

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020, #3</p> <p><b>Petitioners:</b> Carol Hedges and Steve Briggs,</p> <p>v.</p> <p><b>Title Board:</b> Ben Schler, LeeAnn Morrill, and Jason Gelender</p>	
<p><i>Attorneys for the Title Board:</i> PHILIP J. WEISER, Attorney General EMILY B. BUCKLEY, Assistant Attorney General* 1300 Broadway, 6th Floor Denver, Colorado 80203 Phone: (720) 508-6403 Fax: (720) 508-6041 Email: emily.buckley@coag.gov Registration Number: 43002 <i>*Counsel of Record</i></p>	<p>▲ <b>COURT USE ONLY</b> ▲</p> <p>Case No.: 2019SA25</p>
<p><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 1,928 words.

B. The brief complies with C.A.R. 28(a)(7)(A) because each 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.

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/ Emily B. Buckley*

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Title Board members Ben Schler, LeeAnn Morrill, and Jason Gelender (hereinafter “the Board”), by and through undersigned counsel, hereby submit Title Board’s Opening Brief.

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

1. Whether Proposed Initiative 2019-2020 No. 3 contains a single subject under Article V, § 1(5.5) of the Colorado Constitution.

## **STATEMENT OF THE CASE**

Carol Hedges and Steve Briggs (“Proponents”) seek to circulate Proposed Initiative 2019-2020 No. 3 (“No. 3”) to obtain the required number of signatures to place the measure on the general election ballot. No. 3 proposes a repeal of the Taxpayer Bill of Rights (“TABOR”), Colo. Const., art. X, § 20.

Proponents submitted the final draft of No. 3 to the Board on January 4, 2019. *See Attachments to Petition for Review* at p. 2. The Board conducted an initial public hearing on January 16, 2019, at which it determined No. 3 does not constitute a single subject as required by Colo. Const. art. V, §1(5.5) and § 1-40-106.5, C.R.S. (2018), and thus denied the setting of a title for lack of jurisdiction. *See id.* at 3. Proponents filed a motion for rehearing on January 22, 2019,

asserting that No. 3 does not contain more than one subject. *Id.* at 5. At the rehearing held on February 6, 2019, the Board denied Proponents’ motion for rehearing, and declined to set a title. *Id.* at 6. Proponents timely filed a petition for review with this Court on February 20, 2019.

### STATEMENT OF FACTS

Measure No. 3 would amend the Colorado Constitution by repealing TABOR, Colo. Const., art. X, § 20. *See* Petition for Review at p. 7 (“In the constitution of the state of Colorado, **repeal** section 20 of article X.”). Colo. Const., art. X, § 20, is sometimes referred to as Amendment 1. *See In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 No. 43 (“#43”),* 46 P.3d 438, 442 n.3 (Colo. 2002). TABOR was adopted by the electorate to “protect citizens from unwarranted tax increases.” *Matter of Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to Constitution of State of Colo. Adding Subsection (10) to Sec. 20 of Art. X (“In re Amend Tabor 25”),* 900 P.2d 121, 123 (Colo. 1995) (quoting *Submission of Interrogatories on Senate Bill 93–74,* 852 P.2d 1, 4 (Colo. 1993)). TABOR “accomplishes its purpose by limiting

the spending and taxing authority of state and local governments by requiring voter approval of certain tax and spending increases.” *Id.* (citing *Bickel v. City of Boulder*, 885 P.2d 215, 225 (Colo. 1994)).

TABOR was enacted by initiative in 1991, before the approval of Referendum A in 1994, which extended the single subject requirement to ballot initiatives, through Colo. Const., art. V, § 1(5.5). #43, 46 P.3d at 440.

### **SUMMARY OF THE ARGUMENT**

As proposed, No. 3 contains multiple subjects. Because No. 3 seeks the repeal of TABOR—a constitutional provision consisting of multiple subjects—No. 3 itself contains multiple subjects. As such, the Board properly determined that it lacked jurisdiction to set title because No. 3 contains more than one subject.

### **STANDARD OF REVIEW AND PRESERVATION**

Whether a proposed initiative contains a single subject is a question of law that must be determined by the Board before it exercises jurisdiction to set a title. As such, this Court reviews *de novo* the Board’s decision that No. 3 contains multiple subjects. *See In re*



*Title, Ballot Title & Submission Clause, & Summary for 1999-2000*

#219, 999 P.2d 819, 820-22 (Colo. 2000).

In determining whether the single subject requirement has been satisfied, the Court will not address the merits of a proposed initiative, interpret it, or construe its future legal effects. *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02 #21 and #22*, 44 P.3d 213, 215-16 (Colo. 2002) (“#21”); #43, 46 P.3d at 443. However, the Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *In re Title, Ballot Title and Submission Clause for 2005-06 #55*, 138 P.3d 273, 278 (Colo. 2006) (“#55”). To do so, the Court will “examine sufficiently the initiative’s central theme to determine whether it contains a hidden purpose under a broad theme.” *In re Title, Ballot Title and Submission Clause for 2007-08 #17*, 172 P.3d 871, 875 (Colo. 2007) (“#17”). Through its exam, the Court will “determine unstated purposes and their relationship to the central theme of the initiative.” #55, 138 P.3d at 278. If the

unstated theme is consistent with the general purpose, the single subject requirement will be met. *Id.*

The Board agrees that Proponents preserved the single-subject issue by raising it in the motion for rehearing.

## **ARGUMENT**

### **I. Measure No. 3 contains more than one subject.**

#### **A. The single subject rule.**

The Board must abide by the single subject rule when considering proposed initiatives. Colo. Const., art. V, § 1(5.5), states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. *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.*

(emphasis added). Colorado law further prevents the Board from setting a title for a measure that contains “incongruous subjects ... having no necessary or proper connection, for the purpose of enlisting in

support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits.” § 1-40-106.5(1)(e)(I), C.R.S. (2018). Multiple subjects also are prohibited because their “surreptitious” nature may cause “surprise and fraud [to be] practiced upon the voters.” § 1-40-106.5(1)(e)(II), C.R.S. (2018).

A proposed measure violates the single subject rule if “it relates to more than one subject, and has at least two distinct and separate purposes that are not dependent upon or connected with each other.” #55, 138 P.3d at 277; #21, 44 P.3d at 215. In contrast, a proposed measure that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). The single subject rule serves to prevent both the joinder of multiple subjects to secure the support of various factions, and voter fraud and surprise. #43, 46 P.3d at 442.

All initiatives must comply with the single subject requirement. Colo. Const. art V, § 1(5.5). Neither Colo. Const. art V, § 1(5.5) nor § 1–40–106.5 “creates any exemptions for initiatives that attempt to repeal

constitutional provisions.” *In re Proposed Initiative 1996-4*, 916 P.2d at 532. To the contrary, it is “well established” that ‘measure’ as used in Colo. Const. art V, § 1(5.5) “includes initiatives that either enact or repeal.” *Id.* “A proposed initiative contains multiple subjects not only when it proposes new provisions constituting multiple subjects, but also when it proposes to repeal multiple subjects.” *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 104*, 987 P.2d 249, 254 (Colo. 1999). Further, “no special permission exists for initiatives that seek to address constitutional provisions adopted prior to the enactment of the single subject requirement.” *In re Proposed Initiative 1996-4*, 916 P.2d at 532.

**B. Application of the single subject rule to #3.**

The Board correctly determined that No. 3 contains multiple subjects. In determining whether a measure seeking repeal of a constitutional provision meets the single subject requirement, “[t]he underlying constitutional provision to be repealed must be examined in order to determine whether the repealing and reenacting initiative contains a single subject.” *In re Proposed Initiative 1996-4*, 916 P.2d

528, 533 (Colo. 1996). “If, for example, a constitutional provision contains multiple subjects and an initiative proposes to repeal the entire underlying provision, then the initiative contains multiple subjects. On the other hand, if an initiative proposes anything less than a total repeal, it may satisfy the single subject requirement.” *In re Proposed Initiative 1996-4*, 916 P.2d 528, 533 (Colo. 1996).

No. 3 seeks the repeal of TABOR, a constitutional provision that contains multiple subjects. Though the Court has never addressed the precise question posed by this appeal—whether a measure seeking to repeal TABOR contains multiple subjects—its prior decisions demonstrate that a repeal of TABOR violates the single subject requirement.

In *Amend Tabor 25*, 900 P.2d at 121, 126 (Colo. 1995), the Court observed that TABOR “itself was not subject to the single subject requirement and contains multiple subjects.” Subsequently, the Court strongly suggested that if a measure involved a simple repeal of TABOR, it would violate the single subject requirement:

If, for example, a constitutional provision contains multiple subjects and an initiative proposes to repeal the entire

underlying provision, then the initiative contains multiple subjects. On the other hand, if an initiative proposes anything less than a total repeal, it may satisfy the single subject requirement. We recently noted that Amendment 1 would not have met the single subject requirement of article V, section 1(5.5): “Amendment 1 itself was not subject to the single subject requirement and contains multiple subjects.” *In re Amend Tabor 25*, 900 P.2d at 126.... Because the proposed Initiative does not seek a total repeal of Amendment 1, our dictum in *In re Amend Tabor 25* does not dispose of the present case. Rather, we must examine the proposed Initiative to determine whether it satisfies the single subject requirement.

*In re Proposed Initiative 1996-4*, 916 P.2d at 533. While the foregoing passage is dicta, its inference that a repeal of TABOR—a multi-subject provision—would violate the single subject rule supports the Board’s decision that No. 3 contains more than one subject.

Most recently in #43, this Court held that an initiative designed to *prevent* the repeal of TABOR contains multiple subjects, in violation of Colo. Const. art V, § 1(5.5):

An amendment to the Colorado Constitution which prevents the repeal of TABOR itself constitutes multiple subjects in violation of article V, section 1(5.5). TABOR contains multiple subjects. *In re Proposed Initiative Amend TABOR 25*, 900 P.2d at 126. If “a constitutional provision contains multiple subjects and an initiative proposes to repeal the entire underlying provision, then the initiative contains multiple subjects.” [*In re Proposed Initiative 1996-4*,] 916

P.2d at 533. It follows that an initiative proposing to prevent the repeal of a constitutional provision containing multiple subjects also contains multiple subjects. Therefore, an initiative proposing to prevent the wholesale repeal of TABOR contains multiple subjects.

43, 46 P.3d at 447. If, as this Court held in #43, an amendment prohibiting the repeal of TABOR contains multiple subjects because TABOR contains multiple subjects, it must also be true that an amendment *repealing* TABOR contains multiple subjects.

Because TABOR contains multiple subjects and No. 3 proposes to repeal TABOR, No. 3 necessarily contains multiple subjects. *See In re Proposed Initiative 1996-4*, 916 P.2d at 533. Accordingly, the Board properly determined that No. 3 contains multiple subjects.

## CONCLUSION

For the above-stated reasons, the Court should affirm the Board's decision that it lacked jurisdiction to set title because No. 3 violated the single subject rule.

Respectfully submitted on this 5<sup>th</sup> day of March, 2019.

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## CERTIFICATE OF SERVICE

This is to certify that I served the **TITLE BOARD'S OPENING BRIEF** and related documents upon the following counsel of record and parties through either Colorado Courts E-Filing or FedEx overnight delivery this 5<sup>th</sup> day of March, 2019, addressed as follows:

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