

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>JUN 06 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007) Appeal from the Ballot Title Board</p>	
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #125 DOUGLAS BRUCE, OBJECTOR , Petitioner, v. NICOLE S. HANLEN AND LYNDA K. NEFF, PROPONENTS; AND WILLIAM A. HOBBS AND DAN CARTIN, TITLE BOARD, Respondents.</p>	<p>▲ COURT USE ONLY ▲ Case No.: 08 SA 187</p>
<p>JOHN W. SUTHERS, Attorney General MAURICE KNAIZER, DEPUTY ATTORNEY GENERAL* 1525 Sherman Street, 7th Floor Denver, CO 80203 303-866-5380 Registration Number: 5264 *Counsel of Record</p>	
<p>OPENING BRIEF OF TITLE BOARD</p>	

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William A. Hobbs, and Daniel L. Cartin, in their capacities as members of the Title Board (hereinafter “Board”), hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

1. Does proposed initiative #125 contain a single subject?
2. Are the titles for proposed initiative #125 fair, clear and accurate?

STATEMENT OF THE CASE

On March 9, 2008 Nicole S. Hanlen and Lynda K. Neff, the proponents, filed Proposed Initiative #125 (#125) with the Secretary of State. The Board held a hearing to set the titles on May 21, 2008. At the hearing, Douglas Bruce, the Objector, argued that the measure contained three subjects: (1) education funding, (2) transportation funding; and (3) and the elimination of the state refunds. The Board concluded that #125 had a single subject and set titles.

On May 21, 2008 Objector filed a motion for rehearing. He alleged that #125 contained multiple subjects and that the titles were incomplete and inaccurate. On May 29, 2008, he filed a supplement in which he alleged that titles were unclear and reiterated his arguments regarding single subject. On May 28, 2008, the proponents filed a motion for rehearing seeking amendments to the titles.

On May 29, 2008, the Board amended the titles and approved the titles as amended. Objector filed this appeal.

STATEMENT OF THE FACTS

#125, if enacted, would amend Colo. Const. art. IX, § 17. The measure would:

- Eliminate the requirement that through state fiscal year 2010-11 the statewide base per pupil funding and the total state funding for all categorical programs increase by at least the rate of inflation plus one percent
- Eliminate the requirement that for state fiscal year 2011-12 and each following fiscal year, the statewide base per pupil funding and total state funding for all categorical programs increase by at least the rate of inflation
- Eliminate the requirement that through the 2010-11 state fiscal year the general fund appropriation under the school finance act annually increase by at least 5% when personal income grows by at least 4.5% between the two previous calendar years

- Eliminate the prohibition against using moneys appropriated to the state education fund to supplant the level of general fund appropriations for total program under the school finance act existing as of the effective date of Amendment 23.
- Create a state educational fund savings account within the state education fund and specify that the moneys in that account shall consist of 10% of the amount that is annually deposited into the state educational fund from the tax of 1/3 of one percent on the federal taxable income.
- Authorize the general assembly to appropriate money from the account by the enactment of a bill approved by a two-thirds majority of all members elected to each house of the general assembly, and specifies the purposes for which moneys in the account may be used.¹
- Places a cap on the total amount of moneys in the account.

¹ Proponents submitted a companion measure, proposed initiative #126. It authorizes the General Assembly to appropriate money with either a two-third vote “or by a simple majority in any state fiscal year in which Colorado personal income grows less than six percent between the two previous calendar years.” The simple majority vote is the only significant difference between the measures.

- For fiscal years commencing 2009-10 authorize the general assembly to transfer money from the general fund to the state education fund, and specify that the transfers shall not be subject to any statutory limits on general fund appropriations growth or otherwise affect such limitation.
- Specify that such transfers shall be allowed only if the maximum percentage of state sales and use taxes that is required by law to be transferred annually to the highway users tax fund is so transferred.

SUMMARY OF THE ARGUMENT

#125 contains only one subject: a mechanism for funding of public education.

The titles set by the Board are fair, clear and accurate. Although the titles do not describe all of the details of the proposed measure, they do state its central features.

ARGUMENT

I. The Measure Includes Only One Subject: A mechanism for funding public education.

Objector contends that the Board should not have set titles because #125 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if it “relate[s] to more than one subject and ... [has] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2002)(Colo. 2006) (#55) A proposed initiative that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). The single subject rule both prevents joinder of multiple subjects to secure the support of various factions and

prevents voter fraud and surprise. #55, 138 P.3d at 277 *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02* #43, 46 P.3d 438, 442 (Colo. 2002)(#43).

The Court will not address the merits of a proposed measure, interpret it or construe its future legal effects. #43, 46 P.3d at 443. However, the Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *In re Title, Ballot Title and Submission Clause for 2001-2002* #21 and #22, 44 P.3d 213, 216 (Colo. 2002). The single subject rule must be liberally construed to avoid unduly restricting the right of initiative. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98* No. 74, 962 P.2d 927, 929 (Colo. 1998).

Objector asserts that the #125 contains three subjects: (1) the funding of public education, (2) transportation funding and (3) the elimination of refunds under Colo. Const. art. X, § 20. For the following reasons, the Court must reject this argument.

#125 merely amends art. IX, § 17. This section was added to the state constitution in 2000. It increased per pupil funding for public schools and total state funding for special purpose education by at least the rate of inflation plus one

percent for the ten years after its passage and by at least the rate of inflation thereafter. It established a state education fund into which moneys derived from a tax of one third of one percent on federal taxable income would be placed. It exempted such tax from fiscal year spending limits in Colo. Const. art. X, § 20. *An Analysis of the 2000 Statewide Ballot Proposals and Recommendations on Retention of Judges*, (Research Publication No. 475-6) 9.

#125 amends the method for funding the state education fund in Colo Const. art. IX, § 17(4). In addition to existing funding sources, the state education fund created would receive money that would otherwise have been refunded to taxpayers under Colo. Const. art. X, § 20. Ten percent of this money would then be transferred to the newly-established State Education Savings Fund Account. Moneys in the State Education Savings Fund Account could be appropriated only by a two-thirds vote of all members elected to each house of the General Assembly. An appropriation from the State Education Savings Fund Account must be used only for the same purposes as the State Education Fund. The measure also authorizes transfers from the general fund to the state education fund if the maximum percentage of state sales and use taxes attributable to the sales of vehicles and related items is transferred to the Highway Users Tax Fund.

#125 intends to provide additional sources of funding for one purpose: assuring funding for public education. It designates two sources of money. The moneys which otherwise would have been refunded to taxpayers is one source. The second source is taxes on sales and use taxes on vehicles and related items in excess of the amounts that that are required to be transferred to the Highway Users Tax Fund and expended for the implementation of the Strategic Transportation Project Investment. It does not substantively impact transportation.

This Court has concluded that a measure with one purpose and multiple funding sources constituted a single subject. *In re Hunter's Estate*, 97 Colo. 279, 49 P.2d 1009 (1935). In that case, citizens challenged a bill containing multiple fees and taxes from a variety of sources that were used to fund the old age pension program. They contended that the assessment of the separate taxes constituted separate subjects. The Court rejected this claim, noting that the three additional taxes were imposed only for one purpose. *Id.* 97 Colo. at 284, 49 P.2d at 1011.

The Court must conclude that the #125 contains a single subject.

II. The Titles Are Fair, Clear And Accurate.

Section 1-40-106(3), C.R.S. (2007) establishes the standard for setting titles.

Section 1-40-106(3), C.R.S. (2007) establishes the standard for setting titles. It provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00* #256, 12 P.3d 246, 256 (Colo. 2000). However, the Board is not required to set out every detail. #21, 44 P.3d at 222. In setting titles, the Board may not ascertain the measure’s efficacy, or its practical or legal effects. #256, 12 P.3d at 257; *In re Title, Ballot Title and*

Submission Clause, and Summary for 1999-2000 #246(e), 8 P.3d 1194, 1197 (Colo. 2000). The Court does not demand that the Board draft the best possible title. #256, at p. 219. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will reverse the Board's decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994).

Objector contends that the titles should have changed in four ways: (1) the phrase "to Colorado taxpayers" should have been added after the phrase "to refund" on line 4 of the titles; (2) the word "permanently" should have been inserted prior to the word "transferred" on line 5; (3) the phrase "requiring a two-thirds majority vote of the general assembly" should have been amended to conform to the exact language of the measure; and (4) inserting the word "undefined" before the phrase "Colorado personal income" on line 12 of the titles.

These titles are neither misleading nor inaccurate. The titles fairly and accurately restate the key components of the measure. Objector's suggested changes would add words that are not in the measure and which would not significantly enhance the readers' understanding.

CONCLUSION

For the above-stated reasons, the Court must affirm the Board's action.

JOHN W. SUTHERS
Attorney General



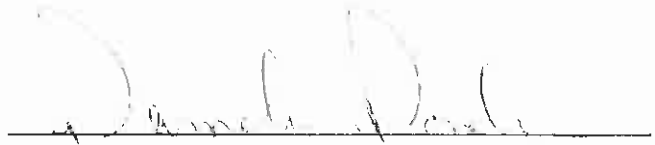
MAURICE KNAIZER, 5264*
DEPUTY ATTORNEY GENERAL
Attorneys for Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same in the United States mail, Express Mail, first-class postage prepaid, at Denver, Colorado, this 6th day of June, 2008 addressed as follows:

Douglas Bruce
Box 26018
Colorado Springs, CO 80936

Blain D. Myhre, Esq.
Isaacson Rosenbaum, P.C.
633 17th Street, #2200
Denver, CO 80202



A handwritten signature in black ink, appearing to read "Blain D. Myhre", is written over a horizontal line.

RECEIVED

MAY 09 2008

May 9, 2008

12:34 P.M.
ELECTIONS
SECRETARY OF STATE

via **HAND DELIVERY**

Ms. Cesi Gomez
Colorado Secretary of State
Elections Division
1700 Broadway, Suite 270
Denver, Colorado 80290

Re: Initiative 2007-2008 #125
Initiative 2007-2008 #126

Dear Ms. Gomez:

Attached please find the required drafts of Initiative 2007-2008 #125 and Initiative 2007-2008 #126 which our office is filing on behalf of the Proponents for each measure.

Sincerely,



Amy Knight
Legal Assistant to Blain D. Myhre

aak
enclosure
1830508_1.doc

To the State Title Board:

MOTION FOR REHEARING

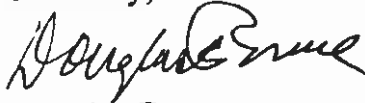
I am a registered Colorado elector. Per C.R.S. 1-40-107 (1), the last sentence, I hereby move for a rehearing on May 30 on petitions 125 and 126 regarding education funding and other subjects.

The grounds for the rehearing are:

1. The attorney general designee has a conflict of interest and should be disqualified from participating in board proceedings on this case.
2. Neither petition is a single subject as required by statutory and constitutional provisions.
3. Neither petition has been given a title that fairly and accurately expresses the true meaning and main and essential features of the text.

In view of the distance between my home and the title board, and based on scheduling conflicts, I request that I be allowed to restate my position by telephone at the rehearing.

Sincerely,



Douglas Bruce
Box 26018
Colo. Spgs. CO 80936
(719) 550-0010
taxcutter@msn.com

RECEIVED

MAY 21 2008

ELECTIONS
SECRETARY OF STATE

DBB

From: Douglas Bruce [taxcutter@msn.com]
Sent: Thursday, May 29, 2008 1:07 PM
To: Cesiah Gomez
Cc: taxcutter@email.msn.com
Subject: Re: Title Board Rehearing 05-29-08 and 05-30-08

**Please call before 1:30 p.m. to confirm receipt,
and distribution to the Title Board.**

Additional grounds for my rehearing motions on #125 and #126 (education funding)-

1. On line three of the title, after "to refund," add "to Colorado taxpayers."
2. Before "transferred," insert "permanently."
3. Conform the 2/3 vote requirement wording in both petitions to the actual language of the text, and to each other..
4. I still object to the linkage to transportation funding, and the elimination of state refunds, as being a second and a third subject.
5. On #126, the word "undefined" should appear in front of "Colorado personal income."

I object that the Title Board is still in the 19th century dawn of technology and declined to allow testimony by speakerphone.

Douglas Bruce
Box 26018
Colo. Spgs. CO 80936
(719) 550-0010
taxcutter@msn.com

5/30/2008

In the Matter of Initiative 2007-08 #125 (Education Funding), Nicole S. Hanlen and Lynda K. Neff, Proponents

MOTION FOR REHEARING

On behalf of the proponents, the undersigned moves for rehearing as follows:

1. On May 21, 2008, the Title Board met and adopted a title for Initiative #125. The Board correctly found that the title met the single-subject requirement. The title set, however, is inaccurate, misleading, and confusing, and should be modified.

2. First, the phrase “requiring that any revenue that the state would otherwise be required to refund pursuant to the constitutional limit on state fiscal year spending (Taxpayer’s Bill of Rights) be transferred instead to the state education fund,” is misleading and confusing. That phrase, particularly the use of the terms “refund” and “Taxpayer’s Bill of Rights,” may well mislead voters into erroneously believing that their state income tax refunds may be diverted to the state education fund—something the measure does not do. In addition, the reference to the Taxpayer’s Bill of Rights is unprecedented in Colorado ballot titles. To the best of proponents’ knowledge, never before has the Title Board used the term “Taxpayer’s Bill of Rights” (or “TABOR”) in setting a title. Instead, the Board has either referred to the specific constitutional provision (article X, section 20) or referred generally to revenue and spending limits. *See* Ballot Title for Amendment 35 (2004 election) (“section 20 of article X of the Colorado Constitution); Ballot Title for Amendment 33 (2003 election) (“exempting net proceeds and license fees from . . . all restrictions on spending, revenues, and appropriations”); Ballot Title for Amendment 26 (2001 election) (“exempting the authority from constitutional revenue and spending limitations”); Ballot Title for Amendment 23 (2000 election) (“exempting appropriations . . . from constitutional and statutory limitations”). The phrase used in the title for #125 not only departs from past Title Board practice, but also creates the danger that voters will be misled into erroneously believing the “Taxpayer’s Bill of Rights” is something other than article X, section 20 of the state constitution.

3. Moreover, the term “Taxpayer’s Bill of Rights” is an impermissible “catch phrase.” A “catch phrase” consists of words that could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment. *In the Matter of the Title, Ballot Title and Submission Clause and Summary for 1999-2000 #227 and #228*, 3 P.3d 1, 6 (Colo. 2000). The use of catch phrases should be carefully avoided by the Title Board. *In the Matter of the Title, Ballot Title and Submission Clause and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). “This rule recognizes that the particular words chosen by the Title Board should

not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion." *Id.* Including the term "Taxpayer's Bill of Rights" puts in place words that can form the basis of a slogan against the initiative, contrary to the supreme court's direction. *See id.* If the term is allowed to stay in the title, the Board will have set a precedent for allowing self-serving catch phrases in future ballot titles. Such catch phrases should be avoided. *See id.* For example, 2007-08 #41 (Amendment 47) is entitled "The Colorado Right to Work Amendment." But the title set for that measure properly does not contain the catch phrase "right to work." If, however, the phrase "Taxpayer's Bill of Rights" is allowed to remain in the title for initiative #125, there would be no justification for excluding the catch phrase "right to work" in the ballot title for Amendment 47 or similar future measures. The supreme court, however, requires the Board to avoid catch phrases when setting titles. Therefore, the catch phrase "Taxpayer's Bill of Rights" should be stricken from the title.

4. The simplest and shortest way to fix this flawed phrase is to rewrite it to read, "requiring that any revenue in excess of the constitutional limit on state fiscal year spending be transferred to the state education fund." This revision remedies the catch-phrase problem and avoids the danger of confusing and misleading the voters.

5. Second, the phrase "for the 2010-11 state fiscal year and each state fiscal year thereafter, creating a state education fund savings account in the state education fund," is both incorrect and redundant. Under the measure, the state education fund savings account would be created immediately, and would be funded beginning in the 2009-10 state fiscal year. *See Proposed Art. IX, Section 17(6).* Thus, the phrase "for the 2010-11 state fiscal year and each state fiscal year thereafter," is inaccurate and should be eliminated. In addition, the phrase "state education fund savings account in the state education fund" is redundant, and should be shortened to "savings account in the state education fund."


6. Finally, the ballot title is simply too long, and its length in itself is likely to make it confusing for voters (and in fact may cause many voters to simply not read it). At 248 words, it is much longer than necessary. Proponents suggest the Board adopt the following revision, which accurately states the title but shortens it to 205 words:

"An amendment to the Colorado constitution concerning the manner in which the state funds public education from preschool through the twelfth grade, and, in connection therewith, requiring that revenue in excess of the constitutional limit on state fiscal year spending be transferred to the state education fund; eliminating the requirement that, for the 2011-12 state fiscal year and each state fiscal year thereafter, the statewide base per pupil funding for public education from preschool through the twelfth grade and the total state funding for all categorical programs increase annually by at least the rate of inflation; creating a savings account in the state education fund; requiring that a portion of the state income tax revenue that is deposited in the state education fund be credited to the savings account in certain circumstances; requiring a two-thirds majority vote of the general assembly to use the moneys in the savings account; establishing the purposes for which moneys in the savings account may be spent; establishing a maximum amount that

may be in the savings account in any state fiscal year; and allowing the general assembly to transfer moneys from the general fund to the state education fund, so long as certain obligations for transportation funding are met.”

Respectfully submitted this 29th day of May, 2008.


ISAACSON ROSENBAUM P.C.


Blain D. Myhre
633 17th Street, Suite 2200
Denver, Colorado 80202
Phone: (303) 292-5656
Fax: (303) 292-3152

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May 2008, a true and correct copy of the foregoing **Motion for Rehearing** was sent via e-mail to the following:

Hon. Douglas Bruce
taxcutter@msn.com



Ballot Title Setting Board

Proposed Initiative 2007-2008 #125¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning the manner in which the state funds public education from preschool through the twelfth grade, and, in connection therewith, for the 2010-11 state fiscal year and each state fiscal year thereafter, requiring that any revenue that the state would otherwise be required to refund pursuant to the constitutional limit on state fiscal year spending be transferred instead to the state education fund; eliminating the requirement that, for the 2011-12 state fiscal year and each state fiscal year thereafter, the statewide base per pupil funding for public education from preschool through the twelfth grade and the total state funding for all categorical programs increase annually by at least the rate of inflation; creating a savings account in the state education fund; requiring that a portion of the state income tax revenue that is deposited in the state education fund be credited to the savings account in certain circumstances; requiring a two-thirds majority vote of the general assembly to use the moneys in the savings account; establishing the purposes for which moneys in the savings account may be spent; establishing a maximum amount that may be in the savings account in any state fiscal year; and allowing the general assembly to transfer moneys from the general fund to the state education fund, so long as certain obligations for transportation funding are met.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning the manner in which the state funds public education from preschool through the twelfth grade, and, in connection therewith, for the 2010-11 state fiscal year and each state fiscal year thereafter, requiring that any revenue that the state would otherwise be required to refund pursuant to the constitutional limit on state fiscal year spending be transferred instead to the state education fund; eliminating the requirement that, for the 2011-12 state fiscal year and each state fiscal year thereafter, the statewide base per pupil funding for public education from preschool through the twelfth grade and the total state funding for all categorical programs increase annually by at least the rate of inflation; creating a savings account in the state education fund; requiring that a portion of the state income tax revenue that is deposited in the state education fund be credited to the savings account in certain circumstances; requiring a two-thirds majority vote of the general assembly to use the moneys in the savings account; establishing the purposes for which moneys in the savings account may be spent; establishing a maximum amount that may be in the savings account in any state fiscal year; and allowing the general assembly to transfer moneys from the general fund to the state education fund, so long as certain obligations for transportation funding are met?

¹ Unofficially captioned “**Education Funding**” by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

*Hearing May 21, 2008:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 11:31 a.m.*

*Hearing May 29, 2008:
Motions for Rehearing granted in part to the extent Board amended titles; denied in all other respects.
Hearing adjourned 2:22 p.m.*

