ORIGINAL

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<tr><td>SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue, Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2005)
Appeal from the Ballot Title Setting Board</td><td>FILED IN THE SUPREME COURT
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OF THE STATE OF COLORADO
SUSAN [illegible]
▲ COURT USE ONLY ▲</td></tr>
<tr><td>IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR 2005-2006, #73

Petitioners:
BEVERLY AUSFAHL and NICOLE KEMP, Objectors,

v.

Respondents:
JON CALDARA and DENNIS POLHILL, Proponents,

and

Title Board:
WILLIAM A. HOBBS, ALLISON EID, and DANIEL L. CARTIN</td><td>Case No. 06SA42</td></tr>
<tr><td>Attorneys for Petitioners:
Edward T. Ramey, #6748
Isaacson Rosenbaum P.C.
633 17th Street, Suite 2200
Denver, Colorado 80202
Phone Number: 303/292-5656
Fax Number: 303/292-3152
E-mail: eramey@ir-law.com</td><td></td></tr>
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Attachments:

Colorado Secretary of State Certificate, text, motion for rehearing, titles, and the rulings thereon of the Title Board on proposed Initiative 2005-2006 #73

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Beverly Ausfahl and Nicole Kemp ("Petitioners"), through their undersigned counsel, respectfully submit the following Opening Brief in support of their Petition for Review of Final Action of the Ballot Title Setting Board Concerning Proposed Initiative for 2005-2006 #73 ("Issue Committee Contributions").

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Proposed Initiative for 2005-2006 #73 contains multiple subjects in violation of Colo. Const. art. V, § 1(5.5) and § 1-40-106.5, C.R.S. (2005), thereby depriving the Title Board of jurisdiction to set a title.

2. The title, ballot title, and submission clause set for proposed Initiative for 2005-2006 #73 do not fairly express the true meaning and intent of the proposed constitutional amendment.

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Before the Title Board.

This Original Proceeding is brought pursuant to § 1-40-107(2), C.R.S. (2005), seeking review of the actions of the Ballot Title Setting Board regarding proposed Initiative for 2005-2006 #73. The Petitioners are registered electors who timely submitted a Motion for Rehearing before the Title Board raising the objections presented herein pursuant to § 1-40-107(1), C.R.S. (2005).

The Title Board conducted its initial public meeting and set a title, ballot title, and submission clause for proposed Initiative for 2005-2006 #73 on January 18, 2006. The Petitioners filed a Motion for Rehearing on January 25, 2006. The Motion for Rehearing was heard at the next regularly scheduled meeting of the Title Board on February 1, 2006. At the rehearing, the Title Board overruled Petitioners' objections. Petitioners filed their Petition for Review with this Court on February 6, 2006.

B. Statement of Facts.

Proposed Initiative for 2005-2006 #73 seeks to amend Colo. Const. art. X, § 20 (popularly known as "TABOR"), by adding a new subsection primarily directed at eliminating what the proponents describe as "pay-to-play" – contributions to issue committees supporting TABOR ballot measures by persons who might stand to gain any form of direct or indirect benefit from the passage of the measure. A copy of the initiative, as well as a copy of the title, ballot title, and submission clause, are attached hereto. Notwithstanding its principal focus, the proposed initiative stretches well beyond its primary subject. And, the title omits several critical components and effects.

III. SUMMARY OF THE ARGUMENT

1. Proposed Initiative for 2005-2006 #73 contains at least three distinct subjects: (a) a restriction upon the ability of governmental districts to provide any form of economic or business benefit to persons who have contributed more than $500 to an issue committee that supported a TABOR ballot measure for that district; (b) an apparent prohibition of "pass-through" contributions to Colo. Const. art. XXVIII issue committees generally; and (c) a retroactive invalidation of otherwise valid TABOR elections and a mandatory refund of all collected revenues.

2. The title, ballot title, and submission clause for proposed Initiative for 2005-2006 #73 do not fairly express the true meaning and intent of the proposed constitutional amendment by: (a) affirmatively stating that the restrictions apply only to "tax or debt campaign[s]" when they also apply to all other TABOR measures including campaigns for relief from spending and revenue limits; (b) failing to disclose the mandated refund of revenues resulting from invalidated TABOR elections; (c) failing to disclose the apparent amendment to Colo. Const. art. XXVIII regarding pass-through contributions to issue committees; and (d) failing to disclose the restrictions upon "pooling" of contributions.

IV. ARGUMENT

A. Single Subject.

Colo. Const. art. V, § 1(5.5) provides that "[i]f 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." "To violate the single subject requirement, an initiative must: 1) 'relate to more than one subject' and 2) have 'at least two distinct and separate purposes which are not dependent upon or connected with each other.'" In re Proposed Initiatives for 2003-2004 #32 and #33 and 2003-2004 #21 and #22, 76 P.3d 460, 461 (Colo. 2003), quoting In re Public Rights in Waters II, 898 P.2d 1076, 1078-79 (Colo. 1995). This Court has recognized the single-subject requirement to be "intended to prevent voters from being confused or misled and to ensure that each proposal for change is considered on its own merits." In re Proposed Initiative for 1997-1998 #74, 962 P.2d 927, 928 (Colo. 1998).

The primary subject of proposed Initiative for 2005-2006 #73 is clearly the enactment of a constitutional restriction upon the ability of governmental districts to provide any form of economic or business benefit (contracts, employment, gifts, purchases, and sales) to individuals or entities who have contributed more than

$500 to an issue committee that supported a TABOR ballot measure for that district. Most of the remainder of the measure flows from that. However, two distinct subjects also appear.

First, the initiative provides in paragraph (2)(B) that "pass-through contributions to issue committees through other individuals or entities *are expressly prohibited and* are included in the limitations of (2)(A)" (emphasis added). While the incorporation of pass-through contributions into the "limitations of (2)(A)" pertains to the primary subject, the additional complete prohibition of pass-through contributions to issue committees generally does not. Rather, the explicit general prohibition adds a restriction properly within the scope of Colo. Const. art. XXVIII – where, incidentally, a somewhat similar restriction already exists with regard to candidate committees though notably *not* with regard to issue committees. *See* Colo. Const. art. XXVIII, § 2(4), §3(7).

The third subject of the initiative is paragraph (2)(D)'s retroactive invalidation of otherwise valid TABOR elections, *and mandatory refund of all collected revenues*, should a district be determined at some point "to have violated" the restrictions of paragraph (2)(A), *i.e.*, to have provided some form of business or economic benefit or employment to a person who had contributed more than $500 to an issue committee supporting a successful TABOR measure. While paragraph

(2)(D) is labeled simply "Enforcement," this provision goes a long way beyond the reasonable ambit of that term.

This Court has held on a number of occasions that "implementation details" that are directly tied to the primary focus of an initiative do not constitute separate subjects. *See, e.g.*, In re Proposed Initiative for 1999-2000 #200A, 992 P.2d 27, 30-31 (Colo. 2000); In re Proposed Initiative for 1997-1998 #74, *supra*, at 929. In the present context, requiring the return of a benefit or invalidation of a contract with a person who had contributed more than $500 to a relevant issue committee would constitute an "implementation detail."

Here, however, the complete retroactive invalidation of an entire district election and mandate that all revenues collected (presumably, though not clearly, limited to those obtained as a result of the measure passed at the election) be refunded to taxpayers – though these revenues may well already have been spent or irrevocably committed – is a whole lot more than an "implementation detail." It would constitute a major and broad-sweeping undoing of the public will to punish a peripheral, likely minor, and quite probably unintentional lapse by a public official in a hiring or contracting decision. It would uniformly undermine the finality of all TABOR ballot elections for an indeterminate period of time. And, particularly if revenues or borrowings have been spent or committed by the time a

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"pay-to-play challenge" is brought, it could easily obligate a district to curtail wholly independent programs to obtain the funds necessary for the mandated refund. The effect could easily be draconian, and the connection with the offending contribution less than tenuous.

In 1998, this Court confronted an initiative that proposed to lower various state and local taxes, require the state to replace resulting local revenue loss, and hold the state's revenue replacement obligation within its own tax and spending limits. In re Proposed Initiatives for 1997-1998 #84 and #85, 961 P.2d 456 (Colo. 1998). The Court noted that the latter component of the initiative would necessarily result in mandated reductions in state spending on other state programs to enable it to meet its local revenue replacement obligations. Id. at 460. This, the Court held, was a separate subject. Id. "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. The effect was "dual constitutional changes" – Id. at 460 – "precisely the types of mischief which the single subject requirement was intended to prevent." Id.

The present case is conceptually similar – voters would be asked to: (1) prevent their governmental districts from conferring economic or business benefits upon certain contributors to issue committees that had supported TABOR ballot

measures, while concurrently; (2) rendering all TABOR elections retroactively voidable and their districts potentially obligated to refund revenues already committed or spent – with the resulting almost inevitable reduction, or possible collapse, of other wholly independent district programs. Again, these are "dual constitutional changes" with significant hidden implications. And, the present measure is potentially massively more pernicious than the 1998 measure.

B. Ballot Title Disclosure.

The title, ballot title, and submission clause set by the Title Board for proposed Initiative for 2005-2006 #73 do not "fairly express the true meaning and intent of the proposed . . . constitutional amendment" as required by §1-40-107(1), C.R.S. (2005). Particularly, they fall short in the following respects of "enabling informed voter choice," as this Court has mandated. In re Proposed Initiative for 1999-2000 #37, 977 P.2d 845, 846 (Colo. 1999), quoting In re Proposed Initiative for 1999-2000 #29, 972 P.2d 257, 266 (Colo. 1999).

First, the title affirmatively states – and misrepresents – that the restrictions imposed by the initiative apply only to "tax or debt campaign[s]." Paragraph 2(A) of the initiative expressly includes "any other ballot issue that must adhere" to Colo. Const. art. X, § 20. This would include ballot issues containing mill levy and property valuation adjustments and tax policy changes – *see* Colo. Const. art.

X, § 20(4)(a) – as well as measures intended to provide relief from spending and revenue limits per Colo. Const. art. X, § 20(7). These – particularly the latter – are generically different issues from "tax or debt campaign(s)." *Cf*, In re Proposed Initiative for 1997-1998 #30, 959 P.2d 822, 826 (Colo. 1998). As illustrated by "Referendum C" in the state's 2005 general election, this is not an incidental omission.

Second, there is no mention in the title of paragraph (2)(B)'s restrictions upon "pass-through" contributions. This may be viewed as an incidental omission of detail were it not for that paragraph's broad prohibition of "pass-through" contributions to issue committees generally – as discussed above a significant amendment to Colo. Const. art. XXVIII and a separate subject. The voters are entitled to be apprised of this.

Third, there is no mention in the title of the "pooling" restrictions contained in paragraph (2)(C) of the initiative. Again, this could be viewed at first blush as an incidental omission of detail, though its importance becomes apparent when one considers that a secondary contributor to someone who "pools" contributions becomes subject to the initiative's economic, business, and employment restrictions based upon a lower ($400) contribution than disclosed in the title.

Finally, there is no mention in the title of the hugely important potential refund obligation that the initiative places upon governmental districts. As discussed above, this involves more than simply "voiding the subject election" as the title suggests. It has the very real potential to curtail wholly unrelated district programs if not financially ruin the district. This is a potential impact that should be made very, very clear to voters being asked to approve what the title suggests is simply a prohibition upon persons benefiting from campaign contributions.

V. CONCLUSION

For the reasons set forth above, the Petitioners request the Court to reverse the actions of the Title Board and to direct the Board to strike the title, ballot title, and submission clause and return proposed Initiative for 2005-2006 #73 to its proponents.

Respectfully submitted this 27th day of February, 2006.

ISAACSON ROSENBAUM P.C.

By: ______________________
Edward T. Ramey, #6748

ATTORNEYS FOR PETITIONERS

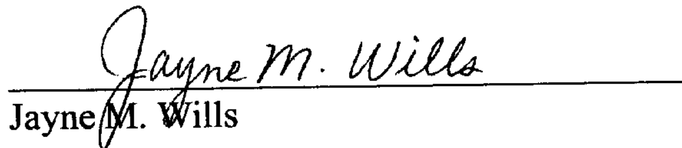
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of February, 2006, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was forwarded, as listed, to the following addressees:

Via Federal Express
Jon Caldara
14142 Denver West Parkway
Golden, CO 80401

Via Federal Express
Dennis Polhill
49 South Lookout Mountain Road
Golden, CO 80401

Via Hand Delivery
Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, CO 80203



Jayne M. Wills

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STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, GINETTE DENNIS, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2005-2006 #73".

..............**IN TESTIMONY WHEREOF** I have unto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver this 6th day of February, 2006.

Ginette Dennis

SECRETARY OF STATE

10 Final Copy

RECEIVED
JAN 06 2006
ELECTIONS/LICENSING
SECRETARY OF STATE

BE IT ENACTED BY THE PEOPLE OF THE STATE OF COLORADO:

ARTICLE X, SECTION 20 (TAXPAYER'S BILL OF RIGHTS) OF THE CONSTITUTION OF THE STATE OF COLORADO IS AMENDED BY THE ADDITION OF A NEW SUBSECTION TO READ:

(10) **SYSTEM TO END PAY-TO-PLAY**. (1) THIS SECTION TAKES EFFECT DECEMBER 31, 2006. THE PREFERRED INTERPRETATION SHALL REASONABLY DISCOURAGE THE PRACTICE KNOWN AS PAY-TO-PLAY, WHERE INDIVIDUALS AND ENTITIES CONTRIBUTE TO A TAX OR DEBT ELECTION CAMPAIGN WITH THE EXPECTATION OF OR PREREQUISITE OF RECEIVING, A REWARD, EITHER FINANCIAL OR OTHERWISE.

(2)(A) ANY INDIVIDUAL OR ENTITY THAT CONTRIBUTES MORE THAN FIVE HUNDRED DOLLARS, WHETHER CASH OR THE EQUIVALENT, EITHER DIRECTLY OR INDIRECTLY, TO ANY ISSUE COMMITTEE AS DEFINED IN SECTION 2(10) (A) OF ARTICLE XXVIII, OR ANY COMBINATION OF ISSUE COMMITTEES, THAT ADVOCATES IN FAVOR OF A BALLOT ISSUE THAT RAISES A TAX RATE, CONTINUES A TAX THAT WOULD OTHERWISE EXPIRE, CREATES A NEW TAX, OR INCREASES PUBLIC INDEBTEDNESS, OR ANY OTHER BALLOT ISSUE THAT MUST ADHERE TO THIS SECTION, SHALL NOT PROFIT BY RECEIVING A GIFT, BY RECEIVING EMPLOYMENT, BY BEING AWARDED A CONTRACT, OR BY RECEIVING ANY TRANSFER OF TAXPAYER ASSETS OR FUNDS IN EXCHANGE FOR GOODS OR SERVICES FROM THAT DISTRICT FOR WHICH THIS SECTION APPLIES FOR THE PERIOD THE SUBJECT TAX OR PUBLIC INDEBTEDNESS IS IN PLACE.

(B) PASS-THROUGH CONTRIBUTIONS TO ISSUE COMMITTEES THROUGH OTHER INDIVIDUALS OR ENTITIES ARE EXPRESSLY PROHIBITED AND ARE INCLUDED IN THE LIMITATIONS OF (2) (A). THE ORIGINATOR OF THE CONTRIBUTION AS WELL AS ALL INDIVIDUALS OR ENTITIES THAT HANDLED A PASSED-THROUGH CONTRIBUTION ARE SUBJECT TO THE LIMITATIONS STATED IN (2) (A).

(C) IF A CONTRIBUTION OF MORE THAN FIVE HUNDRED DOLLARS COMES FROM ANY INDIVIDUAL OR ENTITY THAT POOLS FUNDING FROM OTHER INDIVIDUALS OR ENTITIES, THEN ALL THE INDIVIDUALS AND ENTITIES THAT HAVE CONTRIBUTED MORE THAN FOUR HUNDRED DOLLARS INTO THAT ENTITY THAT POOLS SUCH FUNDING ARE SUBJECT TO THE LIMITATIONS STATED IN (2) (A).

(D) ENFORCEMENT. WHEN A DISTRICT IS FOUND TO HAVE VIOLATED PAY-TO-PLAY STATED IN (2) (A), THE SUBJECT ELECTION IS CONSIDERED VOID. REVENUES COLLECTED PRIOR TO AN UPHELD PAY-TO-PLAY CHALLENGE, SHALL BE REFUNDED TO TAXPAYERS.

Jon Caldera
13952 Denver West Parkway Ste #400
Golden, CO
303-279-6536

David Chandler
7930 Kendall St
Arvada, CO
303-424-9897

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BALLOT TITLE BOARD

MOTION FOR REHEARING

IN RE PROPOSED INITIATIVE 2005-2006 #73 ("ISSUE COMMITTEE CONTRIBUTIONS")

Beverly Ausfahl and Nicole Kemp ("Petitioners"), being registered electors of the State of Colorado, through their undersigned counsel, respectfully submit the following Motion for Rehearing, pursuant to C.R.S. §1-40-107(1), concerning the actions of the Title Board at the hearing on January 18, 2006, regarding Proposed Initiative 2005-2006 #73 ("Issue Committee Contributions"). Petitioners request a rehearing with regard to the following issues:

1. The Board lacks jurisdiction to set a title for this Initiative as it contains multiple subjects in violation of Colo. Const. art. V, §1(5.5) and C.R.S. §1-40-106.5. Specifically, the Initiative (a) amends Colo. Const. art. X, §20 to prevent certain persons from receiving gifts, employment, contract awards, or transfers of taxpayer assets or funds from districts that have passed various forms of ballot issues; (b) effectively amends Colo. Const. art. XXVIII (though purportedly by amendment to Colo. Const. art. X, §20) to prohibit specified "pass-through" contributions to issue committees; (c) further effectively amends Colo. Const. art. XXVIII (though purportedly by amendment to Colo. Const. art. X, §20) to restrict a defined practice of "pooling" contributions to issue committees; (d) voids elections otherwise freely and fairly voted upon; and (e) mandates refunds to taxpayers of revenues collected in the event of an upheld challenge to covered contributions.

2. The title does not clearly and fairly apprise the voters that the restrictions upon contributions to issue committees set forth in section (2)(A) apply to all ballot issues within the

scope of Colo. Const. art. X, §20 – to include, *e.g.*, relief from spending limits – rather than just those concerning "a tax or debt increase."

3. The title does not clearly and fairly apprise the voters that the Initiative is effectively amending various provisions of Colo. Const. art. XXVIII.

4. The title wholly fails to apprise the voters that the Initiative prohibits "pass-through" contributions to issue committees.

5. It is not clear from the text of the Initiative what a "pass-through" contribution is – *e.g.*, whether or not it must be intended or earmarked by the initial contributor to be directed to the subject issue committee – and it is therefore not possible to set a clear and fair title with regard to this provision so that the voters may make an informed choice. In re Proposed Initiative 1999-2000 #37, 977 P.2d 845 (Colo. 1999).

6. It is not clear from the text of the Initiative whether the prohibition upon "pass-through" contributions applies to all issue committees as defined in Colo. Const. art. XXVIII or solely to issue committees supporting ballot issues within the ambit of Colo. Const. art. X, §20. It is therefore not possible to set a clear and fair title with regard to this provision so that the voters may make an informed choice. In re Proposed Initiative 1999-2000 #37, 977 P.2d 845 (Colo. 1999).

7. It is not clear from the text of the Initiative what individuals or entities will be deemed to have "handled" a "pass-through" contribution. It is therefore not possible to set a clear and fair title with regard to this provision so that the voters may make an informed choice. In re Proposed Initiative 1999-2000 #37, 977 P.2d 845 (Colo. 1999).

8. The text of the Initiative is internally inconsistent in both prohibiting "pass-through" contributions and simultaneously including them within the limitations established by

paragraph (2)(A). It is therefore not possible to set a clear and fair title with regard to this provision so that the voters may make an informed choice. In re Proposed Initiative 1999-2000 #37, 977 P.2d 845 (Colo. 1999).

9. The title wholly fails to apprise the voters regarding the "pooling" restrictions of paragraph (2)(C).

10. It is not clear from the text of the Initiative what it means to "pool[] funding." It is therefore not possible to set a clear and fair title with regard to this provision so that the voters may make an informed choice. In re Proposed Initiative 1999-2000 #37, 977 P.2d 845 (Colo. 1999).

11. The title fails to disclose that revenues collected prior to an "upheld pay-to-play challenge" must be refunded to the taxpayers.

12. It is not clear from the text of the Initiative how a district can be found to have violated "pay-to-play" restrictions upon contributors to issue committees, and particularly in the context of "pass-through" or "pooling" violations incorporated into paragraph (2)(A) by paragraphs (2)(B) and (2)(C). It is therefore not possible to set a clear and fair title with regard to this provision so that the voters may make an informed choice. In re Proposed Initiative 1999-2000 #37, 977 P.2d 845 (Colo. 1999).

13. It is not clear from the text of the Initiative what or who may find or uphold a "pay-to-play challenge" or before whom, by whom, or against whom such a challenge may be brought. It is therefore not possible to set a clear and fair title with regard to the "enforcement" provision of the Initiative so that the voters may make an informed choice. In re Proposed Initiative 1999-2000 #37, 977 P.2d 845 (Colo. 1999).

Respectfully submitted this 25th day of January, 2006.

ISAACSON ROSENBAUM P.C.

By: ______________________
Mark G. Grueskin, #14621
Edward T. Ramey, #6748
633 17th Street, Suite 2200
Denver, Colorado 80202
Telephone: (303) 292-5656
Facsimile: (303) 292-3152

ATTORNEYS FOR PETITIONERS

Petitioners' Addresses:

Beverly Ausfahl
603 East 7th Avenue
Denver, CO 80203

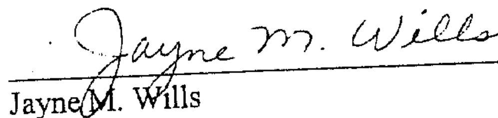
Nicole Kemp
3332 West Moncrieff Place
Denver, CO 80211

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of January, 2006, a true and correct copy of the foregoing **MOTION FOR REHEARING** was placed in the United States mail, postage prepaid, to the following:

Mr. Jon Caldara
14142 Denver West Parkway
Golden, CO 80401

Mr. Dennis Polhill
49 South Lookout Mountain Road
Golden, CO 80401



____
Jayne M. Wills