DATE FILED: May 3, 2024

SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #245 ("Valuation for Assessments") **Petitioners:** Dave Davia and Michael Fields, **v.** **Respondents:** Scott Wasserman and Ann Adele Terry, **and** **Title Board:** Theresa Conley, Christy Chase, and Kurt Morrison	**▲COURT USE ONLY▲**
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RESPONDENTS' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all 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:

X It contains 3,210 words.

☐ It does not exceed 30 pages.

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

☐ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

X For the party responding to the issue:

It contains, under a 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 of the requirements of C.A.R. 28 and C.A.R. 32.

/s Nathan Bruggeman
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Attorney for Petitioners

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INTRODUCTION

Initiative #245 lumps together what are two of the longest standing and unsettled issues in Colorado politics—property taxes and school funding—and, in doing so, violates the constitutional single subject limitation. There is no necessary and proper connection between cutting local property taxes and preventing changes to the funding scheme under the Public School Finance Act. Beyond the logical inconsistency of the subjects and obvious attempt at logrolling, Proponents have inserted into this measure the type of state legislative limitation that, under this Court's precedent, constitutes a separate subject. The Board was right in concluding it lacks jurisdiction over this measure, and the Court should affirm.

ISSUES PRESENTED

1. Whether the Title Board correctly determined that Initiative #245 violates the constitutional single subject requirement given the measure's multiple, different subjects.

2. Petitioners' second issue is so vague that it is impossible at this time to understand what the issue entails.

STATEMENT OF THE CASE

A. Statement of Facts.

Dave Davia and Michael Fields (hereafter "Petitioners") proposed Initiative 2023-2024 #245 (the "Initiative" or "Initiative #245"). Review and comment hearings were held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, Proponents submitted a final version of the Initiative to the Secretary of State for purposes of submission to the Title Board.

1. The Initiative.

Initiative #245 purports to provide property tax relief. It accomplishes this by reforming one element of Colorado's property tax equation[1]: the "valuation for assessment of tax" or "assessed value" for properties. Petitioners propose two changes to Colorado's assessed value:

- For nonresidential property such as commercial property or vacant land, they seek to lower the assessed value rate from 29% to 25.5%;

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[1] Property taxes are determined by multiplying the "actual value" of property by the "assessed rate" that applies to the type of property at issue. The result of that calculation is then multiplied by the "tax rate," which is determined based upon the "mill levies" imposed by the taxing authorities (e.g. the county, school district, special districts). The result of that calculation is the property tax owed for a given property. *See* Div. of Prop. Taxation, Colo. Dep't of Local Affairs, "Understanding Property Taxes in Colorado," last visited Apr. 29, 2024, https://dpt.colorado.gov/understanding-property-taxes-in-colorado.

- For residential property, including multifamily property, they seek to lower the assessed value rate from 7.15% to 5.7%;

- For property constituting mines, oil and gas lands/leaseholds, agricultural property, and renewable energy production property, they propose no change to the assessed rate.

(CF p. 3 (Proposed C.R.S. §§ 39-1-104 & 39-1-104.2).)

Presumably concerned about facing a campaign argument that their measure would lead the General Assembly to cut K-12 spending to deal with the increased burden the state would suffer because of the measure's tax cuts, Proponents added a provision for the "[p]rotection of school district revenue." This provision prevents the General Assembly from changing funding levels under the Public School Finance Act:

> In order to insulate school districts from any revenue loss due to the reduced valuations for assessment set forth in section 39-1-104(1) and in sections 39-1-104.2(3)(q) and (3)(r), any revenue loss attributed to such reductions shall not reduce funding school districts receive under article 54 of title 22, otherwise known as the Public School Finance Act of 1994.

(CF p. 4 (Proposed C.R.S. § 39-3-210).)

According to Legislative Council Staff's fiscal summary, the measure's tax cuts will require the state to increase its contribution to K-12 funding by "an

estimated $870 million in FY 2025-26 and $890 million in FY 2026-27, and by larger amounts in later years." (CF p. 13.)

B. Nature of the Case, Course of Proceedings, and Disposition Below.

The Title Board heard the measure on April 3, 2024, at which time it set a title. (*Id.* at 5.) On April 10, 2024, Respondents filed a Motion for Rehearing, alleging that the Board lacked jurisdiction to set titles. (*Id.* at 9-11.)

The Title Board heard the Motion for Rehearing on April 18, 2024, and it unanimously granted the Motion, concluding that the "Board lacks jurisdiction to set title because the measure has multiple subjects." (*Id.* at 7.) The Board found that the measure's provision for "protecting education funding" constituted a second subject. *See also* April 18, 2024, Continuation of April 17, 2024, Title Bd. Hr'g at 12:14:30-12:15:30, *available at* https://tinyurl.com/mtnpky73.

SUMMARY OF ARGUMENT

The single subject requirement prevents proponents from combining separate subjects to generate a political coalition to support a measure. Such logrolling defeats the requirement that each subject be able to pass on its own merits. But that is what proponents have done here by mixing property taxes cuts while prohibiting the state from adjusting the school financing formula in response.

While there may be some general relationship between the subjects, given the unique political, policy, and electoral history of each subject, combining them into one measure violates the single subject requirement.

As such, the Board made the right decision in finding that it lacked jurisdiction over Initiative #245, and this Court should affirm.

LEGAL ARGUMENT

I. The Board correctly determined that #245 violates the Constitution's single subject limitation.

A. Standard of Review; Preservation of Issue Below.

An initiative cannot contain "more than one subject." Colo. Const. art. V, sec. 1(5.5). Where a measure "contains more than one subject," "no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls." *Id.* An initiative satisfies the single subject requirement where its provisions are "necessarily and properly connected." *In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 13 (internal quotation marks and citation omitted). "In other words, a measure violates the single subject requirement if its provisions are not 'dependent upon or connected with each other.'" *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175*, 987

P.2d 243, 244 (Colo. 1999) (quoting *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Subsection (10) to Section 20 of Article X (Amend TABOR 25)*, 900 P.2d 121, 125 (Colo. 1995)).

As the General Assembly and this Court have recognized, the single subject requirement principally guards against two evils. *First*, it prevents so-called "logrolling," in which proponents combine "incongruous subjects in the same measure" "for the purpose of" creating a political coalition to support the measure that might not otherwise support the different elements of the measure. C.R.S. § 1-40-106.5(1)(e)(I). In other words, different subjects must be passed on their own merits. *Second*, it ensures that initiative proponents do not coil "surreptitious measures" together that would surprise voters—"that is, to prevent surprise and fraud from being practiced upon voters." *Id.* § 1-40-106.5(1)(e)(II). *See also generally, e.g.*, *In re Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶¶ 11-15 (reviewing single subject limitation); *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #25*, 974 P.2d 458, 460-65 (Colo. 1999) (same).

This Court reviews the Title Board's actions with "deference," *see In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 18, and it "employs all legitimate presumptions in favor of the propriety of the Board's actions," *see In the Matter of the Title, Ballot Title and Submission Clause for 2009-2010 # 91*, 235 P.3d 1071, 1076 (Colo. 2010). It is generally only in a "clear case" that the Court will overturn the Board's single subject determination. *See In re Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 9.

Respondents agree this issue is preserved.

B. Initiative #245's provision for "protection of school district revenue" is a second subject.

Under Proposed C.R.S. § 39-3-210, "any revenue loss attributed to such reductions or revenue limit shall not reduce funding school districts receive under article 54 of title 22, otherwise known as the Public School Finance Act of 1994." This language is not intended to require the state to increase its contribution to K-12 funding to make up for the reduction in local property tax revenue available for that purpose. As reflected in the fiscal summary, existing law would trigger that result, requiring an additional $870 million state K-12 obligation in the first fiscal year alone. (CF p. 13.) *See generally Lobato v. State*, 2013 CO 30, ¶¶ 25-28 (describing how funding works under the Public School Finance Act); *In re*

Interrog. on House Bill 21-1164 Submitted by the Colo. Gen. Assembly, 2021 CO 34, ¶ 7 ("The PSFA funds the so-called 'total program' (i.e., the total amount of money a district receives for operating expenses), first through local funding and then, if a district's local share generates insufficient funds to meet the total program, through state funding.")

Instead, the language is intended to prohibit the state from adjusting the education funding scheme as a result of this new obligation—it is, in other words, freezing the school funding formula under the Public School Finance Act. For instance, it is intended to stop the state from lowering the amount of per pupil funding used to calculate the amount of funding districts receive, *see Lobato*, 2013 CO 30, ¶ 25 (describing per pupil funding formula), or reinstituting a "budget stabilization" factor (or "negative factor") to reduce state K-12 spending due to an inability to meet financing obligations, *see, e.g.*, Josh Abram, Colo. Leg. Council Staff, "The Negative Factor and Public School Finance," Issue Brief No. 15-22 (Dec. 2015), *available at* https://tinyurl.com/4eztzzst.

This is a significant intrusion into the General Assembly's legislative power. The Constitution vests within the General Assembly with the "plenary power to adopt general laws, subject only to the restraints and limitations of the state and

federal constitutions." *People v. M.*, 593 P.2d 1356, 1359 (Colo. 1979). That legislative power includes appropriations. *See* Colo. Const. art. V., sec. 32 & 33.

However, within the General Assembly's power, school finance presents particular limitations of consequence. The Constitution requires the "establishment and maintenance of a thorough and uniform system of free public schools throughout the state," *id.* art. IX, sec. 2, which mandate has been achieved, from a funding perspective, through the Public School Finance Act. Public school funding has an additional constitutional overlay through Amendment 23 and its requirement for annual increases in base per pupil funding. *See In re Dwyer*, 2015 CO 58, ¶ 9. This is a complex mix of factors that has required the General Assembly to resort to "convoluted" and "highly intricate" solutions to balance these requirements with budget reality. *See id.* ¶¶ 10-16 (explaining the budget stabilization factor).

Initiative #245 seeks to deprive the General Assembly its legislative power and decision-making necessary to address the complexities of public school financing—which will be upended by Initiative #245's property tax cuts. The measure blows a hole in the state's public school financing scheme, as school districts will collect less property tax, causing the state share to increase by

approximately $870 million in FY2025-26, $890 million in FY2026-27, and "larger amounts in later years." (CF p. 13.) This creates three single subject problems.

First, protecting education spending in this way is not necessarily and properly connected with the measure's aim of keeping property taxes low. On its face, cutting property taxes bears no logical relationship to the funding formula employed by the Public School Finance Act. The manner in which schools are funded is a hotly contested public policy issue—from the right balance of state v. local funding, to the sufficiency of overall funding, to the right balance of funding factors, to what authority the General Assembly has to impose some budget discipline. It is a perennial topic of debate in the General Assembly, has been subject to ballot initiatives, and has embroiled the courts in resolving complex legal questions with significant budgetary consequences. Under these circumstances, the fact that public school funding happens to be related to property taxes constitutes too abstract or general of a theme to save the measure from a single subject violation. *See In re 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 23 (holding that measures related to the retail sale of alcohol were separate subjects where, among other considerations, the topics had been subjects of "public debate"

that remained "unsettled" such that voters would have different opinions of them). Indeed, this measure effectively combines two of the longest running and most "unsettled" public policy issues in Colorado into one measure: property taxes and public school funding.

Second, this provision exceeds the permissible bounds of how a local property tax measure may impose a state obligation. While the Court has approved for purposes of single subject compliance the pairing of a local district tax cuts with a state funding backfill, *see In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Paragraph (D) Subsection (8) of Section 20 of Article X (Amend Tabor #32)*, 908 P.2d 125, 129 (Colo. 1995), a measure cannot dictate the manner in which the state must provide support. As the Court has explained, in *Amend Tabor #32*, the measure "did not impose any limitations on the state in terms of the manner by which the state replaced lost local revenue." *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 # 84*, 961 P.2d 456, 459 (Colo. 1998). The General Assembly was left with the discretion to determine how to meet the reimbursement obligation.

It is a different scenario where—as here—current law already requires the backfill, but the measure dictates how the state must meet the obligation. In *#84*, the proponents' measure included a state backfill but qualified it by requiring that the state must remain "within all tax and spending limits." *Id.* In that case, because of the Taxpayer's Bill of Rights, the requirement that the backfill be "within all tax and spending limits" would force the state "to replace local revenues lost through tax cuts only if it reduces existing state spending programs." *Id.* at 460. Because of the limitation, the state could not "increase either its overall spending or revenue collection to maintain the current level of spending on state programs." *Id.*

Initiative #245 traps the state in a manner similar to *#84* because it dictates how the state can respond, as it provides that the current funding formula in the Public School Finance Act is inviolable. This is precisely the type of "limitation" on the state that was absent in *Amend Tabor #32* and which triggered a single subject violation in *#84*, and, as the Board concluded, hamstringing the General Assembly in this manner is a separate subject. *See also In re 2009-2010 #91*, 235 P.3d at 1079-80 (holding measure violated single subject requirement where it "propos[ed] to divest the General Assembly of its legislative power over the basin

roundtables and the interbasin compact committee for a prolonged period of time, in addition to establishing and administering a beverage container tax").

Third, this measure presents a logrolling problem. As noted above, property taxes and school funding are distinct policy issues that involve complex, unsettled policy choices. There are different factions with different interests. Many property owners, in particular residential property owners and renters, have an urgent interest in obtaining property tax relief. *See* Office of the Gov., Executive Order D 2023 24, "Call for the First Extraordinary Session of the Seventy-Fourth General Assembly," Nov. 9, 2023, at 1-2, *available at* https://tinyurl.com/5n6wjfv3. Commercial property owners, in turn, have been seeking relief for decades from the effects of the Gallagher Amendment, and while they obtained some relief when Amendment B passed (repealing the Gallagher Amendment), their overall property tax rate remains unchanged at 29%, and lowering that rate has been a longtime goal. *See* NFIB et al., "Iceberg Ahead: The Hidden Tax Increase Below the Surface of the Gallagher Formula," Oct. 2020, *available at* https://tinyurl.com/5de427cc. Either or both of these classes of property owners may have little interest in preserving school funding (or in fact may think it too high) but are willing to accept a freeze in school funding as a tradeoff for their

property tax relief. *See* Colo. Polling Institute, "What do Colorado voters think about the direction of the state and who do they trust?," Nov. 2023, https://www.copollinginstitute.org/research/colorado-issues-november-202 (finding "voters do have a strong opinion about how much they pay in taxes – 61% think they're too high").

On the other hand, advocates of school funding may oppose property tax cuts and the resulting loss of over $2 billion in local government funding, (CF p. 13), but accept them to get the measure's protection against future K-12 funding cuts, especially in light of their recent success in eliminating the budget stabilization factor. *See, e.g.*, Colo. Ed. Ass'n, "Colorado Education Association, Gov. Polis and Legislature Celebrate B.S. Factor Buydown to $0," Feb. 29, 2024, *available at* https://tinyurl.com/34z4jajp. For over a decade, this faction saw the negative factor as violating the spirit, if not the letter, of Amendment 23 and its mandated annual K-12 funding increases. *See In re Dwyer*, 2015 CO 58. The state has finally removed the negative factor from the school finance formula and protecting that victory and stabilizing school funding may be worth the tradeoff for property tax cuts. Combining these opposed policy perspectives to build a political

coalition is precisely what single subject requirement is intended to prevent. *See* C.R.S. § 1-40-106.5(1)(e)(I).

II. It is impossible to understand Petitioners' second issue and, therefore, Respondents cannot meaningfully respond at this time.

A. Respondents cannot address the standard of review or preservation because the issue is too vague.

Because Petitioners' second subject is so vague, it is impossible to understand what argument they intend to make. Accordingly, Respondents are unable to determine what standard of review applies and whether there are any potential issues regarding preservation. Respondents reserve their right to address the standard of review and/or preservation in their Answer Brief.

B. Petitioners' second issue does not identify how they believe the Board erred.

As to their second issue for review, Petitioners state only as follows:

> Whether the Board violated established precedent regarding the single subject requirement when it reversed its single subject determination for Proposed Initiative 2023-2024 #245 and denied title setting.

(Pet. for Rev. at 4.) It is unclear what this means. If Petitioners intend to argue their measure does not contain multiple subjects, then the second issue is redundant of the first (and wrong on the merits as explained above). If they argue the Board lacked jurisdiction to consider a single subject challenge on a motion for rehearing,

they are plainly wrong. *See* C.R.S. § 1-40-107(1)(a). As this discussion shows, because of how Petitioners drafted issue two, Respondents are in the position of speculating as to how Petitioners believe the Board erred. As such, Respondents will respond on the merits to the second issue in their Answer Brief when they have notice of and can understand Petitioners' issue.

CONCLUSION

Respondents respectfully request that this Court affirm the Board's determination that Initiative #245 violated the constitutional single subject requirement and, therefore, it lacked jurisdiction to set a title.

Respectfully submitted this 3rd day of May, 2024.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF** was sent electronically via Colorado Courts E-Filing this day, May 3, 2024, to the following:

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