DATE FILED: November 4, 2013 8:13 PM

Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013–2014 #45 **Petitioners:** Robert Bows and Jason Bosch, v. **Respondents:** Don Childears and Barbara M.A. Walker, **and** **Title Board:** Suzanne Staiert, Jason Gelender, and Daniel Domenico.	▲ **COURT USE ONLY** ▲
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ANSWER BRIEF OF RESPONDENT DON CHILDEARS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☐ It contains ____ words.

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☐ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

☑ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☑ I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Michael D. Hoke
Michael D. Hoke

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CONSTITUTIONAL PROVISIONS

Respondent Don Childears respectfully submits the following Answer Brief in opposition to the Amended Opening Brief ("Opening Br.") of Petitioners Bob Bows and Jason Bosch ("Petitioners" or "Proponents"):

SUMMARY OF ARGUMENT

Proponents' chief argument that their Measure does not violate the single-subject rule is that TABOR should be construed not to apply to bank revenues because they are not taxes or fees. Colorado law has overwhelmingly rejected this interpretation, and leaves no room to dispute that revenues generated by the bank would be subject to TABOR limitations but for the Measure's deliberate override of TABOR for key aspects of the state budget.

When reviewed as a whole, the Measure seeks not only to create a state-owned bank, but also to provide a mechanism for the state to evade TABOR restrictions on spending and growth. The Proponents have been clear on this point: it is an explicit purpose and intent of the Measure to permit the state to grow beyond what would be permitted under TABOR. This additional purpose, which is neither necessarily nor properly connected to the establishment of a state bank, renders the Measure invalid and precludes the Title Board from exercising jurisdiction to set a title. The Petition for Review should therefore be denied and the Measure returned to the Proponents.

PRESERVATION OF ISSUES AND STANDARD OF REVIEW

Respondent agrees that Proponents properly preserved the issues raised in the Petition for Review. Respondent disagrees with Proponents' statement of the standard of review. (*See* Respondent Childears's Opening Br. at 16–17.)

ARGUMENT

The Proponents' Opening Brief purports to present four separate issues for review (in contrast to the seven issues raised in the Petition for Review), and invites the Court to engage in a fractured, piece-meal analysis of individual provisions of the Measure for single-subject purposes. The only issue before this Court, however, is the question of whether the Measure violates the single-subject rule. To answer this question, the Court must review the Measure as an integrated whole, rather than reviewing individual provisions separately.[1] Yet regardless of whether the Measure is considered as a whole or piece-meal, it is clear that the Measure contains multiple separate subjects: at a minimum, it seeks (1) to establish a state bank, (2) to grant the *state*, through the bank, unlimited authority to issue multi-year debt for broad, discretionary purposes without voter approval, and (3) to exempt significant state revenues from TABOR limitations.

[1] *In re Title, Ballot Title, Submission Clause for 2009–2010 No. 91*, 235 P.3d 1071, 1077 (Colo. 2010) ("In order to determine whether an initiative contains a single subject or multiple subjects, we must review the initiative as a whole rather than piecemeal and examine individual statements in light of their context.").

A. PROPONENTS MISINTERPRET TABOR, WHICH IS INTENDED TO RESTRAIN THE GROWTH OF GOVERNMENT REGARDLESS OF THE SOURCE OF GROWTH.

Proponents' primary argument is that the Measure does not contain multiple subjects because it does not implicate TABOR at all. Proponents invite this Court to construe TABOR not to apply to state funds generated through mechanisms other than taxes and fees. (Pet'rs' Opening Br. at 9, 14–15, 17 & 18.) They argue that "the entire focus of [TABOR] is upon income or revenue of the state produced by new or increased taxes and fees to taxpayers" (Pet'rs' Opening Br. at 6) and request that TABOR's direction to restrain government growth "should be deemed not to apply to initiative #45" (*id.* at 9–10). Proponents' interpretation of TABOR is simply wrong.

TABOR's primary intent was to restrain the growth of government. The second sentence of TABOR, immediately following the effective date, reads: "[This section's] preferred interpretation shall reasonably restrain most the growth of government."[2] Where multiple reasonable interpretations are possible, TABOR declares that the interpretation favoring restraint of *growth* (not just restraint of taxes or fees) be chosen. Indeed, this Court has long recognized that TABOR "was

[2] Colo. Const. art. X, § 20(1); *see also HCA-Healthone, LLC v. City of Lone Tree*, 197 P.3d 236, 241 (Colo. Ct. App. 2008) ("if there are multiple interpretation[]s of TABOR's text, we must choose the one that would 'create the greatest restraint' on government's growth." (citation omitted)).

intended to *restrain government growth* by permitting voter control over government revenue, spending and debt."[3] To remove any doubt that TABOR applies to virtually *all* revenue and spending of the state, TABOR section 7 directly limits state spending, regardless of the source of funds. As this Court has observed, "[TABOR] limits the amount of revenue state and local governments can retain from *all* (save, essentially, federal) sources at the end of a fiscal year."[4]

Nor is there any doubt that TABOR would apply to limit state revenues and debt created through a state bank or to the corresponding spending that such revenues would enable. The plain language of TABOR is clear: section 1 requires separate voter approval to relax limits on state "revenue, spending, and debt . . ." regardless of the sources from which revenues are generated or through which debt is incurred. Noting in TABOR suggests that its limitations apply only to taxes and fees. In fact, this Court has held that TABOR limitations apply to certain non-tax,

[3] *Havens v. Bd. of Cnty. Comm'rs of Cnty. of Archuleta*, 924 P.2d 517, 521 (Colo. 1996) (emphasis added) (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 285 (Colo. 1996)).

[4] *Barber v. Ritter*, 196 P.3d 238, 247 (Colo. 2008) (emphasis added).

non-fee proceeds from the sale of lottery tickets.[5] No different conclusion is warranted for the interest income of a state bank.

B. THE MEASURE CANNOT GENERICALLY EXEMPT BANK REVENUES AND EXPENDITURES FROM TABOR LIMITATIONS.

Proponents argue that the "funds in the bank"[6] must be exempt from TABOR restrictions "in order to enable the bank to function as any other bank and to achieve its purposes of lending to meet the needs of the citizens of Colorado . . . ." (Pet'rs' Opening Br. at 13.) They also argue that the bank should be permitted to transfer funds to the state without those funds being subject to legal limitations because private banks are not subject to revenue and expenditure limits or restrictions on how funds transferred to the bank's owners are used.[7] (*Id.* at 13 & 16.) Proponents again misconstrue TABOR.

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[5] *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 11–12 (Colo. 1993) (answering in the affirmative interrogatory asking whether lottery funds are subject to state spending limits under TABOR).

[6] This is clearly too broad. Under section 8 of the Measure, virtually all funds of the state would be held in the bank at some point. If Proponents intend to exempt all "funds in the bank" from TABOR limitations, then they effectively seek a wholesale repeal of TABOR with respect to the state. Respondent therefore reads the measure to exempt from TABOR only bank debt and funds transferred from the bank to the state general fund.

[7] Funds transferred by private banks to their owners are clearly subject to legal restrictions, including taxation. Moreover, when private banks transfer funds to the *state*, those funds are currently subject to TABOR limitations.

TABOR would not necessarily restrict the *bank's* revenues or expenditures. Rather, TABOR operates at the state level to restrict the *state's* revenues and expenditures, and it is the Measure's exemption of *state* funds from TABOR restrictions that causes the most significant single-subject problems.[8] Here, Proponents anticipate that the bank will provide the state with significant additional revenue (Pet'rs' Opening Br. at 17), but wish to escape TABOR's mandate that any revenues from the bank be counted toward the *state's* TABOR revenue cap, and to prevent TABOR's requirement that such excess revenue be used to reduce taxes or otherwise be refunded directly to the taxpayers.

Colorado courts have found transfers of funds to the state general fund to violate TABOR except where "the cash transfers did not increase the growth of government, create new income streams, or constitute 'a tax policy change directly causing a net tax revenue gain to any district.'"[9] Here, the bank transfers would increase the growth of government and create a new income stream—as the

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[8] *See* Colo. Const. art. X, § 20(2)(b) (defining "district" to mean "the state or any local government, excluding enterprises"). Despite the bank's separately elected governing board, Proponents believe the bank to be "part of or an alter ego of the state of Colorado, like a division or department." (Pet'rs' Opening Br. at 16.) Under this interpretation, the bank would not constitute a separate district under TABOR.

[9] *Barber v. Ritter*, 170 P.3d 763, 774 (Colo. Ct. App. 2007) (quoting TABOR section 4), *aff'd in part, rev'd in part on other grounds*, 196 P.3d 238 (Colo. 2008).

Proponents readily admit. In fact, Proponents state that they expect the bank "to produce[] a large amount of new income for the state," which could amount to "the equivalent of the average of approximately 20% return on equity per year earned by the Bank of North Dakota . . . ." (Pet'rs' Opening Br. at 7.)

The proposed exemption of transferred funds from TABOR restrictions is neither necessarily nor properly connected to the operation of a state bank. The bank could earn virtually unrestricted revenue for the state, and could fully effectuate Proponents' desire for the state to retain earnings on its money, without then exempting those revenues from TABOR's revenue and spending caps. Proponents *intend* for the bank to facilitate state *growth*. (*See* Measure section 9 ("Such funds may be used to enable the state to *expand* . . . .") (emphasis added); *see also* Pet'rs' Opening Br. at 16 ("A principal purpose of the bank . . . is to strengthen the economy of Colorado . . . .").) This additional purpose of the Measure, separate and apart from the establishment of a state bank, constitutes a separate subject.

C. THE BANK'S AUTHORITY TO ISSUE UNRESTRICTED DEBT WITHOUT VOTER APPROVAL COMPOUNDS THE MEASURE'S SINGLE-SUBJECT VIOLATIONS.

TABOR subsection 4(b) unquestionably requires voter approval for the "creation of any multiple-fiscal year direct or indirect district debt or other financial obligation whatsoever without adequate present cash reserves pledged

irrevocably and held for payments in all future fiscal years."[10] Proponents seek to avoid this restriction with respect to bonds issued by the bank, which may be issued in any amount and with any frequency at the unfettered discretion of the bank board. As noted in Respondent's Opening Brief, the bank would be authorized to issue debt whenever it or the state decided the bank needed additional reserves to issue loans to permit the *state* to promote the general welfare. (Resp. Childears's Opening Br. at 2.)

Proponents argue that the "decision regarding the amount of capitalization, whether to issue bonds, and if so, in what amount, is a complex decision requiring a thorough evaluation that must be made by the board of the bank . . . ." (Pet'rs' Opening Br. at 7; *accord id.* at 18–19.) This may be true—as it is likely true for any bond issue by any TABOR district—but there is nothing that would then prevent the bank's board from presenting that decision to the voters for ratification, as is done with virtually every other bond issue in the state. Instead, Proponents seek to insulate the decisions of the board regarding the bank's debt funding from voter approval. This would not only require suspension of TABOR subsection 4(b) with regard to the bank, but also the prohibition against state debt in article XI,

[10] Colo. Const. art. X, § 20(4)(b). Proponents notably omit subsection 4(b) from their list of issues requiring a vote of the electorate. (*See* Pet'rs' Opening Br. at 6.)

section 3 of the Colorado Constitution. Proponents have provided no explanation for why it is necessary for a state bank to be protected from the constitutional requirement that it convince the voters of the appropriateness of its debt decisions.

By itself, this provision evinces a subject separate and distinct from the creation of a state bank. The problem is compounded when this provision is read together with the Measure's exemption of its proceeds from the state's revenue and spending caps. According to the Proponents, the bank could earn a 20% return on equity. Because bonds may be issued in any amount and with any frequency to raise capital to allow the bank to issue additional loans, and because interest on those loans would be the bank's primary source of income, it must be anticipated that the bank's debt issuances and transfers to the general fund would be inextricably tied together. As bank funds are transferred to the state, they would no longer be available as capital reserves for the bank, so that bonded debt would directly facilitate transfers to the state general fund. This would provide a back-door mechanism for the state to debt-finance its expenditures free from TABOR restrictions. Voters simply could not anticipate that approving the creation of a state bank would undermine such basic restrictions on the state finance system. This sort of log-rolling is precisely what the single-subject requirement was intended to prevent.

In response, Proponents argue only that the Measure's lack of transparency as to potential debt obligations is alleviated because "it is expected that any bonds will be promptly repaid within about four years . . . ." (Pet'rs' Opening Br. at 19.) Proponents are wrong. First, no provision of the Measure provides any assurance that bonds would ever be repaid by the bank. In fact, the Measure makes bank bonds obligations of the state generally, and places no restriction on the terms of any bond issue. Bonds could be issued for repayment over thirty years (or more), and the bank would remain free to default on any bonds where it might be "sound" to do so. Moreover, the Proponents' subjective expectation that bonds will be repaid does *nothing* to prevent voter confusion or surprise arising from the fact that an initiative to establish a state bank could also burden the state with unrestricted debt in any amount, under any terms, and could enable the state to debt finance significant expenditures without voter input.

D. PROPONENTS DO NOT ADDRESS THE MEASURE'S OVERRIDE OF THE CONSTITUTIONAL PROHIBITION ON PLEDGING THE STATE'S CREDIT AND AGAINST THE ISSUANCE OF STATE DEBT.

The Measure would *require* the state to pledge its credit in aid of persons, companies, and corporations, in violation of article XI, section 1 of the Colorado Constitution. Under section 4 of the Measure, "the debts and obligations of the bank are backed by the full faith and credit of the state of Colorado . . . ." Because

deposits held by the bank are "debts and obligations of the bank," the state would unwittingly be forced to pledge its credit in aid of any depositor of the bank. Similarly, any bond issued by the bank would also require the state to pledge its credit. Under sections 3(c) and 4 of the Measure, bonds may be issued to permit the bank to issue loans to promote a broad array of objectives. To the extent the bank were to issue bonds to facilitate loans to aid persons, companies, or corporations, it would require the state to pledge its credit in violation of article XI, section 1. The Measure would also permit the state to issue debt for purposes other than those enumerated in article XI, section 3 of the Colorado Constitution.[11]

Proponents simply do not address these issues in their Opening Brief. The text of the Measure is clear that it would require the state to pledge its credit, and would permit the state to issue debt, in ways that have *never* been permitted under the Colorado Constitution. These fundamental changes to the state's finance system are neither necessarily nor properly connected to the operation of a state bank, would lead to voter confusion and surprise, and constitute separate subjects.

[11] Article XI, section 3 prohibits the state from issuing debt "except to provide for casual deficiencies of revenue, erect public buildings for the use of the state, suppress insurrection, defend the state, or, in time of war, assist in defending the United States." Nothing in the Measure constrains the bank to issuing bonds for these purposes; to the contrary, bond proceeds would be used to capitalize the bank to facilitate issuance of loans for public purposes.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that the Court affirm the action of the Title Board and return the Measure to the Proponents.

Respectfully submitted this 4th day of November, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2013, I electronically filed a true and correct copy of the **ANSWER BRIEF OF RESPONDENT DON CHILDEARS** with the Clerk of the Court via the ICCES e-filing system which will send notification of such filing to the following:

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