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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2024) 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:** Michael Fields and Dave Davia, **v.** **Respondents**: Scott Wasserman and Ann Adele Terry, **Title Board**: Theresa Conley, Christy Chase, and Kurt Morrison.	▲ **COURT USE ONLY** ▲ Case No. 2024SA122
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THE TITLE BOARD'S 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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,281 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Peter G. Baumann

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INTRODUCTION

Around its single subject of "property tax relief," Pet'rs' Opening Br. at 4, proposed initiative 2023-2024 #248 contains several ancillary terms that would substantially alter existing law. If these additional provisions are necessarily and properly connected to "property tax relief," then that description is the type of "overly broad" and "vague" subject this Court has previously rejected. *See, e.g.*, *In re Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 22 (rejecting "animal cruelty" as too vague a label, and collecting cases refusing to accept single subjects of "redistricting in Colorado," "recall of government officers," "protect and preserve the waters of this state," and "water").

At its core, the single subject requirement protects voters against complicated measures that carry unintended consequences. Where, as here, a tax relief measure will also drastically change the way Coloradans control their local affairs, interact with state government, and fund their schools, that measure violates the single subject

requirement. The Title Board correctly concluded as much, and its determination should be upheld.

REPLY ARGUMENT

I. The cases cited by Petitioner for why cuts to state programs are not a second subject are distinguishable.

During rehearing, and in its Opening Brief, the Title Board identified #248's education backfill provision as a second subject because it would necessarily require cuts to other state programs. *See* Title Board's Opening Br. at 9–11 (citing *In re Title, Ballot Title & Submission Clause, Summary for 1997-1998 No. 84*, 961 P.2d 456 (Colo. 1998)). As this Court has previously concluded, where a backfill provision will require "mandatory reductions in state spending on state programs," it is a second subject separate and distinct from tax relief. *In re 1997-1998 No. 84*, 961 P.2d at 460.

Petitioners first argue that #248's backfill provision complies with the single subject requirement by citing *In re Amend TABOR No. 32*, 908 P.2d 125, 129 (Colo. 1995). Pet'rs' Opening Br. at 5–6. But *In re 1997-1998 No. 84* specfically distinguished the backfill provision at

issue in *In re Amend TABOR No. 32*. Unlike the measure at issue here and in *In re 1997-1998 No. 84*, "Amend TABOR No. 32 did not impose any limitations on the state in terms of the manner by which the state replaced lost local revenue." 961 P.2d at 459. But here, existing law imposes those limitations. Under TABOR, the state "may not impose any new tax, tax rate increase, or mill levy above that for the prior year without voter approval." *Id.* at 460. This means that the backfill obligations included in #248 would *necessarily* "impose mandatory reductions in state spending on state programs." *Id.*

As to Petitioners' other citations, none include the type of unlimited backfill requirement mandated by #248. *See* Pet'rs' Opening Br. at 6 (citing *2023-2024 #21*, No. 23SA109, and *2021-2022 #27*, No. 21SA141). In both of those cases, this Court affirmed without elaboration the Board's decision to set title. And neither measure included a mandatory backfill provision like in *In re 1997-1998 No. 84* or here. In the cases cited by Petitioners, the measures "authorized," but did not require, the State to retain and spend up to $25 million (in

one measure) and $100 million (in the other) to offset lost local revenues. Certified Record, No. 23SA109 at 2; Certified Record, No. 21SA151 at 2. An authorization to offset is substantially different than a required backfill, especially with a limited cap on how much the state may spend on such an offset.

The relevant authority on this backfill provision is *In re 1997-1998 No. 84*, and it holds that a backfill provision that necessarily requires substantial cuts to state spending on state programs is a second subject above and beyond tax relief.

II. Petitioners fail to address the "double-dipping" provision that would substantially increase funding for state school districts.

Petitioners address the "logrolling" concern embedded in #248's education funding provisions, but their argument avoids the double-reimbursement problem at the core of the Board's finding that these provisions constitute a second subject. *See* Pet'rs' Opening Br. at 7–8. At rehearing, that #248 required increased state education funding in general was not the Board's single subject concern. Instead, the Board

noted that #248 appeared to provide for double reimbursement to local school districts. First, the state would keep education funding level by backfilling the percentage of local education budgets lost as a result of the measure's tax provisions. *See* Record at 4 (proposed § 39-3-210(1)). Then, those same local school districts would receive additional reimbursements from the state above-and-beyond the backfill payments the state has already made. *See* Record at 4 (proposed § 39-3-210(2)). Imagine a school district receives $10 million of local property tax revenues. That district will, in effect, receive $20 million of state reimbursements under the proposed initiative. Ten million dollars from proposed section 39-3-210(1), and $10 million from proposed section 39-3-210(2).

Petitioners only argument for why this is not a double reimbursement is to argue that section 39-3-210(2) applies only to "districts other than school districts." Pet'rs' Opening Br. at 8. But that's not what the measure says. The measure says that 210(2) applies

to all "local districts," a term that is undefined in the measure or elsewhere in state law.

In addressing the single subject requirement, this Court affords "words and phrases their plain and ordinary meaning." *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 9. School districts are undoubtedly districts, and they operate at the local level. Employing the "plain and ordinary meaning" of the term, school districts are authorized to receive double reimbursement under the measure. And this increase in funding for local education—turning $10 million in the example above into $20 million—is a second subject.

III. Petitioners have waived any challenge to the third issue identified by the Board—the measure's displacement of local control over retaining revenue.

At rehearing, all three members of the Board were clear that they considered the displacement of local control over retained revenues to be a second subject. *See, e.g.*, *Hearing Before Title Board on Proposed Initiative 2023-2024 #248* (April 18, 2024), https://tinyurl.com/37rc9ay3 ("Hearing") at 10:29:20–10:30:45 (Board member, Kurt Morrison

summarizing the Board's concerns, including "and three, the statewide vote/de-brucing/local control issue that was discussed"); *see also id.* at 10:28:27–33 (Board member, Theresa Conley expressing her view that the measure contained multiple subjects, including "the changing of the local control"); *id.* at 10:12:25–10:14:05 (Board member Christy Chase, expressing the same).

Nonetheless, Petitioners did not address this single subject concern in their Opening Brief. The Court should consider the issue waived. Where a party fails to raise an argument in their opening brief, the argument is waived. *See, e.g.*, *Bumbal v. Smith*, 165 P.3d 844, 847–848 (Colo. App. 2007) (noting that "court will not consider arguments raised for the first time in a reply brief or during oral argument"). The purpose of this rule is to prevent argument from being raised that the opposing party has no opportunity to respond to. *See generally People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990) (noting that issue was waived in part because raising it only in a Reply Brief left opposing party without the chance to brief the issue).

Here, Petitioners were on notice as to the reasons the Board concluded #248 included multiple subjects, including the Board's determination that the displacement of local control over retained revenues was a second subject. Their failure to address that conclusion—or provide any argument for why the Board erred in so concluding—constitutes a waiver.

CONCLUSION

The Court should affirm the Title Board's conclusion that it lacked jurisdiction to set title.

Respectfully submitted on this 10th day of May, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 2024, a true and correct copy of the foregoing **TITLE BOARD'S ANSWER BRIEF** was duly filed and electronically served upon all counsel of record for the parties who have entered their appearance in this matter to date through the Colorado Courts E-Filing System.

/s/ Carmen Van Pelt