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| <p>COLORADO SUPREME COURT</p> <p>Court Address: 2 East 14th Avenue, Denver, Colorado 80203</p>   | <p>DATE FILED: May 13, 2016 6:56 PM</p>            |
| <p>Original Proceeding Pursuant to §1-40-107(2), C.R.S. (2015) Appeal from the Ballot Title Board</p>  |  |
| <p>In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2015-2016 #116, #117 and #118</p> <p><b>Petitioner:</b> Natalie Menten</p> <p>v.</p> <p><b>Respondents:</b> Dan Ritchie and Albert Yates,</p> <p>and</p> <p><b>Title Board:</b> Suzanne Staiert, Frederick R. Yarger and Jason Gelender.</p> | <p>▲ COURT USE ONLY ▲</p>                          |
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| <p><b>PETITIONER'S OPENING BRIEF</b></p>   |  |

## 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:

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

It contains 2,194 words.

This brief complies with C.A.R. 28(a)(7)(A).

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, not to an entire document, where the issue was raised and ruled on.

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/ William M. Banta*

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Attorney for Petitioner, Natalie Menten

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

1. Whether the Ballot Title Setting Board (“Title Board”) correctly determined that Proposed Initiatives #116, #117, and #118 contain a single subject clearly expressed in their respective titles as required by Colorado law.

## **STATEMENT OF THE CASE**

This is a consolidated appeal of the Title Board’s decisions regarding three proposed initiatives. There are substantial similarities in the three proposed initiatives and, on May 5, 2016, this Court granted the Unopposed Motion to Consolidate the three cases respectively concerning the three proposed initiatives. In general, the three initiatives would permanently authorize Colorado to retain and spend state revenues that exceed the limitations on fiscal spending under the TABOR amendment by amending the Colorado Revised Statutes to add a new section.

At a hearing held on April 6, 2016, the Title Board approved single-subject status and set titles for the proposed initiatives. Petitioner respectively filed three (3) Motions for Rehearing to reverse the three title settings. Petitioner asks the Title Board to change the titles to Proposed Initiative #116, #117, and #118 for violation of the single-subject rule and because the title to Proposed Initiative #118 was misleading.

Because upon rehearing, the Title Board denied the main relief that Petitioner had requested, Petitioner filed, respectively, three (3) Petitions for Review of the Title Board’s determination for violating the single-subject rule and, alternately as to Proposed Initiative #118, for being misleading.

### **SUMMARY OF THE ARGUMENT**

Because the three Proposed Initiatives #116, #117, and #118 each contain more than one subject, the Title Board erred in setting titles. In addition, the title to Proposed Initiative #118 is misleading because the general purpose use of unfunded monies is not expressed. Therefore, the titles should be remanded to the Title Board.

### **STANDARD OF REVIEW**

In reviewing a Title Board’s single-subject determination and title setting, the Court is to “employ all legitimate presumptions in favor of the Title Board’s actions[.]” In re Title, Ballot Title, & Submission Clause for 2013-14, #76, 333 P.3d 76, 79 (Colo. 2014).

Only in a clear case will the Court overturn the Title Board’s finding that an initiative contains a single subject. Id. “The subject matter of an initiative must be necessarily and properly connected . . .” Id. In addition, the requirement seeks to

prevent surreptitious measures, surprise and fraud upon the voters.” In re Title, Ballot Title and Submission Clause and Summary (Amend Tabor 25), 900 P.2d 121, 125 (Colo. 1995). The issue was raised and ruled on in #116 Pet. at 7; #117 Pet. at 7, and #118 Pet. at 19.

## ARGUMENT

The Ballot Title Setting Board (“Title Board”) is statutorily instructed to apply judicial decisions construing “the constitutional single-subject requirement.” The Title Board is likewise directed to “follow the same rules employed by the general assembly in considering titles for bills” § 1-40-106.5(3), C.R.S. (2015). *See also In re Title, Ballot Title, & Submission Clause for 1999-2000, #25*, 974 P.2d 458, 465 (Colo. 1999). In turn, the courts and the general assembly look to the Colorado Constitution.

The constitutional single-subject requirement is this:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title[.]

Colo. Const. art. V, § 1(5.5).

The constitutional remedy for a single-subject violation is direct:

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.

Colo. Const. art. V, § 1(5.5).

On these points, the Colorado Constitution is self-executing as article V, section 1(10) declares. Moreover, following the lead of the Colorado Supreme Court, the general assembly recognizes that the single-subject requirement for bills (“section 1(5.5) of article 5 and section 2(3) of article XIX”) was designed to prevent/inhibit certain inappropriate/misleading practices, which contravene the single-subject rule. § 1-40-106.5(1)(d), C.R.S. (2015).

Accordingly, the general assembly targets two particular practices, first:

To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits[.]

§ 1-40-106.5(1)(e)(I), C.R.S. (2015). The Supreme Court describes the practice of ganging various measures as “‘log rolling’ or ‘Christmas tree tactics’”; that is to say:

[T]he joining together of multiple subjects into a single initiative in the hope of attracting support from various

factions which may have different or even conflicting interests.

In re Public Rights in Waters II, 898 P.2d 1076, 1079 (Colo. 1995).

Second, the general assembly targets what might be coined “Trojan horse tactics,” what the Supreme Court explains as “surprise or uninformed voting caused by items concealed within a lengthy or complex proposal.” Id. Hence, the general assembly intends:

To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.

§ 1-40-106.5(1)(e)(II), C.R.S. (2015).

Overall, the general assembly recommends a liberal construction so that voters may have an honest initiative/referendum in front of them.

It is the intent of the general assembly that section 1(5.5) of article V and section 2(3) of article XIX be liberally construed, so as to avert the practices against which they are aimed and, at the same time, to preserve and protect the right of initiative and referendum.

§ 1-40-106.5(2), C.R.S. (2015). In recent cases, the Supreme Court emphasizes the single subject / clear title limitation applicable to proposed initiatives, e.g., In re Title, Ballot Title, & Submission Clause for 2015-2016, #73, 2016 WL 1639809

(Colo. 2016). When the single subject/clear title test is applied to a proposed initiative and a court finds that the bill employs either of the two practices condemned, the proposed initiative will fail, e.g., In re Title, Ballot Title, & Submission Clause for 2014-2015, #76, 333 P.3d 76 (Colo. 2014).

In the original proceeding at bar, the three proposed initiatives take advantage of a provision in the “Taxpayer’s Bill of Rights” (article X, section 20 of the Colorado Constitution) (herein “TABOR”), which allows Colorado voters to waive their constitutional right to a refund of excess revenues. The thrust of each proposal is that, starting with fiscal year 2016-17, the State of Colorado can “retain and spend all state revenues in excess of the limitation on state fiscal year spending.” Proposed Initiatives #116, #117, and #118.

Of course, the main corrective for exceeding TABOR revenue limitations is by way of refunds, TABOR being constitutionally self-executing. Colo. Const. art. X, § (20). In proposing the interruption of their constitutional right to refunds, the three proposed initiatives are momentous for Colorado voters.

Had the proposals gone no further than to ask voters whether to approve or reject a refund of excess revenues, the Title Board would have been able to come up with a single subject/clear title designation. However, Proposed Initiatives

#116, #117, and #118: venture beyond the limits set by section 1(5.5) article V of the constitution; hazard onto the target range of the general assembly; and push the judicial decisions handed down by the Supreme Court. Each refund measure is decked out with nonessential revenue use measures and the title to Proposed Initiative #118 lacks disclosure of the unfettered use of the people's monies altogether.

The end result is that in the manifest for each refund waiver measure, rather than “the language after ‘in connection therewith’ does describe specific features of the measure,” the language of Proposed Initiatives #116, #117, and #118 does not. Lennahan, The Single-Subject Requirement for Initiatives, 29 Colo. Law. 65, 69 (2000). Instead, two of the initiatives cobble the refund together with spending for (1) education, (2) transportation, (3) mental health, and (4) senior services. Proposed Initiatives #116 and #117. Moreover, Proposed Initiative #118 suggests that the general assembly use the money for “public schools, transportation projects, and for other priorities” but actually allows the monies to be used “for any purposes determined by the general assembly”.

As far as the “log rolling” and “Christmas tree” embellishments that Proposed Initiatives #116 and #117 hold out, the first inducement is to enlist voters

who would support revenues to fund “education including public preschool through twelfth grade education, vocation education, and higher education.” To a lesser degree Proposed Initiative #118 would induce voters who are merely hopeful of more money for “public schools.”

Proposed Initiative #116 and #117 also offer enticements to recruit those voters who favor “transportation projects, including highways, bridges, underpasses, mass transit or any other infrastructure, facility, or equipment used primarily or in large part to transport people.” Proposed Initiative #118 would engage certain voters by suggesting that more money “for transportation projects” could be in the offing.

Finally, Proposed Initiatives #116 and #117 make overtures to people interested in revenues for “mental health services and senior services.” And, read carefully, Proposed Initiative #118 aims at enrolling Coloradans willing to trust the general assembly to spend their unrefunded monies for “other priorities.” All in all, the proposed initiatives deploy for the citizens’ persuasion one spending attraction after another.

In summary, the “log rolling,” “Christmas tree,” and “Trojan horse” tactics that Proposed Initiatives #116, #117, and #118 employ are bound to enlist the

support of many more voters than would be willing simply to waive their constitutional refunds in order to have the general assembly spend the people's money. In fairness, Colorado citizens deserve an unadorned chance to vote on their constitutional right to a refund of the extra taxes they paid before they are asked to support a wagonload of education, transportation, mental health, or senior services, let alone give their refunds over to general purposes determined by the general assembly, which did not even make it into the title to Proposed Initiative #118.

### CONCLUSION

For the foregoing reasons, the Title Board's actions should be remanded with instructions. § 1-40-107(2), C.R.S. (2015).

RESPECTFULLY SUBMITTED this 13th day of May, 2016.

*/s/ William M. Banta*

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## CERTIFICATE OF SERVICE

This is to certify that I electronically served the PETITIONER'S OPENING BRIEF and related documents upon the following parties through ICCES this 13th day of May, 2016.

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