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<tr><td>SUPREME COURT OF COLORADO
2 East 14th Ave.
Denver, CO 80203</td><td rowspan="3">DATE FILED: May 9, 2024 4:30 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 OPENING 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).

Choose one:

X It contains 5,888 words.

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X 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.

☐ 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 Mark Grueskin
Mark Grueskin
Attorney for Petitioners

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2. 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.

3. Whether the ballot title set by the Title Board is misleading by stating that the measure "limit[s]" new or increased fees but the fiscal impact analysis states the effect of Initiative #283 does not support this unconditional statement.

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STATEMENT OF THE CASE

A. Statement of Facts.

Michele Haedrich and Steven Ward (hereafter "Proponents") proposed Initiative 2023-2024 #283 (the "Initiative" or "Initiative #283"). 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.

Currently, the Taxpayer's Bill of Rights ("TABOR"), article X, section 20, of the Constitution, does not define "fees," *see* Colo. Const. art. X, sec. 2, and its "advance[d]" voter approval provisions apply to taxes—not to "fees." *See id.* art. X, sec. 4(a); *see Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 18 ("For TABOR to apply, a district must have levied a tax."); *Barber v. Ritter*, 196 P.3d 238, 248-50 (Colo. 2008) (explaining difference between fees and taxes, and that the former "fail[s] to trigger Amendment 1's voter approval provision").

Proponents purport to change the architecture of TABOR by adding the following definition of "fee" to Constitution:

(2) Within this section:

> (d.5) "FEE" MEANS A VOLUNTARILY INCURRED GOVERNMENTAL CHARGE IN EXCHANGE FOR SPECIFIC BENEFIT CONFERRED ON THE PAYER, WHICH FEE SHOULD REASONABLY APPROXIMATE THE PAYER'S FAIR SHARE OF THE COSTS INCURRED BY THE GOVERNMENT IN PROVIDING SAID SPECIFIC BENEFIT.

(CF p. 3 (Proposed Colo. Const. art. X, sec. 20(2)(d.5).) This definition would restructure the conditions of those government charges that would qualify as "fees."

The Court has considered the difference between fees and taxes on several occasions, and it has explained that difference as follows:

> To determine whether a government mandated financial imposition is a "fee" or a "tax," the dispositive criteria is the primary or dominant purpose of such imposition at the time the enactment calling for its collection is passed.

Barber, 196 P.3d at 248. Where the primary purpose of a charge is "to finance a particular service utilized by those who must pay the charge, then the charge is a 'fee.'" *Id.* at 249. On the other hand, if the purpose "is to raise revenues for general governmental spending, then it is a tax." *Id.*

Initiative #283 would displace this analysis by imposing new requirements on a government charge for it to be a fee. Specifically, to be a fee under this measure, a charge must (1) be voluntarily incurred (1) in exchange for (3) a specific benefit (4) conferred on the payer that (5) reasonably approximates the

payer's fair share of the program/service's benefit. (CF p. 3 (Proposed Colo. Const. art. X, sec. 20(2)(d.5).) Where one of those elements is missing, then a charge is not a "fee" but would be, as Proponents explained before the Board, a "tax" that is subject to TABOR's requirements. *See* Apr. 25, 2024, Title Bd. Hr'g at 1:05:55 to 1:06:25, *available at* https://tinyurl.com/5443dwxa.

Under Initiative #283, the definition of "fee" purports to only apply "[w]ithin this section"—meaning "within TABOR." Colo. Const. art X, sec. 20(2). "Within this section" is a phrase that currently exists in TABOR as the lead-in to all the defined terms in TABOR. As was raised by two members of the Title Board, *see* Apr. 25 Hr'g, *supra*, at 1:10:29 to 1:10:49, 1:16:50 to 1:17:05, the term "fee" isn't used in TABOR, at least not for the purposes advanced by Proponents. It only appears in TABOR in one section, the provision relating to lawsuits filed under TABOR. "Successful plaintiffs are allowed costs and reasonable attorney ***fees***…." Colo. Const. art X, sec. 20(1) (emphasis added). Other than that, the term "fee" isn't "within this section." Presumably, Proponents clearly did not intend to affect the attorney fee award provision in TABOR, their measure is a legal enigma that is sure to confuse voters.

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

The Title Board heard the measure on April 17, 2024, at which time it set a title. On April 24, 2024, Petitioners filed a Motion for Rehearing, alleging that the Board lacked jurisdiction to set a title because the measure violates the constitutional single subject requirement, and the titles set by the Board are misleading and confusing as they do not fairly communicate the true intent and meaning of the measure.

The Title Board heard the Motion for Rehearing on April 25, 2024. During the hearing, the representative of the Attorney General explained that he had single subject concerns with the measure.

> On single subject, I'm having questions about my last vote on this one. I'm looking particularly at the language, in the effective date, the applicability clause about the new definition applying to fees enacted or increased on or after the effective date. Including "increases" here seems to loop in, I assume, several dozen different fees already in law that are automatically programmed to go up like the road user, gasoline per gallon fee that goes up by a cent for the next decade. Or DORA fees that are programmed to go up in rule or statute according to inflation or attorney regulation fees. It's the inclusion of the increased in there that makes me think voters might be significantly surprised to realize that they are voting on something that automatically takes a very good number, I'm not even sure how big the number would be, of current fees that have preprogrammed increases that would automatically fall in or out of this definition depending on what a court would find. That's where I find myself struggling right now.

(Apr. 25 Hr'g, *supra*, at 1:10:29 to 1:11:47.) The representative from the Office of Legislative Legal Services (OLLS) recognized aspects of the measure had potentially hidden aspects to them due to the measure's lack of clarity:

> … Nothing is defined here. This is really kind of odd because it says within this section fee means, and then of course except in the definition itself I don't believe the term fee is even used in TABOR anywhere. And then we have "voluntarily incurred" and it's not entirely clear to me what that really means. I think we've all assumed it means something like you buy a hunting license or you pay college tuition or something. I don't know if it's voluntarily incurred if it's imposed on registration of a car. I mean you don't have to register a car, but it is a systemwide benefit, some of those fees verses a specific benefit that's not defined either…

(*Id.* at 1:16:50 to 1:17:39.) The Chair was similarly "curious about the reach of it, and how much, again fee isn't defined, and I think it's sort of interesting saying there needs to be this proportionality. … This is narrowing significantly how fee is used and understood." (*Id.* at 1:18:48 to 1:19:28.) The OLLS representative and the Chair nonetheless concluded the measure did violate the single subject requirement. (*Id.* at 1:17:57 to 1:18:07, 1:18:45, 1:20:26.)

The Attorney General's representative concluded, "for the record," he "fe[lt] there's multiple subjects in here." (*Id.* at 1:20:33 to 1:20:38.) In fact, the discussion around the use of "should" with respect to the measure's proportionality requirement "add[ed] more concerns to [his] earlier thinking as well." (*Id.* at

1:20:38 to 1:20:44.) He wondered "what exactly are we telling the voters they're voting on here" given the potentially non-mandatory nature of the proportionality requirement. (*Id.* at 1:20:55 to 1:21:40.) After further discussion, he was "still struggling" with the single subject implications of the measure, but because he "seemed to be alone on this one," he agreed to move on to clear title issues. (*Id.* at 1:38:05 to 1:38:14.)

The Board granted the Motion for Rehearing only to the extent the Board made changes to the title, setting 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.)

2. Jurisdiction

Petitioners are entitled to review before this Court pursuant to C.R.S. § 1-40-107 (2). Petitioners timely filed their Motion for Rehearing with the Board. *See* C.R.S. § 1-40-107 (1). They timely filed their Petition for Review seven days from the date of the hearing on the Motion for Rehearing. *See* C.R.S. § 1-40-107 (2).

SUMMARY OF ARGUMENT

Initiative #283 seems fairly innocuous. It amends TABOR to define "fee" as it is used "within this section" of the Constitution. The problem is, TABOR doesn't use the word "fee" except to allow for award of "attorney fees" in the event of a successful lawsuit to enforce its provisions. Two Title Board members went on the record to make this point but agreed to set titles anyway.

The fact that "fee" isn't used in TABOR isn't the only problematic aspect of this measure. This initiative converts government charges that are paid for by a third party or that do not yield "specific benefit" to the fee payer into taxes. Likewise, it eliminates regulatory charges that pay for government programs to contain the problems created by an industry because there is no "specific benefit" to the companies that pay for government programs to clean up the messes created by their industries. This makes Initiative #283 the ultimate stealth ballot measure.

Moreover, the Title Board described Initiative #283 as "limiting" fees when that conclusion was called into doubt by the General Assembly's chief economist who prepared the fiscal statement for this measure. This aspect of the title is neither fair nor accurate.

Finally, the Board used language in the titles to describe what is subject to TABOR's voter approval requirement ("tax") and what would not be subject to that requirement ("fee"). Initiative #283 does not expressly address voter approval requirements and thus the Board needlessly waded into the murky waters of describing an initiative's effects. Here, because certain existing fees will become subject to voter approval if they are imposed or increased after the initiative is adopted, voters will be confused by the Board's title.

The Court should order appropriate remedial steps be taken in light of these errors.

LEGAL ARGUMENT

I. Initiative #283 violates the constitutional single subject limitation.

A. Standard of Review.

A proposed initiative must contain no more than one subject. Colo. Const. art. V, § 1(5.5). Provisions that are "disconnected or incongruous" violate this requirement. *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 13, 395 P.3d 318, 321 (quoting *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 13, 500 P.3d 363, 367).

A linkage of concepts under a broad umbrella does not meet this standard. A justification that attempts to "characterize an initiative under some general theme

will not save [it] from violating the single-subject rule if the initiative contains multiple subjects." *In re 2019-2020 #315, supra*, ¶ 16, 500 P.3d at 367. Historically, the Court has acknowledged that a measure's provisions might seem "related when considered at a high level of generality," but those provisions "serve[] different purposes not sufficiently connected to constitute a single subject." *In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37 ¶ 19; 526 P.3d 927 ("*In re #67, #115, & #128*").

Assuring that initiatives do not contain such provisions serves a fundamental goal of the single subject requirement—to "prevent surprise and fraud from being practiced upon voters" by ensuring that the title of the measure "apprise the people of the subject." C.R.S § 1-40-106.5(1)(e)(II); *see also, e.g.*, *In re Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 16 (explaining that, to effectuate the "anti-fraud purposes of the single-subject requirement, our application of the necessarily-and-properly-related test has often taken into account … the potential for voter surprise"). Thus, a measure cannot "hide purposes unrelated to its central theme." *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006). As the Court has recognized,

a measure's "facial vagueness not only complicates [the] attempt to understand the Initiative's subjects, but results in items being concealed within a complex proposal as prohibited by the single subject rule." *Id.* at 282.

B. Preservation of Issue Below.

Objectors preserved this issue in the Motion for Rehearing and by arguing it during the hearing. (CF p. at 9-11; Apr. 25 Hr'g, *supra*, at 50:30 to 1:00:15, 1:14:05 to 1:15:11.)

C. A second subject is the conversion of "fee" from a payment for an identified government program to the payment for a "specific benefit" that runs only to the fee payer.

The superficial subject of Initiative #283 is the constitutional delineation of a governmental "fee." To most voters, this will seem to be a mundane governmental accounting measure. In fact, Initiative #283 reverses decades of jurisprudence that has defined "fee."

> Unlike a tax, a special fee is not designed to raise revenues to defray the general expenses of government, but rather is **a charge imposed upon persons or property for the purpose of defraying the cost of a particular governmental service**. The **amount** of a special fee **must be reasonably related to the overall cost of the service**. **Mathematical exactitude**, however, **is not required**, and the particular mode adopted by a city in assessing the fee is generally a matter of legislative discretion.

Bloom v. City of Ft. Collins, 784 P.2d 304, 308 (Colo. 1988) (citations omitted) (emphasis added).

The real subject of Initiative #283 is to convert fees that are not paid by the user of the government service or fees that provide no "specific benefit" to the fee payer into taxes that, under TABOR, can only be imposed with voter approval. This is not simply an aspect of how fees are assessed. Initiative #283 creates a system of differential treatment of "fees," based on either who pays the charge or who has an identifiable, specific benefit as a result of that payment.

For example, if a person walks into a recreation center and pays $.50 for a towel to use during their time in the facility, that $.50 is a "fee" because the fee payer was the person who benefited from the payment. But if two friends (Friend A and Friend Z) walk into the same facility, and Friend A pays $1.00 for two towels for the two of them to use after working out, only the $.50 paid that Friend A paid for her towel is a "fee." Friend A is both the fee payer and the person who obtained specific benefit from that payment.

The other $.50 paid by Friend A is a tax. Friend Z didn't pay that amount so the charge cannot meet the definition of a "fee." And, after working out, only

Friend Z derived "specific benefit" from the $.50 payment (and the use of the towel).

If an imposition is a "fee," it is exempt from TABOR's election requirement. "Because the charges are fees and not taxes, they cannot constitute a 'new tax' or 'tax rate increase,' triggering the voter approval requirements of Amendment 1." *Barber, supra*, 196 P.3d at 252. As a governmental imposition other than a fee, though, the $.50 paid for Friend Z's towel must be a tax.

A governmental charge that fails to qualify as a "fee" is subject to voter approval as a "tax." An initiative may certainly provide a general definition of an undefined term. But it is a separate subject to use a definition to also change the conditions under which elections will be held. For instance, in a measure dealing with procedural requirements relating to petitions, it was a second subject for "petition" to be defined so as to exclude "referendum petitions that reduce private property rights, such as zoning issues." *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 447 (Colo. 2002). Tucking such a major change into "a seemingly innocuous initiative," *id*. at 446, means that "voters would be surprised" that they had revised key policies "by the

subterfuge" used by the initiative's proponents. *Id.* at 447. The same can be said of the new constitutional definition of "fee" in this initiative.

Thus, the Title Board lacked jurisdiction to set titles for Initiative #283.

D. A third subject is the elimination of regulatory charges that benefit third parties and other persons who do not pay the fee.

The seemingly technical constitutional amendment that defines "fee" provides cover for an additional purpose of this measure—to rid regulated industries of government's ability to impose appropriate regulatory charges without a "new tax" election under TABOR.

As a general matter, certain fees are imposed pursuant to government's police power and thus serve a regulatory purpose. An imposition is a regulatory charge if it is "imposed as part of a comprehensive regulatory scheme, and if the primary purpose of the charge is to defray the reasonable direct and indirect costs of providing a service or regulating an activity under that scheme." *City of Aspen, supra*, 2018 CO 36, ¶ 26. In such instances, benefits stemming from the regulatory program are not specific to fee payers. Instead, the benefits "are shared by citizens and visitors who never pay the charge because they never use" the service provided. *Id*., ¶ 30.

Unlike the towel fee example addressed above, a regulatory charge involves no transaction between government and a recipient of a service. Fee payers pay for the impact that they and/or those who are similarly situated have created. Aspen's bag charge was one such example. *Id*. And there is no "specific benefit" that typically inures to a regulated entity that pays a fee to cover industry costs of operation and malfeasance. *Cf. Barber, supra*, 196 P.3d at 243 (fee imposed on oil companies that is paid into the Petroleum Storage Tank Fund to remediate sites where leaking petroleum storage tanks are located). This is no small definitional matter—it would change the architecture and capacity of many regulatory programs.

With Initiative #283, voters have no notice they are converting what has historically been treated as a fee into a tax. As noted above, revamping substantive law by using the indirect mechanism of the definition of a term is necessarily a surreptitious subject, particularly when it has ramifications for what will be placed on the ballot. *#43*, supra, 46 P.3d at 447. A key purpose of the single subject mandate is "to prevent surprise and fraud from being practiced upon voters." C.R.S. § 1-40-106.5(1)(e)(II). Without knowing they are making a major fiscal *and* regulatory policy change that will change (and increase) the number of elections

that will be a mandatory pre-condition for imposing these charges, voters are subject to the very real potential of such surprise or fraud. Therefore, the Title Board's decision to set titles for this measure should be reversed.

E. This matter is distinguishable from this Court's precedent that deemed a definition of "fee" to be a single subject.

Proponents are sure to argue that the Court's hands are tied because of its decision in *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2013-2014 #129*, 2014 CO 53, 333 P.3d 101 (Colo. 2014) ("*In re Title for #129*"). That measure provided:

> A fee is a voluntarily incurred governmental charge in exchange for a specific benefit conferred on the payer, which fee should reasonably approximate the payer's fair share of the costs incurred by the government in providing said specific benefit.
>
> Ancillary and/ or extraneous benefits, as those terms are defined by Blacks [sic] Law Dictionary, of any fee shall not be considered in determining the value of said fee.

Id. at ¶ 3. That initiative also stated that this definition "shall supersede conflicting constitutional, state statutory, court findings of fact, local charter, ordinance, or resolution, and other state and local provisions." *Id*. at ¶ 4. The Court there ruled that the proposed TABOR definition of "fee" was a single subject. *Id*. at ¶ 19.

The single subject issues raised in 2014 appear to have been indefinite and vague in their own right. Petitioner there complained of the "wide range of contexts" in which the new fee definition would apply as well as the vagueness of what "public Colorado legal documents" and "court findings of fact" really were. *Id*., ¶¶ 16, 19. Those are not the concerns raised in the Motion for Rehearing on Initiative #283 or in this appeal.

It is true that the doctrine of stare decisis applies even in appeals from decisions by the Title Board. *#43, supra*, 46 P.3d at 443. Still, this doctrine "is not an inflexible or immutable rule." *In re Title, Ballot Title and Submission Clause for Proposed Initiative 1999-2000 # 29*, 972 P.2d 257, 262 (Colo. 1999) ("*In re Title for #29*"). Courts "must be willing to overrule a prior decision where sound reasons exist and where the general interests will suffer less by such departure than from a strict adherence." *Id*. (citations and internal quotation marks omitted). This is such a case.

The arguments raised here are not the vague concerns raised in 2014. And the *City of Aspen* case has clarified the issue of fees imposed as regulatory charges. As such, there is a more urgent need to ensure that voters do not inadvertently

allow entire industries that impose social costs they create on the public rather than preserve the right of government to use a pay-as-you-pollute system of fees.

Therefore, this measure is not controlled by a decade-old precedent, and the Title Board should have refused to set titles for Initiative #283.

II. The titles set by the Board are incomplete and misleading.

A. Standard of Review.

An initiative title must "fairly summarize the central points" of the proposed measure. *In re Title, Ballot Title & Submission Clause, & Summary for Petition on Campaign & Political Fin.*, 877 P.2d 311, 315 (Colo. 1994). Titles must be "fair, clear, accurate, and complete" but are not required to "set out every detail of the initiative." *In re Title, Ballot Title & Submission Clause, & Summary for 2005-2006 # 73*, 135 P.3d 736, 740 (Colo. 2006).

This Court reviews titles set by the Board "with great deference" but will reverse where "the titles are insufficient, unfair, or misleading." *Id*. No such deference is required where the titles "contain a material and significant omission, misstatement, or misrepresentation." *In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998). "Perfection [in writing a title] is not the goal; however, the Title Board's chosen

language must not mislead the voters." *In re Title, for # 29, ,supra*, 972 P.2d at 266.

B. Preservation of Issue Below.

Objectors preserved this issue in the Motion for Rehearing and by arguing it during the hearing. (CF p. at 12-13; Apr. 25 Hr'g, *supra*, at 1:00:15 to 1:01:52, 2:07:15 to 2:08:26.)

C. The Board's title will mislead voters into believing the measure "limit[s]" new or increased fees.

The Board described the single subject of the Initiative #283 as "limiting new or increased fees." (CF p. 7.) This may describe Proponents' subjective intent, but it is not what the measure in fact says.

The measure only adds a definition of "fees" to TABOR. (CF p. 3 (Proposed Colo. Const. art. X, sec. 20(2)(d.5).) It does not include any provision that amends the operative provisions of TABOR (for instance, stating that a government charge that is not a "fee" is subject to subsection 4(a)). It does not add a definition of what a "tax" is (for example, any government charge or required payment that is not a "fee" is a tax). Nor does it include any language that expressly overturns this Court's precedent distinguishing between taxes and fees for TABOR purposes, as a prior similar initiative did. *See In re Title for #129, supra*, 2014 CO 53, ¶ 4. And,

as noted above, other than a reference to attorneys' fees, TABOR currently does not use the word "fee."

As the fiscal analysis explained, in the absence of any such operative language, it is unclear what, if anything, the measure would in fact change until it is interpreted by the courts and applied by legislators:

> Defining "fee" in the state constitution ***may*** reduce state and local government revenue ***if the measure is interpreted*** as limiting the scope of charges that governments can impose without voter approval.
>
> …
>
> Any economic impact ***would depend on how the measure is interpreted***, and subsequent government decision-making regarding fees and revenue ***in response to that interpretation***.

(CF p. 15 (emphasis added).) Indeed, the Board ***itself*** expressed uncertainty as to whether the measure would have the effect Proponents seek.

As the OLLS representative explained, after discussing various ambiguities in the measure,

> … I think it's always dangerous when you're sort of familiar with an area of law, and you make a lot of assumptions about what something does. ***I'm not sure the language does, actually does as much as everyone has been assuming it does***.

(Apr. 25 Hr'g, *supra*, 1:18:13 to 1:18:25 (emphasis added).) The Chair in turn was "curious about the "reach" of the measure, and she continued that, while it might

be "impactful" to have the definition in the constitution, she was "not as clear as to what the effect is." (*Id.* 1:18:40 to 1:18:48, 1:19:50 to 1:20:10.) Beyond the general concern, there was a specific concern as to whether it would in fact apply to fees that, under current law, automatically increase. The OLLS representative explained,

> I do think I want to comment just a little bit. First, in terms of the increased, I think, I mean I guess we shouldn't get too much into the facts, but I don't know that a fee that's currently phased-in in law is necessarily deemed increased when the law doesn't change between then. That's analogizing to the *Huber* case [264 P.3d 884 (Colo. 2011)] which had a phased in coal tax, which provided its not a tax policy change or tax rate increase requiring a TABOR vote if the schedule is in place before TABOR essentially. So I'm not so sure that those auto-increasing fees would actually be increased. …

(Apr. 25 Hr'g at 1:15:35 to 1:16:18.) The Attorney General's representative further recognized that, because the measure uses the word "should," one of its key changes to the meaning of "fee" is non-binding—"the second half of all the new substantive law here is non-binding." (*Id.* at 1:20:58 to 1:21:30.)

Faced with the fiscal analyst's expert opinion that the measure may not limit government revenue (i.e. it remains to be seen how the definition of fee would be interpreted and applied), and its own doubts as what the measure would do, the Board nonetheless included an affirmative statement of what the measure would do

in the title: "***limiting*** new of increased fees." (CF p. 7 (emphasis added).) This is a material misstatement of the measure.

Although the Board appears to have been persuaded that this Court's decision in *In re Title for #129* resolved the single subject issues (which, as explained above, the Board should not have followed), it then failed to use the title the Court approved in that case for the measure here. The Board had there described the single subject as "amendment to the Colorado constitution defining a 'fee'…," which conveyed the measure's purpose of providing a "uniform definition of fee." *Id.* ¶ 20.

By declining to use the same description or a substantially similar statement such as was proposed in the Motion for Rehearing ("defining the term 'fee,' and in connection therewith…." (CF p. 12)), the Board exceeded its interpretative authority and settled on an unfair, inaccurate single subject description. While the Board and the Court must engage in some review and interpretation of a measure as part of the title setting process, the scope of interpretation is "limited," and does not include "address[ing] the merits of a proposed initiative ***or suggest[ing] how an initiative might be applied if enacted***." *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 # 43*, 46 P.3d 438, 443 (Colo. 2002)

(emphasis added). By telling voters that the Initiative will "limit" new or increased fees, the Board impermissibly suggested to voters "how [the] initiative might be applied if enacted."

Moreover, a description of the measure as "limiting" fees is not neutral, especially where the measure does not, in fact, have any substantive provisions that accomplish that end. This assessment is almost certain "to color the merit of the proposal on one side or the other." *Say v. Baker*, 322 P.2d 317, 320 (Colo. 1958). A title must be "fair and impartial," and the Board must draft a title "without jeopardizing the impartiality of the designations that ultimately will be placed before the electorate." *In re Proposed Constitutional Amendment under Designation "Pregnancy"*, 757 P.2d 132, 137 (Colo. 1988). By including an interpretation of the measure that even the Board itself wasn't sure was right and which conflicts with the fiscal impact statement, the title is not "impartial" and will impermissibly color voter's consideration of it.

Former Chief Justice Mullarkey's caution about an earlier initiative warrants consideration in connection with Initiative #283. When the Title Board had to approve a fiscal impact statement for each proposed initiative, in one instance, the Board worded the fiscal impact as follows: "Because the simplicity of the measure

raises a question as to the scope of its interpretation, the fiscal impact of the measure is indeterminate." *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1137 (Colo. 1996) (Mullarkey, J., concurring in part and dissenting in part). Justice Mullarkey warned about using non-neutral language in assessing likely fiscal results of an initiative.

> The Initiative is not simple…. Because the Initiative does not specifically set forth a litany of what it will accomplish if passed, the Initiative's unknown potential applications render its fiscal impact difficult to ascertain…. The Board was careless in its choice of language and violated its duty to present a neutral assessment of the Initiative's fiscal impact. The phrase in question should be stricken.

Id.

The Board's characterization that Initiative #283 would "limit" fees can be described as suffering from these same flaws. The Court should require the Board to correct its error in using "limiting" in this title.

D. The Board's description of TABOR's potential application to "fees" is confusing and misleading.

The Board concluded that it needed to describe how TABOR applies to fees as part of the title. Initially the Board accomplished that objective by including in the title the following: "specifying the requirements that such a fee must satisfy to be a 'fee' for purposes of the Taxpayer's Bill of Rights (TABOR)." In response to

the Motion for Rehearing, which explained the TABOR reference was misleading because the definition of fee would apply more broadly (CF p. 12), the Board changed course and instead purported to describe TABOR's application to fees and taxes: "defining a "fee", which does not require voter approval, as opposed to a tax, which does require voter approval…" (CF p. 7.) The Board's change violates the clear title requirement.

As an initial matter, the inclusion of this phrase renders the title inherently contradictory. The single subject statement tells voters that new or increased fees will be "limit[ed]." The title then tells voters that, although there is a limitation, it is not "voter approval." Voters are thus left at a loss—they're told there is a limitation and, instead of being informed of what the limitation is, they're told what the limitation is not. Framing the measure in this way creates precisely the type of title "for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106(3)(b).

The title is further unclear as to whether the "voter approval" requirement applies to fees under current law or fees if the measure passes. As drafted, the title reads as stating that, under this new definition, "voter approval" of fees is not required; however, that runs directly contrary to Proponents' intent, which is to

make various fees subject to TABOR's voter approval requirement. *See* Apr. 25, Hr'g *supra*, at 1:05:55 to 1:06:25. The title is, in other words, misdescribing the intent behind the measure.

Not only is it inconsistent with Proponents' intent, assuming the measure can be interpreted now, only "fees" meeting the measure's very specific requirements would be exempt from TABOR's voter approval requirement. To be exempt, a fee must be paid by the beneficiary of a governmentally provided service or good. If the same fee is paid by a third party or the fee provides benefits to third parties or the public, then it will require voter approval. Given the complexities of the definition and its application, it is misleading for the title to say generally that a fee "does not require voter approval." Many charges that voters understand to be fees will require voter approval, and voters are not going to understand from this title that certain fees are being recategorized to "taxes" subject to voter approval.

To be sure, the title advises voters that a tax "does require voter approval," but it does not explain to voters that fees are being changed to taxes. The Board's description of the voter approval requirement is thus missing a necessary logical link. Having raised the specter of "voter approval," the Board needed to accurately

describe how the measure changes the voter approval requirement for fees. In the absence of telling voters that, the title is incomplete and misleading.

The title set by the Board thus expresses neither the "true intent" or "meaning" of the measure "correctly" or "fairly." *See* C.R.S. § 1-40-106(3)(b). As such, the Court should order the Board to correct the title.

CONCLUSION

Petitioners respectfully request 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 Petitioners' briefs.

Respectfully submitted this 9th day of May, 2024.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF** was sent electronically via Colorado Courts E-Filing this day, May 9, 2024, to the following:

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