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SUPREME COURT, STATE OF COLORADO Court Address: 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	
IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR 2007-2008, #113 ("Severance Tax") **Petitioner**: HOWARD STANLEY DEMPSEY, JR., Objector, v. **Respondents**: MICHAEL A. BOWMAN and DAVID THEOBALD, Proponents, and **Title Board**: WILLIAM HOBBS, SHARON EUBANKS, and DANIEL DOMENICO	**▲COURT USE ONLY▲**
Attorneys for Respondents: Edward T. Ramey, #6748 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: (303) 256-3978 Fax Number: (303) 292-3152 E-mail: eramey@ir-law.com	Case No. 08SA198

ANSWER BRIEF OF RESPONDENT-PROPONENTS

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Michael A. Bowman and David Theobald ("Respondents"), through their undersigned counsel, respectfully submit the following Answer Brief pursuant to the Order of Court, dated June 6, 2008:

I. SUMMARY OF THE ARGUMENT

1. Proposed Initiative for 2007-2008 #113 ("Severance Tax") contains a single subject: creation of a single source of revenue and dedication of the uses for that specific revenue. The proposed initiative represents a single policy proposal by Proponents – that increased revenue be generated from the extraction of a non-renewable resource (oil and gas) from the earth in this state and that this revenue be dedicated and reinvested in the manner proposed for the long-term benefit of the people of the state.

2. The term "state colleges and universities" fairly describes the institutions at which Colorado residents may use the scholarships to be funded by the proposed initiative.

II. ARGUMENT

A. The Proposed Initiative Contains a Single Subject.

Objector Dempsey's first and primary argument appears to be that a single initiative may not levy or increase a tax and concurrently dedicate uses for the resulting revenue. The puzzling implication of this argument is that the Proponents

may ask the voters to levy or increase a tax, but that they must remain mum on what to do with the revenue.

Dempsey cites a series of opinions for this proposition, all or which deal with a quite different issue – and all of which are dependent for context upon a critical earlier opinion which he omits. The first – omitted -- opinion is In re Amend Tabor #32, 908 P.2d 125 (Colo. 1995), dealing with a proposal to impose successive annual credits against an array of state and local taxes and require the state to replace local revenue lost through the credits. This Court found this proposal to constitute a single subject. Id. at 129.

This opinion was followed by In re Proposed Initiatives for 1997-1998 #84 and #85, 961 P.2d 456 (Colo. 1998), cited by Dempsey, where a proposal to impose successive annual decreases in various state and local taxes and require the state to replace all affected local revenue "within all tax and spending limits" – a constitutional qualification not present in Amend Tabor #32 -- was held by this Court to violate the single subject requirement specifically because of that additional qualification. Id. at 459-61. The Court's point was that Amend Tabor #32 "did not impose any limitations on the state in terms of the manner by which the state replaced lost local revenue" – Id. at 459 – while the new proposed initiatives constitutionally constrained the state to replacing the lost local revenue

"within all tax and spending limits," which could only be done by reducing state spending on other state programs. Id. at 460. "Voters would be surprised to learn that by voting for local tax cuts, they also had required the reduction, and possible eventual elimination, of state programs." Id. at 460-61. As cited by Dempsey, this case was followed by In re Proposed Initiatives for 1997-1998 #86 and # 87, 962 P.2d 245 (Colo. 1998), involving "the exact same language as provided in Initiatives #84 and #85" – Id. at 248 – with the same result. Still another attempt at the same theme was addressed in In re Proposed Initiative for 1999-2000 #25, 974 P.2d 458 (Colo. 1999), cited by Dempsey, where the language of the initiative was sufficiently unclear that the Title Board could not even determine whether the effect would or would not be the same – Id. at 467 – leading this Court to conclude that the title could not possibly "clearly" state the initiative's purported single subject. Id. at 468.

The opinions cited by Dempsey do not stand for the proposition that a tax decrease (which he characterizes as a "revenue mandate") may not be combined in a single measure with a direction that portions of the lost revenue be replaced (which he characterizes as a "spending mandate"). In re Amend Tabor #32, the omitted first in the series, held precisely that such measures could be combined within a single subject. Rather, these opinions stand for the proposition that the

replacement mandate cannot contain a further – hidden – requirement that spending on other programs would have to be reduced. "While requiring the state to replace affected local revenue in itself sufficiently relates to a tax cut, requiring the state separately to reduce its spending on state programs is not 'dependent upon and clearly related' to the tax cut" – In re Proposed Initiatives for 1997-1998 #84 and #85, 961 P.2d at 460 – particularly when this would be accomplished through the "mischief" of voter surprise. Id. at 460-61.

In the present case, there is no suggestion, even from Dempsey, of the prospect of "surreptitious" effects or voter surprise. And, the "spending mandates" are directly and necessarily related to and dependent upon the revenue increase.

Dempsey's second and third arguments are somewhat blended. As anticipated in Proponents' Opening Brief, Dempsey finds fault with the facts that (a) the severance tax revenue is not being plowed back into something directly related to the extraction of the oil and gas being taxed and (b) the proposed uses for the revenue are not all categorically related to one another. On the first point, Proponents respectfully reiterate that this is a tax, not a fee – a point also emphasized by the Title Board in its Opening Brief. Please see Proponents' Opening Brief at p. 8; Title Board's Opening Brief at pp. 4-8. The point of a tax is to generate revenue for uses independent of the activity being taxed.

Dempsey's third argument focuses on the fact that the Proponents are proposing various uses for the revenue which do not fall neatly into a single categorical basket. He views this as "political calculus" and "log rolling" – and, apparently in his eye, the worst "mischief" of all, "coalition-building." Dempsey Br. at p. 10.

The implication of Dempsey's argument is that the Proponents, if indeed allowed to propose any use at all for the revenue they seek to generate, must at most propose a single categorical use for 100% of it. Rather than enhance a specific revenue stream to create multiple public benefits, Dempsey would force the Proponents to choose a single special interest to receive the entirety of the benefit -- whether or not the Proponents viewed that to be an optimal public policy choice. It is difficult to think of a more effective way to straight-jacket the initiative process for the benefit of moneyed or momentarily popular special interests and to the indisputable detriment of the public good.

The principal point Dempsey is missing is that the single subject requirement was not designed to inhibit coalitions, consideration of the broader public good, or informed policy choices. "We have never held that just because a proposal may have different effects or that it makes policy choices that are not inevitably interconnected that it necessarily violates the single-subject requirement.

It is enough that the provisions of the proposal are connected." In re Proposed Initiative for 1999-2000 #256, 12 P.3d 246, 254 (Colo. 2000). Here, the provisions are all directly, necessarily, and properly connected to a single tax and single enhanced revenue stream. This is not akin to a general appropriations measure, as Dempsey seems to suggest – each of the proposed uses for the severance revenue is directly, necessarily, and properly connected specifically to the generation of that severance tax revenue.

It is important to recall that the "practices intended by the general assembly to be inhibited" by the single subject requirement are "surreptitious measures" (not at issue here) and "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 diverse political support. § 1-40-106.5(1)(e), C.R.S. (2007) (emphasis added). *Accord*, In re "Public Rights in Waters II," 898 P.2d 1076, 1079 (Colo. 1995), quoting Catron v. Board of County Comm'rs, 33 P. 513, 514 (Colo. 1893). Here, there is a necessary *and* proper connection between the generation and dedication for public purposes of a specific revenue stream from a specific single tax.

B. The Title is Not Misleading.

The title set by the Title Board states that a portion of the revenue proposed to be generated through the proposed initiative would be "used to fund scholarships for Colorado residents attending state colleges and universities." Dempsey's objection is that the title does not explicitly state that this does not include "junior colleges" – a specific type of educational institution separately defined in § 23-71-102, C.R.S. (2007) and excluded from the statutory definition of "state institution of higher education" per § 23-18-102(10), C.R.S. (2007).

Whether the voters would be any more or less "misled" were the Title Board to follow Dempsey's suggestion and use the technical term "state institutions of higher education" (which may in fact be more susceptible in the vernacular to misunderstanding as including junior colleges), or his alternative suggestion to include a parenthetical stating that junior colleges are excluded (though the two-year local district colleges addressed in § 23-72-121.5, C.R.S. (2007) of the statutory article dealing with affiliated junior college districts would have to be excluded from the exclusion), is debatable. To flesh out every detail, the title would also have to make clear that not everyone momentarily residing in Colorado is a "Colorado resident," that "state colleges and universities" does not include private institutions located within the state, that the scholarships will be directed

toward lower and middle income families, that the Colorado Commission on Higher Education would be charged with establishing guidelines and policies for eligibility to receive a scholarship to specifically include consideration of such factors as household income, family size, eligibility for other sources of financial assistance, and the institution the student will be attending, and that the Colorado Commission on Higher Education will also establish academic performance criteria both for obtaining and maintaining a scholarship. None of this is unimportant, and this level of detailed disclosure could readily be extended to each of the proposed uses for the dedicated revenue to a point where the title for this initiative could run literally for pages.

The statement in the title that the specified portion of the revenue would be "used to fund scholarships for Colorado residents attending state colleges and universities" is wholly accurate. This is precisely the purpose for which this portion of the dedicated revenue would be used – though not every person living in Colorado will be eligible at all times to receive or continue to receive a scholarship in any amount to attend any post-secondary institution he or she may choose within the state.

Section 1-40-106(3)(b), C.R.S. (2007) mandates that "Ballot titles shall be brief . . . ." To repeat the Proponents' Opening Brief, the Title Board "need not and

often cannot describe every feature of a proposed initiative in a title or ballot title and submission clause and simultaneously heed the mandate that such documents be concise." In re Proposed Initiative for 1997-1998 #62, 961 P.2d 1077, 1083 (Colo. 1998). "To require such would be to transform what the General Assembly intended – a relatively *brief and plain statement* by the Board setting forth the *central features* of the initiative for the voters – into an item-by-item paraphrase of the proposed constitutional amendment or statutory provision." Id. (emphasis added). The Title Board honored its mandate with this proposed initiative. The title is fair, concise, and in no way misleading.

III. CONCLUSION

Proponents respectfully request the Court to affirm the actions of the Title Board.

Respectfully submitted this 19th day of June, 2008.

ISAACSON ROSENBAUM P.C.

By: _____
Edward T. Ramey

ATTORNEYS FOR RESPONDENT-PROPONENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of June, 2008, a true and correct copy of the foregoing **ANSWER BRIEF OF RESPONDENT-PROPONENTS** was served via hand delivery to the following addressees:

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