

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <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 Initiative 2017-2018 #28</p> <p>Petitioner: Dennis Polhill,</p> <p>v.</p> <p>Respondents: Anthony Milo and James Moody,</p> <p>and</p> <p>Title Board: Suzanne Staiert; David Blake; and Sharon Eubanks</p>	<p style="text-align: right;">DATE FILED: May 17, 2017 11:14 AM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorney for Respondents: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com</p>	<p>Case No. 2017SA91</p>
<p style="text-align: center;">RESPONDENTS' OPENING BRIEF ON PROPOSED INITIATIVE 2017-2018 #28</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:

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

Choose one:

It contains _____ words.

It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

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.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

s/ Mark G. Grueskin

Mark G. Grueskin

Attorney for Respondents

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STATEMENT OF ISSUES PRESENTED

Whether the Title Setting Board (“Title Board” or “Board”) correctly found that proposed ballot measures addressing specific funding mechanisms to improve infrastructure at the state, county, and local levels each comprised a single subject.

Whether the Board’s ballot titles that addressed the measures’ central elements satisfied the Board’s statutory directive to set a clear title for voters.

STATEMENT OF THE CASE

A. Statement of Facts.

Initiative #28 would amend Colorado statute to increase the state sales and use tax for infrastructure improvements. It authorizes a .62 percent increase in the state sales and use tax and also authorizes expenditure of the revenue raised on: infrastructure throughout the state, such as water projects and state transportation improvements (including additional bonded indebtedness to fund certain of the transportation projects); county and municipal transportation improvements; and 15% on multimodal transportation.

B. Nature of the Case, Course of Proceedings, and Disposition Below.

Anthony Milo and James Moody (hereafter “Proponents”) proposed Initiative 2017-2018 #28 (the “Proposed Initiative”). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter the Proponents submitted the final version

of the Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member. A Title Board hearing was held on April 19, 2017 to establish the Proposed Initiative's single subject and ballot title.

On April 24, 2017, Petitioner and the Proponents filed Motions for Rehearing. As is relevant here, Petitioner alleged that the Board did not have jurisdiction to set titles, due to a broad single subject objection, and that the titles set were misleading. The rehearing was held on April 28, 2017, at which time the Title Board denied the Motion for Rehearing except as to a single issue that the Board addressed with the consent of the Proponents. The Board set a ballot title for Initiative #28, which is set forth in Exhibit 1 to this Opening Brief.

The Petitioner timely filed a petition for review before this Court pursuant to C.R.S. § 1-40-107(2).

SUMMARY

Initiative #28 meets all the criteria for a single subject, and the Title Board correctly found that to be true. Further, the ballot title set for Initiative #28 meets all the criteria for an accurate, clear title. Thus, the Board's decision should be upheld.

LEGAL ARGUMENT

A. The Title Board correctly set a ballot title for Initiative #28, consistent with the single subject requirement pertaining to initiatives.

1. Standard of review; preservation of issue below.

Without interpreting the merits of proposed initiatives or analyzing how the measures will be applied if adopted, this Court undertakes the limited exercise of evaluating the meaning of initiatives to identify their subject. This limited inquiry is the vehicle for determining whether the single subject requirement, found in Colo. Const., art. V, § 1(5.5), has been violated. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999). In order to be considered a single subject, the Court looks for an initiative's topics to be "necessarily and properly" related to the general single subject assigned the measure by the Title Board, rather than "disconnected or incongruous" with that subject. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17)*, 920 P.2d 798, 802 (Colo. 1996).

The single subject requirement is to be liberally construed. *In re Title, Ballot Title & Submission Clause, and Summary for Initiative 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014). All legitimate presumptions are to be employed in favor of the propriety of the Title Board's action. *In re Title, Ballot Title &*

Submission Clause, and Summary for Initiative 2011-2012 #3, 274 P.3d 562, 565 (Colo. 2011). References to additional statutory provisions, important to effectuate the initiative's single purpose, may be included in the title without offending this constitutional mandate. *See In re Title, Ballot Title & Submission Clause, and Summary for Initiative 1999-2000 #256*, 12 P.3d 246, 253 (Colo. 2000).

The single subject issues raised in this appeal were presented to the Board at the rehearing and thus preserved for review. *See Motion for Rehearing on Initiatives 2017-2018 #23-28* at 1.

2. Initiative #28 contains one subject – providing additional funding of infrastructure improvements.

This ballot measure increases the state sales and use tax by .62 percent in order to supplement revenue used to address the state's infrastructure needs. #28 uses these additional tax revenues and new bonding authority to remedy the gaps in transportation funding and water project funding. Transportation funding is used to supplement such programs at the state, county, and municipal levels of government, and water funding is used for construction projects by the Water Conservation Board. That this is a comprehensive approach does not affect the Title Board's finding that these measures each reflect a single subject.

Polhill complains that the subjects of these measures include:

- Sales tax increase;

- State borrowing;
- State road projects;
- Local road projects;
- 15% for unknown projects;
- Use of general fund revenue for these projects; and
- Funding of water projects.

Motion for Rehearing at ¶3. Yet, all of the new revenue raised is used solely to fund infrastructure projects, and “infrastructure” is a policy objective that meets the single subject standard. *In re Title, Ballot Title & Submission Clause, and Summary for Initiative 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010) (“[W]e must review the initiative as a whole rather than piecemeal....”).

A measure may be detailed without running afoul of the single subject mandate. “Although the Initiative is comprehensive, all of its numerous provisions relate to the single purpose of reforming petition rights and procedures.” *In re Title, Ballot Title & Submission Clause, and Summary for Proposed Petition Pertaining to Section 2 of Article VII*, 907 P.2d 586, 591 (Colo. 1995). Initiative #28 satisfies this comprehensive-single-subject test.

The lack of merit in Polhill’s single subject claim is apparent from the fact that he argues that the state borrowing “subject” is “illegal under Article XI of the state constitution that bans state debt over \$100,000 or on a basis other than

property tax.” *Id.* This claim is well beyond the single subject inquiry, “as those issues do not come up unless and until the voters approve the amendment.” *In re #89, supra*, 328 P.3d at 176.

Therefore, the Title Board’s decision must be upheld.

B. The Title Board set an accurate title, one that communicates the central features of this initiative.

1. Standard of review; preservation of issue below.

Generally, the Title Board is vested with considerable discretion in setting a title. As is true in the Court’s single subject review, the Board’s decision receives the Court’s “legitimate presumptions in favor of the propriety of the Board’s actions. *In re Title, Ballot Title, Submission Clause for 2009-2010 Initiative #45*, 234 P.3d 642, 645 (Colo. 2010).

To violate the “clear title” requirement, the Title Board must be found to have set a title that is incomplete or misleading to voters. *In re Title, Ballot Title, Submission Clause for 2013-2014 Initiative #90*, 328 P.3d 155, 159 (Colo. 2014). The Board does not violate its obligations in this regard by failing to explain the effects of the proposed legal change, including those on existing laws. *Id.* at 162.

The Title Board must set titles that “correctly and fairly express the true intent and meaning” of the proposed initiative and “unambiguously state the principle of the provision sought to be added, amended, or repealed.” C.R.S. § 1–

40–106(3)(b). This Court’s duty is to ensure that the titles “fairly reflect” the proposed initiative so petition signers and voters may appreciate the grounds for supporting or opposing a measure based on the provisions described rather than just the words employed by the Board. *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Burlington*, 830 P.2d 1023, 1026 (Colo. 1992). This obligation is not synonymous with setting the best possible title, as the Board’s duty is only to set a clear and legally sufficient title. #90, *supra*, 328 P.3d at 162.

The title need not describe every single facet of a proposed ballot measure if such aspects are not material, substantive changes to the law. It is sufficient if it merely summarizes the measure’s “central features.” Where that is the case, the title will be upheld. *In re Title, Ballot Title, Submission Clause for 2007-2008 Initiative #61*, 184 P.3d 747, 752 (Colo. 2008).

This issue was presented to the Board at the rehearing and preserved for review. *See* Motion for Rehearing on Initiatives 2017-2018 #23-28 at 1.

2. The ballot title set for Initiative #28 is clear and legally sufficient.

Whether Polhill actually is objecting to the clarity of the ballot title set for Initiative #28 is unknown. In his notice of appeal, Polhill states he “is not satisfied with the amended titles” but specifically mentions *only* the single subject issue

raised in his motion for rehearing “assert[ing] that each of the six measures contains multiple subjects.” Protest of Initiatives #23 Through #28 at 1.

If Polhill is incorporating by reference his Motion for Rehearing to the Board, he does not say so. If he intends to raise any particular clear title objections in his Opening Brief, he does not say so. Until he does, the Proponents’ position is that the Title Board met all of the relevant standards for legally compliant titles, set forth in the above section, and the titles should therefore be upheld.

CONCLUSION

The Title Board correctly found the measure in question to be a single subject and set clear titles, pursuant to statute, for these measures. The Board’s decisions should be upheld by this Court.

Respectfully submitted this 17th day of May, 2017.

/s Mark Grueskin

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ATTORNEY FOR RESPONDENTS

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF ON PROPOSED INITIATIVE 2017-2018 #28** was sent this day, May 17, 2017, via Colorado Courts E-Filing to counsel for the Title Board and via Federal Express overnight to the Petitioner at:

Matthew D. Grove
Assistant Solicitor General
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Dennis Polhill
49 S. Lookout Mountain Rd.
Golden, CO 80401

/s Erin Holweger _____

Results for Proposed Initiative #28

Ballot Title Setting Board 2017-2018

DATE FILED: May 17, 2017 11:14 AM

The title as designated and fixed by the Board is as follows:

STATE TAXES SHALL BE INCREASED \$715,100,000 ANNUALLY FOR A TWENTY-YEAR PERIOD, AND STATE DEBT SHALL BE INCREASED \$3,500,000,000 WITH A MAXIMUM REPAYMENT COST OF \$5,000,000,000, TO PAY FOR INFRASTRUCTURE PROJECTS IN COLORADO, AND IN CONNECTION THEREWITH, CHANGING THE COLORADO REVISED STATUTES TO: 1) INCREASE THE STATE SALES AND USE TAX RATE BY 0.62% BEGINNING JANUARY 1, 2018, OF WHICH 49.8% IS USED TO FUND STATE TRANSPORTATION PROJECTS, 33.2% IS USED TO FUND MUNICIPAL AND COUNTY TRANSPORTATION PROJECTS, 15% OF THE NEW REVENUE IS USED TO FUND MULTIMODAL TRANSPORTATION PROJECTS, AND 2% IS USED TO FUND HIGH PRIORITY WATER PROJECTS; 2) AUTHORIZE THE ISSUANCE OF ADDITIONAL TRANSPORTATION REVENUE ANTICIPATION NOTES TO FUND PRIORITY STATE TRANSPORTATION MAINTENANCE AND CONSTRUCTION PROJECTS; AND 3) PROVIDE THAT ALL REVENUE RESULTING FROM THE TAX RATE INCREASE, PROCEEDS FROM THE ISSUANCE OF REVENUE ANTICIPATION NOTES, AND EARNINGS ON SUCH TAX REVENUE AND NOTE PROCEEDS ARE VOTER-APPROVED REVENUE CHANGES EXEMPT FROM ANY LIMITATIONS IN LAW.

The ballot title and submission clause as designated and fixed by the Board is as follows:

SHALL STATE TAXES BE INCREASED \$715,100,000 ANNUALLY FOR A TWENTY-YEAR PERIOD, AND SHALL STATE DEBT BE INCREASED \$3,500,000,000 WITH A MAXIMUM REPAYMENT COST OF \$5,000,000,000, TO PAY FOR INFRASTRUCTURE PROJECTS IN COLORADO, AND IN CONNECTION THEREWITH, CHANGING THE COLORADO REVISED STATUTES TO: 1) INCREASE THE STATE SALES AND USE TAX RATE BY 0.62% BEGINNING JANUARY 1, 2018, OF WHICH 49.8% IS USED TO FUND STATE TRANSPORTATION PROJECTS, 33.2% IS USED TO FUND MUNICIPAL AND COUNTY TRANSPORTATION PROJECTS, 15% OF THE NEW REVENUE IS USED TO FUND MULTIMODAL TRANSPORTATION PROJECTS, AND 2% IS USED TO FUND HIGH PRIORITY WATER PROJECTS; 2) AUTHORIZE THE ISSUANCE OF ADDITIONAL TRANSPORTATION REVENUE ANTICIPATION NOTES TO FUND PRIORITY STATE TRANSPORTATION MAINTENANCE AND CONSTRUCTION PROJECTS; AND 3) PROVIDE THAT ALL REVENUE RESULTING FROM THE TAX RATE INCREASE, PROCEEDS FROM THE ISSUANCE OF REVENUE ANTICIPATION NOTES, AND EARNINGS ON SUCH TAX REVENUE AND NOTE PROCEEDS ARE VOTER-APPROVED REVENUE CHANGES EXEMPT FROM ANY LIMITATIONS IN LAW?

Exhibit 1

Hearing April 19, 2017

Single subject approved; staff draft amended; titles set.
Hearing adjourned 1:03 PM.

Rehearing April 28, 2017

Motion for Rehearing filed by Anthony Milo and James Moody denied; Motion for Rehearing filed by Dennis Polhill denied except to the extent that the Board made changes to the titles.
Hearing adjourned 1:04 PM.

** Unofficially captioned "Transportation Funding" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.*