COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 3, 2024 9:57 AM
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 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, 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 2,499 words.

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ISSUES ON REVIEW

I. Whether the Title Board clearly erred in finding that proposed initiative 2023-2024 #248 contains multiple subjects.

STATEMENT OF THE CASE

According to its proponents, the single subject of proposed initiative 2023-2024 #248 is "keeping taxes low." *See Hearing Before Title Board on Proposed Initiative 2023-2024 #248* (April 18, 2024), https://tinyurl.com/37rc9ay3 ("Hearing") at 9:48:08–12. It accomplishes this purported purpose in two ways. First, it caps certain statewide property tax revenue at 4%. Record at 3, filed April 25, 2024 (proposed § 39-1-103.9). Separately, it reduces property tax valuations for both non-residential and residential properties. Record at 3–4 (proposed §§ 39-1-104, 104.2(3)(q), (3)(r)).

Number 248 has several subparts mixed around these two central provisions. First, "to insulate school districts from any revenue loss" resulting from the measure's operative provisions, #248 requires that any "revenue loss" as a result of the measure shall not reduce the

amount of funding a school district receives under the Public School Finance Act. Record at 4 (proposed § 39-3-210(1)). This provision would require the state to backfill a substantial portion of existing school funds that currently come from local property taxes. At the Board's rehearing, concerns were raised that this would necessarily result in a substantial reduction in state funding for other programs, given the size of the backfill that would be needed for local education.

Second, under current law, local jurisdictions may receive approval from local voters to retain excess revenues that would normally be refunded to those local voters under the Taxpayers Bill of Rights ("TABOR"). *See generally* Colo. Const. art. X, § 20.[1] But proposed initiative #248 would change that process, instead requiring statewide approval for local districts to retain excess funds if statewide property tax revenue is projected to exceed the 4% cap set by the measure. Record at 3 (proposed § 39-1-103.9(1)).

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[1] This process is known colloquially, and referred to during the Title Board's discussion on #248, as "debrucing" after TABOR's author, Douglas Bruce.

Finally, the measure also requires the state treasurer to "issue a warrant to be paid yearly to reimburse local districts for lost revenue" resulting from the measure. Record at 4–5 (proposed § 39-3-210(2)). The General Assembly is then directed to make these reimbursements "to the maximum extent practicable." *Id.* at 5. "Local districts" is not a defined term in the measure or elsewhere in Colorado law, raising the concern that this provision would also allow school districts to obtain additional funding on top of the Public School Finance Act funds to make up for lost property taxes.

At its April 3, 2024, hearing, the Title Board originally found that it had jurisdiction to set title on #248, and did so. Record at 8. Two electors timely moved for rehearing, challenging the Board's finding that #248 contained a single subject. Record at 11–16.

At its April 18, 2024, rehearing, the Board granted the motion for rehearing, concluding that it lacked jurisdiction to set title because #248 contained multiple subjects. Record at 9. The Board found that in addition to the residential and commercial property tax cuts, the

measure would also 1) require mandatory cuts to state spending; 2) usurp local control over the right to retain local revenues above the 4% cap, and 3) potentially result in a substantial increase in state funding for public education. Hearing at 10:29:20–10:30:45

Number 248's proponents objected to the Motion for Rehearing, and timely petitioned this Court for review of the Board's single subject determination. Pet. for Review at 3–4.

SUMMARY OF ARGUMENT

Employing all legitimate presumptions in its favor, the Title Board correctly determined that proposed initiative #248 contains multiple subjects. Its core purpose is to reduce taxes. But alongside that measure it contains three additional subjects.

First, it operates identically to the measure at issue in *In re Title, Ballot Title, Submission Clause, Summary for 1997-1998 No. 84*, 961 P.2d 456 (Colo. 1998), which this Court concluded contained multiple subjects. Like there, proposed initiative #248 attempts to backfill the reduction in revenue suffered by school districts because of this

measure with funds at the state level. As this Court recognized in 1998, this backfill provision will necessarily require cuts to other state programs, which is itself a second subject.

Second, proposed initiative #248 contains a procedural change to Colorado law that will surprise voters. Under current law, local jurisdictions can vote to retain local revenues above the applicable revenue cap. But this measure would require statewide approval for such retention, transferring the power to retain local revenues from those jurisdictions to statewide voters.

Third, the measure could result in a substantial windfall for local school districts, dramatically increasing the amount the state spends on public education. This is a second subject unrelated to the tax cuts, and could cause some voters who are not otherwise inclined to support the measure to back it at the ballot box.

ARGUMENT

I. The proposed initiative contains a single subject.

A. Standard of review and preservation.

1. Standard of Review.

The Title Board has jurisdiction to set a title only when a measure contains a single subject. *See* Colo. Const. art. V, § 1(5.5). To satisfy the single-subject requirement, the "subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8.

Ordinarily, whether a measure meets this bar is left to the sound discretion of the Title Board. "In reviewing a challenge to the Title Board's single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board's actions." *Id*. In doing so, the Court does "not address the merits of the proposed initiative" or "suggest how it might be applied if enacted." *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 8. The Court does, however, "sufficiently examine the initiative . . . to

determine whether or not it violates" the single subject rule, "employ[ing] the general rules of statutory construction and accord[ing] the language of the proposed initiative its plain meaning." *In re Title, Ballot Title, & Submission Clause for 2011-2012 No. 45*, 2012 CO 26, ¶ 9.

2. Preservation.

The Board agrees that this issue is preserved for the Court's review. Petitioners are the designated representatives for #248, and their counsel appeared at the rehearing and opposed the Motion for Rehearing. Hearing at 9:30:00.

B. The Board did not err in finding that #248 contains multiple subjects.

The constitutional single subject requirement has two chief purposes. First, it prevents logrolling, or the practice of "putting together in one measure multiple subjects for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits." *In re Title, Ballot Title, & Submission Clause for 2009-2010 No.*

91, 235 P.3d 1071, 1077 (Colo. 2010) (quotations omitted). This concern is triggered when topics included in a measure don't "point in the same direction," and "seek to garner support from various factions with different or conflicting goals." *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 33 (quotations omitted); *see also* § 1-40-106.5(e)(I) (intending single subject requirement to "forbid treatment of incongruous subjects in the same measure . . . for the purpose of enlisting in support of the measure the advocates of each measure").

Second, the single subject requirement "helps avoid voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision 'coiled in the folds' of a complex initiative." *In re Title, Ballot Title, & Submission Clause for 2011-2012 No. 3*, 2012 CO 25, ¶ 11 (quotations omitted); *see also* § 1-40-106.5(e)(II) (intending single subject requirement to "prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters").

According to the proponents, #248's single subject is "keeping taxes low." Hearing at 9:30:08–11. But this is the type of "overly broad" and "vague" subject this Court has previously rejected. *See, e.g.*, *In re 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").

Instead, #248's primary purpose is to reduce the residential and commercial property tax rates and, alongside this, set a new 4% cap on property tax revenue. But around its central purpose, it includes several additional subjects.

1. The measure would also cut state spending on non-educational programs.

First, in addition to its property tax cut, #248 would also substantially reduce funding for non-education-related state programs. Here, existing precedent establishes that a measure operating exactly as does this one contains multiple subjects.

In the late-1990s, proponents advanced a measure lowering "various state and local taxes." *In re 1997-1998 No. 84*, 961 P.2d at 457. The measure, which was only a paragraph long, also required the state to "replace affected local revenue monthly within all tax and spending limits." *Id.* Understanding that Colorado law prohibits tax increases without voter approval, the Court held that this language would necessarily require the state to "reduce[] existing state spending on state programs." *Id.* at 460. This "mandatory reduction[] in state spending on state programs" was a second subject separate and apart from the central tax cuts. *Id.*

Proposed initiative #248 operates identically to that measure. The state is obligated to cover any reduction in revenue for local school districts stemming from the tax cuts at the core of this proposal. Record at 4 (proposed § 39-3-210(1)) In fact, it may be obligated to do so twice. Record at 4–5 (proposed § 39-3-210(2)).

The fiscal summary anticipates that school districts will face an $870 million shortfall in FY 2025-26 as a result of this measure,

requiring the state to provide $870 million in additional funding to school districts under the Public School Finance Act. Record at 17. Put simply, this money has to come from somewhere. And because the state is unable to raise taxes without voter approval, the unavoidable cuts to other state programs are a second subject under this Court's holding in *In re 1997-1998 No. 84.*

These cuts to state spending are "coiled in the folds" of the measure, and not necessarily and properly connected to the initiative's core tax cuts.

2. The measure would also transfer control of retaining local revenues above the cap from local voters to statewide voters.

Second, #248 would upset existing law which allows local jurisdictions to vote to retain local revenue. Proposed section 39-1-103.9(1), Record at 3, would require *statewide* approval for any local jurisdiction to retain local revenues if statewide revenues are projected to exceed the 4% cap. This usurpation of local control would surprise voters, who are accustomed to local control over local revenue retention.

In re Title, Ballot Title, and Submission Clause for 1997-1998 No. 30, 959 P.2d 822, 826 (Colo. 1998), is instructive. There, a proposed initiative was focused primarily on tax cuts. *Id.* Alongside this core purpose, though, 1997-1998 No. 30 also included a procedural requirement: any future tax increases referred to voters "must be specific in setting forth fixed maximum tax rates with a fixed maximum number of dollars." *Id.* This procedural requirement was a second subject. *Id.* at 827.

So too here. Although #248 includes a revenue cap in addition to tax cuts, it transfers authority for retaining revenue above that cap from local jurisdictions to voters statewide. This procedural requirement is a second subject unrelated to the core purpose of the proposed initiative. Because it is "coiled in the folds" of the initiative, voters would likely be surprised by the transfer of rights from local communities to statewide voters.

3. The measure could also result in a substantial increase in state funding for public education.

Third, as written, proposed initiative #248 may result in a substantial windfall to school districts, thus triggering the single subject requirements anti-logrolling concerns. Proposed sections 39-3-210(1) and 210(2) each require state revenues to be used to backfill revenue reductions stemming from the measure. Record at 4–5. Section 210(1) deals exclusively with school districts and contains no ambiguity. The state is required to backfill any funds school districts lose from local property taxes as a result of this measure. *Id*. at 4. For FY 2025-26, this amount is projected to be $870 million.

Section 210(2) is not so clear. As a threshold matter, it applies to all "local districts," which is not a term defined in the proposal or elsewhere in state law. Presumably, then, it would apply to school districts which are both "districts" and operate at the "local" level.

Subsection (2) requires the state treasurer to "issue a warrant to be paid yearly to reimburse" these local districts "for lost revenue as a

result of" this measure. *Id.* (proposed § 39-3-210(2)). Such reimbursement is to be made "by the General Assembly to the maximum extent practicable." *Id.* at 5.

This section is inherently contradictory. The language applying to the reimbursement warrant is mandatory, the treasurer has no discretion. *See, e.g.*, *Waddell v. People*, 2020 CO 39, ¶ 16 ("[T]he use of the word 'shall' in a statute generally indicates the legislature's intent for the term to be mandatory.") (cleaned up). But the language applying to the General Assembly is discretionary. It must appropriate funds to cover the warrant "to the maximum extent practicable." *See, e.g.*, *Gagne v. Gagne*, 2014 COA 127, ¶ 30 (noting Black's Law Dictionary definition of "practicable" as "reasonably capable of being accomplished; feasible in a particular situation").

Even leaving aside this contradiction, in at least some years, school districts will receive reimbursement under proposed section 39-3-210(2) *and* have local school funding held constant using state funds under proposed section 39-3-210(2).

Using FY 2025-26 as an example, school districts would face an $870 million shortfall resulting from this measure. Record at 17. But that loss would be made up by the state under the Public School Finance Act under proposed section 39-3-210(1). At the same time, though—at least to the extent practicable—those same school districts will also receive $870 million worth of additional state funds under proposed section 39-3-210(2). In other words, local school districts could receive a substantial windfall from this measure. The state would both fill the hole in their budgets stemming from reduced local property tax revenues and cut the districts a substantial check on top of that backfill.

This potential explosion in spending for public education is a second subject wholly unrelated to #248's tax cutting provisions. Because it may convince some proponents of education funding to nonetheless support the tax cuts, it triggers the logrolling concerns animating the single subject requirement.

CONCLUSION

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

Respectfully submitted on this 3rd day of May, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 3rd day of May, 2024, addressed as follows:

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