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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' 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 3,881 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
Nathan Bruggeman
Attorney for Petitioners

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INTRODUCTION

Initiative #248 may not be long, but as the Title Board correctly recognized, it packs multiple subjects into its three pages. Ostensibly focused on lowering property taxes for commercial and residential property, a goal it achieves by lowering the assessed rates used in property tax calculations, the measure then upends the Taxpayer's Bill of Rights by, effectively, "***re***-brucing" local jurisdictions that have received voter approval to retain excess property tax revenue through a new statewide revenue limit and statewide election to waive it.

Petitioners weren't done yet, however. They then coiled into the folds of the measure provisions that not only protect local education from losing funding due to its property tax cuts but would create a double-dip of state education funding support (once as an increased state share under the school funding formula and then again as a mandatory local jurisdiction reimbursement). Overall, Petitioners tag the state with billions of dollars in reimbursement obligations, which will necessitate cuts to state programs to cover local property tax cuts—in violation of this Court's precedent. While Petitioners say the General Assembly has discretion in whether to reimburse local jurisdictions, what's clear under the measure is that the state treasurer is mandated to issue reimbursement warrants, as "shall" means

"shall." If the General Assembly doesn't honor those mandatory reimbursement warrants, the state will have impermissibly issued debt. That is not discretion.

Faced with this constellation of subjects, the Title Board concluded that Initiative #248 contains multiple subjects that will surprise voters and thus violates the Constitution's single subject limitation. This Court should affirm.

ISSUES PRESENTED

1. Whether the Title Board correctly determined that Initiative #248 violates the constitutional single subject requirement given the measure's multiple, different subjects.

2. The second issue in Petitioner's Petition for Review is so vague that it is impossible at this time to understand what it entails.

STATEMENT OF THE CASE

A. Statement of Facts.

Dave Davia and Michael Fields (hereafter "Petitioners") proposed Initiative 2023-2024 #248 (the "Initiative" or "Initiative #248"). 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 #248 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%;
- 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. 3-4 (Proposed C.R.S. §§ 39-1-104 & 39-1-104.2).)

Petitioners did not stop there, however, as their measure seeks to impose several additional changes to Colorado law that do not concern the calculation of property taxes. The other changes are:

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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.

- New statewide revenue limit: under the measure, local jurisdictions are not permitted to keep property tax revenue when "statewide property tax revenue … is projected to increase by more than 4% over the preceding year," (*id.* at 3 (Proposed C.R.S. § 39-1-103.9(1)));

- New statewide excess revenue procedure: when the new statewide revenue threshold is reached, the Initiative requires, rather than local approval to retain excess revenue, "statewide voter approval" for "local districts to retain the additional revenue," (*id.*);

- Prohibiting reductions in school funding: the measure prohibits reductions in school funding under the Public School Finance Act of 1994 due to "any revenue loss attributable" to the measure (*id.* at 4 (Proposed C.R.S. § 39-3-210(1)));

- Local backfill: the state treasure "shall issue a warrant to be paid yearly to reimburse local districts for lost revenue" because of the measure, which would include school districts, and it requires the General Assembly to allocate funds for those warrants if practicable, (*id.* at 4-5 (Proposed C.R.S. § 39-3-210(2))).

According to Legislative Council Staff's fiscal summary, the measure will reduce local district property tax revenue by "$3 billion for property tax year 2025, $3.1 billion for property tax year 2026, and by larger amounts in later years." (*Id.* at 17.) The state is thus left to backfill those amounts, including to school districts, and it must increase the state share of education funding under the Public School Finance Act by approximately $900 million a year to cover the loss of local district funding. (*Id.* at 17-18.) The state is thus facing a requirement to support local district budgets of nearly $4 billion dollars a year.

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 titles. (*Id.* at 7-8.) On April 10, 2024, Respondents filed a Motion for Rehearing, alleging that the Board lacked jurisdiction to set titles. (*Id.* at 11-16.)

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 9), due to the measure's change from local control of excess revenue retention to the new statewide scheme, the requirement of state backfill which will necessitate cuts to state programs, and the double-dip of state monies school districts will receive, *see* April 18, 2024, Continuation of April 17, 2024, Title Bd. Hr'g at 10:28:28-10:30:45, *available at* https://tinyurl.com/mtnpky73.

SUMMARY OF ARGUMENT

Initiative #248 violates the single subject requirement in several ways, as the Title Board concluded. Although billed as keeping property tax low, the measure surreptitiously creates a new revenue limitation and voter approval requirement that displaces the system of local control created by the Taxpayer's Bill of Rights, Colo Const. art. X, sec. 20. Overriding prior voter approvals for local districts to

keep excess revenue is separate from cutting property taxes, as is creating an entirely new statewide procedure for local districts to retain revenue.

Its "backfill" provisions then create two more subjects. The first is a substantial ***increase*** in education funding. Whatever connection may exist between local tax cuts and a state backfill does not extend to ***increasing*** state education spending substantially. Second, that connection fails in any event, because, under this Court's precedent, a measure that requires a state backfill of lost local revenue cannot at the same time mandate cuts in other state programs. And that is what this measure does. With a new state obligation in the billions of dollars, the state will be forced to cut state programs to provide local reimbursements.

As the measure violates the single subject requirement, the Board was right to conclude it lacked jurisdiction, and this Court should affirm.

LEGAL ARGUMENT

I. The Board correctly determined that #248 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 pass on their own merits. *Second*, it ensures that initiative proponents do not coil "surreptitious measures"

into an initiative 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 generally, e.g., In re Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶¶ 11-15; *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #25*, 974 P.2d 458, 460-65 (Colo. 1999).

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 #248's multiple subjects.

The Board properly decided it lacked jurisdiction to set a title for #248 because, although the Initiative's purported single subject is "keeping property taxes low," it includes several distinct and unrelated subjects.

1. Initiative #248's "re-brucing" of local jurisdictions and the new statewide procedure to retain excess revenue violates the single subject requirement.

Initiative #248 does not just change the formula for calculating property taxes—it, in effect, upends the system of local control established by the Taxpayer's Bill of Rights ("TABOR"). *See* Colo. Const. art. X, sec. 20. The measure provides:

> If the total of statewide property tax revenue attributable to property subject to the valuation for assessments set forth in sections 39-1-104(1) and 39-1-104.2(3)(q) and (3)(r) is projected to increase by more than 4% over the preceding year, statewide voter approval is needed for local districts to retain the additional revenue.

(CF p. 3 (Proposed C.R.S. § 39-1-103.9(1).) This 4% revenue limitation presents two problems. First, it effectively "re-bruces" jurisdictions that have received voter approval to retain excess property tax revenue. Second, it displaces the constitutional procedure of local voter approval with a new statewide procedure.

TABOR limits the ability of taxing authorities, including local jurisdictions, to retain revenue that exceeds the constitutional formula, which is tethered to inflation. As to property taxes, it provides the following: "The maximum annual

percentage change in each district's[2] property tax revenue equals inflation in the prior calendar year plus annual local growth, adjusted for property tax revenue changes approved by voters after 1991 and (8)(b) and (9) reductions." Colo. Const. art. X, sec. 20(7)(c). Where revenue collected by a jurisdiction "exceeds these limits in dollars for that fiscal year, the excess shall be refunded in the next fiscal year unless voters approve a revenue change as an offset." *Id.* sec. 20(7)(d). As reflected in this refund obligation, voters in a district can authorize a district to retain excess revenue—a so-called "de-brucing." According to one analysis in 2019, "51 out of the 64 counties in the state, 230 out of the 274 municipalities, and 177 out of 178 school districts, have debruced since TABOR's inception in 1992." The Bell Policy Center, "What is debrucing?," July 12, 2019, https://www.bellpolicy.org/2019/07/12/what-is-debrucing/; *see also, e.g.*, *In re Interrog. on House Bill 21-1164 Submitted by the Colo. Gen. Assembly*, 2021 CO 34, ¶ 9 (discussing school districts obtaining voter approved revenue waivers).

Initiative #248 upends these hundreds of TABOR waiver elections conducted by local jurisdictions by overlaying a new statewide 4% revenue

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[2] A district means "the state or ***any*** local government, excluding enterprises." Colo. Const. art. X, sec. 20(2)(b) (emphasis added).

retention limit. This new limit operates without regard to whether voters in a particular jurisdiction have waived TABOR's revenue limit, and it displaces TABOR's ***local*** standard with a ***statewide*** standard. Under TABOR, the revenue limit determination applies to "each district's property tax revenue." Initiative #248's, in contrast, applies "[i]f the total of statewide property tax revenue" triggers the 4% limit.

Beyond this new statewide standard, the measure applies a new election procedure to authorize local jurisdictions to retain excess revenue. Currently, whether a local jurisdiction can retain revenue above TABOR limits is a matter of local decision—it is up to the voters of the jurisdiction to decide. Under this measure, no longer is a local jurisdiction's ability to retain and spend excess revenue subject to local control (i.e. even if local jurisdiction voters have authorized the retention of excess revenue under TABOR, the measure creates a new, independent revenue retention procedure). Once the Initiative's 4% threshold has been triggered, what was once a local election decision becomes a matter of a statewide election. Voters in Jefferson County are being asked to decide on a local matter in Douglas, Boulder, and Weld Counties, with Denver-area voters considering a question that determines local jurisdiction spending for Western

Slope and Eastern Plains communities. This type of new procedure that effectively voids prior voter revenue authorizations is a separate subject from tax cuts. *Cf. In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 # 30*, 959 P.2d 822, 826 (Colo. 1998) (single subject violation by commingling a local tax cut with procedural changes that affected prior voter-approved revenue and spending increases).

In addition to logrolling, this new procedure creates a "coiled in the folds" problem. Voters are now educated about and used to the TABOR process and ballot questions for retaining local revenue. There is a substantial risk they will not understand that Initiative #248 is layering a new, statewide process on top of TABOR to retain excess local jurisdiction property tax revenue—and one that may effectively nullify a prior TABOR waiver vote. This is the type of "surreptitious measure" the single subject prohibits "to prevent surprise and fraud from being practiced upon voters." C.R.S. § 1-40-106.5(1)(e)(II).

2. Public school funding receives a double-dip of state funds.

The measure will create a windfall to local school districts to the tune of hundreds of millions of dollars per year. This will occur because Proposed C.R.S § 39-3-210(1) requires that funding for schools remain constant (i.e. the state share

is going to increase to keep funding constant) and Proposed C.R.S. § 39-3-210(2) requires the state to provide local districts—including school districts—with a reimbursement warrant for lost property tax revenue. Local education is effectively receiving a double reimbursement through these provisions—once because the state must preserve current funding under the Public Schools Act and a second time through a mandatory state reimbursement warrant.

This double dip is the result of the requirement that, in addition to holding funding for schools constant, "the State Treasurer ***shall*** issue a warrant to be paid yearly to reimburse local districts for lost revenue…" (emphasis added). The measure does not define what a "local district" is, and neither does Article 1 of Title 39, C.R.S. In fact, "local district" does not appear to be a concept that currently exists in Title 39. Undoubtedly, "local district" includes "school district." A school district is a district—it's in the name. *See* Colo. Const. art. X, sec. 20(2)(b) ("district" means "the state or ***any*** local government, excluding enterprises." (emphasis added)); *see also* C.R.S. § 22-54-103(5) ("'District' means any public school district organized under the laws of Colorado, except a local college district."). School districts are local—there are nearly 180 of them in the state, each serving a particular geographic area (or district). *See* C.R.S. § 39-1.5-

102(2) ("'Local government' means a county, municipality …, ***school district***, or special district which has ***the authority to impose general property taxes***." (emphasis added)). Because school districts are local districts, the local district backfill provision found in Proposed C.R.S. § 39-3-210(2) would require the state to reimburse each local school district for local property tax revenue lost because of the Initiative's assessed value reductions. That revenue replacement is mandatory and operates independently of the requirement that the state maintain education funding—accomplishing one does not relieve the state of the burden to do the other.

Reimbursing local school districts for lost tax revenue is one thing, but giving those districts a double recovery of lost revenue is something entirely different. That type of increase, not backfill, of local education funding is not "necessarily and properly connected" to cutting local property taxes. Moreover, it implicates both single subject concerns. For those who can determine that is occurring, they may vote for Initiative 248 to achieve an increase in school funding; it is generating a political constituency to support the measure that otherwise may not. For those who do not understand this is what the measure requires, they would be surprised to learn that in voting for property tax cuts they

are approving a significant school funding increase that is coming at the cost of other state programs. C.R.S. § 1-40-106.5(1)(e)(I) & (II).

3. The measure's backfill requirements violate this Court's precedent on local tax cuts and state funding backfills.

Proponents' drafting of the backfill provision creates an internal inconsistency. On the one hand, the backfill requirement is mandatory. The state treasurer "shall issue" warrants, and "reimbursements shall be made" by the General Assembly. "Shall" does not leave any discretion; rather, as the Court has often explained, "the generally accepted and familiar meaning[]" of shall is "mandatory." *People v. District Court, Second Judicial Dist.*, 713 P.2d 918, 921 (Colo. 1986). Thus, Colorado courts have "consistently held that the use of the word 'shall' in a statute is usually deemed to involve a mandatory connotation." *Id*.; *see also* C.R.S. § 2-4-401(13.7)(a) (shall means "a person has a duty").

On the other hand, the measure may suggest the General Assembly has some discretion to make reimbursements, because reimbursements are made "to the maximum extent practicable." As the Board recognized, however, there is an inherent contradiction in this language. The treasurer has a mandatory duty to issue the warrants, but the General Assembly may have some discretion as to whether to fund the warrants. But that "discretion" to fund the warrants is illusory, because the

General Assembly must balance the budget and unfunded warrants issued by the treasurer would be an impermissible state debt. *See* Colo. Const. art. X, secs. 2 & 16; *id.* art. XI, secs. 3 & 4. In short, whatever Petitioners may have intended by this language, the result is that the state will have to make the reimbursements to local jurisdictions.

As such, this provision, coupled with the mandate to protect education funding (i.e. that the state increases its share of education funding to keep education funding constant), violates this Court's precedent on permissible state funding backfills of tax cuts. The prohibited second subject in *1997-98 #84* was forced cuts in state spending to accomplish reimbursements to local jurisdictions due to local tax cuts. The Court explained it thus:

> First, the initiatives provide for tax cuts. Second, the initiatives impose mandatory reductions in state spending on state programs. These two subjects are distinct and have separate purposes. While requiring the state to replace affected local revenue in itself sufficiently relates to a tax cut, ***requiring the state separately to reduce its spending on state programs is not "dependent upon and clearly related" to the tax cut***.

In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 # 84, 961 P.2d 456, 460 (Colo. 1998) (emphasis added). Although Initiative #248 does not include the "within all tax and spending limits" provision *1997-98 #84* had, the

absence of that language is not determinative because this measure does the same thing as *1997-98 #84*. As the fiscal analysis explains, "The measure is estimated to increase state expenditures up to $3.0 billion in FY 2025-26 and $3.1 billion in FY 2026-27, and by larger amounts in later years." (CF p. 17.) A reimbursement obligation of $3 billion is not spare change, and, as the Board recognized, the fiscal analysis may ***understate*** the state's obligations by nearly $900 million due to the double-dip for K-12 education described above—meaning the state is facing, under this measure, nearly $4 billion in reimbursement obligations. Given these amounts, and with K-12 spending protected, the General Assembly will have to look to other state programs for funding to meet the reimbursement requirement.

As the Board concluded, forcing these types of changes to the state budget because of local tax cuts presents "precisely the types of mischief which the single subject requirement was intended to prevent." *In re 1997-98 # 84*, 961 P.2d at 460.

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 #248 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 mean to 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). Because of how Petitioners drafted issue two, Respondents are in the position of speculating as to how Petitioners believe the Board erred. Respondents will respond on the merits to the second issue in their Answer Brief when they have notice of and can understand Petitioners' second issue.

CONCLUSION

Respondents respectfully request that this Court affirm the Board's determination that Initiative #248 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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