

COLORADO SUPREME COURT  
2 E. 14<sup>th</sup> Ave.  
Denver, CO 80203

Original Proceeding Pursuant to § 1-40-107(2),  
C.R.S. (2016)

Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and  
Submission Clause for Proposed Initiative 2017-  
2018 #23, #24, #25, #26, and #27.

**Petitioner:**  
Dennis Polhill,

v.

**Respondents:**  
Anthony Milo and James Moody

**and**

**Title Board:**  
Suzanne Staiert, David Blake, and Sharon  
Eubanks

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Case Nos. 2017SA86, 2017SA87,  
2017SA88, 2017SA89, and  
2017SA90

**TITLE BOARD'S OPENING BRIEF**

## Table of Contents

<b>STATEMENT OF THE ISSUES</b> .....	1
<b>STATEMENT OF THE CASE</b> .....	1
<b>STATEMENT OF FACTS</b> .....	2
<b>SUMMARY OF THE ARGUMENT</b> .....	3
<b>ARGUMENT</b> .....	4
<b>I. The Board correctly found that Nos. 23-27 contain a single subject.</b> .....	4
<b>A. Standard of review and preservation.</b> .....	4
<b>B. Nos. 23-27 contain only one subject.</b> .....	4
<b>II. The titles are fair, clear, and accurate.</b> .....	6
<b>A. Standard of review and preservation.</b> .....	6
<b>B. Standards governing titles set by the Board.</b> .....	8
<b>III. The fiscal statements and abstracts are not misleading or prejudicial.</b> .....	10
<b>A. Standard of review.</b> .....	10
<b>B. Plaintiff waived his challenge to the abstract by failing to present documentation that supports a different estimate.</b> .....	11
<b>CONCLUSION</b> .....	13

## TABLE OF AUTHORITIES

### CASES

<i>Hayes v. Spalding</i> , 333 P.3d 76 (Colo. 2014) .....	5
<i>In re Proposed Initiative Amend TABOR 25</i> , 900 P.2d 121 (Colo. 1995) .....	4
<i>In re Public Rights in Waters II</i> , 898 P.2d 1076 (Colo. 1995).....	5
<i>In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Casino Gambling Initiative</i> , 649 P.2d 303 (Colo. 1982) .....	7
<i>In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62</i> , 184 P.3d 52 (Colo. 2008) .....	8
<i>In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45</i> , 234 P.3d 642, 645 (Colo. 2010).....	6, 10
<i>In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91</i> , 235 P.3d 1071 (Colo. 2010).....	7
<i>In re Title, Ballot Title, &amp; Submission Clause for 2001-2002, #22 &amp; #23</i> , 44 P.3d 213 (Colo. 2002).....	9
<i>In re Title, Ballot Title, &amp; Submission Clause for 2009-2010, #24</i> , 218 P.3d 350 (Colo. 2009).....	9
<i>In re Title, Ballot Title, &amp; Submission Clause for 2011-2012, #45</i> , 274 P.3d 576 (Colo. 2012).....	4
<i>In re Trespass-Streams with Flowing Water</i> , 910 P.2d 21 (Colo. 1996) .....	7
<i>In the Matter of the Title, Ballot Title, and Submission Clause, and Summary for 1999-2000, # 25</i> , 974 P.2d 458 (Colo. 1999) .....	6

### OTHER AUTHORITIES

§ 1-40-105.5(2)(a), C.R.S. (Colo. 2016) .....	11
§ 1-40-105.5, C.R.S. (Colo. 2016).....	1, 10
§ 1-40-106(3)(b), C.R.S. (Colo. 2015) .....	8

§ 1-40-106.5(1)(e)(I), C.R.S. (Colo. 2016)..... 4  
§ 1-40-107(1)(b), C.R.S. (Colo. 2016) ..... 10, 11, 12

Title Board members Suzanne Staiert, David Blake, and Sharon Eubanks (“the Board”), by and through undersigned counsel, submit their opening brief.

### **STATEMENT OF THE ISSUES<sup>1</sup>**

1. Whether the measure complies with the single subject requirement.
2. Whether the title reflects the true intent and meaning of the measure.
3. Whether the fiscal impact statements presented to the title board comply with the requirements of § 1-40-105.5, C.R.S. (2016).

### **STATEMENT OF THE CASE**

Anthony Milo and James Moody (“Proponents”) seek to circulate Proposed Initiatives 2017-2018 #23, #24, #25, #26, and #27, to obtain the requisite number of signatures to place a measure on the ballot to

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<sup>1</sup> The Title Board draws these issues from Petitioner’s motion for rehearing submitted to the Title Board on April 23, 2017. To the extent Petitioner raises any additional issues in his opening brief, the Title Board reserves the right to address them in its answer brief (assuming that Petitioner preserved them below).

authorize the issuance of \$3.5 billion in new transportation revenue anticipation notes (“TRANS”), and to increase the state sales and use taxes to raise revenue for repayment. Following a review and comment period before the Legislative Council and the Office of Legislative Legal Services, Proponents submitted the final drafts of Nos. 23-27 to the Board on April 7, 2017. *See Attachments to Petitions for Review.*

The Board conducted an initial public hearing on April 19, 2017, at which it set titles for Nos. 23-27. *See Attachments to Petitions for Review.* Proponents and Petitioner Dennis Polhill both filed motions for rehearing. After the rehearing on April 28, 2017, the Board denied Proponents’ motions for rehearing, and denied Petitioner’s motion except to the extent that it made changes to the titles. *See id.*

Petitioner filed petitions for review with this Court on May 3, 2017.

The Title Board moved to consolidate briefing for Nos. 23-27 and this Court granted the motion on May 16, 2017.

## **STATEMENT OF FACTS**

Initiative Nos. 23-27 seek to increase state sales and use taxes in varying amounts for a twenty-year period, in order to fund the issuance of \$3.5 billion in TRANS, to be paid back at maximum cost of \$5 billion.

The money raised from the bond issuance in each of the measures would go toward transportation projects across the state. Each measure would devote approximately 35% of the revenue raised to state transportation projects, 50% to municipal and county transportation projects, and 15% to multimodal transportation projects. Although the initiatives vary in terms of the tax rates that they would impose and some of the details surrounding repayment, those differences appear to be immaterial to the Petitioner’s challenge here.

### **SUMMARY OF THE ARGUMENT**

The Title Board correctly found that Nos. 23-27 pertain to a single subject: transportation funding. Moreover, the titles set by the Board “correctly and fairly express[ ] the true intent and meaning” of Nos. 23-27 and would not lead to “public confusion.” Finally, because Petitioner did not include documentation in his motion for rehearing that would support a different fiscal estimate than the one produced by the Legislative Council, his challenge to the accuracy of the fiscal impact statement and abstract is unpreserved and should not be considered here.

## ARGUMENT

### I. The Board correctly found that Nos. 23-27 contain a single subject.

#### A. Standard of review and preservation.

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). The Board agrees that Petitioner preserved this issue by raising it in his motion for rehearing.

#### B. Nos. 23-27 contain only one subject.

The purpose of the single subject rule is to “prohibit the practice of putting together in one measure subjects having ‘no necessary or proper connection,’ for the purpose of garnering support for measures from parties who might otherwise stand in opposition.” *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 124–25 (Colo. 1995) (quoting § 1-40-106.5(1)(e)(I), C.R.S.) [hereinafter *Amend TABOR 25*]. In addition, the requirement seeks to prevent surreptitious measures,

surprise and fraud upon the voters.” *Id.* (quoting § 1-40-106.5(1)(e)(II). “The subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *Hayes*, 333 P.3d at 79. A “second subject with a distinct and separate purpose not dependent on or connected to the first subject” will not pass muster. *Id.* Accordingly, “umbrella proposals” that attempt to unite separate subjects under a single description are unconstitutional. *Id.* (holding that an initiative that would allow recall of both elected and non-elected governmental officers was two subjects), *see also Amend TABOR 25*, 900 P.2d at 125–26 (holding “revenue changes” was an umbrella proposal); *In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995) (holding that initiative relating to “water” was an umbrella proposal).

In his motion for rehearing, Petitioner asserted that “among other issues,” Nos. 23-27 cover “a) a sales tax increase; b) state borrowing ... c) state road projects; d) local road projects; e) 15% of revenue for unknown projects;<sup>[2]</sup> [and] f) diversion of existing revenue from the general fund.” *Motion for Rehearing*, ¶3.

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<sup>2</sup> Petitioner’s claim that the initiatives would authorize “unknown” projects is spurious, at least to the extent that it implies that these

Petitioner’s list itself, however, demonstrates that Nos. 23-27 are not umbrella proposals. They do not “(1) relate[ ] to more than one subject and (2) ha[ve] at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In the Matter of the Title, Ballot Title, and Submission Clause, and Summary for 1999-2000*, # 25, 974 P.2d 458, 463 (Colo. 1999). To the contrary, they seek to raise revenue via the issuance of bonds, and then spend that money on transportation projects throughout the state. No additional analysis is necessary in order to demonstrate that Nos. 23-27 satisfy the single subject requirement. This Court should affirm the titles set by the Board.

**II. The titles are fair, clear, and accurate.**

**A. Standard of review and preservation.**

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 645, 648 (Colo. 2010). The Court grants

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“unknown” projects are unrelated to transportation. Nos. 23-27 all clearly indicate that 15% of new revenue would be devoted to “multimodal transportation projects.”

great deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.*, at 649, n.3; *In re Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board’s decision only if the titles are insufficient, unfair, or misleading. *Id.*

The Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

The Board agrees that Petitioner preserved his challenge to the clarity and accuracy of the titles. However, because Petitioner’s notice of appeal states merely that “[h]e is not satisfied with the amended titles” and then goes on to identify only the single subject requirement with particularity, it is not entirely clear whether he continues to

challenge the clarity of the title in this Court. In an abundance of caution, the Title Board nonetheless addresses that question below.

**B. Standards governing titles set by the Board.**

Section 1-40-106(3)(b), C.R.S. (2015), establishes the standards for setting titles. It provides:

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, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed...within two weeks after the first meeting of the title board. ...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. (2015). In short, a title must be fair, clear, accurate, and complete. *In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008).

Here, the Board’s title plainly expresses the core purpose of each measure: raising revenue and spending it on transportation projects throughout the state. Petitioner suggested in his motion rehearing that the titles failed to define certain terms or explain in detail the precise details of how the money, once raised, would be allocated. The law, however, requires only that the title “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.” *In re Title, Ballot Title, & Submission Clause for 2009-2010*, #24, 218 P.3d 350, 356 (Colo. 2009) (quotation omitted). The Board “need *not* include every detail” of the measure. *In re Title, Ballot Title, & Submission Clause for 2001-2002*, #22 & #23, 44 P.3d 213, 222 (Colo. 2002). Because they adequately describe how revenue will be raised and what it will be spent on, the titles for Nos. 23-27 fall well within the Board’s substantial discretion.

### **III. The fiscal statements and abstracts are not misleading or prejudicial.**

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

This Court has not yet issued an opinion addressing the fiscal impact statement and abstract requirements that first took effect on March 26, 2016. § 1-40-105.5, C.R.S. (2016). But the Court should adopt the same standard of review it uses for titles that the Board sets and “give great deference to the Title Board in the exercise of its drafting authority[, reversing] its decision only if the [statement and abstract] are insufficient, unfair, or misleading.” *In re #45*, 234 P.3d at 648. Drafting a fiscal impact statement and abstract, much like drafting a title, requires a substantial degree of discretion. The director of research of the General Assembly’s Legislative Council must synthesize a wide array of information and distill it down into a final report, which the Board must then evaluate. The Court should not review these kinds of decisions *de novo*, but should instead overturn the director’s and the Board’s judgments only if they constitute an abuse of discretion.

As discussed in detail below, Petitioner did not preserve his challenge to the abstract as required by § 1-40-107(1)(b). Nor is it

mentioned in his notice of appeal. Because § 1-40-107(1)(b) has not yet been interpreted by this Court, however, the Title Board will address Petitioner's lack of compliance in detail.

**B. Plaintiff waived his challenge to the abstract by failing to present documentation that supports a different estimate.**

Effective March 26, 2016, the General Assembly revised Article 40 of Title 1, C.R.S. to add a “fiscal impact statement” requirement. The new law provides that “[f]or every initiated measure properly submitted to the title board ..., the director shall prepare an initial fiscal impact statement[.]” § 1-40-105.5(2)(a), C.R.S. (2016). Along with this change, the General Assembly also amended § 1-40-107(1)(b) to clarify the procedures for challenging the fiscal impact statement and abstract. In pertinent part, the statute provides that “If the [rehearing] motion claims that an estimate in the abstract is incorrect, the motion must include documentation that supports a different estimate. If the motion claims that the abstract is misleading or prejudicial or does not comply with the statutory requirements, the motion must specifically identify the specific wording that is challenged or the requirement at issue.” § 1-40-107(1)(b).

Petitioner’s motion for rehearing asserts that the “abstracts and fiscal impact [statements for Nos. 23-27] are obviously false, biased, and inconsistent” because, whereas they estimated a repayment cost of \$5 billion on \$3.5 billion of bonds, “other citizen proposals ... heard that day,” forecast that debt service would cost substantially more. *Motion for Rehearing*, ¶ 6. In particular, Petitioner asserts that 2017-2018 #21 “said a \$2.5 billion debt had a repayment cost of \$4 billion,” and that 2017-2018 #22 “said its \$3.5 billion debt had a repayment of \$5.2 billion.” *Id.* This difference, Petitioner asserts, “is not explained or explainable.” *Id.*

The above-cited paragraph represents the entirety of the analysis (with respect to the abstract) that Petitioner presented to the Title Board. Petitioner clearly contends that an “estimate in the abstract,” namely the cost of debt service, “is incorrect.” § 1-40-107(1)(b). But his motion for rehearing failed to “include documentation that supports a different estimate.” *Id.* The documentation requirement cannot possibly be satisfied by simply pointing to other measures that outline different repayment requirements. Indeed, the total cost of repayment is a feature of the proposed initiative itself—not the abstract. The

abstract merely calculates what the average annual repayment cost would be based on the maximum repayment cost that the measure would authorize if passed.

Petitioner's attempt to satisfy the documentation requirement of § 1-40-107(1)(b) by cross-referencing other pending initiatives should be rejected. This Court should affirm that § 1-40-107(1)(b) contemplates the submission of a detailed alternate analysis that identifies how and why the abstract's estimates are incorrect, and that support a different estimate. Because Petitioner provided no such documentation, his challenge was not preserved and cannot be raised in this proceeding.

### CONCLUSION

The Title Board's decision should be affirmed.

Respectfully submitted this 17<sup>th</sup> day of May, 2017.

CYNTHIA H. COFFMAN

Attorney General

*/s/ Matthew D. Grove*

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the within **TITLE**  
**BOARD'S OPENING BRIEF** upon all parties herein by Colorado  
Courts E-Filing, by electronic transmission, or by depositing copies of  
same in the United States mail, first-class postage prepaid, at Denver,  
Colorado, this   17th   day of   May   2017 addressed as follows:

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