

<p>SUPREME COURT, STATE OF COLORADO 2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2015-2016 #116, #117, &amp; #118 (“Retention of Excess State Revenue”)</p> <p><b>Petitioner:</b> Natalie Menten,</p> <p>v.</p> <p><b>Respondents:</b> Dan Ritchie &amp; Albert Yates,  and</p> <p><b>Title Board:</b> Suzanne Staiert, Frederick R. Yarger, &amp; Jason Gelender.</p>	
<p style="text-align: center;"><b>TITLE BOARD’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, I certify that:

A. The brief complies with C.A.R. 28(g) because it contains 2,433 words.

B. The brief complies with C.A.R. 28(k) because 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, and not to an entire document, where the issue was raised and ruled on.

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## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Whether the Title Board (“Board”) correctly determined that Proposed Initiatives #116, #117, and #118 (“#116,” #117,” and “#118”) contain a single subject under Article V, § 1(5.5) of the Colorado Constitution.
2. Whether the title the Board set for #118 complies with Colorado law.

## **STATEMENT OF THE CASE**

This is a consolidated appeal of the Board’s decisions regarding three proposed initiatives. Respondents Dan Ritchie and Albert Yates seek to circulate #116, #117, and #118 to obtain the required number of signatures to place the measures on the ballot. These three proposed initiatives are substantially similar—though not identical—to each other, and for that reason this Court granted Petitioner-objector Natalie Menten’s motion to consolidate these three petitions. *See* May 5, 2016 Order of the Court. In general, the three initiatives would permanently authorize Colorado to retain and spend state revenues that exceed the

state constitution's limitation on fiscal year spending under the Taxpayers' Bill of Rights. Each initiative amends title 24, article 7 of the Colorado Revised Statutes to add a new section that reads in part, "Notwithstanding any provision of law to the contrary ..., the state is authorized to retain and spend all state revenues in excess of the limitation on state fiscal year spending." April 27, 2016 Petition for Review of #116, at 15 ("#116 Pet."); April 27, 2016 Petition for Review of #117, at 9 ("#117 Pet."); April 27, 2016 Petition for Review of #118, at 12 ("#118 Pet.").

The initiatives differ in two ways. First, they have different provisions regarding how the additional revenues are spent. Number 116 and #117 would require the state legislature to appropriate at least 35 percent of the money "to fund education," at least 35 percent "to fund transportation projects," and "any amounts not spent on education or transportation may only be used to fund mental health services and senior services." #116 Pet. at 15; #117 Pet. at 9. Number 118, in contrast, would allow the state to "appropriate[] or transfer[]" the funds

“for any purposes determined by the general assembly, including but not limited to, for public schools, transportation projects, and for other priorities.” #118 Pet. at 12.

Second, the initiatives have different provisions regarding the extent to which the state is authorized to retain and spend those additional revenues. Number 116 makes the proposed change permanent, providing that the state may “retain and spend” the excess revenues “for each fiscal year commencing on or after July 1, 2016. #116 Pet. at 15. Numbers 117 and 118 are more narrowly tailored; they permit the state to “retain and spend” the excess revenues “for each fiscal year commencing on or after July 1, 2016, *but before July 1, 2026* ....” #117 Pet. at 9; #118 Pet. at 12 (emphasis added). After July 1, 2026, the state may only retain “revenues that are in excess of the limitation on state fiscal year spending, *but less than the 2016 election excess state revenues cap for the given fiscal year.*” #117 Pet. at 9; #118 Pet. at 12 (emphasis added).



The Board held a hearing for all three initiatives on April 6, 2016, and it granted single-subject approval and set a title for each. #116 Pet. at 7; #117 Pet. at 7; #118 Pet. at 19. Menten, along with the Proponents and another Colorado elector, filed motions for rehearing on each of the initiatives on April 13. #116 Pet. at 41-43; #117 Pet. at 19-21; #118 Pet. at 16-18. The Board granted or partially granted some of the motions to make alterations to the titles it initially set, but otherwise denied those requests. #116 Pet. at 29; #117 Pet. at 7; #118 Pet. at 19. The title the Board set for #118—the only title Menten challenges as improper—reads:

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 fiscal year during the ten-year period adjusted for increases in state population and inflation.

#118 Pet. at 19.

## SUMMARY OF THE ARGUMENT

The Board's decision to set titles for #116, #117, and #118 were proper. As a procedural matter, Menten waived any argument that #118 violates the single-subject rule when she failed to raise the issue before the Board in her motion for rehearing. In any event, the Board correctly determined that all three initiatives contain just one subject: permitting Colorado to retain and spend the state revenues it collects that exceed the constitutional limitation on state fiscal year spending. Finally, the title the Board set for #118 correctly and fairly expresses the true intent and meaning of the measure and would not lead to public confusion. As a result, the Board's decisions should be affirmed.

## ARGUMENT

### **I. Nos. 116, 117, and 118 contain a single subject.**

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

When this Court reviews “the Title Board's single subject decision, [it] employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions. [It] will only overturn the Title Board's finding

that an initiative contains a single subject in a clear case.” *In re Title, Ballot Title, & Submission Clause for 2011-2012, #45*, 274 P.3d 576, 579 (Colo. 2012) (quotation omitted).

This issue was properly preserved as to Nos. 116 and 117, but not as to #118. The Board found that Nos. 116, 117, and 118 all contain a single subject at a hearing on April 6, 2016. #116 Pet. at 7; #117 Pet. at 7; #118 Pet. at 19. Menten moved for rehearing and raised the single-subject issue as to Nos. 116 and 117. #116 Pet. at 41-43; #117 Pet. at 19-21. And while Menten did file a motion for rehearing on #118, she did not argue that #118 violated the single-subject rule. Because “[a]rguments not presented to or ruled upon by the district court cannot be raised for the first time on appeal,” this Court should not consider the issue. *Silverview at Overlook, LLC v. Overlook at Mt. Crested Butte, LLC*, 97 P.3d 252, 257 (Colo. App. 2004) (citing *Estate of Stevenson v. Hollywood Bar & Café, Inc.*, 832 P.3d 718 (Colo. 1992)).

It is true that in the opening paragraph of her motion for rehearing, Menten wrote that “Initiative 118 *does not comply with the*

*Single Subject rule* and title set [sic] is misleading and prejudicial.” #116 Pet. at 16 (emphasis added). But she develops no argument in support of this contention; in fact, she never mentions the single-subject issue again in the motion. *See id.* at 16-18. It is well settled that courts “will not consider a bald legal proposition presented without argument or development.” *Barnett v. Elite Props. Of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010). In short, “[u]ndeveloped and unsupported claims are waived.” *Sinclair Transp. Co. v. Sandberg*, 350 P.3d 924, 936 (Colo. App. 2014) (quoting *United States v. Brocksmith*, 991 F.2d 1363, 1366 (7th Cir. 1993)).

**B. Nos. 116, 117, 118 contain a single subject.**

In any event, all three initiatives comply with the single-subject rule. The state constitution provides that “[n]o measure shall be proposed by petition containing more than one subject ....” COLO. CONST., art. V, § 1(5.5). A proposed measure that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Title, Ballot Title, & Submission Clause for 1999-2000*, #25, 974

P.2d 458, 463 (Colo. 1999). In contrast, “to constitute more than one subject, the text of the measure must relate to more than one subject and it must have at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002, #43, 46* P.3d 438, 441 (Colo. 2002) (quotations omitted).

The Board correctly determined that all three initiatives contain only one subject: permitting Colorado to retain and spend the state revenues it collects that exceed the constitutional limitation on state fiscal year spending. Menten suggests that the three initiatives contain more than one subject because they require the state to spend at least 35 percent of the additional funds for education and another 35 percent for transportation projects. *See* #116 Pet. at 3; #117 Pet. at 3.<sup>1</sup> These initiatives are best analogized to the initiative at issue in *In re Title*,

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<sup>1</sup> Menten also argues that #118 provides that the excess revenues “be used to fund both public schools and transportation projects.” #118 Pet. at 3. But as discussed in greater detail below, this reading misinterprets #118, which does not impose any limitations on how the General Assembly may allocate the funds. *See* Section II.B, *supra*.

*Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d 76 (Colo. 2014). There, this Court took up a challenge to an initiative relating to the recall provisions for state and local officials. *Id.* at 78. The Court noted that the initiative’s “first subject” would make “substantial changes to the manner in which state and local recall elections are triggered and conducted under constitutional and statutory law.” *Id.* at 81. These changes included “new enforcement provisions,” a new “threshold requirement for the number of valid petition signatures,” different rules regarding the “content of recall ballots,” a different “manner of filling vacancies caused by recall elections,” the “elimination of the application of existing campaign finance laws to recall petitions and elections,” and different “[r]equirements applicable to petition circulation.” *Id.* at 81-83. Despite the large number of procedural and substantive amendments the initiative would make, the Court nevertheless held that “[c]ollectively, these changes to the manner in which recall elections are triggered and conducted constitute a single subject.” *Id.* at 83.

Just as in *In re #76*, Nos. 116, 117, and 118 contain a number of different provisions, but all relate to one overarching goal: permitting the state to retain *and spend* certain revenues. The fact that two of those initiatives provide limits on how the additional funds are spent does not mean that they contain more than one subject. Particularly given that the standard of review for violation of the single-subject rule is to employ “all legitimate presumptions” in the Board’s favor, this Court should affirm the Board’s decision.

**II. The title the Board set for #118 was proper.**

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

This Court does not demand that the Board “set the best possible title.” *In re Title, Ballot Title, & Submission Clause for 2009-2010, #45*, 234 P.3d 642, 645, 648 (Colo. 2010). Rather, it “give[s] great deference to the Title Board in the exercise of its drafting authority and will reverse its decision only if the titles, are insufficient, unfair, or misleading.” *Id.* (citation omitted).

This issue was properly preserved. The Board set a title for #118 on April 6, 2016. #118 Pet. at 19. Menten filed a motion for rehearing on the title, *id.* at 16-18, and the Board ruled on that motion, *id.* at 19. Menten then timely filed her petition for review in this Court.

**B. *Number 118's title is proper.***

The state constitution requires that the subject of a proposed initiative “shall be clearly expressed in its title ....” COLO. CONST., art. V, § 1(5.5). Section 106(3)(b) establishes the standard for setting titles:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment... shall correctly and fairly express the true intent and meaning thereof .... Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.



§ 1-40-106(3)(b), C.R.S. In short, a title must be fair, clear, accurate, and complete. *In re Title, Ballot Title, & Submission Clause for 2007-2008, #62*, 184 P.3d 52, 58 (Colo. 2008). Here, the Board’s title plainly expresses the measure’s core purpose—to permit the General Assembly to appropriate all revenue it collects to provide for the general welfare.

Menten contends that the title “do[es] not reflect in any way the priority given to public schools and transportation projects in the use of the funds retained, and therefore the titles are [*sic*] misleading ....” #118 Pet. at 3. This argument misconstrues #118’s language. Menten indicated in her motion for rehearing before the Board that “[t]he clear meaning of [#118’s] language is that the funds are to be used for public schools and transportation projects.” *Id.* at 17. But that is not what #118 says. The initiative would permit the state legislature to “appropriate[] or transfer[]” the excess funds “*for any purposes determined by the general assembly, including but not limited to, for public schools, transportation projects, and for other priorities.*” *Id.* at 12 (emphasis added). The plain language of the initiative makes clear

that the newly retained funds need not be used for public schools or transportation projects, but may be appropriated for any legitimate governmental purpose as determined by the legislature. *E.g.*, *Turtle Island Restoration Network v. Nat’l Marine Fisheries Serv.*, 340 F.3d 969, 975 (9th Cir. 2003) (“[T]he phrase ‘including but not limited to’ is often used to mitigate the rule of statutory construction that general words are to be construed as only applying to a specific list.”) (citing *Ramirez, Leal & Co. v. City Demonstration Agency*, 549 F.3d 97, 104 (9th Cir. 1976)). In short, #118’s title “enable[s] 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.” *In re Title, Ballot Title, & Submission Clause for 2009-2010*, #24, 218 P.3d 350, 356 (Colo. 2009) (quotation omitted). The Board’s decision should be affirmed.

## CONCLUSION

For the reasons given above, this Court should affirm the Board’s decisions regarding #116, #117, and #118.

Respectfully submitted on this 12<sup>th</sup> day of May, 2016.

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## CERTIFICATE OF SERVICE

This is to certify that I electronically served the **TITLE BOARD'S OPENING BRIEF** and related documents upon the following parties through ICCES this 12<sup>th</sup> day of May, 2016:

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