CDOS Received 4/28/2021 2:19 p.m.

COLORADO BALLOT TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATVE 2021-2022 #26

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2021-2022 #26

On behalf of Carol Hedges and Scott Wasserman ("Movants"), registered electors of the State of Colorado, undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2021-2022 #26 ("Initiative #26") pursuant to Section 1-40-107, C.R.S. (2020).

I. ACTIONS BY THE TITLE BOARD AT THE APRIL 21, 2021 HEARING

On April 21, 2021, the Title Board determined (by a 2-1 vote) that Initiative #26 contains a single subject and set the following title:

> A change to the Colorado Revised Statutes concerning government revenue, and, in connection therewith, reducing property tax revenue by an estimated $1.03 billion in 2023 and by comparable amounts thereafter by reducing the residential property tax assessment rate from 7.15% to 6.5% and reducing the property tax assessment rate for all other property, excluding producing mines and lands or leaseholds producing oil or gas, from 29% to 26.4% and allowing the state to annually retain and spend up to $25 million of excess state revenue, if any, for state fiscal years 2022-23 through 2026-27 as a voter-approved revenue change to offset lost revenue resulting from the property tax rate reductions and to reimburse local governments for fire protection.

II. GROUNDS FOR REHEARING

Movants respectfully submit that the majority of the Board erred at the initial hearing when they concluded that Initiative #26 contains a single subject. This error appears to stem primarily from the confusing language of the initiative itself, though any interpretation of the measure reveals the presence of multiple subjects. Additionally, the title ultimately set by the Board mis-states a couple critical elements of the initiative and fails to disclose a very material direct and obfuscated consequence of the initiative.

A. The Language of the Initiative is Hopelessly Confusing and Its Purposes are Insufficiently Clear for the Board to Set a Title.

The Supreme Court has cautioned that "if the [Title] Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *See, e.g., In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999). "Before a clear title can be written, the Board must reach *a definitive conclusion* as to whether the initiatives encompass multiple subjects." *Id*., at 468 (emphasis added).

Initiative #26 poses this conundrum. Sections 1 and 2 of the measure would permanently[1] reduce both residential and most non-residential property tax assessment rates, and thus prospective property tax revenue in most local districts.

Section 3 of the Initiative purports to "authorize" the State – *a separate taxing district*[2] that does not levy property taxes – "to retain and spend up to 25 million (dollars?) per year in revenue exempt from limitations under section 20 of article X of the state constitution." The measure recites that this temporary (five year) authorization – at the *State district* level – is for two purposes: "off-setting lost revenue resulting from a reduction in property tax" "*and* "to fund state reimbursements to local government entities for fire protection."

First, it is unclear from the text what "revenue exempt from limitations" under TABOR is being referred to[3] – and why any "authorization" is necessary if the revenue is "exempt." The Board apparently concluded that the Proponents' intention was to obtain advance voter approval "of a revenue change as an offset" to a "spending limit" otherwise applicable at the State district level under Colo. Const. art. X, §20(7). The language of the measure, however, does not say that.

Second, it is not clear from the language of the measure whether the "authorized" use (or uses) of the transferred "exempt" State revenue is (or are) (1) either "for the purpose of off-setting lost revenue resulting from a reduction in property tax" (irrespective of application at the local level) or – alternatively (at State or local discretion?) – "to fund state reimbursements to local government entities for fire protection" (independent of any "lost" property tax revenue?); or (2) "for the purpose of off-setting lost revenue resulting from a reduction in property tax" *for*

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[1] While these reductions are reversible, it should be noted that any future "valuation for assessment increase for a property class" would require a new election and separate voter approval in advance – not just an adjustment by the General Assembly – under Colo. Const. art. X, §20(4)(a).

[2] Colo. Const. art. X, §20(2)(b).

[3] The most logical object of a reference to "exempt" revenue under Colo. Const. art. X, §20, would be the items listed in subsection (2)(e).

the limited purpose of funding "state reimbursements to local government entities for fire protection."

Third, it is not clear from the language of the measure whether the potential offset for "lost revenue resulting from a reduction in property tax" – whether or not limited exclusively to "fire protection" – (a) applies only to reductions in local property tax revenue resulting from the assessment rate reductions specified in Sections 1 and 2, or (b) applies to any-and-all "reduction in property tax" (through reduced mill levies, actual value depreciation, or otherwise) at the local level.

The confusion in the language of the measure itself is inevitably reflected in the title set by the Board – converting the authorization to retain and spend "exempt" revenue to "excess state revenue," converting "off-setting lost revenue resulting from a reduction in property tax" to "offset lost revenue resulting from the property tax rate reductions," and retaining ambiguity as to the uses to which the "excess" (accurately "exempt") revenue may be put (and who decides). While Movants would like to offer suggestions for clarification, they are in no better a position to do so than was the Board.

B. The Initiative Impermissibly Contains Multiple Subjects.

Colo. Const. art. V, §1(5.5) and §1-40-106.5, C.R.S. (2020), require all ballot initiatives to contain a single subject. The purposes of this requirement are:

> (1) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, 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; and
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> (2) 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.

§1-40-106.5(1)(e), C.R.S. (2020). The first purpose is often described as directed primarily at the practice of "log rolling," while the second is directed, in part, at identifying matters obscurely "coiled in the folds" – intentionally or otherwise – of what may on its surface appear to be a clear measure.

Irrespective of – though exacerbated by – the confusion in the text of the measure itself, Initiative #26 clearly violates the single-subject requirement.

The primary subject of Initiative #26 is presented in Sections 1 and 2 – to permanently reduce both residential and most non-residential property tax assessment rates at the local district level, and thus estimated property tax revenue in most local districts.

Section 3 is where the problems arise:

1) The language of the measure provides that the State will be authorized to retain and spend "25 million" "for the purpose of off-setting lost revenue resulting from a reduction in property tax *and* to fund state reimbursements to local government entities for fire protection" (emphasis added). As noted above, neither the measure itself *nor the title* are clear as to whether this discretionary limited additional funding from the State is:

> (a) wholly restricted to "fire protection" (and only to those local districts that independently provide fire protection though all will suffer reduced assessment rates? – *a clear single subject problem*); or available for any local purpose (and any local district) (and, if so, who decides); and/or
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> (b) available for "fire protection" (solely or alternatively) *independent* of any reduction in local district property tax revenue directly caused by the assessment rate reductions (as suggested by the placement of this provision in §24-33.5-1201, C.R.S. (2020), specifically addressing the operations of the State's Division of Fire Prevention and Control) – *a clear single-subject violation*; and/or
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> (c) limited (in whole or in part) to replacing local revenue lost specifically due to the assessment rate reductions in Sections 1 and 2 (either generally or exclusively for "fire protection") or from *any* reduction in property tax revenue (irrespective of cause) – another *clear single-subject violation*.

This absence of clarity – reflected in the language of both the measure and the title – makes it impossible "to reach *a definitive conclusion* as to whether the initiatives encompass multiple subjects." *In re 1999-2000 #25, supra.* Under any interpretation, the restrictive or alternative and/or independent dedication to "fire protection" smacks of manifest "log rolling."

2) The language of the measure states that, for the unclear and disconnected purposes noted above, the State "shall be authorized to retain and spend" a comparatively miniscule – hardly an "offset" – amount of "revenue exempt from limitations under" Colo. Const. art. X, §20. The title interprets this as intended to be a temporary "de-Brucing" clause addressed to State revenue exceeding the Colo. Const. art. X, §20(7) spending limit (though noting appropriately that there may not be any such "excess" to "de-Bruce"). As noted above, this is not what the language of the measure says, and the miniscule level of the restricted "off-setting" "authorization" at the State level – as compared with the magnitude of the sweeping revenue reductions at the local level – demonstrates a complete disconnect (and ulterior purpose) between the subject and purposes of Sections 1 and 2, on the one hand, and Section 3 (whatever it means) on the other.

3) While the temporary (five year) "authorization" for the State to "off-set[]" "lost revenue" and "reimburse[]" local government entities" through retention and expenditure of up to "25 million" per year in TABOR-"exempt" revenue is framed in discretionary terms – thus

seeking to avoid the single-subject conundrum of a resulting mandatory reduction in State spending on *State programs* similar to the ones addressed by the Supreme Court in *In re Title, Ballot Title & Submission Clause, and Summary for 1997-1998 #84 (Outcelt v. Bruce)*, 974 P.2d 458, 465 (Colo. 1999), and its progeny – Initiative #26 does not escape this problem.

Sections 1 and 2 of the Initiative will, among other effects, immediately reduce local property tax revenue available for "local share" funding of public schools throughout the state. This will immediately and directly impact the *State's* constitutional and statutory obligation to backfill those shortfalls to maintain "thorough and uniform" "total program" funding levels for the affected school districts. Colo. Const. art. IX, §§2, 17; §22-54-101, *et seq*., C.R.S. (2020) (Public School Finance Act of 1994). The Fiscal Summary for Initiative #26 estimates this impact on the *State share* of public school funding to be $257.7 million. As the "authorization" in Section 3 for the State to temporarily tap "exempt" State revenue (whatever that means) falls far short of this direct impact created by Sections 1 and 2 of the measure – and as the "authorization" appears to be restricted in whole or in part to "fire protection" in any event – the State will be confronted with an immediate budgetary shortfall.

This will leave the State with one or a mix of three options:

(a) reduce *other State programs* to enable it to maintain its constitutional funding obligations to the State's public school system; and/or

(b) reduce *one specific State program* – funding of its "State Share" support for the State's public school system (on top of the funding reductions at the local district level);[4] and/or

(c) seek – and necessarily obtain – voter approval for a tax increase *and* revenue (spending limit) changes *at the State level* to avoid or ameliorate material reductions in funding for some mix of *State programs*.

There is no way under this scenario that the Initiative's reduction in *local* assessment rates will not directly cause a material reduction in one or more *State programs* and/or require an immediate increase in taxes and relief from spending limits at the *State* district level. This is quite different from a measure whose direct impacts are limited to *local* taxing districts and their programs.

None of this is at all apparent from either the text of the measure itself or the title set by the Board. Rather – as in *Outcelt*, *supra* – this is a classic example of a "surreptitious" measure (by design or otherwise) with material and unavoidable consequences "coiled in the folds" that would assuredly "surprise" the voters.

[4] This would likely have to involve separate legislative invocation of the "budget stabilization factor" *at the State level* per §22-54-104(5)(g), C.R.S. (2020), to reduce overall "total program" funding for the entirety of the State's public school system.

C. The Title Set By the Board Misstates the Content of the Initiative.

While the presence of multiple subjects and the somewhat contrived and thoroughly confusing language of the Initiative itself effectively makes it impossible for the Board to set a clear title consistent with the single-subject requirement, a few drafting points are paramount:

First, consistent with the language of Section 3 of the Initiative, the title would have to recite that the measure would allow "the state to retain and spend up to $25 million in revenue exempt from limitations under article X, section 20 of the state constitution" – not "excess state revenue." The language of the measure does not clearly propose a revenue change under Colo. Const. art. X, §20(7).

Second, the final phrase of the title – constrained to reflect the confusing language and multiple subjects of the measure – would at least more accurately read "to replace a minimal portion of the revenue lost by some local districts resulting from a reduction in property tax and/or to reimburse some local governments for fire protection."

Third, the concealed direct and inevitable impact upon funding for "state programs" would have to be disclosed – at a minimum by including language to the effect of "necessitating an immediate reduction in funding for public education and/or other State Programs in an amount of at least $258 million."

III. REQUEST FOR RELIEF

For the reasons set forth above, Ms. Hedges and Mr. Wasserman respectfully request the Title Board to deny the setting of a title for Proposed Initiative 2021-2022 #26, and/or for such further relief as the Board deems appropropriate.

Respectfully submitted this 28th day of April, 2021.

s/Edward T. Ramey
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of April, 2021, a true and correct copy of this **MOTION FOR REHEARING ON PROPOSED INITIATIVE 2021-2022 #26** was filed and served to the following:

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