

SUPREME COURT  
STATE OF COLORADO

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2 East 14th Avenue  
Denver, CO 80203

Original Proceeding Pursuant to C.R.S. § 1-40-107(2) (2013)

Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 # 129 (“Definition of ‘Fee’”)

**Petitioner:**

ANTHONY MILO,

v.

**Respondents:**

PETER COULTER and LISA BRUMFIEL,

**Title Board:**

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Case No. 2014SA135

**TITLE BOARD'S OPENING BRIEF**

## **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).

It contains 2,190 words.

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

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.

/s/ Kathryn A. Starnella

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Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board (“Title Board”), hereby submit their Opening Brief.

**I. Statement of the issues**

- (1) Does Initiative # 129 concern a single subject and, therefore, render proper the Title Board’s exercise of jurisdiction?
- (2) Whether the title and submission clause correctly and fairly express the true intent and meaning of the proposed initiative?

**II. Statement of the case**

This is an appeal of a ballot title setting by the Title Board pursuant to § 1-40-107(2), C.R.S. (2013).

Proponents Peter Coulter and Lisa Brumfiel filed Proposed Initiatives 2013-2014 # 129 (“# 129”) with the Colorado Secretary of State. The Title Board conducted a hearing on April 17, 2014, amended a draft of the proposed initiative, made one technical correction to the final text of the measure, and set title. On April 23, 2014, Petitioner Anthony Milo filed a motion for rehearing on the title. The Title Board considered the motion on April 25, 2014, and granted in part the motion

to make certain changes to the title. Petitioner filed this appeal shortly thereafter.

### **III. Statement of the facts**

# 129 seeks to amend the Taxpayer’s Bill of Rights, Article X, Section 20 of Colorado’s Constitution, to define the term “fee” and differentiate it from a tax. Specifically, # 129 seeks to define “fee” as “a voluntarily incurred governmental charge in exchange for a specific benefit conferred on the payer, which fee should reasonably approximate the payer’s fair share of the costs incurred by the government in providing said specific benefit.” No part of a fee shall be based on “ancillary and/or extraneous benefits, as those terms are defined by Black[’]s Law Dictionary[.]” In essence, # 129 seeks to incorporate into the state’s constitution the Colorado Supreme Court’s holding in *Barber v. Ritter*, which held that a fee’s “primary purpose is to defray the cost of services provided to those charged.” 196 P.3d 238, 241 (Colo. 2008).

The title and submission clause set by the Title Board mirror the salient portions of the proposed initiative’s text. The title highlights the

proposed definition of “fee,” and the ballot title and submission clause clarify that the proposed initiative concerns an amendment to the Colorado constitution.

#### **IV. Summary of the argument**

The title and submission clause do not violate the single-subject rule and meet the clear title standards established by this Court. They fairly and accurately set forth the salient aspects of the measure.

#### **V. Argument**

##### **A. Standard of review**

The title must clearly express the single subject of the proposal. The language of the title cannot obscure the meaning of the measure. The title must enable all citizens, whether familiar or unfamiliar with the subject matter, to determine whether to support the proposal. *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010) (#45). The Title Board must “consider the confusion that might be caused by misleading titles” and “avoid titles for which the general understanding of the effect of a ‘yes’ or ‘no’ vote will be unclear.” § 1-40-106(3)(a), C.R.S. (2013). Ballot titles shall be

brief. *Id.* The title need not discuss every aspect of a measure, provide specific explanations or discuss every possible effect of the measure on the current statutory scheme. *In re Title, Ballot Title and Submission Clause and Summary for a Petition on Campaign and Political Finance*, 877 P.2d 311, 314, 315 (Colo. 1994) (“Political Finance”).

The Court has set forth the following directive for ballot titles:

We direct the board to begin the titles with a clear, general summary of the initiative, followed by a brief description of the major elements of the initiative. The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal but need not include every detail.

*In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 222 (2002) (#21 and #22).

When the Court reviews a challenge to the clear title requirement of a ballot title setting, it employs all legitimate presumptions in favor of the propriety of the Board’s decision. #45, 234 P.3d at 645. The Court will examine the text to determine whether the title and submission clause are consistent with the standards established in statute. *Id.*

**B. The title and submission clause do not violate the single subject rule.**

Article V, Section 1(5.5) of the Colorado Constitution requires that all measures proposed by petition contain no more than one subject, which shall be “clearly expressed” in the title. Moreover, the Board may not set a title for a measure that contains “incongruous subjects . . . having no necessary or proper connection” for the purpose of enlisting support of the measure. C.R.S. § 1-40-106.5(1)(e)(I). Likewise, the Board cannot set a measure that would cause surprise and fraud to be practiced upon the voters. C.R.S. § 1-40-106.5(1)(e)(II).

A proposed measure violates the single subject rule if “it relates to more than one subject, and has at least two distinct and separate purposes that are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for 2005-06 #55*, 138 P.3d 273, 277 (Colo. 2006) (#55); #21 and #22, 44 P.3d at 215. In contrast, a proposed measure 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) (#25).

## **1. Standard of single subject review by this Court.**

Whether a proposed initiative contains a single subject is a question of law that must be determined by the Board before it exercises jurisdiction to set a title. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #219*, 999 P.2d 819, 820-22 (Colo. 2000) (#219). In determining whether the single subject requirement has been satisfied, the Court may engage in a limited inquiry into the meaning of terms within a proposed measure. #55, 138 P.3d at 278. To do so, the Court will “examine sufficiently the initiative’s central theme to determine whether it contains a hidden purpose under a broad theme.” *In re Title, Ballot Title and Submission Clause for 2007-08 #17*, 172 P.3d 871, 875 (Colo. 2007). Through its exam, the Court will “determine unstated purposes and their relationship to the central theme of the initiative.” #55, 138 P.3d at 278. If the unstated theme is consistent with the general purpose, the single subject requirement will be met. *Id.*

## **2. Application of the single-subject rule to # 129.**

Petitioner Milo contends that # 129 violates the single-subject rule because: (1) its definition of “fee” extends beyond Article X, Section 20 of the Colorado Constitution to the Colorado Revised Statutes, Codes, and Directives; and (2) it defines the term “fee” in two contexts: (a) at the time of imposition; and (b) once the fee revenue is held by a governmental entity. These bases for invalidating # 129 should be rejected for the reasons discussed below.

First, as a fee-definition initiative, # 129 concerns a single subject, namely the definition of the word, “fee.” Even though the proposed initiative’s text extends the definition beyond Colorado’s constitution to other provisions of Colorado law, # 129 does not violate the single subject rule because the “matters encompassed [by it] are necessarily or properly connected to each other rather than disconnected or incongruous.” *In re Proposed Ballot Initiative on Parental Rights (“Parental Rights”),* 913 P.2d 1127, 1131 (Colo. 1996) (finding no violation of single-subject rule even though the initiative concerned

parents' right to control of their children in upbringing, education, values, and discipline); *see also In re Title, Ballot Title and Submission Clause for 1999-00 # 256 (# 256)*, 12 P.3d 246, 254-55 (Colo. 2000) (finding no single-subject rule violation even though the detailed initiative addressed numerous issues relating to the subject of development management); *In re Matter of Petition for Amend. to Const.*, 907 P.2d 586, 591 (Colo. 1995) (concluding that a comprehensive initiative's numerous provisions related to the subject of petition reform and, therefore, did not violate the single-subject rule). Although # 129 may be broad in application, like the proposals in # 256 or *Petition for Amend. to Const.*, # 129 serves connected purposes: it defines the term “fee” and renders uniform that definition throughout Colorado law.

Thus, # 129 presents only one subject because it “tends to effect or to carry out one general objective or purpose.” # 256, 12 P.3d at 253.

Second, # 129 does not violate the single-subject rule merely because its “fee” definition applies to multiple contexts. The fact that # 129, as a fee-definition initiative, “may affect more than one other statutory provision does not itself mean that the measure contains

multiple subjects.” *In re Ballot Title 1999-2000 # 255 (# 255)*, 4 P.3d 485, 496 (Colo. 2000) (finding no single-subject rule violation where initiative concerning background checks at gun shows contained a fee provision); *see also In re Matter of Proposed Petition for Amend TABOR No. 32*, 908 P.2d 125, 128-29 (Colo. 1995) (concluding that a tax credit initiative comported with the single-subject requirement even though it applied a \$60 tax credit to more than one tax). Indeed, this Court has never held that a proposal necessarily violates the single-subject requirement simply because it has “different effects or that it makes policy choices that are not inevitably interconnected[.]” # 256, 12 P.3d at 254. Thus, the title’s validity should be upheld.

**3. The title and submission clause fairly convey the major import of # 129.**

Petitioner wrongly contends that the title and submission clause “unfairly characterizes” # 129 and “fails to reflect its full intent” by failing to disclose: (a) that its fee definition extends beyond the Colorado Constitution to all Colorado law; (b) that no part of a fee shall be based on “ancillary and/or extraneous benefits”; (c) that it supersedes any

conflicting pre-existing state or local law; and (d) that it supersedes this Court’s “fee” definition in *Barber v. Ritter*, 196 P.3d 238 (Colo. 2008). *See Pet. for Review* at 3.

The Court must consider whether the title “fairly reflects the proposed initiative so that the petition signers and voters will not be misled” in their support for, or opposition to, the initiative. #45, 234 P.3d at 656. “Unless the summary adopted by the Board is clearly misleading or does not fairly reflect the [initiative’s purpose], [the Court] will not interfere with the Board’s choice of language.” *In re Proposed Initiative Under the Designation “Tax Reform,”* 797 P.2d 1283, 1289 (Colo. 1990). Moreover, “[a] summary is not intended to fully educate people on all aspects of the proposed law, and it need not set out in detail every aspect of the initiative.” *Id.*

The title and submission clause for # 129 convey the initiative’s singular purpose: to provide a clear, consistent definition of a “fee.” # 129 is captioned as “Definition of Fee,” and the title and submission clause inform prospective voters that the initiative seeks to incorporate the definition into the Colorado Constitution. Although # 129’s title and

submission clause do not educate voters about the proposed fee definition's broad application to other areas of state law, summaries are not intended to educate voters about the initiative's intricacies. Moreover, it is well established that state constitutional provisions trump any conflicting state or local provisions. *See Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) (discussing constitution's pre-emption of conflicting statutory provision). Thus, even if the proposed text for # 129 did not specify that the fee definition uniformly applied to the Colorado Constitution, Colorado Revised Statutes, Codes, Directives, and all public Colorado legal documents, the constitutional amendment would trump any conflicting state or local law, by default.

Similarly, the title and submission clause need not educate prospective voters that “ancillary and/or extraneous benefits . . . shall not be considered in determining the value of [a] fee.” “The title and summary are intended to alert the electorate to the *salient* characteristics of the proposed measure.” # 255, 4 P.3d at 497 (emphasis added). Here, the title and submission clause adequately convey the meaning of a fee; they inform voters that a fee “should

reasonably approximate the payer’s fair share of the *costs incurred* by the government in providing the benefit.” Final Title and Submission Clause (dated April 25, 2014) (emphasis added). Because a fee is directly tied to the costs incurred by the government, it is axiomatic that a fee does not include any “ancillary and/or extraneous benefits.” Therefore, the title and submission clause do not mischaracterize # 129 simply because they fail to expressly inform prospective voters that the fee’s valuation does not include “ancillary and/or extraneous benefits.” Accordingly, these bases for the title’s invalidation should be rejected.

## VI. CONCLUSION

Based on the foregoing reasons and authorities, the Title Board respectfully requests that this Court approve the title and submission clause for # 129. In sum, the title and submission clause do not violate the single-subject rule and adequately convey the proposed initiative’s material elements.

Respectfully submitted this 15th day of May, 2014.

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## **CERTIFICATE OF SERVICE**

This is to certify that, on May 15, 2014, I duly served this **OPENING BRIEF** on all parties via ICCES or electronic mail, addressed as follows:

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