

<p>COLORADO SUPREME COURT 2 East 14<sup>th</sup> Ave. Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2017) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #69 (“Establishment of Expanded Learning Opportunities Program”)</p> <p>PETITIONERS: Juliet Sebold and Monica R. Colbert,</p> <p>v.</p> <p>RESPONDENTS: Title Board Members Ben Schler, LeeAnn Morrill, and Jason Gelender.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p><b>THE TITLE BOARD’S OPENING BRIEF</b></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 the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,174 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).

Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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.

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The Colorado Title Board (“Board”), by and through undersigned counsel, hereby submits the following Opening Brief.

### **STATEMENT OF THE ISSUE**

Whether the Board correctly determined that Proposed Initiative 2019-2020 #69 (“#69”) contains multiple subjects and thereby violates the single-subject rule in article V, § 1(5.5) of the Colorado Constitution.<sup>1</sup>

### **STATEMENT OF THE CASE AND FACTS**

Petitioners Juliet Sebold and Monica R. Colbert seek to circulate #69 to obtain the requisite number of signatures to place a measure on the ballot to enact a new article, § 22-86.1-101, *et seq.*, in Colorado’s revised statutes. The proposed initiative seeks to create a new “Expanded Learning Opportunities Program” for Colorado children and youth. Record for Initiative #69, p. 2, filed May 3, 2019 (“Record”).

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<sup>1</sup> Before the Board, Proponents incorporated their legal arguments related to Proposed Initiative 2019-2020 #68’s (“#68”) single subject into their legal arguments related to Proposed Initiative 2019-2020 #69, #72, and #73’s single subjects. The Board’s single-subject rulings on #68, #69, #72, and #73 are identical. As such, the Board’s Opening Briefs for #68, #69, #72, and #73 are substantively identical.

According to Proponents, #69’s single subject is “creat[ing] a financial aid program for Colorado families to use to provide their children approved out-of-school learning experiences.”<sup>2</sup> The proposed initiative funds the new program, in part, through monetary donations made by taxpayers to a nonprofit entity that administers the program. Record, pp. 8–9 (proposed § 39-22-121.5). Taxpayers who donate to the nonprofit entity that administers the new program are eligible for a state income tax credit to offset their tax liability. *Id.*

To avoid revenue limitations under the Taxpayer Bill of Rights (“TABOR”), the proposed initiative makes the new program “revenue-neutral.” It instructs the General Assembly to “reduce the total amount of *other* credits” allowed to taxpayers “in an amount at least equal to the credits allowed under this section.” Record, p. 9 (proposed § 39-22-121.5(4)). The proposed initiative, however, “prioritize[s] the preservation” of certain types of favored tax credits by insulating them from the reduction requirement. In particular, tax credits that benefit

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<sup>2</sup> *Hearing Before Title Board on Proposed Initiatives 2019-2020 #68 & #69, Part II* (Apr. 17, 2019), available at <https://tinyurl.com/y6enzlxn> (statements at minutes 0:50, 6:15).

“veterans, parks, open space, early childhood education programs, low-income Colorado residents, seniors, and other underserved or vulnerable communities” are prioritized and thus shielded from the reduction requirement. *Id.*

The Board conducted an initial public hearing on April 17, 2019 and declined to set a title after finding that #69 violated Colorado’s single-subject rule. Record, p. 12. Petitioners filed a motion for rehearing on April 23, *id.* at 13, and the Board denied that motion after holding a rehearing on April 26, 2019, *id.* at 14. Petitioners then filed a timely petition of review with this Court on May 3, 2019.

### **SUMMARY OF THE ARGUMENT**

For two reasons, this Court should affirm the Board’s decision that #69 violates the single-subject rule. *First*, #69 contains at least two subjects: (1) the creation of a new expanded learning opportunities program, and (2) a prioritization of existing tax credits over other, less-favored tax credits. Existing precedent from this Court holds that a proponent violates the single-subject rule if the measure dictates how the State must cut existing government programs to pay for the new



program created by the proposed initiative. Because #69's credit-prioritization scheme does precisely that, it violates the single-subject rule.

*Second*, #69 creates the risk of improper "log rolling." By shielding certain favored categories of credits from reduction—such as credits benefiting veterans, parks, open space, early childhood education programs, low-income residents, and seniors—the measure joins together multiple subjects into a single initiative in the hope of attracting support from various disparate groups of voters. The single-subject rule was designed to guard against such "log rolling," ensuring that each measure passes on its own merits. This Court should affirm.

## ARGUMENT

### **I. The measure contains multiple subjects.**

Proponents object to the Board's decision that #69 contains at least two subjects: (1) the creation of a new expanded learning opportunities program, and (2) a prioritization of existing tax credits. Proponents also disagree with the Board's concern that #69 creates the

risk of improper “log rolling.” Proponents’ objections should be overruled.

**A. Standard of Review and Preservation**

“In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014). 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 2001-2002 #21 and #22*, 44 P.3d 213, 215–16 (Colo. 2002); *In re Title, Ballot Title and Submission Clause for 2001-2002 #43*, 46 P.3d 438, 443 (Colo. 2002). The Court may, however, 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 and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006). To do so, the Court will “examine sufficiently an 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 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007). Through its exam, the Court will “determine unstated purposes and their relationship to the central theme of the initiative.” *In re #55*, 138 P.3d at 278. If the unstated theme is consistent with the general purpose, the single subject requirement will be met. *Id.*

Petitioners preserved this argument by raising it in their motion for rehearing, Record, p. 13, and at the rehearing itself.

**B. Based on existing precedent, the Board correctly found #69 violates the single-subject rule.**

The state constitution provides that a proposed initiative may relate to only one subject:

No 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). Further codifying the single-subject rule, Colorado statutory law 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 voters.” § 1-40-106.5(1)(e)(II), C.R.S. (2018)

A proposed measure violates the single-subject rule if (1) it relates to more than one subject, and (2) has at least two distinct and separate purposes that are not dependent upon or connected with each other. *In re #55*, 138 P.3d at 277; *In re #21 and #22*, 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 Title, Ballot Title and Submission Clause, and Summary for 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. *In re #43*, 46 P.3d at 442.

In this case, the Board correctly determined that #69 contains at least two subjects. The first subject within #69 is the creation of a new expanded learning opportunities program for Colorado children and youth. Record, p. 2. Proponents do not dispute this subject within #69. The second subject within #69 is the prioritization of certain favored tax credits over other, less-favored tax credits. Record, p. 9 (proposed § 39-22-121.5(4)). Proponents contend this feature in #69 does not constitute a second subject in violation of the single-subject rule. But as pointed out by one of the Board members, the prioritization of certain tax credits is not “necessarily and properly connected” to the creation of new expanded learning opportunities program.<sup>3</sup> To the contrary, this second subject is separate and distinct from the first because it is “not dependent upon” the former. *In re #55*, 138 P.3d at 277.

This Court addressed an analogous proposed initiative in *In re Title, Ballot Title and Submission Clause, Summary for 1997-98 #84*, 961 P.2d 456 (Colo. 1998). There, a proposed initiative lowered various

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<sup>3</sup> *Hearing Before Title Board on Proposed Initiatives 2019-2020 #68 & #69, Part II* (Apr. 17, 2019), available at <https://tinyurl.com/y6enzlxn> (statements of Board member Jason Gelender at minute 4:50).

state taxes *and* required the state to replace affected local revenue losses. *Id.* at 457. The State’s obligation to replace local revenue losses came with its own set of restrictions—the reimbursements had to be made monthly and “within all tax and spending limits.” *Id.* at 461. That is, the State was prohibited from surpassing TABOR’s revenue and spending limits to make the reimbursements. This Court observed that the State “will be able to replace local revenues lost through tax cuts only if it reduces *existing* state spending on state programs.” *Id.* at 460 (emphasis added). Based on this restrictive structure, the Court held that the proposed initiative violated the single-subject requirement because it contained two subjects: “tax cuts” and “mandatory restrictions in state spending on state programs.” *Id.* These two subjects, the Court explained, are “distinct and have separate purposes.” *Id.* “While requiring the state to replace affected local revenue in itself sufficiently relates to a tax cut, requiring the state separately to reduce its spending on state programs is not dependent upon and clearly related to the tax cut.” *Id.* (quotations omitted). Thus,

the Court held that the measure violated the single-subject requirement.

Here, the same analysis reveals that #69 also contains two distinct and separate subjects. Number 69's creation of a new expanded learning opportunities program has certain collateral fiscal consequences, just like the tax cuts in *In re #84*. The single-subject problem arises from Proponent's attempt to dictate *how* the State must deal with those collateral fiscal consequences. With *In re #84*, the measure dictated mandatory spending cuts to existing programs; in this case, #69 dictates which existing tax credits must be preserved notwithstanding reductions to other credits. In both instances, requiring the State to deal with the collateral fiscal consequences in prescribed ways constitutes a distinct and separate subject.

Accordingly, based on existing court precedent, the Board correctly found that #69 contains multiple subjects.

**C. Number 69 creates the risk of improper log rolling.**

Beyond preventing voter surprise, this Court has explained that the single-subject rule prevents proponents from engaging in “log

rolling” or “Christmas tree” tactics—the joining together of multiple subjects into a single initiative “in the hope of attracting support from various factions which may have different or even conflicting interests.” *In re Proposed Initiative on “Public Rights in Water II,”* 898 P.2d 1076, 1079 (Colo. 1995). By forbidding the joining of “incongruous subjects” in the same measure, the single-subject rule ensures that each proposal “depends on its own merits for passage.” *In re #43,* 46 P.3d at 441 (quotations omitted).

In this case, the Board members rightly expressed concern that #69’s prioritization of certain favored tax credits might constitute improper “log rolling.”<sup>4</sup> Had the Board crafted a title for #69, it necessarily would have summarized the new program’s tax-credit-reduction funding mechanism. As indicated, that funding mechanism pays for #69’s new program within TABOR’s limits by reducing other available state tax credits and simultaneously prioritizing certain favored tax credits. Those favored tax credits that are prioritized under

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<sup>4</sup> *Rehearing Before Title Board on Proposed Initiatives 2019-2020 #68 & #69* (Apr. 26, 2019), available at <https://tinyurl.com/y6enzlxn> (statements of Board member LeeAnn Morrill at minute 22:00).



#69 include credits benefiting “veterans, parks, open space, early childhood education programs, low-income Colorado residents, seniors, and other underserved or vulnerable communities.” Record, p. 9 (proposed § 39-22-121.5(4)).

A voter who is indifferent or even opposed to the creation of #69’s new expanded learning opportunities program may nonetheless feel induced to vote in favor of #69 because he or she feels strongly that credits benefiting veterans, for example, should be preserved. If so, #69 is one such measure that, “incapable of being enacted on [its] own merits,” nonetheless 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 #43*, 46 P.3d at 442 (citation omitted). This is precisely the kind of “log rolling” or “Christmas tree” tactics the single-subject rule was designed to prevent. *Public Rights in Water II*, 898 P.2d at 1079.

## CONCLUSION

For the foregoing reasons, the Court should affirm the Board’s decision that #69 contains multiple subjects.

Respectfully submitted this 20th day of May, 2019.

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado, this 20th day of May, 2019 addressed as follows:

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