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<tr><td>SUPREME COURT OF COLORADO
2 East 14th Ave.
Denver, CO 80203</td><td rowspan="3">DATE FILED: May 16, 2024 3:56 PM

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<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Board</td></tr>
<tr><td>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #283 (“Government Fees”)

Petitioner: Norma B. Akright,

v.

Respondents: Michele Haedrich and Steven Ward,

and

Title Board: Theresa Conley, Jason Gelender, and Kurt Morrison</td></tr>
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<tr><td colspan="2">PETITIONER’S ANSWER BRIEF</td></tr>
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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 Mark Grueskin
Mark Grueskin
Attorney for Petitioner

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SUMMARY OF LEGAL ARGUMENT

Initiative #283's Proponents describe the conversion of fees into taxes, requiring elections for any new "fee" or "fee increase," to be an "irrelevant" effect of the measure. That's inaccurate. As they are changing an election process that affects every Coloradan through an obscure definition, Proponents have combined multiple subjects in one measure, a construct the Constitution forbids.

As to the clarity and fairness of the title set for #283, the Board acknowledged the hidden complexity of this measure and departed from the title it set on a similar measure ten years ago. But in its good faith attempt to tell the electorate more about what it might be facing if this measure passes, the Board mistakenly tilted the scales away from just informing voters toward actively influencing voters to cast "yes" ballots for Initiative #283. This is an error the Court can and should correct.

LEGAL ARGUMENT

I. Initiative #283 violates the single subject mandate.

A. Converting fees into taxes under the guise of adopting a bookkeeping definitional change violates the single subject requirement.

Petitioner in this matter ("Objector") argued that Initiative #283 both defines "fee" *and* converts historic fees that are not paid by the user of the government

service or that provide no "specific benefit" to the fee payer into taxes. Objector's Opening Brief ("Obj. Op. Br.") at 11-14. Under TABOR, these newly named taxes can only be imposed or increased with voter approval, but voters will not know they are creating election requirements when they vote on what appears to be an accounting definition.

The Board justifies the finding that #283 is a single subject because the new definition of "fee" will "have broad impacts, but these impacts are directly related to the single subject proposal here." Title Board Opening Brief ("Bd. Op. Br.") at 6-7. That Board adds that, in any event, such impacts are "necessarily and properly connected" to the new definition of "fee." *Id*. at 7-8.

This response does not acknowledge, much less challenge, the key point made in Objector's Motion for Rehearing. "[V]oters will unknowingly require fees to be subject to TABOR's voter approval requirement for new taxes and tax increases." CF at 10. This argument was also the pivotal point in Objector's Opening Brief. "A governmental charge that fails to qualify as a 'fee' is subject to voter approval as a 'tax'…. But it is a separate subject to use a definition to also change the conditions under which elections will be held." Obj. Op. Br. at 13,

citing *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 447 (Colo. 2002) ("*In re Title for #43*").

The fact that the title[1] identifies that fees do not require voter approval but taxes do require such approval is inadequate to ameliorate #283's single subject problem. This initiative is not a question of bookkeeping or auditing niceties. It is a question of whether the fiscal election system, established by TABOR, is triggered in ways that voters wouldn't see coming.

Proponents argue that there is no surprise element in their measure. And whatever the intended or unintended outcomes (including, presumably, triggering a host of new fiscal policy elections), it is "irrelevant to whether the proposed initiative contains a single subject." Proponents' Opening Brief ("Prop. Op. Br.")

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[1] The Board set the following title and submission clause:

> Shall there be an amendment to the Colorado constitution limiting new or increased fees, and, in connection therewith, defining a "fee", which does not require voter approval, as opposed to a tax, which does require voter approval, as a governmental charge voluntarily paid in exchange for specific benefit provided to the payer in an amount that should reasonably approximate the payer's share of the costs incurred by the government in providing the benefit?

(CF p. 7.)

at 6, citing *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2013-2014 #129*, 2014 CO 53, ¶ 18, 333 P.3d 101, 105 (Colo. 2014) ("*In re Title for #129*").

To the contrary, the conduct of elections is far from "irrelevant." As this Court observed almost 50 years ago, "Elections involving local government units have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the quality of life of more and more of our citizens." *Skafte v. Rorex*, 553 P.2d 830, 833 (Colo. 1976) (citation and internal quotation marks omitted), *appeal dismissed for want of federal question*, 430 U.S. 961 (1977). The relevance of the electoral process has never been limited to elections occurring at the local level. "All elections are public in character, and are of governmental and state-wide importance." *Mauff v. People*, 123 P. 101, 103 (Colo. 1912); *see also People ex rel. Miller v. Tool*, 86 P. 224 (Colo. 1905) ("Questions affecting elections are of the most vital importance").

TABOR elections are of no lesser significance. In adopting TABOR, voters sought to exercise "greater direct control over government growth by, among other things,… requiring voter approval of measures that would increase

debt, spending, or taxes." *Zaner v. City of Brighton*, 917 P.2d 280, 284 (Colo. 1996). "A leading argument for the adoption of [TABOR] was that 'voters should be the ultimate authority on matters of taxation and should be trusted to exercise sound judgment.'" *Havens v. Board of County Comm'rs*, 924 P.2d 517, 522 (Colo. 1996) (citation omitted). Given that Initiative #283's definition was placed in the Constitution to expand this type of election redistributing authority to levy fees, how can that election requirement be "irrelevant"?

This is precisely the point on which the Court focused in *In re Title for #43, supra*. There, the Court found a second, hidden subject when proponents defined "petition" to exclude any referendum that reduced private property rights, such as zoning. As to zoning, there was "an increased skepticism of the judgment of elected officials" who determined the local quality of life, and this type of government decision making "provide[d] much of the impetus for voters' exercise of the powers of referenda and initiative." 46 P.3d at 448, citing *Margolis v. Dist. Court*, 638 P.2d 297, 303 (Colo. 1981). There, changing the election process on substantive issues that matter to voters was anything but irrelevant.

Using a new definition to, first, alter government's authority to impose certain charges ***and***, second, to require elections on all charges other than redefined

"fees" are not aspects voters would connect under the rubric of redefining "fee." A ballot question posing the issue of how to define "fee" seems to be a fairly arcane matter that would ordinarily be in the hands of agency auditors or accounting manuals. The fact that #283 alters—dramatically—both governmental authority and the election landscape will not be apparent to the electorate. To paraphrase *In re Title for #43, supra*, 46 P.3d at 447, "voters would be surprised to learn that by voting for an initiative purporting to deal with the procedural aspects of" governmental accounting, "they had excluded" the legislative and executive branches of government from performing their ordinary, expected function. *See, e.g., Krupp v. Breckenridge Sanitation Dist*., 19 P.3d 687, 693 (Colo. 2001) (General Assembly authorized local governments to impose certain fees; a variety of local service fees, including storm drainage and flood management, public transportation, street maintenance, sewer systems, and water systems, had been judicially approved).

It's not that a new definition of "fee" necessarily must produce this result. The Proponents originally drafted this measure as a statutory amendment to add a

definition to C.R.S. § 24-77-101.[2] After their Review and Comment hearing, however, they submitted to the Title Board an overhauled measure that placed a "fee" definition in the Constitution and, specifically, in TABOR.[3] Had they stuck with their original approach, it is unlikely that virtually every new state, local, and district fee and fee increase would be forced to jump through TABOR election hoops.

But Proponents want that to be the result, even if most voters will have no idea what they are requiring as it applies to the elections that are necessary due to TABOR. Thus, there can be no argument that Proponents could not have brought their first subject (defining "fee") to fruition without triggering their second subject (elections on every imposition that will not qualify as a "fee"). As such, Initiative #283's two subjects are not "necessarily and properly connected," and the Title Board should have refused to set titles for this measure.

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[2] https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/283Original.pdf (original draft of Initiative #283, adding subsection (5.5) to C.R.S. § 24-77-101) (last viewed May 15, 2024).

[3] https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/283Amended.pdf (amended draft of Initiative #283, changing initiative to a constitutional amendment to Colo. Const., art. X, sec. 20) (last viewed May 15, 2024).

Finally, there can be no doubt that converting fees into taxes that require elections is the intent, not the effect, of Proponents. When asked at their Review and Comment hearing what governmental decision makers would need to do with fee-funded programs that did not meet this new definition of "fee," Proponents were plain spoken about their intent for policy makers. "They could always go to a vote of the people."[4]

As Proponents further admitted at their Review and Comment hearing, if an imposition is not a "fee" under #283, "It could be recategorized as a tax. It could be categorized as something else. But it would be an unlawful collected fee. "[5] But it is not clear what that "something else" might be, as Proponents didn't offer any detail or explanation of what that meant, and no reasonable alternative springs from the Constitution or this Court's tax vs. fee body of decisions. Thus, it is clear that Proponents seek to transmogrify fees into taxes through the passage of Initiative #283.

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[4] April 5, 2024 Review and Comment Hearing on Initiative 2023-2024 #283 at 11:10:30-37 (https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20240516/72/15735).

[5] *Id*. at 11:06:00-18.

Thus, the concealed election condition for certain governmental funding—the true purpose of Proponents—is not going to be apparent to voters as the true design of Initiative #283. As such, it violated the single subject requirement.

B. Obliterating most regulatory fees is #283's third, hidden subject.

Neither the Title Board nor Proponents specifically responded to the issue identified in Objector's Petition for Review which was: "Whether Initiative #283 violates the single subject requirement by surreptitiously converting regulatory charges, previously deemed "fees," into taxes if they do not confer a specific benefit on the fee payer but instead benefit the public." Petition for Review at 3. Presumably, their general responses, addressed above about "broad impacts" and the absence of voter "surprise" were meant to address this topic as well. Objector incorporates her arguments made above as a partial response.

Beyond that, regulatory programs often require their own dedicated revenue streams in order to pay for programs that benefit persons who create the need for that program. A city government, for instance, "has inherent power to establish reasonable regulations to promote the public health, welfare, and safety." *City of Colorado Springs v. Grueskin*, 422 P.2d 384, 387 (Colo. 1966). When it uses that police power, a city can also impose a charge (i.e., a fee) "if this charge is in fact

imposed to defray the direct or indirect costs of regulation and if the amount of the fee is reasonable in light of those costs." *Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 30, 418 P.3d 506. The benefit need not be "specific" to the fee payer (as it must be under #283) and in fact can "incidentally benefit the general public" (as it cannot do under #283) without being deemed a tax. *Id*.

The likely bromides in answer briefs about the effects of an initiative do not change the fact that this measure is drafted to end the imposition of regulatory charges that do not directly and specifically benefit the fee payer. At the Review and Comment hearing on this measure, legislative staff was specific about Proponents' intent. "The intent of the initiative isn't only to create a cause of action. It's also to limit what charges may be imposed at the outset." Proponents answered, "Yes."[6] The cause of action has been eliminated from the current version of #283. So limiting the ability of government to impose charges in the first place is not an ***effect*** of Initiative #283; it is ***the intended purpose and subject*** of this initiative—according to the Proponents themselves.

And as this Court has noted, charges imposed as part of a regulatory program do not typically reflect only the specific benefit to the fee payer

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[6] *Id*. at 11:05:48-58.

relationship that is at the core of this measure. Instead, fee-funded programs can provide socially valuable goods "to residents and visitors, educate[] the public…, raise awareness [about goals and public programs], and fund[] equipment designed to" advance those goals. *City of Aspen, supra*, 2018 CO 36, ¶ 30.

"These facts do not make the charge a tax." *Id*. But they will if Initiative #283 is allowed to secretively convert fees into taxes. That's because fees will no longer exist as such where government provides an "indirect service" and charges a fee in order to provide it. *Id*. at ¶ 31.

This overreach is a second subject, and no title should have been set.

C. The Court's decision in In re Title for #129 does not control this case.

Both the Board and the Proponents rely heavily on this Court's approval of *In re Title for #129*, but that reliance is misplaced.

The challenges lodged in this appeal are different in substance and in the level of specificity than those raised in *#129*. *See* Obj. Op. Br. at 16-18. In that earlier case, the objectors complained of the indefiniteness and breadth of the coverage of the definition. No such objection is made in this appeal. In fact, what is at issue here is just the opposite—Initiative #283 specifically triggers TABOR elections because of the fee payer/specific benefit tests in this measure. In addition,

this measure specifically ends regulatory charges relied on at almost every level of government in Colorado.

As a matter of judicial economy, it is not in the public interest to relitigate the same claims over and over again. But if a ballot measure changes substantively (and this one has) and if distinct objections to the new measure are raised (as is the case here), the relevance of precedent is much less compelling. Accordingly, this is a case where "the general interests will suffer less by such departure [from precedent] than from a strict adherence." *In re Title, Ballot Title and Submission Clause for Proposed Initiative 1999-2000 # 29*, 972 P.2d 257, 262 (Colo. 1999).

Therefore, this Court is not bound by the *In re Title for #129* opinion and should evaluate these single subject concerns on their own rather than lumping them in with unrelated challenges to a different initiative.

II. Initiative #283's title is misleading and confusing.

Before the Title Board and in their Petition for Review, Objector identified specific defects in the title for the measure—describing the measure as "limiting" new or increased fees when the fiscal analysis said that may not be the case (an assessment which the Board itself eventually agreed), and then confusingly

describing the operation of TABOR's voter approval mechanism. Neither the Board nor Respondents squarely address these arguments in their opening brief.

A. The Court's precedent on a redefinition of "fee" does not compel a decision now to approve the title set for #283.

Similar to their single subject defense, Proponents' primary argument is that the Court effectively approved this title in *In re Title for #129, supra*. (Prop. Op. Br. at 8-9.) This is ***not*** true.

The Board that set title in *#129* did not include the language to which Petitioners object. That Board opted instead, and this Court approved, a title that only restated the proposed constitutional definition. The material differences between the titles are apparent in the following side-by-side comparison.

#129 Title	*#283 Title*
Shall there be an amendment to the Colorado constitution **defining a "fee"** as a voluntarily incurred governmental charge in exchange for a specific benefit conferred on the payer, which fee should reasonable approximate the payer's fair share of the costs incurred by the government in providing the benefit.	Shall there be an amendment to the Colorado constitution **limiting new or increased fees**, and, in connection therewith, defining a "fee", **which does not require voter approval, as opposed to a tax, which does require voter approval**, as a governmental charge voluntarily paid in exchange for specific benefit provided to the payer in an amount that should reasonably approximate the payer's share of the costs incurred by the government in providing the benefit.

These are consequential differences in the title. #129's title included a neutral single subject statement ("defining a fee"), while the title here has a value-laden description not supported by the record or the Board's own analysis ("limiting new or increased fees"). Notably, the Board that set titles for #129 did not attempt to describe TABOR's operation in that title, leaving open questions about what this description meant for the initiative before voters. These titles have

some overlap, but they are not the same such that *In re Title for #129* controls the outcome here.

B. Petitioners aren't arguing the title needs to describe additional hypotheticals or "effects" but, instead, are objecting to the Board's attempts to describe the measure's effects.

Both the Board and Respondents contend that Petitioners are arguing that the title should have described the measure's "effects." (Bd. Op. Br. at 11; Prop. Op. Br. at 9.) They have it backwards. Petitioners' argument is that the ***Board*** erred in ***its attempts*** to describe the measure's effects. Whether or not the measure "limits" new or increased fees is clearly the "effect" of the measure. As explained in Objectors' Opening Brief, the Board's title is erroneous and misleading in this key representation of the initiative, leading to a title that will mislead voters. Obj. Op. Br. at 19-24.

C. The Board misconstrues Petitioners' argument on the single subject statement.

Although Petitioners are challenging the Board's single subject statement, the argument is specifically describing the measure as "***limiting***" new or increased fees. Obj. Op. Br. at 19-24. The issue is not whether it will impact "new or increased fees," as the Board urges, Bd. Op. Br. at 14, but whether the measure will, in fact, ***limit*** them.

While the fiscal impact statement certainly identifies that there will be administrative and legal costs attendant with implementing the measure, it is quite clear that the General Assembly's fiscal analyst determined that it was not certain that the measure would "limit" new or increased fees. This expert in state fiscal matters explains that the definition "may" reduce revenue "***if*** the measure is interpreted as limiting the scope of charges that governments can impose without voter approval." And as to economic impact, the analysis states that the impact is unknown until the "measure is interpreted" and policymakers react to the "interpretation."

In short, the fiscal impact statement is crystal clear that whether the measure "limits" new or increased fees is unknown at this time, a fact which the Board itself recognized. Obj. Op. Br. at 20-21. If it isn't clear on the face of the measure that it will limit fees, the Board shouldn't have described it as doing so, especially since "limiting" is a non-neutral description.

D. There are limits to the deference the Court shows to the Board's title setting authority.

Objector doesn't dispute the truisms that the Court defers to Board's title setting decisions and that a title need not be the "best" title. Bd. Op. Br. at 9-10. But the deference the Court shows the Board gives way when it sets a title with

facial and consequential defects. And that consideration should have greater force in the context of constitutional changes and, especially, as here a change with significant implications.

TABOR is one of the most complex constitutional provisions in Colorado, and it has generated numerous rounds of litigation in this Court—from title setting to determining its operational application. Beyond its inherent complexity, TABOR has an outsized impact on state government and ***every*** local district. When voters are asked to make a potentially consequential change to TABOR and with the potential to upend a key component of the regulatory and administrative architecture of government, they should be told clearly and accurately what they are being asked to do. In fact, the Title Board must not compromise in fulfilling this duty. "The Board must simultaneously consider the potential public confusion that might result from misleading titles and exercise its authority in order to protect against such confusion." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 25*, 974 P.2d 458, 468 (Colo. 1999). The title here falls below that standard, and the Court needs to step in to fix it.

CONCLUSION

Objector respectfully requests that this Court direct the Title Board to return the initiative to the designated representative for lack of jurisdiction or, in the alternative, to correct the title to address the deficiencies outlined in Objector's briefs.

Respectfully submitted this 16th day of May, 2024.

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I, Erin Mohr, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF** was sent electronically via Colorado Courts E-Filing this day, May 16, 2024, to the following:

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