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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
In the Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #70 (Severance Taxes on Oil and Gas) **Petitioners:** Andrew J. O'Connor and Mary E. Henry, v. **Respondent:** Jeff Wasden, and **Title Board:** Suzanne Staiert, Sharon Eubanks, and Glen Roper.	▲ **COURT USE ONLY** ▲
Attorneys for Respondent Jeff Wasden Jason R. Dunn, #33011 David B. Meschke, #47728 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Tel: 303.223.1100; Fax: 303.223.1111 jdunn@bhfs.com; dmeschke@bhfs.com	Case No.: 17SA286

RESPONDENT'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3420 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Jason R. Dunn

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Respondent Jeff Wasden, registered elector of the State of Colorado, through his undersigned counsel, submits his Opening Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2017-2018 #70 (unofficially captioned "Severance Taxes on Oil and Gas").

ISSUES PRESENTED FOR REVIEW BY PETITIONERS

1. Whether the Title Board erred in granting Respondent's Motion for Rehearing on the ground that the measure does not constitute a single subject.

STATEMENT OF THE CASE

The Petitioners bring this original proceeding pursuant to section 1-40-107(2), C.R.S., as an appeal from a decision of the Title Board to grant Respondent's Motion for Rehearing and deny Title Setting on Proposed Initiative 2017-2017 #70 on the ground that the measure does not constitute a single subject and thus the board lacks jurisdiction to set a title.

Proposed Initiative #70 is the *eighth version* of this measure the Petitioners filed for 2017-2018.[1] Like its predecessors, the Initiative purports to increase the existing severance tax rates on oil and gas by five percentage points and eliminate a related tax credit. Initiative, §§ 1–2. Petitioners, Andrew J. O'Connor and Mary E. Henry, filed an original draft of the measure on October 25, 2017. One day later, the Staff of Legislative Council and Office of Legislative Legal Services notified Petitioners in a waiver letter that no review and comment hearing was necessary because the submitted version does not raise any additional comments that had not been raised in the earlier memorandum and hearings for the seven previous versions of the

[1] Initiative #70 is only the second of the eight versions to be filed with the Title Board. Earlier this year, this Court affirmed the Title Board's decision that it lacked jurisdiction to set a title for Initiative #20, the previous version of the measure filed with the Title Board, because that measure's amended draft failed to comply with the requirements in section 1-40-105(4). Order of Court, *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #20*, No. 2017SA85 (Colo. June 20, 2017).

measure.[2] Petitioners then filed an identical draft of the Initiative (the "Final Draft") with the Title Board on November 2, 2017. *See* Petitioners' Ex. B, Final Draft. The Title Board considered the Initiative on November 15, 2017, determined that it possessed jurisdiction to set title, and set a title.

Respondent Jeff Wasden filed a Motion for Rehearing (the "Motion") pursuant to section 1-40-107(1)(a) on November 22, 2017. Petitioners' Ex. D, the Motion. In the Motion and at the rehearing, Wasden argued in part that the Initiative is vague and confusing and impermissibly contains multiple separate and distinct subjects in violation of the single-subject requirement. *See id.* at 2–4. Specifically, Wasden contended that, in addition to allowing proceeds from the severance tax increase to be collected and spent by the State as a voter-approved revenue change (*i.e.*, "deBruced"), it deBruced all other

[2] *See* Proposed Initiative #70's Waiver Letter at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/70WaiverLetter.pdf. Initiative #70 is the only one of the Petitioners' eight versions of this measure for 2017-2018 that did not go through the review and comment process.

revenue the State or any local district may collect and spend, regardless of source.

At the Rehearing on December 6, 2017, the Title Board considered Wasden's single-subject argument. The board agreed that the language is unclear and deBruced both the severance tax revenue and all other state and local revenue. It then granted the Motion on the ground that the broader deBrucing was an impermissible second subject that significantly diverged from the measure's central purpose of increasing the severance tax rates on the oil and gas industry.

Petitioners subsequently filed a Petition for Review of Final Action of the Title Setting Board Concerning Proposed Inititiave [sic] 2017-2018 #70 ("Severance Taxes on Oil and Gas") in this Court on December 11, 2017 and an Amended Petition for Review on December 18, 2017.

SUMMARY OF THE ARGUMENT

Proposed Initiative #70 violates the constitutional single-subject requirement. While the heart of the measure is an increase to the oil and gas severance tax rates and the distribution of the increased

revenue generated to fund a variety of public causes, it also contains a provision that would remove limitations on the amount of non-severance tax revenue that may be collected and distributed by the State and local districts. This provision, which undoubtedly is coiled up in the folds of the measure, is unrelated to the increase in severance tax rates, does not carry out any of the measure's purposes, and may appeal to a number of competing factions and thus prevent its passage on its own merits. Therefore, the Title Board correctly determined that it lacked jurisdiction to set a title.

STANDARD OF REVIEW

Article V, Section 1(5.5) of the Colorado Constitution requires that "[n]o measure shall be proposed by petition containing more than one subject . . . ." "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); *see also* § 1-40-106.5 (statutory single-subject requirement). "A proposed initiative violates this rule if its text relates to more than one subject,

and has at least two distinct and separate purposes not dependent upon or connected with each other." *In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012).

Because the Title Board reviews a multitude of initiatives every election cycle and is in the best position to make this determination, this Court, in reviewing a challenge to the board's decision, "employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board's actions." *In re Title, Ballot, Title and Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010). Although the right of the initiative is to be liberally construed, "[i]t merits emphasis that the proponents of an initiative bear the ultimate responsibility for formulating a clear and understandable proposal for the voters to consider." *In re Initiative 2007-2008 #62*, 184 P.3d 52, 57 (Colo. 2008) (citation omitted).

ARGUMENT

The narrow issue on appeal is whether Proposed Initiative #70 impermissibly contains multiple subjects in violation of the constitutional and statutory single-subject requirement. Section 3 of

the measure not only exempts from TABOR the revenue collected from the severance tax on oil and gas, it also removes spending limitations on *all other revenue* that may be collected and spent by the State and local districts. Therefore, the measure contains multiple subjects and the Title Board correctly determined that it lacks jurisdiction to set a title.

I. Section 3 of Proposed Initiative #70.

Although the majority of Proposed Initiative #70 concerns the severance tax on oil and gas, Section 3 of the measure contains a clause that deviates from the measure's central purpose.

A. Section 3's language.

Section 3 of the measure, which follows the legislative declaration and the increased severance tax rates on the oil and gas industry, reads in full:

> SECTION 3. In Colorado Revised Statutes, 39-29-105, add (3) as follows:
>
> (3) THE PROCEEDS OF THIS TAX RECEIVED IN ACCORDANCE WITH THE PROVISIONS OF SUBSECTION (1)(c) OF THIS SECTION AND INVESTMENT INCOME THEREON SHALL BE COLLECTED AND SPENT BY THE STATE AS A VOTER-APPROVED REVENUE CHANGE WITHOUT REGARD TO ANY SPENDING LIMITATION CONTAINED WITHIN

> SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION, OR ANY OTHER LAW, AND WITHOUT LIMITING IN ANY YEAR THE AMOUNT OF OTHER REVENUE THAT MAY BE COLLECTED AND SPENT BY THE STATE OR ANY DISTRICT.

The first clause is clearly intended to deBruce the severance tax revenue. The second clause, however, digresses from exempting severance tax revenue from TABOR. By stating "without limiting in any year the amount of other revenue that may be collected and spent by the State or any District," the measure appears to deBruce all other state and local district revenue that may be collected and spent, regardless of source. In other words, in passing an increase to the oil and gas severance tax rates, voters also would be removing the limits on the collection and spending of all tax revenue for the State and every individual district in the state, a result that is without question more significant and important than the measure's stated purpose of increasing the severance tax rates.

B. The Petitioners have yet to explain what they believe is Section 3's meaning.

Perhaps recognizing that the Petitioners may not realize the full extent of Section 3's effect, the staff of Legislative Council and Office of

Legislative Legal Services asked the Petitioners a number of clarifying questions during the review and comment process for Proposed Initiative #20, an earlier version of Proposed Initiative #70.[3] The Petitioners either did not answer these questions or answered them in such a manner as to create more confusion.

For example, Question 6 in Initiative #20's Review and Comment Memorandum asked, with respect to Section 3's addition of section 39-29-105(3) to the Colorado Revised Statutes, whether the Petitioners intended that (a) the state may retain all of the oil and gas severance tax revenue collected after the new rates go into effect as a voter-approved revenue change to the fiscal year spending limit in TABOR, or (b) the state may retain the increased revenue from the changes to the oil and gas severance tax as a voter-approved revenue change. Put another way, the question asks whether the measure (a) simply deBruces the increased revenue from the severance tax, or (b) deBruces increased revenue beyond revenue generated from the severance tax increase. When asked that question at the review and comment

[3] Section 3 in Initiative #70 contains the exact same language as it did in Initiative #20.

hearing, Petitioner O'Connor said "I like (b) better than (a)," but, after the staff stated that they think the answer is (a), he changed his answer and agreed that the answer is (a).[4] No further discussion or clarity has since been provided on this point.

In addition, Question 8 in Initiative #20's Review and Comment Memorandum asked: "Can the voters from the state, which is one district for purposes of TABOR, approve a voter-approved revenue change for the other districts?" When asked that question at the review and comment hearing, Petitioner O'Connor responded that he "d[oesn't] know what that question mean[s]," but then later said "yes."[5] Both questions raise "deBrucing" concerns—if the measure deBruces all State and local government revenue, and not just revenue to the State resulting from the increased severance tax rates, then the measure contains another subject.

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[4] Audio for the Review and Comment Hearing can be found on the Colorado General Assembly's website at http://leg.colorado.gov/committee/granicus/964136 by clicking on "2017 Review and Comment Hearings Achieved Audio" and the link "Initiative 2017-2018 #20 Review and Comment Hearing." The audio for question 6 begins at 35:20 of the recording.

[5] *See* discussion starting at 37:45 of Initiative #20's review and comment hearing at http://leg.colorado.gov/committee/granicus/964136.

Despite the language of the measure, the deBrucing concerns remain unanswered. In their Response in Opposition to Motion for Rehearing (the "Response"), the Petitioners failed to address the issue Respondent Wasden raised and did not seem to fully understand that Section 3 of the measure contains specific language addressing TABOR. Instead, the Petitioners stated that "TABOR does not apply here nor do 'deBrucing' concerns . . . . Proposed Initiative 2017-2018 #70, does not raise tax rates on the public nor does it increase spending limits . . . . [Respondent Wasden] intentionally conflates TABOR and "deBrucing" which are inapplicable and irrelevant to Proposed Initiative 2017-2018 #70."[6] Petitioners' Ex. E, the Response, at 3. When the Title Board asked Petitioner O'Connor at the rehearing what he believed the last clause in Section 3 of the measure means, he again failed to provide a substantive answer. Instead, he addressed issues raised concerning Proposed Initiative #20, namely whether the measure had a retroactive

[6] Petitioners repeated this statement in their Opening Brief, which was filed before the applicable deadline. *See* Petitioners' Op. Brief at 5–6.

effect and whether funds could be pulled from a general fund to satisfy the measure's requirements.[7]

C. The Title Board determined that the last clause in Section 3 constitutes a second subject.

During Proposed Initiative #70's rehearing, the Title Board discussed Section 3's language and determined that it constituted a second subject because the clause "without limiting in any year the amount of other revenue that may be collected and spent by the State or any District," deBruces not just the severance tax revenue that is the main subject of the measure but also "other revenue" not generated through the increased severance tax rates.

Specifically, Board member Sharon Eubanks expressed that the reference to "other revenue" in the last clause in Section 3 "goes beyond just the severance tax rate increase" because it is broader in scope than

[7] Audio for the Title Board Rehearing can be found at https://www.sos.state.co.us/pubs/info_center/audioArchives.html and by clicking on "Title Board – December 6, 2017 – 10:00 a.m. Petitioner O'Connor's answer begins at 39:45 in the recording.

the severance tax revenue generated under the measure.[8] She explained that because the first half of Section 3 of the measure merely deBruces severance tax revenue at the State level and the measure would require deBrucing at the local district level, it would make sense for the last clause in Section 3 to deBruce severance tax revenue at the local district level.[9] However, she noted, the last clause's reference to "other revenue" seems to indicate the measure deBruces all revenue in the governments' budgets and not just revenue generated from the severance tax.[10] Board member Glen Roper agreed and explained that "the grammar" in that clause forced such a reading.[11] The Petitioners' explanation at the rehearing "did not satisfy" these two board members as to what Section 3 was intended to mean.[12]

As a result, both board members voted to grant the Motion because the measure contained a second subject that precluded the

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[8] *See* Title Board's discussion of its single-subject concerns and Section 3 beginning at 44:29 in "Title Board – December 6, 2017 – 10:00 a.m.," *available at* https://www.sos.state.co.us/pubs/info_center/audioArchives.html.
[9] *See id.* starting at 50:10 in the recording.
[10] *Id.*
[11] *See id.* starting at 49:01 in the recording.
[12] *See id.* starting at 52:39 in the recording.

board from having jurisdiction to set a title.[13] Because the board determined that it lacked jurisdiction for that reason, it did not vote on a number of Respondent Wasden's other arguments, including that the measure contains a second subject because it "deBruces" district-level spending limits for severance tax revenue and separate concerns regarding the title and abstract.[14] Petitioners' Ex. D, the Motion, at 3–6.

II. The Title Board correctly concluded that the last clause in Section 3 contains a second subject.

The last clause in Section 3 lies in stark contrast to Proposed Initiative #70 's purposes of increasing the severance tax rates on the oil and gas industry and distributing the increased revenue to fund a variety of public causes. At its heart, the measure dramatically increases (by 100% to 350%) the severance tax rates on oil and gas production beginning on January 1, 2019. Initiative, § 2. Section 3, on

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[13] *See id.* starting at 56:55 in the recording.

[14] Petitioners' Opening Brief addresses Respondent Wasden's arguments in his Motion for Rehearing regarding the measure's title and abstract. Petitioners' Op. Brief, at 6–9. Because the Title Board granted the Motion for Rehearing on single subject grounds, the Board did not address these issues and Petitioners' attempt to raise them before this Court should be rejected as not ripe.

the other hand, departs from these purposes and instead, whether intentional or not, contains a clause that removes limits on the amount of "other revenue" collected by the State or any District. This clause constitutes a second subject.

A. Section 3's last clause lacks a necessary and proper connection to the rest of the measure.

An initiative violates the single-subject requirement when it has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title, Submission Clause, and Summary for 2005-2006 # 73,* 135 P.3d 736, 738 (Colo. 2006) (quoting *In re Petition Procedures*, 900 P.2d 104, 109 (Colo. 1995)). Therefore, under the single-subject requirement, there must be a "'necessary or proper' connection between the component parts of a proposed initiative." *See, e.g.*, *In re Title, Ballot Title and Submission Clause, for 2007-2008, #17,* 172 P.3d 871, 878 (Colo. 2007). Only when an initiative "tends to effect or to carry out one general object or purpose, [is it] a single subject under the law." *In re Initiative "Public Rights in Waters II*," 898 P.2d 1076, 1079 (Colo. 1995).

Here, the last clause in Section 3 has no necessary and proper connection to the rest of the measure. While the deBrucing of the severance tax revenue at the state-level may be necessary to distribute the revenue from the increased severance tax rates, the same is not true for the deBrucing of "other revenue." The latter, which would have far reaching effects on State and local government, does not carry out the measure's central purpose because it bears no connection to increasing the severance tax rates. It is a separate feature that extends beyond the measure's central facet.

B. The "dangers" that underlie the single-subject doctrine are present.

Not only does the last clause in Section 3 lack a necessary or proper connection, but it presents the very dangers the single-subject rule is designed to prevent.

The single-subject requirement specifically is designed to protect against two dangers. First, the single-subject requirement is meant to prevent "voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex

initiative." *In re Title, Ballot Title, and Submission Clause 2007-2008, #17*, 172 P.3d at 875. Here, voters would be surprised to learn that by voting for Proposed Initiative #70, they have voted to remove other revenue not generated through the increased severance tax rates from TABOR's prohibition on state and local governments raising tax rates or increasing spending limits without voter approval. Such an effect is not a related matter. *See In re Petition Procedures,* 900 P.2d 104, 113 (Colo.1995) (Scott, J., concurring) ("So long as an initiative encompasses related matters it does not violate the single subject requirement."). Rather, the clause constitutes a major change for state and local governments that is buried in the last clause of a section and is separated from the measure's central focus.

Second, the single-subject requirement is designed to prevent a measure from containing unconnected subjects for the purpose of garnering support from groups with different, or even conflicting, interests. *In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d at 566. If voters delve into the folds of the measure and notice Section 3's effect of removing limitations on other revenue that may be

collected and spent by the State or local districts, they may be inclined to vote for the measure not because it increases the oil and gas severance tax but rather because it removes spending limitations on other revenues they are interested in. Because there is no limitation to what "other revenue" is implicated, the measure could be attractive to a particularly large number of factions. Thus, it is likely that Initiative #70 could be a measure "incapable of being enacted on [its] own merits" that nevertheless passes because it "join[s] multiple subjects ... [that] will secure the support of various factions that may have different or even conflicting interests." *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002) (citation omitted).

C. The Petitioners filing of a new version of the measure is revealing.

After the Title Board granted the Motion, the Petitioners filed a new version of the measure, Proposed Initiative #94.[15] This new version

[15] *See* the text of Proposed Initiative #94 at http://leg.colorado.gov/sites/default/files/initiatives/2017-2018%2520%252394.pdf.

has identical language to Proposed Initiative #70, except that it removes the last clause in Section 3. This edit suggests that even the Petitioners acknowledge that the last clause in Section 3 is troublesome.

CONCLUSION

Respondent Wasden respectfully asks this Court to affirm the Title Board's grant of his Motion for Rehearing and hold that the measure violates the single-subject requirement and thus the Title Board lacks jurisdiction to set title.

Respectfully submitted this 9th day of January 2018.

BROWNSTEIN HYATT FARBER SCHRECK LLP

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CERTIFICATE OF SERVICE

I hereby certify that on January 9th, 2018, I electronically filed a true and correct copy of the foregoing **RESPONDENT'S OPENING BRIEF** via the Colorado Courts E-Filing System which will send notification of such filing and service on all counsel of record and separately emailed to Petitioners:

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