SUPREME COURT, STATE OF COLORADO 2 E. 14th Ave. #400 Denver, Colorado 80203-2115 ORIGINAL PROCEEDING PURSUANT TO 1-40-107 (2) C.R.S. (2007) Appeal from the Ballot Title Board	**Word count: 1866** Case No. 08SA191
IN THE MATTER OF THE TITLE, BALLOT TILE AND SUBMISSION CLAUSE FOR 2007-2008 #126 ("Education Funding"). **Petitioner:** Douglas Bruce, v. **Respondents:** Nicole S. Hanlen and Lynda K. Neff, Proponents and **Title Board:** WILLIAM HOBBS and DAN CARTIN	**COURT USE ONLY**
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OPENING BRIEF

Because of late notice (June 6th) of the briefing deadline, this Opening Brief was prepared when petitioner lacked access to the local law library. Petitioner cannot dispute or add citations of case law. Petitioner does not dispute, and in fact incorporates, citations by both attorneys of statutory and constitutional law, and accepts their statements of facts, issues, and the case, except as noted below.

I. FACTUAL ERRORS BY TITLE BOARD

Petitioner must begin by correcting gross factual errors by the Title Board. Its first statement of the facts, on page 2, is false. One can see from the text that it does not amend only Article IX, section 17, but also Article X, section 20. That the Board does not accurately admit the full nature of the proposal confirms petitioner's claim that their title does not accurately reflect the true nature of the measure. Read the end of the text to see this is so.

Second, the inflation plus one percent provision in Article IX, section 17 is not affected by the measure, despite the Board's second false claim in the first bullet on page 2. Read the start of the text to see this is so.

Third, the third bullet on page 2 claims a deletion from section 17 that is not shown as deleted in the text, in which only existing subsections (1) and (4) are altered, and new subsections (6) and (7) are added on a different topic. The cited maintenance of effort, section (5), is untouched by this measure.

Fourth, the first bullet on page 3 is ALSO false. That issue is part of the untouched subsection (5).

In view of these four big errors in describing the measure, s it any wonder the Board did not get the title right, nor see its multiple subjects? As further example, the Board repeated at the bottom of page 6 that "#125 merely amends art. IX, section 17." That is FALSE. See section 2 of the text, amending TABOR.

Unwittingly, the Board says on page 8, line 3 "moneys which otherwise would have been refunded to taxpayers" (emphasis added). That confirms one of petitioner's main objections. The Board felt the need to be clear to this court, but

not to the petition-signing and voting public. Petitioner specifically asked at the original setting and in his rehearing documents that voters be informed that it was their tax refunds that would be permanently confiscated by this scheme.

Again, the Board misdescribes the measure on page 8. It says the two sources of money are TABOR refunds to taxpayers and vehicle sales and use taxes in excess of amounts required for statutory transfer to the HUTF. That excess is NOT required to be transferred. The second source is found in (7)(a), which is general fund appropriations newly exempted from the existing statutory limit on appropriations growth (the "Arveschoug-Bird limit"). Subsection (7)(b) instead ties that appropriation to a guarantee of meeting the (changeable) statutory limit for a subject UNRELATED to education funding, namely transportation funding. This ploy recruits road supporters to back this measure, and education funders to lobby for full funding of transportation projects. That coalition is precisely what the single subject rule was adopted to prevent.

Since the Board overtly misunderstands what the measure does, it must not set a title. Since there are multiple subjects, the Board must not set a title. Since the Board clearly does not understand the measures, it failed to "unambiguously state the principle of the provision sought to be added, amended or repealed," as required by 1-40-106 (3) C.R.S. The Board also violated the requirement of "brevity" of ballot titles stated in that same statutory subsection. Even proponents agreed with and adopted that criticism in their motion for rehearing.

II. DEFECTS IN TITLE WORDING SET BY TITLE BOARD

As the Board's attorney has here admitted, the phrase "to Colorado taxpayers"

is vital to understand what the measure does. At the first setting, the Board used the phrase "Taxpayer's Bill of Rights" (TABOR) to describe what constitutional refund provision would be eliminated FOREVER. That phrase was removed on a rehearing motion by proponents, whose attorney did not want the public to realize they were being asked to give up their TABOR tax refunds FOREVER. Since the original title mentioned TABOR by name, petitioner did not move that it remain there. Petitioner does now move that that first-setting wording be restored. Right now, voters may well perceive that money in one government fund would be returned or refunded to another government fund, something they are less likely to care about than the permanent loss of THEIR tax refunds previously received.

It is not a "catch phrase" to call a well-known provision by its official title that is stated verbatim in the state constitution in bold print. To avoid doing so is the real deception. This is not a case of a new concept, but of a provision that is easily recognized and incessantly discussed. It is not like Amendment 41, which was improperly allowed to have as its subject "ethics in government." People won't know here what constitutional provision is affected unless they are told explicitly. They need to know they would be voting to give up forever their hard-won rights under the Taxpayer's Bill of Rights (TABOR) Amendment.

In a five-year period, those state refunds totaled **$3.4 BILLION,** an average amount of about $700 per man, woman, and child, or $2800 per average family of four. Is that amount insignificant to an informed voter decision? **NO!** Is the title, in the words of the Board "insufficient, unfair or misleading?" **YES!**

Right now, the title does not tell voters WHOSE REFUND is being

permanently confiscated. Voters are entitled to know IT IS THEIR REFUND. They also have a right to know they would be losing forever the following constitutional rights, among others:

1. Their right to tax refunds of excess TABOR revenue, a very large sum, both individually and in the aggregate.

2. Their right to control runaway government spending at the ballot box.

3. Their right to protection from new fees and fee increases, which are not limited directly, but only indirectly through the spending revenue limit this new stealth measure would permanently repeal.

4. Their right to vote on tax increases, which would be falsely labeled as fee increases hereafter and never submitted for voter approval. This is already occurring at the local level, particularly in jurisdictions that have claimed to have "de-TABORed," as though state constitution rights are by local option!

TABOR is unquestionably the best-known and most controversial of all state constitutional provisions. This same provision, subsection (7), was the subject of a heated, expensive, and close election on Referendum C as recently as 2005. It is also the subject of well-publicized and controversial litigation in the illegal School Finance Act case headed for this court, and hundreds of local elections.

Despite petitioner's request, the fact that this would be a permanent change was also suppressed. The permanent eradication of constitutional rights must be clearly stated in the title. Political suicide is bad enough; uninformed suicide is a act of cynical corruption from breach of a legal duty to inform the public.

The accurate phrase for the two-thirds legislative language was available and requested. Not providing it was a travesty. There is a big difference between the text's requirement of a two-thirds vote of each house, and two-thirds of the general assembly. One requires at least 24 senators and 44 representatives. The

other would allow 2 senators and 65 representatives. That is a much lower barrier. Also, the text says the former; why should the Board state that which is not accurate? Even more ludicrous, the same two-thirds language is described differently in the titles for measures #125 and #126. One says "each house of" and the other does not. They can't both be right!

There is no definition of "Colorado personal income" in the measure. That creates the appearance of a limit, but leaves it up to the state to alter the definition based on legislative whim. That is no standard and no protection. If the Board cannot understand a measure, it must be returned to proponents. At the very least, voters should be alerted that the stated standard is meaningless and subject to later political manipulation. It is also unstated whether the test is aggregate or individual Colorado personal income, adjusted for inflation in "real terms," etc.

III. THE MEASURE CONTAINS MORE THAN ONE SUBJECT.

One purpose of the single-subject rule is to prevent "logrolling," or building political coalitions to pass a amalgam of changes that could not pass on their own individual merit. See 1-40-106.5 (e)(I) C.R.S. The other goal is to prevent voter surprise regarding stealth provisions "folded in the coils" of another measure. The linkage to transportation funding is just such an abuse. It is political reality that Republicans favor more spending on roads and Democrats want more spending on education. This measure gives the ILLUSION of guaranteeing both. It is an illusion because this constitutional measure ropes in a STATUTORY limit that the general assembly may change at any time. Still,

the text engages in the practice forbidden by Article V, section 1 (5.5) of the state constitution this court took an oath to uphold. There is NO LOGICAL NEXUS or connection between transportation funding and education funding. They are not necessarily or properly joined in one measure. If the measure had tied its funding scheme to multiple triggers—the crime rate, water tables, the cost of health care, etc.—this court would see the naked violation even more clearly. But TWO subjects is a sufficient violation; five are not required.

The term "categorical programs" can mean whatever a future general assembly wants it to mean. The definition in Article IX, section 17 (2)(a) is not even limited to being related to education! It only must be a current or future "accountable program." The subject matter is not limited, so it is not limited to education, so it need not be related to the subject of "education funding."

Petitioner is a state representative in the general assembly. It was overt and admitted by the original proponent, Speaker Romanoff, as reported in the media regularly this spring, that this measure, which failed in committee in the first house before it was filed as an initiative petition, was a "grand compromise" to do what previously had been agreed could not be done in one measure. The Speaker had even publicly proposed a constitutional measure to lift temporarily the single subject rule so this log-rolling deal to unite the education lobby, the TABOR haters, and the road builders could proceed. Now proponents are bluffing their way through this assemblage of various unrelated "reforms" by saying that what their advocates had earlier this year called separate subjects was now magically one.

CONCLUSION

The Board cannot even truthfully describe the measure to this court, and obviously does not understand it. The measure contains more than one subject. The wording is inaccurate, incomplete, and suppresses vital features of the measure. The title and ballot title and submission clause must be stricken, and the text returned to proponents.

Submitted,

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Certificate of Service

I hereby certify that on June 9, 2008, I emailed and mailed, postage paid, or had hand-delivered, or all three, copies of this Opening Brief to the Board attorney and to the attorney of record for proponents, addressed as follows:

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