DATE FILED: June 3, 2019 4:28 PM

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to §1-40-107(2), C.R.S. (2017) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #69 ("Establishment of Expanded Learning Opportunities Program") **Petitioners**: JULIET SEBOLD and MONICA R. COLBERT v. **Respondents**: TITLE BOARD MEMBERS BEN SCHLER, LEEANN MORRILL, and JASON GELENDER.	▲COURT USE ONLY▲ Supreme Court Case No.: 2019SA83
ATTORNEYS FOR PETITIONERS: William A. Hobbs, #7753 Benjamin J. Larson, #42540 IRELAND STAPLETON PRYOR & PASCOE, PC 717 17th Street, Suite 2800 Denver, Colorado 80202 Telephone: 303-623-2700 Facsimile: 303-623-2062 E-mail: bhobbs@irelandstapleton.com blarson@irelandstapleton.com	

PETITIONERS' ANSWER 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) because it contains 2,946 words.

In response to each issue raised, Proponents provide, under a separate heading before the discussion of the issue, a statement indicating whether Proponents agree with the Title Board'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.

By: */s/ Benjamin J. Larson*
Benjamin J. Larson, #42540

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Petitioners Juliet Sebold and Monica R. Colbert ("Proponents"), registered electors of the State of Colorado and the Designated Representatives of the proponents of Initiative 2019-2020 #69 ("Initiative #69"), through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit this Answer Brief in support of their Petition for Review of Final Action of Title Board on Initiative #69 ("Petition").

SUMMARY OF ARGUMENT

The essence of the Title Board's position is that Proponents' decision about how to fund their new program constitutes a second subject because Proponents could have chosen a different funding mechanism. However, policy decisions are left to Proponents, not to the Title Board, which does not consider an initiative's merits or future application.

The Title Board nevertheless offers two unpersuasive reasons for why Proponents' funding mechanism, i.e., new tax credits with offsetting reductions in existing tax credits, constitutes a second subject. First, the Title Board contends that the funding mechanism chosen is not necessarily and properly connected to the creation of the program because it "deal[s] with the collateral fiscal consequences in [a] prescribed way" by prioritizing the preservation of tax credits that benefit certain historically underserved causes.

However, the only case the Title Board cites for this proposition has nothing to do with the prioritization of revenue sources for funding a new program. The Title Board cannot cite a case for its prioritization argument because this Court has repeatedly permitted proponents of a new program to prescribe—or prioritize—the exact revenue source for their program, such as an unrelated tax or elimination of an unrelated tax credit. Where the revenue-neutral funding mechanism is a new tax, the Title Board's prioritization rule would illogically mean that proponents of a new program could direct the General Assembly to increase taxes but could not say which tax to increase. The Court should reject the Title Board's constrained reasoning because it is rooted in an overly narrow single-subject standard that would require every implementing provision in a measure to be "necessary" to achieve the measure's purpose.

The Title Board's second argument is that "shielding" the prioritized tax credits risks logrolling because some voters may be attracted to preserving those categories of tax credits. However, voters who believe that the prioritized tax credits should be preserved would vote against Initiative #69 because that would be the surest way to preserve them. If Initiative #69 fails, no tax credits would be eliminated. On the other hand, if Initiative #69 passes, other tax credits would have to be eliminated. While Initiative #69 prioritizes certain categories of credits, it does

not mandate—or "shield"—their preservation, as the Title Board incorrectly states. Accordingly, prioritizing the preservation of certain categories of tax credits does not pose a logrolling risk.

Because the Title Board's logrolling rationale fails, there is no justification for its narrow application of the single-subject rule, which would improperly require that every implementing provision be necessary to achieve a measure's purpose. To follow the Title Board's logic would defy the principle that the single-subject rule be liberally construed and would have significant policy ramifications on lawmakers' and citizens' ability to fund new programming through bills or initiatives. Accordingly, the Court should reverse and remand with instructions that the Title Board set titles within 69 hours of the Court's order.

ARGUMENT

I. Standard of Review/Preservation.

Proponents disagree that the Title Board should be given deference when it denies title setting on single-subject grounds. The "all-legitimate-presumptions" rule and the corresponding clear error standard derive from the underlying principle that the "single-subject requirement must be liberally construed . . . so as not to impose undue restrictions on the initiative process." *In re Title, Ballot Title, & Submission Clause for 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998); *see also*

In re Title, Ballot Title, & Submission Clause for 2013-2014 #89, 2014 CO 66, ¶ 8 (acknowledging liberal construction of single-subject standard and therefore recognizing that the Court will "only overturn the Title Board's finding that an initiative contains a single subject in a clear case"). As such, to Proponents' knowledge, this deferential standard has only been applied in cases where the Title Board finds a single subject and sets titles. Regardless, here, the Title Board's incorrect and overly narrow application of the single-subject standard is clear error.

The Title Board agrees that Proponents preserved their single-subject argument, so this issue is moot. Title Board's Op. Br. at 6.

II. The Single Subject of Initiative #69 Is the Creation of the Program.

The Title Board cannot dispute that the funding mechanism chosen by Proponents for their new expanded learning opportunities program ("Program") is directly connected to the creation of the Program. Instead, the Title Board found a second subject by painstakingly parsing out the implementing details of Initiative #69, concluding that it contains a second subject because the Program could be established without the prioritization aspect of the disputed tax credit offset provision. Title Board's Op. Br. at 10-11.

Notably, the Title Board now appears to take no issue with the offset mechanism itself, but merely the way in which Initiative #69 achieves the offset.

Such an analysis is improper because the single-subject rule does not require every provision of a measure to be "wholly integral to the basic idea of a proposed initiative." *In re Title, Ballot Title, & Submission Clause for 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998) ("Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's constitution.").

The Title Board's exacting analysis of how Proponents' have elected to fund their new Program contradicts the fundamental principle that the single-subject standard is to be liberally construed "to ensure that the rights of proponents are not unduly restricted." *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1131 (Colo. 1996). As such, the two reasons proffered by the Title Board as warranting its narrow single subject application lack merit. Each reason is addressed in turn.

A. Prescribing How to Fund a New Program in a Revenue-Neutral Manner Is Not a Second Subject.

From the outset, the Title Board's reasoning for why the tax credit offset mechanism constitutes a second subject has been murky, and that lack of clarity carries through its Opening Brief. At the rehearing on Initiative #69, one board

member believed that giving the General Assembly discretion as to which tax credits to reduce was the source of the second subject because the measure must explicitly identify those tax credits for voter transparency reasons.[1] On the other hand, another member believed that any tax credit offset provision—even if it explicitly calls out the credits to be reduced—would constitute a second subject because a measure can never address the "collateral" revenue consequences of creating a new program.[2] For instance, when Proponents' counsel asked what type of tax credit offset provision the Title Board would find permissible, member Morrill made the blanket statement that, "we're not finding any offset provision to be compliant with single subject."[3]

The Title Board's confusion as to why Proponents' chosen funding mechanism—an issue that in undeniably related to the creation of the Program—purportedly constitutes a second subject underscores why the Title Board should not overanalyze the effect of a measure's implementing provisions. This is particularly true where, as here, the measure does not present a risk of any danger the single subject rule was enacted to prevent, i.e., logrolling or voter surprise.

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[1] *Hearing Before Title Board on Proposed Initiatives 2019-2020 #68 & #69* (Apr. 26, 2019, 10 a.m.), *available at* https://tinyurl.com/y6enzlxn (exchange between Proponent's counsel and board member Jason Gelender at minute 12:15-13:45).
[2] *Hearing Before Title Board on Proposed Initiatives 2019-2020 #68 & #69* (Apr. 26, 2019, 10 a.m.), *available at* https://tinyurl.com/y6enzlxn (statements by board member LeAnn Morrill at minute 13:55-14:25, 19:15-19:30).
[3] *Id.* at 19:15-19:30.

With its Opening Brief, the Title Board has shifted from both its prior conflicting positions (Position 1: that a tax credit offset must be sufficiently precise in identifying the credits to be offset; versus Position 2: that any tax credit offset violates single subject regardless of its precision). Rather, it seems the Title Board now contends that Proponents' "attempt to dictate *how* the State must deal with [the] collateral fiscal consequences" of creating their new Program is the second subject. Title Board's Op. Br. at 10-11 (emphasis in original). In essence, the Title Board contends that a measure can dictate that a new program be revenue-neutral through the creation of a new tax, or as here, the reduction of existing tax credits, but the measure cannot "prescribe" (or prioritize) which new tax will be increased or which tax credits will be reduced. *See id.* at 10-11. Thus, according to the Title Board, a funding mechanism can address the collateral revenue effects of a new program, but only generically, not specifically. *See id.*

Based on this new third position, the Title Board would apparently not take issue with a measure that instructed the General Assembly to offset new tax credits by reducing other tax credits, so long as the provision provided no guidance on which tax credits to reduce. Likewise, under this proposed rule, a measure could address the collateral revenue effects of creating a new program by instructing the General

Assembly to increase taxes, so long as the provision did not "prescribe" which taxes must be increased.

The Title Board's new position lacks common sense because it would illogically require voters to go through a separate ballot measure if they want to have any say in the specifics of how a new program is funded. Moreover, the Title Board's position directly contradicts the precedent outlined in Proponents' Opening Brief that allows proponents of a measure to dictate precisely how to address the "collateral fiscal consequences" of a new program, i.e., its funding costs. Proponents' Op. Br. at 9-10 (discussing various instances of this Court approving measures providing for specific new taxes, e.g., a new gambling tax, even if those new taxes are wholly unrelated to the program, e.g., education). Indeed, in the example Proponents provided in their Opening Brief regarding the use of oil and gas taxes to fund scholarships, taxes were increased, at least in part, by eliminating tax credits, just as Proponents propose to do here. *See* Title Setting for 2007-2008 #113 (attached hereto as **Exhibit 1**); *see also* Proponents' Op. Br., Ex. A (Supreme Court Order denying appeal on single-subject grounds and affirming title setting).

In the face of this precedent, the Title Board relies exclusively on this Court's decision in *In re Title, Ballot Title, & Submission Clause for 1997-1998 #84*, 961 P.2d 456 (Colo. 1998) to support its new rule. Title Board's Op. Br. at 9-11. This

case is inapposite. There, the proposed measure had nothing to do with creating a new program. Rather, the proposed measure sought to establish various new state and local tax cuts, while also requiring the state to backfill the resulting lost local tax revenues within the confines of all revenue and spending limits imposed by TABOR. *In re 1997-1998 #84*, 961 P.2d at 457. Because of the practical effect of the TABOR limitation was to preclude the state from offsetting the revenue impact of the tax cuts with increased tax revenues, the collateral effect of the backfill requirement was the mandatory reduction in state spending on other state programs. *Id.* at 460. The cuts to state programs would have ramped up yearly, as the measure proposed annual increases to the tax cuts. *Id.*

The Court concluded that, in addition to the first subject of tax cuts, the measure's second subject was that it surreptitiously had the collateral effect of forcing the state to reduce state spending on existing state programs. *Id.* at 460-61. This is the opposite of what Proponents are trying to accomplish with their tax credit offset mechanism. Whereas, in *In re 1998-1999 #84*, the measure surreptitiously had the collateral effect of reducing state revenues available for funding other state programs, here, Initiative #69 openly attempts to avoid the collateral effect of reducing state funding available for other state programs by making the Program revenue-neutral. Thus, unlike the measure in *In re 1998-1999 #84*, Initiative #69

avoids collateral impacts rather than creates them. Accordingly, if anything, *In re 1998-1999 #84* supports the proposition that a measure creating a new program can expressly provide for how to avoid collateral revenue impacts.

In sum, the Title Board cannot dispute that the funding mechanism chosen by Proponents is necessarily and properly connected to the creation of their new Program. In nitpicking how Proponents address funding, the Title Board overanalyzes Initiative #69's implementing provisions and improperly delves into the merits of the measure. Accordingly, the Court should reverse and find that Initiative #69 has a single subject.

B. The Title Board's Logrolling Argument Is Illogical.

The Title Board's second single-subject argument is that Initiative #69 poses a risk of logrolling because it "shields" tax credits that benefit historically underserved causes. Title Board's Op. Br. at 11. According to the Title Board's logic, voters may be incented to vote for Initiative #69 to ensure that tax credits for one of their preferred causes are preserved. *See id.* at 12-13.

As a threshold matter, the premise of the Title Board's logrolling argument that the prioritized tax-credit categories are "shielded" is incorrect. Initiative #69 does not exclude any particular tax credit from potential reduction or elimination by the General Assembly. Instead, Initiative #69 instructs the General Assembly to

prioritize the preservation of certain categories of credits, but ultimately gives the General Assembly the discretion to determine which are reduced or eliminated. R., p. 9, Proposed § 39-22-121.5(4). At any rate, the Title Board's interpretation of the effect of the prioritization language is inappropriate because the Title Board cannot speculate as to a measure's future application. *In re 2013-2014 #89*, 2014 CO 66, ¶ 10.

More problematic, however, is that the Title Board's logrolling argument does not make sense. While the prioritization language reduces the chance that the enumerated categories of credits will be affected, discretion ultimately lies with the General Assembly. Therefore, the safest way for a voter to preserve any of the prioritized categories would be to vote "no" on Initiative #69. If Initiative #69 were to fail, no tax credits would be eliminated. On the other hand, if Initiative #69 were to pass, the prioritized tax credit categories would be subject to potential reduction or elimination within the General Assembly's discretion. Accordingly, as set forth in Proponents' Opening Brief, it is unreasonable to contend that Proponents are attempting to garner public support by eliminating tax credits. Certainly, eliminating tax credits is in no way a present under a "Christmas tree" as the Title Board contends. Title Board's Op. Br. at 13.

The Title Board's attenuated logrolling argument cannot justify its constrained single-subject application, which contradicts the longstanding principle that the single-subject requirement be liberally construed "so as not to impose undue restrictions on the initiative process." *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d at 1131.

III. Adopting the Title Board's Narrow Single-Subject Application Would Have Significant Negative Policy Ramifications.

Adopting the Title Board's rule that a measure creating a new program or expanding an existing one cannot specifically address the "collateral fiscal consequences" would have sweeping impacts on the ability of Colorado citizens, through the petition process, and also the General Assembly, through legislation, to fund state programming. *See* Colo. Const. art. V, § 21; §1-40-106.5(3), C.R.S. (applying single-subject standards equally when construing initiatives and legislation by the General Assembly). For example, if Colorado citizens or the General Assembly sought to boost teacher pay by increasing *ad valorem* taxes on oil and gas, doing so would nonsensically have to be accomplished through separate measures or bills. Providing a funding source is, after all, "deal[ing] with the

collateral fiscal consequences." Title Board's Op. Br. at 10-11 (emphasis in original).

Here, the offset provision the Title Board finds so problematic is, in essence, an appropriations clause, i.e., a mechanism for funding the new Program. Indeed, eliminating tax credits is simply the inverse of establishing a new tax as a means of funding. *See In re Title, Ballot Title, & Submission Clause for 2007-2008 #113*, No. 08SA198 (Colo. June 26, 2008) (proposing to reduce oil and gas tax credits to fund state university scholarships); Ex. 1, Title Setting for *2007-2008 #113*. Consequently, under the Title Board's new rule, a single bill or initiative could not, for example, repeal corporate tax credits to fund an expansion of the earned income tax credit. Nor could a single bill or initiative reduce developer tax credits to fund infrastructure improvement projects for K-12 school buildings. Under these constraints, lawmakers would be faced with the irresponsible prospect of funding new programming only if they do not have a concrete, established funding source.

In short, the Title Board took a simple appropriation provision and applied an exacting analysis to find a second subject for reasons that are unclear to the Title Board itself. The Court should reverse because adopting such a narrow application of the single-subject rule would significantly undermine the ability of lawmakers and citizens to fund state programming.

CONCLUSION

WHEREFORE, Proponents respectfully request that the Court reverse the Title Board's decision denying title setting on single-subject grounds and that it remand Initiative #69 to the Title Board with instructions to set the titles within 69 hours of the Court's Order.

Respectfully submitted this 3rd day of June, 2019.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Benjamin J. Larson
William A. Hobbs, #7753
Benjamin J. Larson, #42540
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2019, a true and correct copy of the foregoing **PETITIONERS' ANSWER BRIEF** was filed and served via CCEF, and served upon the following:

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/s/ Carol Christman
Carol Christman

EXHIBIT
1

Ballot Title Setting Board

Proposed Initiative 2007-2008 #113[1]

DATE FILED: June 3, 2019 4:28 PM

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

STATE TAXES SHALL BE INCREASED $321.4 MILLION ANNUALLY BY AN AMENDMENT TO THE COLORADO REVISED STATUTES CONCERNING THE SEVERANCE TAX ON OIL AND GAS EXTRACTED IN THE STATE, AND, IN CONNECTION THEREWITH, FOR TAXABLE YEARS COMMENCING ON OR AFTER JANUARY 1, 2009, CHANGING THE TAX TO 5% OF TOTAL GROSS INCOME FROM THE SALE OF OIL AND GAS EXTRACTED IN THE STATE WHEN THE AMOUNT OF ANNUAL GROSS INCOME IS AT LEAST $300,000; ELIMINATING A CREDIT AGAINST THE SEVERANCE TAX FOR PROPERTY TAXES PAID BY OIL AND GAS PRODUCERS AND INTEREST OWNERS; REDUCING THE LEVEL OF PRODUCTION THAT QUALIFIES WELLS FOR AN EXEMPTION FROM THE TAX; EXEMPTING REVENUES FROM THE TAX AND RELATED INVESTMENT INCOME FROM STATE AND LOCAL GOVERNMENT SPENDING LIMITS; AND REQUIRING THE TAX REVENUES TO BE CREDITED AS FOLLOWS: (A) 22% TO THE SEVERANCE TAX TRUST FUND, (B) 22% TO THE LOCAL GOVERNMENT SEVERANCE TAX FUND, AND (C) 56% TO A NEW SEVERANCE TAX STABILIZATION TRUST FUND, OF WHICH 60% IS USED TO FUND SCHOLARSHIPS FOR COLORADO RESIDENTS ATTENDING STATE COLLEGES AND UNIVERSITIES, 15% TO FUND THE PRESERVATION OF NATIVE WILDLIFE HABITAT, 10% TO FUND RENEWABLE ENERGY AND ENERGY EFFICIENCY PROGRAMS, 10% TO FUND TRANSPORTATION PROJECTS IN COUNTIES AND MUNICIPALITIES IMPACTED BY THE SEVERANCE OF OIL AND GAS, AND 5% TO FUND COMMUNITY DRINKING WATER AND WASTEWATER TREATMENT GRANTS.

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

SHALL STATE TAXES BE INCREASED $321.4 MILLION ANNUALLY BY AN AMENDMENT TO THE COLORADO REVISED STATUTES CONCERNING THE SEVERANCE TAX ON OIL AND GAS EXTRACTED IN THE STATE, AND, IN CONNECTION THEREWITH, FOR TAXABLE YEARS COMMENCING ON OR AFTER JANUARY 1, 2009, CHANGING THE TAX TO 5% OF TOTAL GROSS INCOME FROM THE SALE OF OIL AND GAS EXTRACTED IN THE STATE WHEN THE AMOUNT OF ANNUAL GROSS INCOME IS AT LEAST $300,000; ELIMINATING A CREDIT AGAINST THE SEVERANCE TAX FOR PROPERTY TAXES PAID BY OIL AND GAS PRODUCERS AND INTEREST OWNERS; REDUCING THE LEVEL OF PRODUCTION THAT QUALIFIES WELLS FOR AN EXEMPTION FROM THE TAX; EXEMPTING REVENUES FROM THE TAX AND RELATED INVESTMENT INCOME FROM STATE AND LOCAL GOVERNMENT SPENDING LIMITS; AND REQUIRING THE TAX REVENUES TO BE CREDITED AS FOLLOWS: (A) 22% TO THE SEVERANCE TAX TRUST FUND, (B) 22% TO THE LOCAL GOVERNMENT SEVERANCE TAX FUND, AND (C) 56% TO A NEW SEVERANCE TAX STABILIZATION TRUST FUND, OF WHICH 60% IS USED TO FUND SCHOLARSHIPS FOR COLORADO RESIDENTS ATTENDING STATE COLLEGES AND UNIVERSITIES, 15% TO FUND THE PRESERVATION OF NATIVE WILDLIFE HABITAT, 10% TO FUND RENEWABLE ENERGY AND ENERGY EFFICIENCY PROGRAMS, 10% TO FUND

[1] Unofficially captioned **"Severance Tax"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

TRANSPORTATION PROJECTS IN COUNTIES AND MUNICIPALITIES IMPACTED BY THE SEVERANCE OF OIL AND GAS, AND 5% TO FUND COMMUNITY DRINKING WATER AND WASTEWATER TREATMENT GRANTS?

Hearing May 21, 2008:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 5:20 p.m.

Hearing May 29, 2008:
Motions for Rehearing granted in part to the extent Board amended titles; denied in all other respects.
Hearing adjourned 7:47 p.m.