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COLORADO SUPREME COURT Court Address: 2 East 14th Avenue, Denver, Colorado 80203	
Original Proceeding Pursuant to §1-40-107(2), C.R.S. (2015) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2015-2016 #116, #117 and #118 **Petitioner:** Natalie Menten v. **Respondents:** Dan Ritchie and Albert Yates, and **Title Board:** Suzanne Staiert, Frederick R. Yarger and Jason Gelender.	**▲COURT USE ONLY ▲**
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PETITIONER'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I 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:

A. This brief complies with C.A.R. 28(g) because it contains 2,170 words.

B. This brief complies with C.A.R. 28(b) because all parties concur in the same standard of review with citation to authority and preservation for appeal.

/s/ William M. Banta
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ARGUMENT

The Colorado Constitution contains the single subject standard for sorting citizen initiatives and their titles. The Constitution states in pertinent part:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. If 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. In such circumstance, however, the measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest. The revision and resubmission of a measure in accordance with this subsection (5.5) shall not operate to alter or extend any filing deadline applicable to the measure.

Colo. Const. art. V, § 1 (5.5). For purposes of this original proceeding, recent Colorado Supreme Court precedent characterizes the standard as "the single subject/clear title limitation applicable to bills to proposed initiatives"; e.g., In re

Title, Ballot Title and Submission Clause for 2013-2014 #76, 333 P.3d 76, 78 (Colo. 2014).

In taking up its review function in the title – setting process, the Court promptly disposes of a petition for review by affirming or reversing title board action. § 1-40-107(2), C.R.S. (2015). If reversed, the action is remanded and the Court points out the errors to the title board. § 107(2).

When the Court reviews title board work, it employs "all legitimate presumptions" in deference to the board's determination. In re Title, Ballot Title and Submission Clause for Proposed Amendment to Const. Section 2 to Art. VII, 900 P.2d 104, 108 (Colo. 1995). In deferring, the Court does not give up its oversight responsibility:

> [W]e must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.

In re Title, Ballot Title and Submission Clause for 1997-98 #30, 959 P.2d 822, 825 (Colo. 1998).

Moreover, the General Assembly that created title boards charges the boards to "apply judicial decisions construing the constitutional single-subject requirement for bills . . ." § 1-40-106.5(3) C.R.S. (2015). *See also* In re Title,

Ballot Title and Submission Clause for 1999-2000 #25, 974 P.2d 458, 469 (Colo. 1999). Judicial decisions provide a trove of ongoing Supreme Court opinions that assay proposed initiatives against the single subject standard.

In the case at bar, judicial review is critical because the three Proposed Initiatives (#116, #117, and #118) would eliminate the constitutional refund remedy that the Taxpayer's Bill of Rights ("TABOR") provides. TABOR's remedy for excess revenue collections is to refund the excess in the fiscal year following its collection. Colo. Const. art. X, § 20(3)(c). The Proposed Initiatives would permanently block such refunds in whole or in part. Proposed Initiatives #116, (#116 Pet. at 35) (§ 24-77-103.6.5(1)); #117 (#117 Pet. at 14) (§ 24-77-103.1(1)(a) and (b)); and #118 (#118 Pet. at 12) (§ 24-77-103.1(1)(a) and (b)).

Crafted to get rid of TABOR's refund mechanism, the Proposed Initiatives come before the Court in unconstitutional form. Instead of a straightforward single subject submission, to which voters could easily answer "yes" or "no" (In re Title, Ballot Title and Submission Clause for 2013-2014 #76, 333 P.3d 76, 79 (Colo. 2014)), the language of each Proposed Initiative beckons beyond voters enamored of TABOR to less enamored voters who might set aside their own pecuniary or austerity concerns in return for designated spending on education, spending for

transportation, spending on mental health, spending for senior services, or even just spending on "other priorities" (#118 Pet. at 12).

Accordingly, it is apparent that none of the three Proposed Initiatives (#116, #117, and #118) comport with the Colorado Constitution's single subject/clear title limitation. All three initiatives and two of the titles feature the logrolling – Christmas tree tactics that the Court, the General Assembly, and the Constitution all decry (#116 Pet. at 7; #117 Pet. at 7; #118 Pet. at 12) (§ 24-77-103.1(2)). In re Public Rights in Waters II, 898 P.2d 1076, 1079 (Colo. 1995).

Moreover, the failure of the title set for Proposed Initiative #118 to divulge the use of #118's retained revenues, conceals the "priorities" spending that is held out to Colorado electors who may thereby be persuaded to vote against receiving their refunds. However, the Constitution actually provides a reasonable fix for Proposed Initiative #118:

> [I]f any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed.

Colo. Const. art V, § 1 (5.5).

What that means for #118 is that while the title and the submission clause set by the Title Board might remain (#118 Pet. at 19), the initiative itself (#118 Pet. at

12-13) ought to be redressed by deleting the last sentence of § 24-77-103.1(2). The deletable sentence is this one:

> The moneys in the account shall be appropriated or transferred for any purposes determined by the general assembly, including, but not limited to, for public schools, transportation projects, and for other priorities.

Whether or not this repair would be acceptable to the Respondents is unknown. Still, the Respondents "only intend to circulate petitions for one of the Initiatives." Respondents' Opening Brief, p. 1., n. 1.

As for presenting multiple initiatives to the Title Board for consideration, it has been observed that:

> [E]ven the Proponents—by submitting two other versions of the Proposed Initiatives that authorize [retention of excess revenues for spending on education, transportation, and possibly mental health and senior services] -- appear to have recognized the . . . inessential nature of the [earmarks for education, transportation and possibly mental health and senior services next to the importance of cancelling TABOR refunds].

In re Title, Ballot Title and Submission Clause for 2013-2014 #90, 328 P.3d 155, 168 (Colo. 2014) (Rice, C.J. dissenting) (language juxtaposed).

Continuing with #118, although on page 6 of the Title Board's Opening Brief, it is stated that the Petitioner didn't argue that Proposed Initiative #118 violated the single-subject standard, her Motion for Rehearing (#118 Pet. at 16)

shows otherwise. At the outset, Petitioner's motion states that "Initiative 118 does not comply with the Single Subject rule and title set is misleading and prejudicial."

The exercise of comparing a title with the initiative itself is a way to corroborate whether the subject of an initiative is really "single." As the Court holds:

> [I]n order to pass the Single-subject test, the subject of the initiative should be capable of being clearly expressed in the initiative's title.

In re Title, Ballot Title and Submission Clause for 2005-2006 #74, 136 P.3d 237, 239 (Colo. 2006).

The titles to Proposed Initiatives #116 and #117 reflect the multiple subjects that their underlying initiatives show, namely, the use of attractive spending measures to induce different sets of voters. By contrast, the title to Proposed Initiative #118 does not reveal the "public schools, transportation projects and other priorities" spending that the underlying initiative intimates.

In all three initiatives, the spending measures themselves: (1) point in the opposite direction of refunding (In re Title #76, 333 P.3d at 88 (Eid, J. dissenting)); (2) would permanently eliminate TABOR refunds in whole or in part curtailing without disclosing voters' constitutional right to the refunds In re Title #90, 328 P.3d at 168 (Rice, C.J. dissenting); and (3) display the logrolling and Christmas

tree tactics against which both Colorado's legislature and judiciary inveigh (Waters II, 898 P.2d at 1079).

The problem with these tactics is that, to gain the votes needed to eliminate TABOR refunds, there ends up being something in the initiative for just about everyone. Added together, these "somethings" can be anticipated to result in an uncommonly large number of votes against Colorado taxpayers' otherwise constitutional commitment to "reasonably restrain most the growth of government." Colo. Const. art. X, § 20(1).

Furthermore, a foreseeable single subject/clear title objection to Proposed Initiatives #116, #117, and #118 is the reaction of voters in the event any of these initiatives should pass. It can be imagined that post-election reactions will include voters' surprise at having permanently waived constitutionally mandated refunds of excess revenue for the sake of having voted for some spending earmarks. *See* In re Title, Ballot Title and Submission Clause for 2001-02 #43, 46 P.3d 438, 446-48 (Colo. 2002).

Finally, the spending attractions that Proposed Initiatives #116, #117, and #118 offer voters in return for repudiating TABOR's restorative remedy have nothing to do with implementing or enforcing the sought-after excess refund waiver. In re Title, Ballot Title and Submission Clause for 2005-2006 #73, 135

P.3d 736, 743 (Colo. 2006) (Hobbs, J. dissenting). Instead, the bargain will attract "yes" votes from voters who would vote "no" if the subject of refunds "were proposed separately." In re Title #76, 333 P.3d at 79.

CONCLUSION

Gleaning among the Court's ongoing decisions, there are at least two main concerns that recur. First, there is particular attention paid when there are constitutional ramifications, particularly when voters have already approved a measure such as TABOR. In re Title #43, 46 P.3d at 446-47.

Second, there is antipathy to initiatives that increase voting power by combining measures that could not be carried on their individual merits or that could surprise voters by surreptitiously including regrettable consequences. In re Title #74, 136 P. 3d at 243 (Coats, J. dissenting).

Both concerns are present here. For the forgoing reasons, the Title Board action should be reversed and remanded with instructions. § 1-40-107(2), C.R.S. (2015).

RESPECTFULLY SUBMITTED this 27th day of May, 2016.

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CERTIFICATE OF SERVICE

This is to certify that I electronically served the PETITIONER'S ANWER BRIEF and related documents upon the following parties through ICCES this 27th day of May, 2016.

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