill rates for all other classes of real property. *See id.* at 2. The measure also includes provisions requiring that any increase to the amended assessment rate for residential real property must be approved by fifty-one percent of Colorado's registered voters and that any increase to the mill rate for

such property must be approved by fifty-one percent (51%) of a district's registered voters. *See id.* at 4.

Petitioner Peter Simmons submitted, and appeared on behalf of, #148. *See id.* at 1. At its March 7, 2024, hearing (the "Hearing"), the Board unanimously determined that it lacked jurisdiction to set a title for #148 because the measure violated the single-subject requirement for proposed initiatives. *Id.* at 5; *see Hearing Before Title Board on Proposed Initiative 2023-2024 #148* (March 7, 2024) at 3:43:30-3:47:33.

Simmons filed a timely motion for rehearing under section 1-40-107(1)(a)(I), C.R.S., in which he challenged the Board's determination that #148 violated the single-subject requirement. *See Record*, p 6. The rehearing for #148 occurred on March 20, 2024 (the "Rehearing"), during which the Board unanimously denied Simmon's motion. *See Rehearing Before Title Board on Proposed Initiative 2023-2024 #148* (March 20, 2024) at 12:30-12:50. The Board reiterated its previous determination that #148 contains three subjects. *See id.* at 7:35-12:00.

SUMMARY OF THE ARGUMENT

The Board correctly determined that #148 violates the single-subject requirement because it contains at least three subjects that are not necessarily and properly connected: (1) reducing property taxes for residential real property; (2) resetting the mill rate for all classes of real property; and (3) changing the percentage of votes needed to increase the assessment and mill rates for certain classes of real property. Accordingly, #148 amounts to impermissible logrolling and risks surprising voters about the measure’s outcomes if it were to pass.

ARGUMENT

I. Proposed Initiative #148 violates the single-subject requirement.

A. Standard of review and preservation.

“No measure shall be proposed by petition containing more than one subject,” and “[i]f a measure contains more than one subject . . . no title shall be set.” COLO. CONST. art. V, § 1(5.5). The Court will “overturn the Board’s finding that an initiative contains a single subject only in a clear case.” *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (quotations omitted) (emphasis added). “In

reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8.

The Court does “not address the merits of the proposed initiative” or “suggest how it might be applied if enacted.” *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 8.

Instead, the Court “must examine the initiative’s wording to determine whether it comports with the constitutional single-subject requirement.” *Id.* To satisfy the single-subject requirement, the “subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Where an initiative “tends to . . . carry out one general objective” or central purpose, “provisions necessary to effectuate [that] purpose . . . are properly included within its text,” and the “effects th[e] measure could have on Colorado . . . law if adopted by voters are irrelevant” to the single

subject inquiry. *In re Title, Ballot Title, & Submission Clause for 2013- 2014 #90*, 2014 CO 63, ¶¶ 11, 17 (quotations omitted).

The Board agrees that Simmons preserved his single-subject objection in the motion for rehearing. Record, p 6.

B. Proposed Initiative #148 contains at least three subjects.

The Board did not err by determining that #148 violates the single-subject requirement: The measure contains at least three subjects.

The first subject in #148 — reducing property taxes for residential real property — is the very subject that Simmons proffered to the Board. *See, e.g., Rehearing* at 6:40-7:30. Most of the provisions in #148 are “necessarily and properly connected” to this purpose, including the provisions that set the actual value of residential real property as the amount of the property’s most recent sale; amend the assessment rate for residential real property to 6.7%; and amend the mill rate for residential real property to the mill rate that was in effect for that property on January 1, 2021. *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Each of those provisions would have a direct impact on reducing

residential real property taxes in Colorado. *See Gilpin Cnty. Bd. of Equalization v. Russell*, 941 P.2d 257, 260 (Colo. 1997) (explaining that taxation of real property is dependent on a calculation of the property’s actual value); *In re Interrogatory on House Bill 21-1164 Submitted by Colo. General Assembly*, 2021 CO 34, ¶ 38 (explaining that a change to a mill levy impacts property tax assessments).

The second subject in #148 — resetting the mill rate for all classes of property — appears in the plain language of sections 1 and 4 of #148. *See Record*, pp 2, 4. Section 1 of #148, which concerns proposed amendments to the uniformity provision in article X, section 3, of the Colorado Constitution, contains language providing that “[e]ach property tax levy shall be uniform upon all real and personal property not exempt from taxation.” *Id.* at 2. Section 4 of #148, in turn, provides that “[b]eginning with the property tax year which commences January 1, 2024, the mill rate for residential real estate shall be the mill rate as of January 1, 2021.” *Id.* at 4. Reading the quoted language in sections 1 and 4 of #148 together, it is evident that the measure would reset the mill rate for all classes of real property because such mill rates

comprise part of the property tax levy, which must be uniform for all real and personal property. *See In re Interrogatory on House Bill*, 2021 CO 34, ¶ 38.

Resetting the mill rate for all classes of real property other than residential real property is not “necessarily and properly connected” to #148’s proffered purpose of reducing residential real property taxes. *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. That is, resetting the mill rate for all other classes of real property does not “describe[] a part of the legal framework” to reduce residential real property taxes, *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 13, provide “[i]mplementation details that are ‘directly tied’ to the initiative’s ‘central focus,’” *In re 2021-2022 #16*, 2021 CO 55, ¶ 29 (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #200A*, 992 P.2d 27, 30 (Colo. 2000)); or provide “enforcement details” necessary to reduce residential real property taxes, *In re Title, Ballot Title & Submission Clause, & Summary for 2005-2006 #73*, 135 P.3d 736, 739 (Colo 2006).

In the petition for rehearing, Simmons argued that #148 contains only a single subject because the measure’s language requiring uniformity for “all real and personal property not exempt from taxation,” Record, p 2, “refers to a uniform tax levy on a class of real property and not a uniform tax levy upon all classes of real property,” *id.* at 6. In effect, Simmons argued that the Board had erred in its determination of #148’s impact on Colorado law at the Hearing.

The Board did not consider the impacts #148 might have on Colorado law if the measure were to pass. The Board would have erred had it done so. *See In re 2019-2020 #3*, 2019 CO 57, ¶ 8. Rather than determining that #148 would violate the uniformity provision in article X, section 3, of the Colorado Constitution, as Simmons suggested, the Board based its determination solely on the measure’s plain language. *See Rehearing* at 7:35-10:30.

The third subject in #148 — changing the percentage of votes needed to increase the assessment and mill rates for residential real property— appears in the plain language of section 4 of #148. *See* Record, p 4. If enacted, the measure would require that any increase in

the assessment rate for residential real property “shall be approved by a yes vote of 51% of the registered voters of the State of Colorado” and that any increase in the mill rate for such property “shall be approved by a yes vote of 51% of the registered voters of the taxing district.” *Id.*

This subject is not necessarily or properly connected to reducing residential real property taxes. Instead, it is a separate policy choice that would make it more difficult to repeal the proposed changes to the assessment and mill rates for residential real property. *See, e.g.,* COLO. CONST. art. X, § 20(4) (requiring voter approval for any tax rate increase or policy choice that results in a net tax revenue gain to any district). And under the plain language of #148, the amendment to the mill rate in section 4 of the measure would affect all classes of real property. Thus, the policy choice in this third subject would also make it more difficult to repeal the changes to the mill rate for all other classes of real property.

Although policy choices do not, by themselves, amount to a separate subject, the policy choices must nonetheless be necessary to effectuate the central purpose of a proposed initiative. *See In re 2013-*

2014 #90, 2014 CO 63, ¶ 11. Making it more difficult to repeal changes to the assessment rate of residential real property and more difficult to repeal changes to the mill rate for all classes of real property is not, in any way, necessary to reducing residential real property taxes. *See In re Title, Ballot Title & Submission Clause, & Summary for 1997–1998 #64*, 960 P.2d 1192, 1197 (Colo. 1998) (holding that the proposed initiative contained two distinct subjects by containing provisions concerning the qualifications of judicial officers and the number of judges in each district).

Even if the Court disagrees and concludes that making it more difficult to increase the assessment and mill rates for residential real property is directly tied to reducing residential real property taxes, it does not follow that making it more difficult to increase the mill rate for other classes of real property is necessary to reduce residential real property taxes. *See In re Title, Ballot Title & Submission Clause, & Summary for 1997–1998 #84*, 961 P.2d 456, 460 (Colo. 1998) (holding that the proposed initiative contained multiple subjects because it provides for tax cuts and mandatory reductions in state spending on

state programs). And even if the Court holds that any two of the measure's three subjects are connected, #148 nonetheless violates the single-subject requirement.

C. The multiple subjects in Proposed Initiative #148 present the dangers that the single-subject requirement attempts to prevent.

“The single subject requirement prevents two ‘dangers’ of multi-subject initiatives.” *In re 2013-2014 #89*, 2014 CO 66, ¶ 13 (quoting *In re Title, Ballot Title, & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶ 11). “First, combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions — that may have different or even conflicting interests — could lead to the enactment of measures that would fail on their own merits.” *In re 2011-2012 #3*, 2012 CO 25, ¶ 11; see § 1-40-106.5(1)(e)(I), C.R.S. Second, “[t]he single-subject requirement also ‘prevent[s] surprise and fraud from being practiced upon voters.’” *In re 2021-2022 #16*, 2021 CO 55, ¶ 12 (quoting § 1-40-106.5(1)(e)(II)).

Each danger is present with #148. First, the three distinct subjects in #148 would likely be supported by different factions with

different and sometimes conflicting interests. The first subject — reducing property taxes for residential real property — would most likely be supported by persons who own residential real property only and seek to lower their tax burden. The second subject — resetting the mill rate for all classes of property — would most likely find support in persons who own a variety of classes of real property, including residential, commercial, industrial, and/or agricultural, and seek to lower their tax burden. The proponents of the first and second subjects are unlikely to be from the same faction because a change in tax revenue often impacts other taxes, including subsequent mill rates for real property, under the Taxpayer Bill of Rights (“TABOR”). *See, e.g., Mesa Cnty Bd. of Cnty. Comm’rs v. Colorado*, 203 P.3d 519, 524-26 (Colo. 2009) (explaining the effect of TABOR on mill rates for purposes of funding Colorado’s public schools). Thus, if there is a reduction in residential real property taxes, there will likely need to be an increase in the mill rate for other classes of property or a decrease in the allocation of funds to other government programs. *See id.* A voter could conceivably seek a reduction in residential real property taxes without

increasing mill rates or decreasing government programs. The converse is equally true.

And the third subject — changing the percentage of votes needed to increase the assessment and mill rates for certain classes of real property — would most likely find support from persons who want to “restrain . . . the growth of government” by limiting its funding from property tax levies. COLO. CONST. art. X, § 20(1).

Because the provisions in #148 are not related to the accomplishment of a single subject, the measure may pass or fail on the merits of any of the distinct subjects. There is, therefore, a risk that #148 will garner support from factions with “different or conflicting goals,” *In re 2013-2014 #89*, 2014 CO 66, ¶ 18, because they “may focus on one change and overlook the other[s],” *In re 2021-2022 #16*, 2021 CO 55, ¶ 41.

The second danger of multi-subject initiatives — voter surprise — is also present here. *See id.* at ¶ 19 (“This danger 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.”). Most of the provisions in #148 directly relate to reducing residential real property taxes. *See Record*, pp 2-4. A voter would reasonably assume that voting in favor of the measure would reduce taxes for such property. But without a careful reading of sections 1 and 4 in #148, a voter would be surprised that voting in favor of the measure would amend the mill rate for all classes of real property. Thus, there is a serious risk that voters would be surprised by one of the primary outcomes of #148.

CONCLUSION

The Court should affirm the Board’s determination that Proposed Initiative #148 violates the single-subject requirement, especially under the deferential standard of review that applies. *See In re 2021-2022 #16*, 2021 CO 55, ¶ 9. The measure contains three subjects, which present the dangers of logrolling and voter surprise.

Respectfully submitted this 12th day of April, 2024.

PHILIP J. WEISER
Attorney General

/s/ Harlan Norby

HARLAN NORBY,
Assistant Attorney General*
Ralph L. Carr Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203

**Counsel of Record for the Title Board*

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **AMENDED OPENING BRIEF** upon Petitioner via Fedex overnight delivery service at Petitioner's address on record, 21395 E. Greenwood Pl., Aurora, CO 80013, this 12th day of April, 2024.

/s/ Jennet Kurbandurdyeva