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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 #248 ("Property Tax Revenue") **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▲**
Attorneys for Respondents: Thomas M. Rogers III, #28809 Nathan Bruggeman, #39621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) trey@rklawpc.com; nate@rklawpc.com Edward T. Ramey, #6748 Tierney Lawrence Stiles LLC 225 E. 16th Ave., Suite 350 Denver, CO 80203 303-949-7676 (telephone) eramey@TLS.legal	Case Number: 2024SA122
RESPONDENTS' ANSWER 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).

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/s Nathan Bruggeman
Nathan Bruggeman
Attorney for Petitioners

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INTRODUCTION

Petitioners' opening brief essentially offers a defense of how pairing local property tax cuts with a prohibition on the state changing the education funding formula is a single subject. The problem with this argument is that the Title Board's single subject determination for this Initiative did ***not*** rely on that issue.

Instead, the Board identified three other single subject violations, which, with one possible exception, Petitioners do not address. Having offered no grounds to hold the Title Board erred as to those other subjects, the Court should affirm.

LEGAL ARGUMENT

I. Petitioners have effectively conceded the appeal.

The Board's single subject determination rested on multiple different facets of Initiative #248. The Board identified ***three*** different subjects in the measure that fall outside the measure's purported single subject of cutting property taxes:

1. Imposing a new statewide voter approval scheme that displaces the current method of local control over local revenue;
2. The local backfill requirement will impermissibly necessitate cuts to state programs;
3. The double-dip of state monies local school districts will receive under the measure.

(Resps.' Op. Br. at 5; *see also* Title Bd. Op. Br. at 3-4 ("The Board found that in

addition to the residential and commercial property tax cuts, the measure would also 1) require mandatory cuts to state spending; 2) usurp local control over the right to retain local revenues above the 4% cap, and 3) potentially result in a substantial increase in state funding for public education.").

Petitioners do not address two of the three grounds—displacing local control of local revenue with a new statewide scheme and election requirement, and the education double dip—identified by the Board as violating the single subject requirement (and arguably haven't addressed the third, local backfill funding, and the Board's application of this Court's precedent to it). Instead, Petitioners' brief primarily focuses on a different part of their measure that addresses protection of education funding. Petitioners' "Summary of the Argument" succinctly states this focus:

> Initiative #248's ***provision prohibiting reductions in funding for public schools*** as a result of the passage of #248 is necessarily and properly connected to the reductions in revenue resulting from the initiative's reduction in assessment rates. Initiative #248 is a single subject.

(Pets.' Op. Br. at 2 (emphasis added).) While the question of whether a property tax measure complies with the single subject requirement by including a "provision prohibiting reductions in funding for public schools" is the subject of another

appeal (*see* 2024SA121 (Initiative 2023-2024 #245)), the Board did not decide #248 on that issue.[1]

Respondents assume that, upon reviewing the opening briefs, Petitioners will try to correct this mistake and address in their answer brief the merits of why the Board dismissed Initiative #248. As a matter of appellate procedure and fairness, the Court should not allow Petitioners to do this.

An appellant cannot raise arguments in a reply brief that were not raised in their opening brief. *See, e.g.*, *People v. Owens,* 2024 CO 10, ¶ 90 ("it is well-settled that an appellate court will not consider arguments raised for the first time in a reply brief"). This reflects the fact that, when a party does not timely raise an argument, it leaves "the opposing party[] unable to respond." *Grohn v. Sisters of*

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[1] Because the Board did not grant the motion for rehearing on the protection of education funding issue, there is no basis for this Court to reverse the Board because of it. *See* C.R.S. § 1-40-107(2) (providing a party may appeal where the party "is not satisfied with the ruling of the title board upon the motion," and permitting the Court to affirm or reverse "the action of the title board"). Even if the Court determines the Board did base its decision in part on the protection of education funding issue, Petitioners have failed to address, at the least, (1) the displacement of local control over local revenue with the new statewide system and (2) the education double-dip. These are separate and distinct single subject violations the Board found in Initiative #248, either of which is a sufficient ground to affirm the Board's decision (and certainly together). Accordingly, by not addressing these issues, Petitioners have conceded those grounds and effectively their appeal.

Charity Health Servs., 960 P.2d 722, 727 (Colo. App. 1998) (addressing principle with respect to trial court briefing); *see also, e.g.*, *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (where issue "was raised for the first time in [a] reply brief," the other side "did not brief the issue," and "[u]nder these circumstances, the issue is not properly before us and we will not address it"), *abrogated in part on other grounds by Rojas v. People*, 2022 CO 8.

These concerns are present here. Respondents (and presumably the Title Board) do not have any insight or indication into what arguments Petitioners will raise on the unaddressed grounds of the Title Board's decision. Not only is their opening brief silent on those grounds, so too is their Petition for Review, which offers only general advisory issues that lack specificity:

> 1. Whether the Board improperly found multiple subjects in Proposed Initiative 2023-2024 #248.
>
> 2. Whether the Board violated established precedent regarding the single subject requirement when it reversed its single subject determination for Proposed Initiative 2023-2024 #248 and denied title setting.

(Pets.' Pet. for Rev., Case No. 2024SA122, Apr. 25, 2024, at 3-4.) Respondents are thus left to speculate as to what Petitioners might say and can only re-urge the arguments made in their opening brief. That is not fair to Respondents or

"consistent with the rights of the parties," C.R.S. § 1-40-107(2), and it is not helpful to the Court. The Court should not consider arguments raised by Petitioners for the first time in their answer brief.

II. Petitioners have not shown how the local backfill requirement satisfies the requirements of the Court's precedent.

Petitioners mention their measure's local backfill requirement towards the end of their brief, (*see* Pets.' Op. Br. at 7-9), but they do not explain how this provision does not violate the Court's decision in *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 #84*, 961 P.2d 456 (Colo. 1998). There, like here, the proponents imposed a mandate on the state to provide a backfill for a local property tax, which would have required cuts to state programs. The combination of this mandate and forced cuts to state programs to fund a local tax cut violated the single subject requirement. *See id.* at 460-61.

While Petitioners try to explain how the provision in their measure protecting education spending complies with the Court's precedent,[2] they do not

[2] Petitioners' citations to Initiatives 2021-2022 #27 (2021SA151) and 2023-2024 #21 (2023SA109) do not further their argument because the Court in those cases issued only one-sentence affirmances of the Title Board. It is impossible to understand how the Court viewed those measures, and, therefore, they are not persuasive. And on the merits, those measures included authorizations for the state

explain how their measure's ***separate*** local backfill provision does. (Pets. Op. Br. at 4-6). As the Board recognized, imposing a multi-billion-dollar annual commitment on the state is going to force cuts elsewhere in the state budget. (*See also* CF p. 17 (explaining, without counting the education double-dip, the local backfill will "increases General Fund expenditures for local reimbursements up to $2.2 billion in FY 2025-26 and FY 2026-27, and larger amounts in later years"). *1997-98 #84* prohibits proponents of a local tax cut from affecting the state in this way, and Petitioners have not explained how the Board erred in its application of the case to the local backfill.

As to the logrolling argument, while there are logrolling issues in Petitioners' measure, the local backfill issue presents a different concern: it is a surreptitious subject that will surprise voters. *See* C.R.S. § 1-40-106.5(1)(e)(II) (single subject requirement "prevent[s] surreptitious measures and apprise[s] the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters"). As the Court put it in *1997-98 # 84*, "Voters would be surprised to learn that by voting for local tax cuts, they also had

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to retain and spend funds, not the type of mandate on the state at issue here. *See* 2021SA151, Certified R. at 10; 2023SA109, Certified R. at 2.

required the reduction, and possible eventual elimination, of state programs." 961 P.2d 4at 460-61. Petitioners have not addressed the coiled in the folds problem presented by the backfill provisions (or the education double dip or displacement of local control over local revenue with a new state system).

III. Petitioners impermissibly recast the scope of the single subject.

Recognizing their single subject problems, Petitioners try to expand their single subject. Petitioners initially note that their single subject is "property tax relief," (Pets.' Op. Br. at 4), but they then try to recast the single subject into the larger and more amorphous subject of "state tax policy," (*id.* at 9). Shifting the single subject into this high-level, amorphous concept of "state tax policy" places into sharp relief that Petitioners are trying to save this measure by reliance on an overly broad or general theme, which the single subject requirement does not allow. *See, e.g.*, *In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 20 ("retail sale of alcohol"); *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 22 ("animal cruelty"); *In re Title, Ballot Title & Submission Clause for 2015-2016 #132*, 2016 CO 55, ¶ 34 ("redistricting in Colorado"); *In re Title, Ballot Title, and Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 10 ("recall of

government officers"); *In re Title, Ballot Title and Submission Clause for 2007-2008, #17 (New State Dep't and Elected Bd. for Env't Conservation)*, 172 P.3d 871, 875 (Colo. 2007) ("environmental conservation" and "conservation stewardship"). There is no necessary-and-proper connection between property tax cuts, creation of a new statewide revenue retention standard and election process that displaces the current approach of local control, requiring the state to backfill lost local revenue by cutting state programs, and increasing education spending.

CONCLUSION

Petitioners have effectively conceded this appeal, but even if they have not, the Court should still affirm because Initiative #248 contains several single subject violations. Accordingly, the Board correctly determined that it lacked jurisdiction to set a title.

Respectfully submitted this 10th 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' ANSWER BRIEF** was sent electronically via Colorado Courts E-Filing this day, May 10, 2024, to the following:

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