

ORIGINAL

Certification of Word Count: 1,739

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, Denver, Colorado 80203</p> <p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2005) Appeal from the Ballot Title Setting Board</p>	<p>FILED IN THE SUPREME COURT</p> <p>FEB 27 2006</p> <p>OF THE STATE OF COLORADO SUSAN L. FESTAG, CLERK ▲ COURT USE ONLY ▲</p>
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR 2005-2006, #74</p> <p><b>Petitioners:</b> BEVERLY AUSFAHL and NICOLE KEMP, Objectors,</p> <p>v.</p> <p><b>Respondents:</b> JON CALDARA and DENNIS POLHILL, Proponents,</p> <p>and</p> <p><b>Title Board:</b> WILLIAM A. HOBBS, ALLISON EID, and SHARON L. EUBANKS</p>	<p>Case No. 06SA41</p>
<p>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: <a href="mailto:eramey@ir-law.com">eramey@ir-law.com</a></p>	
<p><b>PETITIONERS' OPENING BRIEF</b></p>	

**TABLE OF CONTENTS**

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW ..... 1

II. STATEMENT OF THE CASE ..... 1

    A. Nature of the Case, Course of Proceedings, and Disposition Before  
        the Title Board..... 1

    B. Statement of Facts ..... 2

III. SUMMARY OF THE ARGUMENT ..... 3

IV. ARGUMENT ..... 3

V. CONCLUSION..... 8

**Attachments:**

Colorado Secretary of State Certificate, text, motion for rehearing, titles, and  
the rulings thereon of the Title Board on proposed Initiative 2005-2006 #74

## TABLE OF AUTHORITIES

### **Cases**

<u>In re "Amend TABOR #25,"</u> 900 P.2d 121 (Colo. 1995).....	3
<u>In re "Amend TABOR #32,"</u> 908 P.2d 125 (Colo. 1995).....	4, 6
<u>In re Proposed Initiative for "Public Rights in Waters II,"</u> 898 P.2d 1076 (Colo. 1995).....	5
<u>In re Proposed Initiative for 1996-4,</u> 916 P.2d 528 (Colo. 1996).....	4, 5
<u>In re Proposed Initiative for 1997-1998 #30,</u> 959 P.2d 822 (Colo. 1998).....	5, 6
<u>In re Proposed Initiative for 1997-1998 #74,</u> 962 P.2d 927 (Colo. 1998).....	3
<u>In re Proposed Initiatives for 1997-1998 #84 and #85,</u> 961 P.2d 456 (Colo. 1998).....	6
<u>In re Proposed Initiatives for 1997-1998 #86 and #87,</u> 962 P.2d 245 (Colo. 1998).....	7
<u>In re Proposed Initiative for 1999-2000 #25,</u> 974 P.2d 458 (Colo. 1999).....	7
<u>In re Proposed Initiative for 1999-2000 #37,</u> 977 P.2d 845 (Colo. 1999).....	7

### **Constitutional Provisions**

Colorado Constitution, Article V, § 1(5.5) .....	1, 2, 3
Colorado Constitution, Article X, § 20 .....	2, 3, 4, 6, 7

### **Statutes**

Colorado Revised Statutes § 1-40-106.5 (2005).....	1
Colorado Revised Statutes § 1-40-107(1) (2005) .....	1
Colorado Revised Statutes § 1-40-107(2) (2005).....	1

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 #74 ("Expiration of Voter-Approved TABOR Issues").

## **I. STATEMENT OF ISSUE PRESENTED FOR REVIEW**

Proposed Initiative for 2005-2006 #74 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.

## **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 #74. Petitioners are registered electors who timely submitted a Motion for Rehearing before the Title Board raising the objection 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 #74 on January 18, 2006. Petitioners filed a Motion for Rehearing on January 25, 2006, objecting

that the proposed initiative contained multiple subjects. 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' objection. Petitioners filed their Petition for Review with this Court on February 6, 2006.

**B. Statement of Facts.**

Proposed Initiative for 2005-2006 #74 seeks to amend Colo. Const. art. X, § 20 – popularly known as the "Taxpayer's Bill of Rights" or "TABOR" – by the addition of a new subsection that reads as follows:

(10) **Term Limits for Taxes.** (A) This subsection takes effect December 31, 2006. The preferred interpretation shall prevent one generation's decision to increase tax or debt from burdening future generations without future generations' direct voting consent.

(B) Any 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 passed after December 31, 2006 must sunset, expire, and end within ten years of its passage. Such ballot issue may be renewed by a subsequent vote of the people, but not for longer than 10 years.

Colo. Const. art. X, § 20 was itself adopted by initiative in 1992, two years prior to the adoption by referendum of the single-subject requirement now contained within Colo. Const. art. V, § 1(5.5). Subsequent efforts to repeal or amend all or parts of Colo. Const. art. X, § 20 have been required to comply with this constitutional single-subject limitation.

### III. SUMMARY OF THE ARGUMENT

Proposed Initiative for 2005-2006 #74 imposes expiration dates upon the full panoply of governmental actions for which voter approval is required under the multiple-subject Colo. Const. art. X, § 20 – from tax measures, to authorization and refinancing of public debt, to expenditure of revenues in excess of formulaic spending limits. By imposing restrictions in multiple subject areas, the proposed initiative violates the single-subject requirement of Colo. Const. art. V, § 1(5.5).

### IV. ARGUMENT

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." 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 "TABOR" initiative that created Colo. Const. art. X, § 20 preceded the single-subject requirement by two years, and this Court early noted that TABOR "contains multiple subjects." In re "Amend TABOR #25", 900 P.2d 121, 126 (Colo. 1995). This Court has held that there is no exemption from the single-

subject requirement for initiatives that happen to be directed at previously adopted multi-subject enactments. In re Proposed Initiative for 1996-4, 916 P.2d 528, 532-33 (Colo. 1996).<sup>1</sup> Subsequent efforts to amend or repeal all or parts of Colo. Const. art. X, § 20 have thus been required to comply with the single-subject requirement.

Over the years, the Court has provided guidance regarding the applicability of the single-subject requirement to TABOR-related ballot issues. In 1995, the Court applied the single-subject test to an initiative establishing a \$60 credit applicable to a variety of state and local taxes and requiring the state to replace local revenues lost as a result of the credit. Noting that the "single purpose" of the initiative was to implement a single tax credit, albeit to multiple taxes, and that the replacement of lost local revenues was "dependent upon and closely connected" to implementation of the tax credit, the Court found the initiative to contain a single subject. In re "Amend TABOR #32," 908 P.2d 125, 129 (Colo. 1995).

The following year, however, the Court addressed an initiative that would have repealed TABOR in its entirety and reenacted selected subjects in modified

---

<sup>1</sup> While three Justices would have concluded that an initiative "seeking to repeal a constitutional provision in its entirety" should not abrogate the single-subject requirement, they concurred that an effort to "repeal and reenact selected portions" of Colo. Const. art. X, § 20 would be "a clear violation of the single-subject requirement." In re Proposed Initiative for 1996-4 at 538 (Mullarkey, C.J., Kourlis, J., Hobbs, J., concurring).

form – *e.g.*, adopting a revised voter approval requirement for tax measures while deleting TABOR's district spending limits. In re Proposed Initiative for 1996-4, *supra*, at 533, 534-35 (App. A). The Court held that this initiative "contains multiple subjects disconnected from any encompassing principle." *Id.* at 533. The Court further noted that simply characterizing the topic of the initiative as "limiting government spending" was "too broad and general a concept to satisfy the single subject requirement." *Id.* *Cf. In re Proposed Initiative for "Public Rights in Waters II,"* 898 P.2d 1076, 1079-80 (Colo. 1995).

Two years later, the Court addressed an initiative that sought to enact prospective annually increasing tax reductions (with resulting local revenue shortfalls to be funded by revenue transfers from the state) while concurrently applying a reduction formula to previously enacted revenue and spending increases approved at elections in which specified ballot title language had not been used. In re Proposed Initiative for 1997-1998 #30, 959 P.2d 822, 826-27 (Colo. 1998). The Court held the initiative to contain multiple subjects, noting that "voters could be enticed to vote for the measure in order to enact a substantial tax cut while not realizing that passage of the measure would simultaneously achieve a purpose not necessarily related to a tax cut" – *i.e.*, apparently impacting the outcome of past elections regarding, among other things, spending limits. *Id.* at 827. Instructively,



the Court noted that Colo. Const. art. X, § 20 contains both "revenue limitations" and "spending limitations" and that "[t]hese provisions operate separately and independently. The first is a limitation on receipt of revenue by governmental entities . . . while the second is a limitation on district spending of lawfully derived revenues." Id. at 826 (emphasis added).

This was immediately followed by an initiative proposing a similar formula for prospective reductions in tax revenues, again with local shortfalls to be funded by revenue transfers from the state, though requiring the state's revenue replacement obligation to be constrained within its own tax and spending limits. In re Proposed Initiatives for 1997-1998 #84 and #85, 961 P.2d 456, 457 (Colo. 1998). Since the state could not increase its own spending to maintain current levels while meeting these increased mandated transfer obligations, the result would have been mandatory reductions in spending on other state programs. Id. at 460. The Court held that "[w]hile 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." Id., quoting In re "Amend TABOR #32," supra, at 129. The Court noted that these initiatives were "precisely the types of mischief which the single subject requirement was intended to prevent." Id. The same result was reached

upon similar language in In re Proposed Initiatives for 1997-1998 #86 and #87, 962 P.2d 245, 248 (Colo. 1998), and upon similar though increasingly confusing initiative language in In re Proposed Initiative for 1999-2000 #25, 974 P.2d 458, 466-69 (Colo. 1999), and In re Proposed Initiative for 1999-2000 #37, 977 P.2d 845, 846 (Colo. 1999).

As this Court has noted, Colo. Const. art. X, § 20 contains at least two general substantive topics – limitations on revenues and limitations on spending. There is at least a third – limitations upon public indebtedness. It is not necessary to draw finer distinctions for purposes of dealing with the present case.

Proposed Initiative for 2005-2006 #74 imposes a ten-year expiration, or "sunset," date upon "every ballot issue that must adhere" to the voter approval requirements of Colo. Const. art. X, § 20. The initiative explicitly refers to both *tax* and *debt* measures and necessarily incorporates voter approved relief from *spending* limits. At a minimum, the initiative contains three subjects.

The pernicious effect of what may appear at first blush to be a simple and uniform sunset provision is readily illustrated. While voters may well be receptive to a broadly applicable ten-year limitation upon the duration of tax increases, they may not realize that they will be simultaneously limiting their ability to incur multiple-fiscal year district debt obligations to fund public projects. While either

or both tax or debt limitations may be attractive, the voters would also be limiting prospectively the duration of all future ballot issues designed to provide relief from TABOR's wholly independent spending caps. Any or all of these results may be desirable – or not – though they are certainly very different subjects. And, the voters are certainly entitled to have each of these disparate subjects considered upon its own merits.

#### V. CONCLUSION

For the reasons set forth above, 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 #74 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**

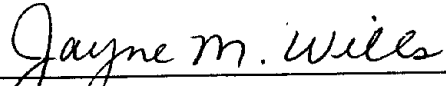
Jon Caldara  
14142 Denver West Parkway  
Golden, CO 80401

**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



# 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 #74".

.....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

# 17 Final Copy

Be it Enacted by the People of the State of Colorado:

Section 20 of article X of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SUBSECTION to read:

(10) **TERM LIMITS FOR TAXES.** (A) THIS SUBSECTION TAKES EFFECT DECEMBER 31, 2006. THE PREFERRED INTERPRETATION SHALL PREVENT ONE GENERATION'S DECISION TO INCREASE TAX OR DEBT FROM BURDENING FUTURE GENERATIONS WITHOUT FUTURE GENERATIONS' DIRECT VOTING CONSENT.

(B) ANY 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 PASSED AFTER DECEMBER 31 2006 MUST SUNSET, EXPIRE, AND END WITHIN TEN YEARS OF ITS PASSAGE. SUCH BALLOT ISSUE MAY BE RENEWED BY A SUBSEQUENT VOTE OF THE PEOPLE, BUT NOT FOR LONGER THAN 10 YEARS.

**RECEIVED**

JAN 06 2006

*Ch. 5.2(a) via email WCC*

**ELECTIONS / LICENSING  
SECRETARY OF STATE**

**Dennis Polhill**  
**49 S. Lookout Mtn Road**  
**Golden, CO**

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

RECEIVED

JAN 25 2006

ELECTIONS / LICENSING  
SECRETARY OF STATE

BALLOT TITLE BOARD

MOTION FOR REHEARING

IN RE PROPOSED INITIATIVE 2005-2006 #74 ("EXPIRATION OF VOTER-APPROVED TABOR ISSUES")

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 #74 ("Expiration of Voter-Approved TABOR Issues"). 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 purports to create an expiration date for "any ballot issue" that "raises a tax rate," "continues a tax that would otherwise expire," "creates a new tax," "increases public indebtedness," or that must otherwise "adhere to this section" (Colo. Const. art. X, §20). At a minimum, this would encompass new and extended taxes, mill levy increases, valuation for assessment ratio increases, tax policy changes, creation or increase of public debt or other financial obligations, and increases of or relief from otherwise applicable spending limits. The Supreme Court has held that, while Colo. Const art. X, §20 is itself a multi-subject provision adopted by initiative prior to adoption of Colo. Const. art. V, §1(5.5), it may not now be repealed or amended by virtue of a multi-subject initiative. In re Proposed Initiative 1996-4, 916 P.2d 528



(Colo. 1996); In re Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Subsection (10) to Section 20 of Article X, 900 P.2d 121 (Colo. 1995).

2. The text of the Initiative is inherently unclear as to its reach and purpose, such that the Board is precluded from setting a ballot title. 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

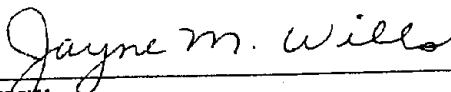
Nicole Kemp  
3332 West Moncrieff Place  
Denver, CO 80211

**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

**Ballot Title Setting Board**

**Proposed Initiative 2005-2006 #74<sup>1</sup>**

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

An amendment to the Colorado constitution concerning a limitation on the number of years that a ballot issue approved by the voters under section 20 of article X shall remain in effect, and, in connection therewith, providing that any ballot issue that increases a tax or public indebtedness or takes other action under section 20 of article X that is passed by the voters on or after December 31, 2006, must sunset, expire, and end within ten years of passage of the ballot issue and allowing the ballot issue to be renewed for up to ten years by a subsequent vote of the people.

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 a limitation on the number of years that a ballot issue approved by the voters under section 20 of article X shall remain in effect, and, in connection therewith, providing that any ballot issue that increases a tax or public indebtedness or takes other action under section 20 of article X that is passed by the voters on or after December 31, 2006, must sunset, expire, and end within ten years of passage of the ballot issue and allowing the ballot issue to be renewed for up to ten years by a subsequent vote of the people?

*Hearing January 18, 2006:  
Single subject approved; staff draft amended; titles set.  
Hearing adjourned 2:20 p.m.*

*Hearing February 1, 2006:  
Motion for Rehearing denied.  
Hearing adjourned 2:28 p.m.*

---

<sup>1</sup> Unofficially captioned "Expiration of Voter-Approved TABOR Issues" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.