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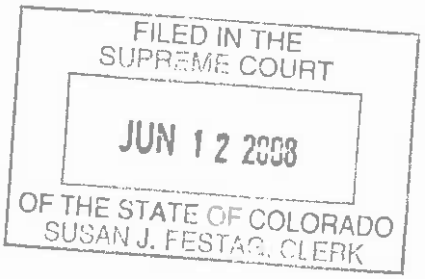
SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2), C.R.S. (2007) Appeal from the Ballot Title Setting Board **Petitioner:** Howard Stanley Dempsey, Jr., Objector, v. **Respondents:** Michael A. Bowman, and David Theobald, Proponents, and **Title Board:** William A. Hobbs, Sharon Eubanks, and Daniel Dominico	**▲COURT USE ONLY▲**
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OPENING BRIEF OF THE PETITIONER

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I. STATEMENT OF THE ISSUES

A. Does the initiative violate the single subject requirement by increasing revenue through a higher severance tax on oil and gas production, while also creating multiple spending mandates?

B. Are the ballot title and submission clauses incomplete and misleading because they state that scholarships are for "colleges", when in fact the new scholarship eligibility rules exclude junior colleges.

II. STATEMENT OF THE CASE

A. Nature of the Case

This case challenges the Title Board's determination that Proposed Initiative 2007-2008 #113 ("Initiative 113") contains a single subject. It also challenges the accuracy of the title. This is an important case, because during the Motion for Rehearing, the Title Board explicitly requested guidance from this Court in resolving the single subject challenge. One board member stated during the Motion for Rehearing, ". . . whether or not we get some guidance from the court -- I think that would be extremely helpful,"[1] while another stated "I think this is a really difficult issue."[2]

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[1] Tr. 15:5-6.

[2] Tr. 17:15.

B. Proceedings Below

The Title Board conducted its initial public meeting for Proposed Initiative 2007-2008 #113 on May 21, 2008. At that time, the Title Board determined that the initiative contained a single subject and then set a ballot title and submission clause. On May 28, 2008, Protestor Stan Dempsey filed a timely Motion for Rehearing under C.R.S. § 1-40-170(1), contesting the single subject determination as well as the title's accuracy. Title Board considered the Motion for Rehearing the next day, on May 29, 2008, at which time it reaffirmed its single subject determination and modified the title, based on arguments made at the motion for rehearing. Dempsey then sought review from this Court.

C. Statement of Facts

Initiative 113 modifies Colorado statute to do several things. First, it removes the ability of oil and gas producers to apply an ad valorem property tax credit to their severance taxes. Second, it reduces the severance tax exemption for small production wells ("stripper wells"), thus making many more stripper wells subject to tax. Third, it increases the severance tax rate on stripper wells.

In addition to increasing severance taxes, the initiative contains relatively detailed instructions on how to spend the resulting funds. Accordingly, it directs funds to: the severance tax trust fund; the local government severance tax fund; college scholarships; native wildlife habitat preservation; renewable energy and

energy efficiency enhancements; transportation projects; and community drinking and water and wastewater treatment.

III. SUMMARY OF THE ARGUMENT

Initiative 113 contains two separate subjects: new revenue provisions, and new spending mandates. This Court has held that revenue and spending provisions create two separate subjects. Likewise, the spending mandates have no logical connection with the revenue increase or with one another, but instead they represent classic "log rolling." Indeed, if Initiative 113 only contained the spending mandates, it would violate the single subject requirement. Adding a tax increase does not solve this fundamental problem. Therefore, this Court should declare that the Title Board did not have jurisdiction to set a title.

The title for Initiative 113 is misleading. It states that the new funds will be used for scholarships to state colleges and universities. In fact, the scholarships will not be used to help students attending Colorado's junior colleges, and these students, their families, and others will all be mislead by use of the term "colleges" in the ballot title. Accordingly, the Court should remand the matter to the Title Board to correct the error.

IV. ARGUMENT

A. Standard of Review

While the Court does not address the merits or future application of the proposed initiative, it must "sufficiently examine an initiative to determine

whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated."[3] The Court makes "all legitimate presumptions in favor of the propriety of the Board's actions."[4]

When reviewing the accuracy of titles and submission clauses, this Court does not rewrite the titles for Board, but only reverses the Board's action if the titles contain a "material and significant omission, misstatement, or misrepresentation."[5] The Title Board is not required to draft the best possible titles, and titles must not contain every detail of the measure.[6]

B. Initiative 113 contains two separate subjects: (1) a mandatory increase in revenue; and (2) mandatory spending measures.

1. The single subject requirement.

Under Colorado law, every proposed initiative must contain a single subject,[7] and no initiative may contain "more than one subject, which shall be

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[3] *In re Title, Ballot Title, & Submission Clause &Summary for 1997-98*, No. 84 961 P.2d 456, 458 (Colo. 1998); *In re Title, Ballot Title, & Submission Clause & Summary for 1997-1998 No. 30*, 959 P.2d 822, 825 (Colo. 1998).

[4] *In re Title, Ballot Title, & Submission Clause & Summary for Pet. Procedures*, 900 P.2d 104, 108 (Colo. 1995).

[5] *In re Title, Ballot Title, & Submission Clause for 2007-2008 No. 62*, No. 08SA90, 2008 WL 2081571, at *13 (Colo. 2008); *In re Title, Ballot Title, Submission Clause & Summary for 1997-1998 No. 62*, 961 P.2d 1077, 1082 (Colo. 1998).

[6] *In re Title, Ballot Title, Submission Clause & Summary for 2007-2008 No. 57*, No. 08SA91, Slip Op. at 10 (Colo. 2008).

[7] Colo. Const. art. V, § 1(5.5).

clearly expressed in its title."[8] An initiative violates the single subject requirement when it: (1) relates to more than one subject; and (2) has at least two distinct and separate purposes that are not dependant upon or connected with each other.[9] This Court has recently stated that, "even when provisions share some common characteristic, they do not satisfy the single-subject requirement unless they have a unifying or common objective."[10] Further, "a proposed initiative contains multiple subjects not only when it proposes *new* provisions constituting multiple subjects, but also when it proposes to *repeal* multiple subjects."[11]

The single subject requirement exists in order to ensure that each proposal depend upon its own merits for passage.[12] By requiring each proposal to pass on its own merits, the rule stops proponents from joining multiple subjects into a single initiative in the hope of attracting support from different interest groups

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[8] Colo. Const. art. V, § 1(5.5).

[9] *In re Title, Ballot Title, Submission Clause & Summary for "Pub. Rights in Waters II"*, 898 P.2d 1076, 1078-79 (Colo. 1995); *In re Title, Ballot Title, & Submission Clause for 2005-2006 No. 55*, 138 P.3d 273, 277 (Colo. 2006); *In re Title, Ballot Title, & Submission Clause for 2007-2008 No. 61*, No. 08SA89, 2008 WL 2081574, at *3 (Colo. 2008); *Blake v. King*, No. 08SA91, 2008 WL 2167847 (Colo. 2008).

[10] *In re Title, Ballot Title & Submission Clause for 2007-2008 No. 62*, No. 08SA90, 2008 WL 2081571, at *8 (Colo. 2008).

[11] *In re Title, Ballot Title & Submission Clause for 2007-2008 No. 62*, No. 08SA90, 2008 WL 2081571, at *9 (Colo. 2008) (emphasis in original).

[12] *In re Title, Ballot Title, Submission Clause & Summary for "Pub. Rights in Waters II"*, 898 P.2d 1076, 1078 (Colo. 1995).

which may have different or even conflicting interests.[13] This tactic is commonly referred to as "log rolling" or the "Christmas tree" tactic, which voters rejected when passing the single subject requirement.[14] The prohibition on log rolling stems from practical considerations; proposals should not merely reflect a political calculus that combines a sufficient number of interest group preferences. Indeed, initiatives should not "increase voting power by combining measures that could not be carried on their individual merits."[15] Accordingly, separate and discrete objectives must be accomplished through separate initiatives.[16]

2. Initiative 113 impermissibly combines revenue mandates with disparate spending mandates.

In this case, Initiative 113 increases the severance tax in three ways – it removes the ad valorem property tax credit, it reduces the exemption for small production wells ("stripper wells"), and it increases the tax rate for stripper wells. But in addition to this revenue increase, Initiative 113 also imposes separate and disparate spending mandates. Specifically, funds must be spent on:

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[13] *In re Title, Ballot Title, Submission Clause & Summary for "Pub. Rights in Waters II"*, 898 P.2d 1076, 1079 (Colo. 1995).

[14] Legislative Council's Analysis of 1994 Ballot Proposals, Research Publ'n No. 392 at 3.

[15] *In re Title, Ballot Title & Submission Clause for 2005-2006 No. 74*, 136 P.3d 237 (Colo. 2006) (Coats, J., dissenting).

[16] *In re Title, Ballot Title, Submission Clause & Summary for "Pub. Rights in Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995).

a. The severance tax trust fund;

b. The local government severance tax fund;

c. College scholarships;

d. Native wildlife habitat preservation;

e. Renewable energy and energy efficiency enhancements;

f. Transportation projects; and

g. Community drinking and water and wastewater treatment.

This Court has firmly held that initiatives that contain both revenue and spending measures violate the single subject requirement. In *Matter of Title, Ballot Title, Submission Clause, Summary for 1997-98 No. 84*,[17] this Court found that an initiative contained two separate subjects:

> First, the initiatives provide for tax cuts. Second, the initiatives impose mandatory reductions in state spending on state programs. These two subjects are distinct and have separate purposes.[18]

According to this Court, requiring the state to reduce spending was not "dependent upon and clearly related to the tax cut." Accordingly, "tax cuts and mandatory state spending reduction do not encompass a single definite object or purpose."[19]

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[17] *In re Title, Ballot Title, & Submission Clause, Summary for 1997-1998 No. 84*, 961 P.2d 456 (Colo. 1998) (*In re No. 84*).

[18] *Id.* at 460.

[19] *Id.* (internal quotations omitted).

Likewise, this Court struck down nearly identical language in another ballot initiative that affected both tax and spending cuts,[20] and one year later this Court again struck down an initiative that contained both tax measures and spending measures in *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 25*, where the Court found two subjects: a tax cut, and impacts on voter-approved revenue and spending increases.[21]

These earlier cases are controlling. Specifically, this case involves tax increases and spending increases. In one sense, this measure is the mirror image of *In re No. 84*, *In re No. 86*, and *In re No. 25*. Whereas the previous cases involved tax and spending decreases, the current case involves tax and spending increases. But logically, the cases are identical. The earlier cases have firmly established that initiatives that combine tax and spending matters violate the single subject. Initiative 113 explicitly combines a tax increase with spending increases. Accordingly, it violates the single subject requirement.

3. The multiple spending measures are prohibited logrolling tactics that seek to gain political support.

As noted above, the single subject requirement is intended to eliminate log rolling, which is a method for currying political favor with disparate groups that

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[20] *In re Title, Ballot Title, & Submission Clause & Summary for 1997-1998 No. 86*, 962 P.2d 245, 247-248 (Colo. 1998) (*In re No. 86*).

[21] *In re Title, Ballot Title, & Submission Clause, & Summary for 1999-2000 No. 25*, 974 P.2d 458, 468 (Colo. 1999) (*In re No. 25*).

may not otherwise support the measure. The disparate spending mandates in Initiative 113 are a stark example of log rolling.

As noted above, Initiative 113 contains seven separate spending mandates, where funds are directed to:

a. The severance tax trust fund;

b. The local government severance tax fund;

c. College scholarships;

d. Native wildlife habitat preservation;

e. Renewable energy and energy efficiency enhancements;

f. Transportation projects; and

g. Community drinking and water and wastewater treatment.

These spending categories are not advisory, but rather mandated in specific proportions.

The spending mandates are not logically connected with one another or with the severance tax itself. For example, college scholarships are not connected with habitat preservation, neither is connected with wastewater treatment, and none are connected to the severance tax. Although one could argue that the spending mandates are ultimately connected in some way with oil and gas exploration, such an approach renders the single subject standards empty of all meaning.

Instead, each spending mandate represents an interest group with a particular pool of voters. By satisfying various interests, initiative proponents

generally may attempt to gather a coalition of voters to pass an initiative. Often proponents will identify the coalition through careful public polling and deal-making. In this instance the proponents have gathered a coalition by distributing tax proceeds for very specific purposes, even though the subjects of the spending have no connection with one another. As one Title Board member stated: "[i]n the papers the proponents of these measures have made clear that they try to figure out who they need to get on board to support a tax increase."[22]

This type of log-rolling – or coalition-building – is the type of mischief that the single subject requirement was designed to avoid. Although he ultimately approved of the single subject because of title board precedence, one board member bluntly stated "I mean, I don't think it's possible, really, to imagine a clearer case of log rolling than this."[23] Allowing the single subject to stand, in light of the plain recognition of log-rolling, unfortunately reduces the public faith in the initiative process.

4. A tax increase does not create a single subject out of disparate spending mandates and priorities.

Finally, to place the disparate and unconnected spending mandates in perspective, this Court should consider if Initiative 113 were silent on tax issues, but required the following budgetary spending increases:

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[22] Tr. 16:1-4.

[23] Tr. 15:13-15.

a. 22% for the severance tax trust fund;

b. 22% for the local government severance tax fund;

c. 33.6% for college scholarships;

d. 8.4% for native wildlife habitat preservation;

e. 5.6% for renewable energy and energy efficiency enhancements;

f. 5.6% for transportation projects; and

g. 2.8% for community drinking and water and wastewater treatment.

Almost certainly, any initiative that contained only these spending increases would violate the single subject. But the proponents have argued that adding the severance tax increase removes these single subject violations, by adding a unifying subject. But disparate spending mandates do not become logically connected to one another merely by the addition of a taxing mandate. Rather these items remain logically unconnected with, and independent of, one another.

C. The title misleadingly states that scholarships may be applied to any college, when in fact the measure specifically excludes junior colleges from scholarship eligibility.

1. Requirement for clear and accurate titles.

Under Colorado law, "the title for the proposed law or constitutional amendment . . . shall correctly and fairly express the true intent and meaning thereof . . . ."[24] As this Court has repeatedly held, titles must be "fair, clear, and

[24] C.R.S. § 1-40-106(3)(b) (2007).

accurate."[25] This is to ensure that "voters are not surprised after an election to find that an initiative included a surreptitious but significant provision that was disguised by other elements of the proposal."[26]

2. By stating that scholarships are for residents attending state colleges, the title misleads junior college students into believing that they are eligible for the scholarships.

As currently written, the title states that revenues are "used to fund scholarships for Colorado residents attending state colleges and universities." But this does not accurately reflect what the measure itself does, because the term "colleges" does not include junior colleges.

The text of Initiative 113 states that scholarships shall be used "for Colorado residents attending state institutions of higher education, as defined by section 23-18-102(10)(a), C.R.S., and local district colleges as described by section 23-82-121.5, C.R.S. . . ."[27]

The term "higher education" does not include junior colleges, as C.R.S. § 23-18-102(10) makes clear. Section (10)(a), which Initiative 113 relies upon, defines "higher education" to mean "a public postsecondary institution that is governed by:"

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[25] *In re Title, Ballot Title, & Submission Clause, & Summary 1999-2000 No. 256*, 12 P. 3d 246, 256 (Colo. 2000); *In re Title, Ballot Title, and Submission Clause for 2007-2008 No. 57*, No. 08SA91, Slip Op. at 10 (Colo. 2008) (*In re No. 57*).

[26] *In re No. 57*, at 10.

[27] Proposed C.R.S. 39-29-110.5(2)(a).

(I) The board of governors of the Colorado State University system;

(II) The board of regents of the University of Colorado;

(III) The board of trustees of the Colorado School of Mines;

(IV) The board of trustees of the University of Northern Colorado;

(V) The board of trustees of Adams State College;

(VI) The board of trustees of Western State College of Colorado;

(VII) The board of trustees of Mesa State College;

(VIII) The board of trustees for Fort Lewis College;

(IX) The board of trustees for Metropolitan State College of Denver; or

(X) The state board for community colleges and occupational education.[28]

This definition does not include junior colleges, and indeed Section (10)(b) makes clear that "'State institution of higher education'" does not include a junior college that is part of a junior college district organized pursuant to article 71 of this title."[29] Accordingly, the term "higher education" as used in Initiative 113 does not include junior colleges.

But the ballot title nonetheless erroneously refers to "colleges."

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[28] C.R.S. § 23-18-102(10)(a) (2007).

[29] C.R.S. § 23-18-102(10)(b) (2007).

This is no small error. In fall 2007, junior colleges in Colorado enrolled 11,105 students,[30] and no doubt these students and their families would all be very surprised to learn that they did not qualify for Initiative 113's scholarships, merely because a "junior college" did not qualify as a "college." A voter reading the term "colleges" in the title would reasonably conclude that the new scholarships would apply to residents attending junior colleges, since junior colleges are logically one type of "college." Indeed, it is difficult to argue otherwise, when Colorado law creates a category of junior colleges, junior colleges advertise themselves as "colleges," and students attending these institutions rightfully believe that they are attending "college."

By using the term "colleges," the ballot title fundamentally misleads voters as to the scope of the available scholarships. There are several ways in which this could be remedied. First, the title could include a parenthetical following the term "colleges" such as "(excluding junior colleges)." Or it could mimic the initiative language by stating that scholarships are available to those attending "state institutions of higher education." In either event, this Court should remand the matter to the Title Board to correct the misleading language.

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[30] According to the Colorado Commission of Higher Education, Colorado Mountain College enrolled 5,206, Northeastern Junior College enrolled 2,571, Otero Junior Coll. enrolled 1,558, and Trinidad Junior Coll. enrolled 1,760, *available at* http://highered.colorado.gov/Data/Search/query.asp?report=enroll.

V. CONCLUSION

The Court should determine that the Title Board did not have jurisdiction to set a title due to the violation of single subject requirements. Alternatively, the Court should remand the matter to the Title Board to correct misleading language.

Respectfully submitted this 12th day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2008, a true and correct copy of the foregoing **OPENING BRIEF OF THE PETITIONER** was served via hand delivery, to the following:

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