BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Scott Wasserman and Ann Adele Terry,
Objectors,

v.

Dave Davia and Michael Fields,
Designated Representatives of Initiative 2023-2024 #303.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #303

Through their legal counsel, Scott Wasserman and Ann Adele Terry, registered electors of the City and County of Denver, submit this motion for rehearing on Initiative 2023-2024 #303, and state:

On April 18, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #303:

> *Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of $145 million in property tax revenue by an amendment to the Colorado constitution prohibiting taxes on a parcel of real property from growing more than 4% annually, and, in connection therewith, excluding from this growth limit property that has been reappraised due to substantial improvement or change in use; increasing the limit for the first year a voter-approved mill levy increase takes effect; in years in which the 4% growth limit is not exceeded, allowing the unmet growth to be added to a later year when the 4% growth limit is exceeded?*

In setting this title, the Board erred in the ways set forth below.

I. Initiative #303 violates the constitutional single subject requirement.

Initiative #303 presents three interrelated single subject violations. *First*, as drafted, the Board cannot set a clear title as it is impossible to know how the measure operates. *Second*, Proponents have coiled within the folds of the measure hidden subjects, the repeal of prior TABOR authorizations and elimination of local voter's authority to keep excess revenue. *Finally*, because of the measure's lack of clarity, it presents a logrolling violation: it seeks to have different groups of voters read into the measure their preferred outcomes to generate a political coalition to support its passage. The measure should be returned to Proponents for lack of jurisdiction.

A. The Board cannot set a clear title.

The measure prohibits the property taxes on a parcel of property from increasing by more than 4% in a year. It is, in other words, a flat cap on output of the property tax calculation process. What the measure does not do, however, is provide for how the competing interests and authorities of different governmental entities will be changed as a result of this cap. Proponents achieve this through using a passive-voice drafting that applies to taxes levied on a property, rather than actively identifying how the measure applies to local taxing authority.[1]

As the Board is aware, real property is subject to property taxation by different governmental entities. For example, a property may be subject to taxation by a county, one or more special districts (from libraries to fire protection districts to early childhood development service districts and so on), a school district, and other varieties of cross-county entities (e.g. the Regional Transportation District or the SCFD in the metro area). These entities are each independent taxing authorities. There is no one local jurisdiction with the authority to compel, direct, or determine property tax revenue collection of another local jurisdiction. Although counties play a coordinating role, it is for assessment and compiling the different local jurisdictions' property taxes into a single property tax bill.

While the measure is clear as to the limit it places on the outcome of the process—a 4% limit on the annual growth in property tax owed for a property—it is fundamentally unclear as to how that limit applies to this multi-jurisdictional environment. Consider, for example,

- If property values rise such that a property's taxes will exceed the 4% limit, how will the resulting revenue reduction be allocated in different amounts to different taxing authorities (counties, school districts, special districts, etc.) and under what standards?

- What occurs when a property is subject to a cross-county local jurisdiction? If a property is subject to RTD or SCFD, typically under a state organic statute, and a property is subject to the 4% limit, what entity decides whether and how to cut the cross-county tax component of that property's property taxes?

Proponents made clear in the review and comment hearing that their failure to address the answers to these questions in the measure was quite intentional and that the answers would be left up to each county. When asked:

> Does the four percent limit apply to each tax imposed by a local jurisdiction separately so that no local jurisdiction may increase the amount of a tax imposed on a parcel by more than four percent or does it apply cumulatively to a parcel so that the total amount of taxes

[1] For example, Proponents could have avoided this problem had the written something to the effect of, "No local jurisdiction may collect property tax revenue that is more than 4% of the revenue collected the prior year," or "No local jurisdiction may collect property taxes from a property that is more than 4% of the revenue collected from that property the prior year."

Proponents are free to draft their measure how they like, and indeed, have the constitutional right to do so. But with that right comes the responsibility for the language they chose.

> imposed on the parcel cannot increase by more than four percent? If the four percent limit is cumulative, how would taxing jurisdictions coordinate, if at all, to ensure that the four percent limit is not exceeded? What would happen if they don't coordinate?

Recording of Review and Comment Hearing on Initiative 2023-2024 #303, April 5, 2024, available here: https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20240424/72/15741 at 9:43 A.M.

Proponents' responded:

> The cap applies to the overall property taxes against a parcel[…]. It will be up to each county to administer. The measure is drafted purposely to provide that flexibility and discretion to the counties to administer.

Id. at 9:44 A.M.

Legislative Council and Office of Legislative Legal Services staff followed up:

> …I think you are suggesting that your intent is for that to be worked out post-measure?

Id. at 9:45 A.M.

Proponents' responded:

> I think I'd just clarify to say that, you know, when this was drafted and our intent is to give broad discretion on how this is administered within the paramaters of how we've achitechted it so we're not trying ot bind people to a prescriptive formula. We're trying to give them some broad discretion.

Id. at 9:46 A.M.

Legislative Council and Office of Legislative Legal Services staff followed up again:

> …the obvious question that anyone would have upon reading this is…is the coordination one and if I understand the proponents correctly, your intent is well, yes, that will need to be resolved, but that's not the purpose here. Instead, the sole purpose here is to establish this…this cap esentially. Is that…is that a fair statement of what…how you're thinking about this?

Id. at 9:47 A.M.

Proponents' responded in the affirmative. *Id.* at 9:47 A.M.

In other words, the vagueness in the measure is a feature, not a bug. The measure would amount to a profound alteration of the system of property tax administration in Colorado, and these questions concern more than mere implementation details. They cut directly to the authority of local jurisdictions to tax and spend, and voters need to know how these authorities are being changed by a measure like #303. But as drafted, it is impossible for the Board to determine these

types of questions and, in turn, set a title that clearly explains the measure to voters. The Board's limited interpretative authority to construe a measure does not include the type of interpretive authority necessary to explain these issues and would be impermissibly speculative. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 258(A) (English Language Education in Public Schools)*, 4 P.3d 1094, 1097-98 (Colo. 2000).

Proponents suggest that these issues will be worked out after passage. However, neither this Board nor the Supreme Court "review an initiative for single subject compliance subsequent to implementing legislation or court-ordered enforcement." *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 280 (Colo. 2006). "Rather, the statute obligates [the Court] to undertake this task prior to the Initiative's placement on the ballot." *Id.* In *2005-2006 #55*, the Court held that a measure that would have prohibited the provisioin of non-emergency services by the state to those not legally present in the country had more than one subject. *Id.* at 275. The measure's failure to define "non-emergency services" made it "impossible for a voter to be informed as to the consequences of his or her vote." *Id.* at 282. The measure's "facial vaugness not only complicates [the] courts 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.*

As in *2005-2006 #55*, the facial vagueness of the measure is fatal. The language of the measure provides no hint as to how it would be implemented, which districts would get less when the 4% limit is exceeded, under what standards those decisions would be made, or how the measure would be applied in the context of multi-county districts. Compounding this failure is the Proponents' insistence in the review and comment hearing that the measure is not intended to resolve these questions. Instead, it is intended to leave these decisions to each county. The problem with this approach is that the vaugness of the measure makes an informed vote impossible.

The Supreme Court has been clear as to the remedy in situations such as these:

> if the 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.

In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #25, 974 P.2d 458, 465 (Colo. 1999); *see also In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69*, 2013 CO 1, ¶ 15 (same); *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999) (same).

B. Additional subjects: repealing voters' TABOR authorizations.

Not only is the measure fatally unclear, it includes a hidden feature that voters will not understand they are being asked to approve. This violates one of the core purposes of the single subject requirement, which is 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." C.R.S. § 1-40-106.5.

1. The measure repeals voters' prior approval to retain excess property tax revenue.

Since voters adopted TABOR approximately 30 years ago, local jurisdictions across the state have gone to voters for approval to retain excess revenue collected through property taxes. Each of those approvals that allow the jurisdiction to retain "any and all revenue" (or similar language) from property taxes are being repealed by this measure. Voters will not understand, based on how the measure is drafted (and in turn how the titles are set), that they are being asked to repeal these prior TABOR authorizations for their counties, schools, libraries, etc.

Repealing these authorizations does not appear on the face of the measure, framed as it is in applying a simple cap on increases in an individual property tax bill. But that is what it does, and, in doing so, Proponents have impermissibly coiled a separate subject in the measure. *Cf. In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 # 30*, 959 P.2d 822, 826 (Colo. 1998) (single subject violation by commingling a local tax cut with procedural changes that affected prior voter-approved revenue and spending increases).

2. The measure eliminates the ability of voters to authorize local jurisdictions to retain excess revenue.

Voters currently understand that, under TABOR, they have the authority to allow local jurisdictions to retain excess revenue. This measure does not simply change the revenue that can flow to local jurisdictions (through the 4% cap), it changes voters' control over the ability of local jurisdictions to retain excess property revenue. Specifically, voters can no longer exercise their rights under TABOR to allow local jurisdictions to retain "any and all" property tax revenue (or any revenue above the 4% limit this measure imposes). Unlike other measures Proponents attempted that included a new statewide vote to retain revenue (*see, e.g.*, 2023-2024 #249 ("Property Tax Revenue"), this measure goes a step farther and removes local control over the question altogether. Combining a substantive provision for tax relief with an entirely new constitutional system for voter control over local jurisdiction revenue violates that single subject requirement. *Cf. 1997-98 # 30, supra*, 959 P.2d at 826.

The removal of voters' control over retention of local jurisdiction revenue is a "coiled in the folds" problem. Voters have a deep understanding of TABOR and the control it gives them. They understand the TABOR process and ballot questions for retaining local revenue. There is a substantial risk they will not understand that Initiative #303 is stripping them of that power. This is the type of "surreptitious measure" the single subject prohibits "to prevent surprise and fraud from being practiced upon voters." C.R.S. § 1-40-106.5(1)(e)(II).

C. The measure violates the prohibition on logrolling.

The measure's lack of clarity not only prevents the Board from being able to set a clear title (as described above), it also creates a logrolling problem. Unlike the usual scenario in which voters explicitly combine "incongruous subjects in the same measure" to "secur[e] the enactment of measures that could not be carried upon their merits," C.R.S. 1-40-106.5; *see e.g.*, *In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022

CO 37, Initiative #303 says so little about how its 4% limit will be applied that voters are left to assume their preferred policy outcomes will be protected.

One group of voters who are opposed to the spending on the library will rest assured that, when the budget cuts come because of the 4% limit, the library's funding will take the hit. Another group of local voters, unhappy with the amount of spending by the school district on administration, believe that the school district will see reduced revenues that can be easily offset by cutting overhead. Other groups believe that spending generally will be reduced, but of course roads and bridges and police/sheriff spending will be protected. Because of the measure's lack of clarity, each group of voters are able to see their interests protected—when other voter groups have different if not diametrically opposed views.

The measure thus can build a coalition that would never support it if voters understood what it will end up doing. That's logrolling, albeit in a different form than is usual, and the Board should hold it violates the single subject requirement.

WHEREFORE, Objectors seek appropriate relief in light of the above claims, including the striking of the titles set and return of Initiative #303 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution.

Respectfully submitted this 24th day of April 2024.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #303** was sent this day, April 24, 2024, via first-class mail, postage paid and via email to:

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