

<p>Colorado Supreme Court 2 East 14<sup>th</sup> Avenue Denver, Colorado 80203</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></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 (“Retention of Excess State Revenue”)</p> <p><b>Petitioners:</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>Supreme Court Case No.: 2016SA138</p>
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<p><b>RESPONDENTS’ OPENING BRIEF</b></p>	

## 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:

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

It contains 3,003 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/ Dee P. Wisor*

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*s/ Martina Hinojosa*

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Respondents Dan Ritchie and Albert Yates (the “Proponents”), by and through their undersigned counsel, hereby submit their Opening Brief:

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether Proposed Ballot Initiative #116 (“Initiative #116”), Proposed Ballot Initiative #117 (“Initiative #117”) and Proposed Ballot Initiative #118 (“Initiative #118,” and together with Initiative #116 and Initiative #117, the “Initiatives”) each contain a single subject.

2. Whether, pursuant to COLO.REV.STAT. § 1-40-106, the title for Initiative #118 correctly and fairly expresses the true intent and meaning of the Initiative.

**STATEMENT OF THE CASE**

The Proponents seek to circulate Initiative #116, Initiative #117 and Initiative #118, each of which would (with variations) authorize the state to retain and spend all state revenues that exceed the constitutional limitation on state fiscal year spending.<sup>1</sup> Following review and comment hearings with the Colorado Legislative Council and the Office of Legislative Legal Services, the Proponents submitted final versions of the Initiatives to the Secretary of State for consideration by the Title Board. During a hearing on April 6, 2016, the Title Board found that it

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<sup>1</sup> The Proponents only intend to circulate petitions for one of the Initiatives.

had jurisdiction to set a title for each of the Initiatives and that each of the Initiatives complied with the single subject requirement. Accordingly, the Title Board set a title for each of the Initiatives.

On April 13, 2016, Petitioner Natalie Menten (the “Petitioner”) filed motions for rehearing on the Initiatives. During a rehearing on April 20, 2016, the Title Board granted the Petitioner’s motions only to the extent that the Title Board made changes to the titles for each of the Initiatives.

On April 27, 2016, the Petitioner filed a Petition for Review of Final Action of Ballot Title Setting Board for each of the Initiatives. The Court granted each of the Petitions on April 28, 2016. On May 5, 2016, the Proponents filed an Unopposed Motion to Consolidate Case Nos. 2016SA138, 2016SA139 and 2016SA140. The Court granted the Unopposed Motion on May 6, 2016 and ordered the parties to file briefs for the Initiatives under case number 2016SA138. Accordingly, this brief addresses all three of the Initiatives.

### **STATEMENT OF FACTS**

The single subject for all of the Initiatives is to authorize the state to retain and spend all state revenues that exceed the constitutional limitation on state fiscal year spending. There are slight variations between each of the Initiatives. For example, Initiative #116 and Initiative #117 provide that of the revenues that are

retained, at least 35% will fund education and at least 35% will fund transportation projects. Any remaining revenues may be used for education, transportation projects, mental health services, or senior services. Initiative #118 does not specify projects and services that may be funded with the retained revenues. Instead, Initiative #118 provides that the revenues may be appropriated or transferred for any purpose determined by the General Assembly. Furthermore, Initiative #117 and Initiative #118 include a sunset date of June 30, 2026. Initiative #116 has no sunset date.

During a hearing on April 6, 2016, the Title Board unanimously determined that each of the Initiatives contained a single subject: to authorize the state to retain excess state revenue. Accordingly, the Title Board set titles for each of the Initiatives. In her Motions for Rehearing and at the rehearing on April 20, 2016, the Petitioner argued that the Initiatives contained more than a single subject because the retained revenues would be used to fund multiple unrelated projects and services. The Petitioner further argued that the title for Initiative #118 was misleading and prejudicial because it did not include language explaining that the General Assembly would be able to appropriate or transfer retained revenues for any purpose, “including, but not limited to . . . public schools, transportation projects, and . . . other priorities.” The Title Board granted the Petitioner’s

Motions for Rehearing only to the extent that the Title Board made changes to the titles. The Title Board denied the Petitioner's Motions in all other respects.

### **SUMMARY OF THE ARGUMENT**

The Taxpayer's Bill of Rights ("TABOR") limits state fiscal year spending unless voters approve a revenue change. *See* COLO.CONST. Article X, Section 20(7). Voters may propose a revenue change pursuant to TABOR through the initiative process set forth in Article V, Section 1(2). *See* COLO.CONST. Article V, Section 1.

The Initiatives are being proposed by the Proponents to authorize the state to retain and spend all state revenues that exceed the constitutional limitation on state fiscal year spending. Initiative #116 and Initiative #117 include provisions allocating certain percentages of any retained revenues to education and transportation projects. Initiative #118 gives the General Assembly discretion on how to spend the retained revenues and lists possible projects and services that may be funded with any retained revenues; it does not guarantee that any particular project or service will be funded with retained revenues. In Initiative #116 and Initiative #117, the limitations on how the retained revenues may be spent are consistent with the voters' power to allow the state to retain the revenues pursuant to TABOR. Such limitations are necessarily and properly connected to the single



subject of authorizing the state to retain excess state revenue. Initiative #118 does not limit how the retained revenues may be spent. Accordingly, each of the Initiatives contains a single subject.

Initiative #118 does not require that any particular project or service be funded with retained revenues. As previously stated, Initiative #118 only describes possible projects or services that may be funded with retained revenues. Because there are no such requirements, the title does not include descriptions of the possible projects or services that may be funded. Accordingly, the title accurately reflects the true intent and meaning of Initiative #118.

The decisions of the Title Board are entitled to great deference and may be rejected by the Court only in a clear case. There is no basis on which reversal is warranted here. Accordingly, the Court should uphold the Title Board's findings that each of the Initiatives contains a single subject and confirm the titles as set by the Title Board.

### **STANDARD OF REVIEW**

In reviewing a challenge to the Title Board's decision, the Court employs all legitimate presumptions in favor of the propriety of the Title Board's actions. *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90)*, 328 P.3d 155, 158 (Colo. 2014). Because the Title Board has considerable

discretion in setting the title, the ballot title and the submission clause, the Court should reverse the Title Board's decision only if the title is insufficient, unfair or misleading. *See id.* at 159.

Furthermore, the Court does not “determine the initiative’s efficacy, construction, or future application, which is properly determined if and after the voters approve the proposal.” *Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45)*, 234 P.3d 642, 645 (Colo. 2010). The Court need only examine the wording of the titles and the initiative to determine whether they comport with the single subject and clear title requirements. *Cordero*, 328 P.3d at 159. Only in a clear case should the decision of the Title Board be held invalid. *In re Title, Ballot Title & Submission Clause, & Summary Pertaining to the Proposed Tobacco Tax Amendment 1994*, 872 P.2d 689, 694 (Colo. 1994).

## **ARGUMENT**

### **I. The Initiatives Contain a Single Subject.**

A measure proposed by a petition must contain a single subject which must be clearly expressed in its title. COLO. CONST. Article V, Section 1(5.5); COLO.REV.STAT. § 1-40-106.5(1). If an initiative “tends to effect or to carry out one general object or purpose, it is a single subject under the law.” *Kemper v.*

*Leahy (In re Title, Ballot Title)*, 328 P.3d 172, 177 (Colo. 2014). Provided that the subject matter is “necessarily or properly connected,” an initiative will meet the single subject requirement. *Id.*

Each of the Initiatives contains a single subject: to authorize the state to retain excess state revenue. After finding that each of the Initiatives contain only one subject, the Title Board set titles for each of the Initiatives as follows:

For Initiative #116:

A change to the Colorado Revised Statutes permanently authorizing the state to retain and spend all state revenues that exceed the constitutional limitation on state fiscal year spending, and, in connection therewith, allocating at least 35% of any revenues retained to fund education and at least 35% to fund transportation projects and allowing the state to use any remaining revenues for the same purposes or to fund mental health services and senior services.

For Initiative #117:

A change to the Colorado Revised Statutes authorizing the state to retain and spend state revenues that exceed the constitutional limitation on state fiscal year spending, and, in connection therewith, authorizing the state to retain and spend all such revenues collected during the ten fiscal years from July 1, 2016 through June 30, 2026; authorizing the state to annually retain and spend such revenues for any subsequent fiscal year in an amount equal to the highest amount collected in any single fiscal year during the ten-year period adjusted for increases in state population and inflation; allocating at least 35% of any revenues retained to fund education and at least 35% to fund transportation projects; and allowing the state to use any remaining revenues for the same purposes or to fund mental health services and senior services.

For Initiative #118:

A change to the Colorado Revised Statutes authorizing the state to retain and spend state revenues that exceed the constitutional limitation on state fiscal year spending, and, in connection therewith, authorizing the state to retain and spend all such revenues collected during the ten fiscal years from July 1, 2016 through June 30, 2026, and authorizing the state to annually retain and spend such revenues for any subsequent fiscal year in an amount equal to the highest amount collected in any single fiscal year during the ten-year period adjusted for increases in state population and inflation.

*See* R. Petition for Review of Final Action of Ballot Title Setting Board for Proposed Initiative 2015-2016 #116, Ballot Title Setting Board, Title for Initiative #116; R. Petition for Review of Final Action of Ballot Title Setting Board for Proposed Initiative 2015-2016 #117, Ballot Title Setting Board, Title for Initiative #117; R. Petition for Review of Final Action of Ballot Title Setting Board for Proposed Initiative 2015-2016 #118, Ballot Title Setting Board, Title for Initiative #118.

As described in the titles, Initiative #116 and Initiative #117 each provide that of the retained revenues, at least 35% will fund education and at least 35% will fund transportation projects. Any remaining revenues may be used to fund education, transportation projects, mental health services or senior services. Initiative #118 provides that the retained revenues may be used to fund any purpose, including but not limited to public schools, transportation, or other

priorities. These descriptions describe to voters how the retained revenues will be or may be spent. Because these required or discretionary expenditures are connected with the retention of excess state revenue, the Initiatives contain a single subject.

The purpose of the single subject rule is to prevent the enactment of combined measures that would fail on their own and protect against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision “‘coiled up in the folds’ of a complex initiative.” *Kemper*, 328 P.3d at 177. The Initiatives do not risk either of these dangers. The single subject of each Initiative is to permit the state to retain excess revenues. Initiatives #116 and #117, and their respective titles, explain that the retained revenues may be spent on education, transportation and other projects. Initiative #118 would not require that any retained revenues be spent on specific projects or services; thus, the title for Initiative #118 does not list any specific purposes on which retained funds must be spent. Because the Initiatives and their titles clearly describe the purposes and effects of the Initiatives, there is no risk that voters may inadvertently vote in favor of or against the Initiatives due to a belief that they would accomplish something other than their stated purposes. Accordingly, the Initiatives do not violate the single subject rule.

At the rehearing, the Petitioner argued that the Initiatives contain more than a single subject because there is no “actual connection” between education, transportation projects, mental health services or senior services. *See* R. Petition for Final Review of Action of Ballot Title Setting Board for Proposed Initiative 2015-2016 #116, Motion for Rehearing, p. 2, ¶ 4. This argument lacks merit. The Court has previously held that proposed ballot initiatives that sought to establish a tax credit that would be applied to more six state and local taxes did not contain more than a single subject. *See In re Title, Ballot Title & Submission Clause, & Summary Regarding Amend TABOR #32*, 908 P.2d 125, 129 (Colo. 1995). In that case, petitioners challenged a proposed ballot initiative that would have established a \$60 tax credit to be applied to six state or local taxes, including each state or local telephone bill tax, specific ownership tax, business personal property tax, abatements and refunds levy, county or city and county levy spent on social services or courts, and state income tax return. *Id.* at 131. The Court held that because the single purpose was the implementation of the tax credit, the initiative contained a single subject.

Similarly, the Colorado Court of Appeals has held that a bill that authorized funding for two types of capital construction projects did not violate the single

subject requirement set forth in Article V, Section 1 of the Colorado Constitution.<sup>2</sup> *See Colorado Criminal Justice Reform Coal. v. Ortiz*, 121 P.3d 288, 291 (Colo. App. 2005), *writ of certiorari denied without opinion*, 2005 LEXIS 944 (Colo. 2005). In *Ortiz*, the plaintiffs argued that the bill contained two subjects because it authorized lease-purchase agreements to finance a correctional facility and new academic facilities for the University of Colorado. *Id.* at 290. The court held that the bill contained a single subject: the use of lease-purchase agreements to fund capital construction of certain state facilities.

The single subject of each of the Initiatives at issue here is the retention of excess state revenues. Like the initiative at issue in *Amend TABOR #32* and the bill in *Ortiz*, the Initiatives describe the projects and services that may be funded if the Initiatives are passed. Because these descriptions are necessarily and properly connected to the subject of each of the Initiatives, the Court should uphold the decisions of the Title Board.

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<sup>2</sup> The language of Article V, Section 1 of the Colorado constitution (pertaining to the single subject rule regarding proposed ballot initiatives) was drawn from Article V, Section 21 of the Colorado constitution (pertaining to the single subject rule regarding bills). *See* COLO.REV.STAT. § 1-40-106.5(1)(c). In setting titles for proposed initiatives, the Title Board applies judicial decisions construing the single subject requirement for bills. *See* COLO.REV.STAT. § 1-40-106.5(3).

## **II. The Title for Initiative #118 Correctly and Fairly Expresses the True Intent and Meaning Thereof.**

Titles and submission clauses should “enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *Earnest*, 234 P.3d at 648. In setting a title, the Title Board must “consider the public confusion that might be caused by misleading titles and to avoid titles for which the general understanding of the effect of a ‘yes’ or ‘no’ vote will be unclear.” *Id.* The title must “correctly and fairly express the true intent and meaning” of the initiative. *Id.* (citing COLO.REV.STAT. § 1-40-106(3)(b)).

At the rehearing, the Petitioner argued that the Title Board should have included in the title for Initiative #118 language explaining that retained revenues may be used to fund any purpose, including but not limited to public schools, transportation, or other priorities. *See* R. Petition for Review of Final Action of Ballot Title Setting Board for Proposed Initiative 2015-2016 #118, Motion for Rehearing, p. 1. The Petitioner contends that the title for Initiative #118 fails to “reflect in any way the priority given to public schools and transportation projects in the use of the funds retained.” *See* R. Petition for Review of Final Action of Ballot Title Setting Board for Proposed Initiative 2015-2016 #118, p.2, ¶ 2. However, Initiative #118 does not prioritize funding for any particular project or



service. To the contrary, and as the Title Board noted at the rehearing, public schools, transportation, and other priorities are mere examples of projects and services that could be funded with retained revenues. Because the Court grants considerable deference to decisions of the Title Board, the Court should uphold the title for Initiative #118.

Furthermore, by reading the title for Initiative #118, an elector would be able to determine that a “yes” vote in favor of the Initiative would authorize the state to retain and spend excess revenues. It is unnecessary for the title to describe the General Assembly’s option to fund the projects and services as a result of the retention of the excess revenues. Because the title clearly explains the effects of Initiative #118, which is to authorize the state to retain and spend excess revenues, the Title Board’s decision should be upheld.

### **CONCLUSION**

For the reasons stated herein, the Proponents respectfully request that the Court uphold the title, ballot title and submission clause for Initiative #116, Initiative #117 and Initiative #118.

Respectfully submitted this 13th day of May, 2016.

*s/ Dee P. Wisor*

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2016, I filed a true and correct copy of the foregoing RESPONDENTS' OPENING BRIEF using the ICCES electronic filing system and served electronic copies to the following:

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