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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
ORIGINAL PROCEEDING PURSUANT TO C.R.S. § 1-40-107(2) **Respondents/Cross-Petitioners:** Alex Valdez and Colin Larson v. **Colorado Ballot Title Setting Board:** Theresa Conly, David Powell, and Ed DeCecco and **Petitioner/Cross-Respondent:** Bernard Buescher	▲ **COURT USE ONLY** ▲
Attorneys for Petitioners: Sarah M. Mercer, #39367 David B. Meschke, #47728 BROWNSTEIN HYATT FARBER SCHRECK LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Tel: 303.223.1100 Fax: 303.223.1111 smercer@bhfs.com; dmeschke@bhfs.com	Case No: 2022SA000102

OPENING BRIEF OF RESPONDENTS/CROSS-PETITIONERS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 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 Colorado Appellate Rule 28(g).

It contains **6,177** words (brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A).

For each issue raised by Respondents/Cross-Petitioners, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 28 and 32.

s/ David B. Meschke
David B. Meschke

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Respondents/Cross-Petitioners Alex Valdez and Colin Larson, registered electors of the State of Colorado and through their undersigned counsel, submit their Opening Brief in this original proceeding challenging the actions of the Colorado Ballot Title Setting Board (the "Title Board") on Proposed Initiative 2021-2022 #75 (unofficially captioned "Concerning Property Valuation").

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW BY RESPONDENTS/CROSS-PETITIONERS

1. Whether the Title Board erred by adopting a title for Initiative #75 that improperly uses the structure in C.R.S § 1-40-106(3)(f).
2. Whether the Title Board erred by adopting a title for Initiative #75 that misleads voters and causes voter confusion.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW BY PETITIONER/CROSS-RESPONDENT

1. Whether the Title Board erred in setting any title at all, given that Initiative #75 both subjects and exempts residential land from its changed property tax valuation techniques, making the measure so inherently confusing that a title reflecting its true meaning cannot be set.

2. Whether the Title Board violated the statutory "clear ballot title" requirement by indicating that the measure changes property tax valuation techniques for real property without stating that agricultural land, mines, and oil and gas producing lands or leaseholds are expressly exempt from this initiative's limits on valuation increases for property tax purposes.

STATEMENT OF THE CASE

Respondents/Cross-Petitioners bring this original proceeding pursuant to section 1-40-107(2), C.R.S., as an appeal from the Title Board's decision to improperly apply section 1-40-106(3)(f) and adopt a title that fundamentally misleads voters as the intent and effect of Initiative #75. Section 1-40-106(3)(f) provides that "for measures that reduce local district property tax revenue through a tax change, the ballot title must begin" with the following language:

> Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of (projected dollar figure of property tax revenue reduction to all districts in the first full fiscal year that the measure reduces revenue) in property tax revenue . . . .

C.R.S. § 1-40-106(3)(f).

Initiative #75, however, does not have a primary purpose of lowering or increasing tax revenues collected by a district or involve a "tax change." Rather, it would amend the Colorado Constitution and the Colorado Revised Statutes to limit the annual increase of the actual value of real and personal property for purposes of property taxation to no more than inflation, limited to 3 percent, and allow such property to be reappraised when a property suffers a decline in value or is in a county that has suffered a sustained economic downturn. For this reason, Respondents/Cross-Petitioners challenged the Title Board's decision to apply section 1-40-106(3)(f) to Initiative #75 and adopt a title with a misleading opening clause.

The Title Board conducted its initial public hearing on the Initiative on March 16, 2022, and, over objections from Respondents/ Cross-Petitioners, set a title containing the language required in section 1-40-106(3)(f) for initiatives that are statutorily defined as "tax changes." Respondents/Cross-Petitioners subsequently filed a timely Motion for Rehearing on March 23, 2022, challenging the Title Board's use of the title structure contained in C.R.S § 1-40-106(3)(f). Petitioner/

Cross-Respondent also filed a timely Motion for Rehearing asserting that the measure does not constitute a single subject and that the Title Board set a misleading title.

The Title Board considered the motions at a rehearing on April 6, 2022 and denied them except to the extent the Title Board made minor changes to the ballot title. In doing so, the Title Board once again rejected arguments from Respondents/Cross-Petitioners that the Title Board should not have applied section 1-40-106(3)(f) and adopted that language in the first clause of the title.

Respondents/Cross-Petitioners now seek review of the Title Board's actions under section 1-40-107(2). They filed a Petition for Review of Final Action of the Title Setting Board Concerning Proposed Initiative #75 in this Court on April 13, 2022. (*See* Resp'ts Pet. for Review of Final Action of the Ballot Title Setting Bd. Concerning Proposed Initiative 2021-2022 #75 [hereinafter, "Pet. For Review"].) Petitioner/Cross-Respondent also filed a Petition for Review on the same date, which argues that the measure is too confusing to set a title

and that the Title Board violated the statutory "clear ballot title" requirement.

SUMMARY OF THE ARGUMENT

The Title Board erred in two primary ways when it adopted a title for Proposed Initiative 2021-2022 #75 ("Initiative #75") that begins with "Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of $1.3 billion in property tax revenue." *First*, the Title Board incorrectly determined that the measure is a "tax change" as defined in section 1-40-106(3)(i)(II), and then implemented section 1-40-106(3)(f), which requires that the above language be stated at the beginning of the title "for measures that reduce local district property tax revenue through a tax change." Initiative #75, though, is not a tax change. It neither "has a primary purpose of lowering or increasing tax revenues collected by a district" nor fits within any of the examples of "tax changes" within section 1-40-106(3)(i)(II). And the legislative history for House Bill 21-1321, which added those provisions to statute, demonstrates that those provisions

were not meant to be applied to measures, such as Initiative #75, that seek to slow the rate of increase of revenue.

Second, regardless of whether Initiative #75 is a "tax change," the language at the beginning of the title adopted by the Title Board misleads and biases voters and causes voter confusion. The formulaic approach in section 1-40-106(3)(f) simply does not work, especially as applied to this measure. It forced into Initiative #75's title the statement that the measure will cause a reduction in property tax revenue for all local districts, which is simply not true. Even worse, the use of the word "shall" in that formulaic language indicates that the measure is requiring "a reduction of $1.2 billion in property tax revenue," when that number is, per statute, only a preliminary estimate from Legislative Council Staff. And the adopted title language does not provide a time frame for the purported $1.2 billion reduction in property tax revenue, leaving voters to guess whether this reduction will occur over a certain amount of months or years. As a result, voters will not only be misled but will also be biased against Initiative #75, usurping the citizens' right to initiative embedded in the Colorado Constitution.

Therefore, the beginning clause to the title adopted for Initiative #75 must be removed. Because the measure is not inherently confusing and the adopted title otherwise accurately captures the central features of the measure, removing that language is the only necessary change.

ARGUMENT

I. The Title Board Erred by Adopting a Title for Initiative #75 that Improperly Uses the Structure In Section 1-40-106(3)(F).

The title for Initiative #75 should not contain the language set forth in section 1-40-106(3)(f). That clause should be added to the title of measures that "reduce local district property tax revenue through a tax change." Because plain language of section 1-40-106(3) and the legislative history behind House Bill 21-1321, which added paragraphs (3)(f) and (3)(i)(II) to that section, demonstrate that Initiative #75 would not reduce revenue through a "tax change," the measure's title should not include that language.

A. Standard of review and preservation.

This Court is vested with the authority to review the rulings of the Title Board. C.R.S. § 1-40-107(2). Although the Court's "review of actions taken by the Title Board is of a limited scope," *In re Title, Ballot*

Title, & Submission Clause for 2007-2008 #62, 184 P.3d 52, 58 (Colo. 2008), and the Court defers to the Title Board's discretion in setting the title, ballot title, and submission clause, *In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016), the interpretation of a statutory provision is a question of law that this Court reviews *de novo*, *see, e.g.*, *Robinson v. Legro*, 325 P.3d 1053, 1056 (Colo. 2014).

Respondents/Cross-Petitioners preserved this issue for review in their motion for rehearing before the Title Board. (*See* Resp'ts Mot. for Reh'g, at 1–4.)

B. Relevant canons of statutory construction.

Section 1-40-106(3) must be construed, like other statutory provisions, to determine its intent. "Congressional intent is determined primarily from the statute's plain language, and secondarily from the statute's legislative history." *Greenwood Trust Co. v. Conley*, 938 P.2d 1141, 1147 (Colo. 1997). "When construing a statute, courts must ascertain and give effect to the intent of the General Assembly and

must refrain from rendering judgments inconsistent with that intent." *State v. Nieto*, 993 P.2d 493, 500 (2000) (internal citations omitted).

In determining legislative intent, courts must first look to the plain language of the statute. *See Vaughan v. McMinn*, 945 P.2d 404, 408 (Colo. 1997); *City of Westminster v. Dogan Constr. Co.*, 930 P.2d 585, 590 (Colo. 1997). "If courts can give effect to the ordinary meaning of words used by the legislature, the statute should be construed as written, giving full effect to the words chosen, as it is presumed that the General Assembly meant what it clearly said." *Nieto*, 993 P.2d at 500 (noting that "[i]f the statutory language is clear and unambiguous, courts need not look further"); *see also* C.R.S. § 2-4-101 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning whether by legislative definition or otherwise, shall be construed accordingly.").

"If a statute is ambiguous, the court, in determining the intention of the general assembly, may consider among other matters: (a) [t]he object sought to be attained; (b) the circumstances under which the

statute was enacted; [and] (c) [t]he legislative history" among other matters. C.R.S. § 2-4-203(1)(a), (b), and (c); *see also Rowe v. People*, 856 P.2d 486, 489 (Colo. 1993) ("If a statute is ambiguous, we may determine the intent of the General Assembly by considering the statute's legislative history, the state of the law prior to the legislative enactment, the problem addressed by the legislation, and the statutory remedy created to cure the problem.").

C. The relevant statutory provisions.

Passed last year, House Bill 21-1321 provides that specific language should inserted at the beginning of the title "[f]or measures that reduce local district property tax revenue through a tax change":

> (f) ***For measures that reduce local district property tax revenue through a tax change***, the ballot title must begin "Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of (projected dollar figure of property tax revenue reduction to all districts in the first full fiscal year that the measure reduces revenue) in property tax revenue...?". The title board shall exclude any districts whose property tax revenue would not be reduced by the measure from the measure's ballot title. The estimates reflected in the ballot title shall not be interpreted as restrictions of a local district's budgeting process.

C.R.S. § 1-40-106(3)(f) (emphasis added). In other words, the plain language of the statute provides that the language beginning with "Shall funding . . ." should only be used in measure's title only if it would: (a) reduce local district property tax revenue; and (b) do so through a tax change.

A "tax change" is thus a critical element triggering the use of that language in a title. Although "tax change" may have a broad definition in common parlance, section 1-40-106(3)(i)(II) narrowly defines this term as the following:

> (II) "Tax change" means any initiated ballot issue or initiated ballot question that has a primary purpose of lowering or increasing tax revenues collected by a district, including a reduction or increase of tax rates, mill levies, assessment ratios, or other measures, including matters pertaining to tax classification, definitions, credits, exemptions, monetary thresholds, qualifications for taxation, or any combination thereof, that reduce or increase a district's tax collections. "Tax change" does not mean an initiated ballot issue or initiated ballot question that results in a decrease or increase in revenue to a district in which such decrease or increase is incidental to the primary purpose of the initiated ballot issue or initiated ballot question.

C.R.S. § 1-40-106(3)(i)(II). Therefore, if a measure does not cause a "tax change," as that term is defined in statute, then the Title Board cannot adopt a title that uses the language in section 1-40-106(3)(f).

D. Initiative #75 would not result in a "tax change" under the plain language of section 1-40-106(3).

Under the plain language of section 1-40-106(3), Initiative #75 does not cause a "tax change" because it does not have a "primary purpose of lowering or increasing tax revenues collected by a district," and does not fit within any of the examples of a "tax change" in section 1-40-106(3)(i)(II).

First, Initiative #75 does not have a primary purpose of lowering tax revenues collected by a district. The measure's primary purpose is to create certainty as to the value of property for tax purposes by establishing a predictable rate of growth for the actual value of properties used for purposes of property taxation, rather than relying on assessors' judgments. In Colorado, the actual value of a property is then multiplied by the assessment rate to ascertain the assessed value (7.15% of actual value for residential property and 26.4 or 29% of actual value for commercial and business personal property). *See* C.R.S. §§ 39-

1-104, 104.2. The assessed value is then multiplied by the applicable mill levy rate to arrive at the property taxes due. *See, e.g.*, C.R.S. § 39-1-111.5. Initiative #75 thus would create increased predictability as to the amount of property taxes owed by limiting the annual increase of the actual value of property to inflation, up to 3%. (*See, e.g.*, Initiative #75, § 1.)

While it is certainly possible that the measure, in creating this predictability, could reduce property tax revenue for some local districts for certain years, lowering such revenue is not a primary purpose of the measure. Indeed, property values may increase in the future at a rate lower than inflation. As the measure's Fiscal Summary notes, "[t]o the extent that properties are sold between 2022 and 2023 and revalued at a higher than inflation up to 3 percent," any reduction in property tax revenue "will be reduced." (Pet. for Review, at 22.) The Fiscal Summary also correctly states that the impact to local governments will vary and "depend on several factors, including mill levies and the composition of properties in each jurisdiction." (*Id.*) Local governments, school districts, and other districts where local voters

have authorized "floating" mill levies will adjust these levies as necessary to keep revenue constant if assessed values grow at a lower rate. *See* Ed Sealover, *Repealing the Gallagher Amendment is a business issue, but not a simple one*, DENVER BUSINESS JOURNAL (Oct. 7, 2020), https://www.bizjournals.com/denver/news/2020/10/07/gallagher-amendment-b-colorado-repeal.html (summarizing "floating" mill levies).

Moreover, by establishing a predictable rate of growth for actual value of properties, the measure, if passed, may actually increase revenue to at least some local districts by incentivizing new development. Thus, lowering tax revenues collected by a district is not a primary purpose of the measure, and any such lowering is merely incidental to the primary purpose of creating greater certainty as to the actual value of properties.

Second, Initiative #75 does not fall within ***any*** of the examples listed under the definition of "tax change" in section 1-40-106(3)(i)(II). The measure would provide a cap on the annual increase for the actual value of properties. (*See, e.g.*, Initiative #75, § 1.) It does not increase or decrease tax rates, mill levies, or assessment ratios. It also has

nothing to do with tax classifications, definitions, credits, exemptions, monetary thresholds, or any combination thereof. ***None*** of the examples in the statutory provision fit the measure.

The Title Board and the Petitioner/Cross-Respondent will likely point to "catch-all" language in section 1-40-106(3)(i)(II), but this language does not encompass Initiative #75. Although the list of examples in section 1-40-106(3)(i)(II) may be non-exhaustive, the canon of statutory construction—*ejusdem generis*—should be applied in ascertaining whether Initiative #75's cap is a "tax change." Under *ejusdem generis*, "where a general term follows a list of things in a statute . . . the general terms are applied only to those things of the same general kind or class as those specifically mentioned." *Winter v. People*, 126 P.3d 192, 195 (Colo. 2006) (concluding that the phrase "other apparatus or equipment" applied only to those things that share the characteristics of the items listed in the statute); *Davidson v. Sandstrom*, 83 P.3d 648, 656 (Colo. 2004) ("[W]hen a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same

type as those listed.") (quoting *Ejusdem Generis*, *Black's Law Dictionary* (7th ed. 1999)).

Applying this canon, the phrase "that has a primary purpose of lowering or increasing tax revenues collected by a district," as well as the term "other measures," must fit within the general kind or class of the specific types of "tax changes" listed in section 1-40-106(3)(i)(II). A cap on the amount that the actual value of property may increase annually, however, does not do so. While this central feature of the measure would impact the base value (*i.e.*, the "actual value" of the property) used in calculating property taxes, the examples listed in section 1-40-106(3)(i)(II), such as tax rates, mill levies, and assessment ratios, pertain to the multiplier and are usually expressed as a fraction or percentage. The measure thus would affect a value that is separate and apart from the multiplier used to obtain a tax amount. In other words, the measure's cap on the annual growth of the actual value of property is not within the general kind or class that the General Assembly deemed a "tax change" in passing House Bill 21-1321.

E. The legislative history behind House Bill 21-1321 confirms that measures such as this one should be excluded from the requirements of section 1-40-106(3).

Even if those two provisions in section 1-40-106(3) were ambiguous, the legislative history demonstrates that the section was not intended to apply to measures such as Initiative #75.

When introduced, House Bill 21-1321 used the term "tax policy change," rather than "tax change," to describe which types of measures are subject to section 1-40-106(3)(f). *See* H.B. 21-1321, 73rd Gen. Assemb., First Reg. Sess. (Colo. 2021) (as "Introduced"), *available at* https://leg.colorado.gov/sites/default/files/documents/2021A/bills/2021a_1321_01.pdf. "Tax policy change" is a term used in section 20 of article X of the Colorado Constitution, which is also known as the Taxpayer's Bill of Rights ("TABOR"). *See* Colo. Const. art. X, § 20(4) (requiring that districts must have voter approval in advance for "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district"). Although undefined in TABOR, this Court has

construed "tax policy change" to mean something more than a legislative change causing only an incidental and de minimus revenue increase. *TABOR Found. v. Reg'l Transp. Dist.*, 416 P.3d 101, 106 (Colo. 2018) (noting that "tax policy change" is found "in a list of other governmental actions that all function primarily to raise tax revenue: raising a tax rate, raising a mill levy, raising the value-for-assessment property-tax ratio, and extending an expiring tax").

The Final and Signed Act of House Bill 21-1321 substituted "tax change" for "tax policy change" and then defined "tax change." *See* H.B. 21-1321, 73rd Gen. Assemb., First Reg. Sess. (Colo. 2021) ("Final Act"), *available at* https://leg.colorado.gov/sites/default/files/2021a_1321_signed.pdf. This change was made in a Senate Floor Amendment at Third Reading. *See* Third Reading, H.B. 21-1321, 73rd Gen. Assemb., First Reg. Sess. (Colo. 2021), *available at* https://s3-us-west-2.amazonaws.com/leg.colorado.gov/2021A/amendments/HB1321_L.020.pdf. Available sources of legislative history do not indicate what prompted the change. Nevertheless, while "tax policy change" may arguably include the changes proposed in Initiative #75, *see* TABOR

Foundation, 416 P.3d at 106 (citing Webster's New College Dictionary's definition of "policy" "as principle, plan, or course of action"), "tax change" has a more narrowly defined definition.

Given the lack of direction from traditional sources of legislative history, the best evidence of intent is instead found in Governor Jared Polis's singing statement for House Bill 21-1321.[1] (Ex. 1, Signing Statement.) In his statement, Governor Polis specifically pronounced that "this legislation does not apply to measures that seek to slow the rate of increase of revenue because such measures do not necessarily result in a determinable increase or decrease in state or local revenue or funding for a particular program." (*Id.*, at 2.) In other words, it would

[1] Although signing statements, such as this one, are not binding, they provide evidence of legislative intent. *Uncovering Legislative History in Colorado*, 32 COLO. LAW. 47, 50 (2003) (listing governor signing statements as a source of legislative history); *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 424 (1996) (citing a governor's signing statement as evidence of legislative intent); *United States v. Cleveland*, 356 F.Supp.3d 1215 (D.N.M. 2018) (listing presidential signing statements as part of an act's legislative history); Chad M. Eggspuehler, Note, *The S-Words Mightier than the Pen: Signing Statements as Express Advocacy of Unlawful Action*, 43:2 GONZ. L. REV. 461, 475 (2007-2008) ("No less than Justice Antonin Scalia, notorious as a justice who does not consider extrinsic legislative history materials at all, has suggested that presidential legislative history should at least be considered in parity with congressional legislative history materials.").

be improper to apply the language in section 1-40-106(3) to measures such as Initiative #75.[2] Governor Polis presumably would not have signed House Bill 21-1321 absent this interpretation.

Governor Polis is correct—measures such as Initiative #75 are fundamentally different than the ones meant to be captured by section 1-40-106(3). Initiative #75 contains a mechanism that would slow the rate of growth of the actual value of a property. It does not fall within the specific types of measure that are tax changes, and thus does not trigger section 1-40-106(3).

F. The first clause in the title set by Title Board must be removed because the measure is not a tax change.

Because Initiative #75 is not a "tax change" as defined in C.R.S. § 1-40-106(3)(i)(II), the Title Board erred by applying section 1-40-106(3)(f). Statutory provisions governing ballot initiatives are to be

[2] Petitioner/Cross-Respondent and the Title Board may point to recent statements made by some of the legislative sponsors of House Bill 21-1321. *See* Jesse Paul, *Debate over wording of 2022 ballot measure could have multibillion-dollar consequences for Colorado schools*, COLO. SUN, Mar. 28, 2022, https://coloradosun.com/2022/03/28/property-tax-ballot-measure-2022-colorado-wording/. These statements were made after House Bill 21-1321 passed and therefore are not evidence of the legislative intent at the time of enactment.

"liberally construed" so as "to preserve and protect the right of initiative and referendum." C.R.S. § 1-40-106.5(2). Thus, the first clause in the measure's title—"Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes shall be impacted by a reduction of $1.3 billion in property tax revenue"—was improperly added and must be removed. Otherwise, the title unfairly classifies the measure as a "tax change," which biases voters against voting for the measure due to the estimated reduction of $1.3 billion in property tax revenue.

II. The Title Board Erred by Adopting a Title for Initiative #75 that Misleads Voters and Causes Voter Confusion.

A. Standard of review and preservation.

The Title Board is "vested with considerable discretion in setting the title and the ballot title and submission clause," but the Court must reverse the Board's decision if a title "is insufficient, unfair, or misleading." *See In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 442 P.3d 867, 869 (Colo. 2019) (quoting *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 159 (Colo. 2014)). In examining an initiative's wording to determine whether its

title comports with the clear-title requirement, the Court "employ[s] the general rules of statutory construction and give[s] words and phrases their plain and ordinary meanings." *In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016).

Respondents/Cross-Petitioners preserved this issue for review in their motion for rehearing before the Title Board and specifically objected to the Title Board's use of the clause starting with "Shall funding available . . . ." (*See* Mot. for Reh'g, at 1, 4.)

B. Titles must not be misleading.

An initiative's subject must be "clearly expressed in its title." Colo. Const. art. V, § 1(5.5). "In setting a title, the title board shall consider the public confusion that might be caused by misleading titles" and "shall unambiguously state the principle of the provision sought to be added . . . ." C.R.S. § 1-40-106(3)(b). To accomplish this, "[t]he titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal." *In re Title, Ballot Title, & Submission Clause for Proposed Initiatives 2001-2002 #21 & # 22*, 44 P.3d 213, 222 (Colo. 2002). That is, "[t]he matter

covered by [the initiative] is to be clearly, not dubiously or obscurely, indicated by the title. [And its] relation to the subject must not rest upon a merely possible or doubtful inference." *In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 # 25*, 974 P.2d 458, 462 (Colo. 1999).

In the end, "[t]he purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose." *In re Title, Ballot Title, & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010). The Court therefore rejects titles that are "misleading, inaccurate, or fails to reflect the central features of the proposed initiative." *In re Title, Ballot Title, Submission Clause, & Summary With Regard to Proposed Pet. for Amend. to Const. of State Adding Se. 2 to Art. VII*, 900 P.2d 104, 108 (Colo. 1995).

C. The first clause in the title set by Title Board must be removed because it unfairly misleads voters and does not express the true meaning and intent of the measure.

In addition to improperly designating Initiative #75 as a "tax change," as describe above, the language at the beginning of measure's

title is fundamentally misleading, and at times factually incorrect, for several other reasons. *First*, the challenged language in the title incorrectly states that the measure *will* cause a reduction in property tax revenue for all counties, schools districts, water districts, fire districts, and other districts. But because of the prevalence of districts with "floating" mill levies, as described above, this is not true. For districts with these types of mill levies, a decrease in assessed value could trigger an increase in mills to stabilize revenue and make up any drop caused by lower "actual values" for properties. This would mean that the measure would not pose a change in revenue for a significant number of districts, making the challenged language inaccurate for a large percentage of Coloradans. *See* Nat'l Fed. Of Indep. Bus., et al., *Iceberg Ahead: The Hidden Tax Increase Below the Surface of the Gallagher Formula*, at 7–8 (Oct. 12, 2020), *available at* https://assets.nfib.com/nfibcom/Gallagher-Tax-Increase-Report-FINAL-10-12-2020.pdf (detailing the prevalence of adjustable mill levies in Colorado).

Second, and even more egregious, the use of the word "shall" at the beginning of the title would mislead voters into thinking the measure mandates a reduction in spending. Specifically, the use of the word "shall" indicates to voters that the measure is ***requiring*** "a reduction of $1.2 billion in property tax revenue." This is not true. Per statute, the $1.2 billion number is only "a preliminary estimate of any change in state and local government revenues, expenditures, taxes, or fiscal liabilities." *See* C.R.S. § 1-40-105(1.5)(a)(I). After reading the title as currently drafted, a voter would be confused to learn that the $1.2 billion number is only a preliminary estimate of what could transpire, and not an actual requirement of the measure. *See In re 2009-2010 #24*, 218 P.3d 350, 356 (Colo. 2009) (quoting In re *Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)) (explaining that a title should "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"). Initiative #75's title not only would mislead voters, it also

has the strong potential to bias them against the measure based on an incorrect representation.

Third, nowhere in Initiative #75's title is there an explanation that the $1.2 billion number is a "projected dollar figure of property tax revenue reduction to all districts in the first full fiscal year that the measure reduces revenue." *See* C.R.S § 1-40-106(3)(f). Indeed, Initiative 75's title provides no indication whatsoever as to which months or years the $1.2 billion reduction in property tax revenue refers to. Voters are left in the dark and again would be surprised to learn that the $1.2 billion number is a preliminary estimate that is limited to the first full fiscal year that the measure in projected to reduce revenue. *See id*. This language therefore fails to express the true meaning and intent of Initiative #75.

Because the first clause in the adopted title for the measure would unfairly mislead voters and bias them against the measure, it must be stricken. Leaving in this language in the title would usurp the citizen's

broad right to initiative reserved in article V, section 1 of the Colorado Constitution.[3]

III. The Title Board Did Not Err in Setting a Title.

A. Standard of review.

"The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause." *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 415 P.3d 151, 153 (Colo. 2016). When reviewing a title for clarity and accuracy, the Court will only reverse the Title Board's decision if the title is "insufficient, unfair, or misleading." *In re Initiative for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). Accordingly, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions." *In re 2015-2016 #156*, 415 P.3d at 153 (quoting *In re 2013–2014 #89*, 328 P.3d 172, 176 (Colo. 2014) and *In re 2009–2010 #45*, 234 P.3d at 645).

In reviewing the Title Board's decision to set a title, the Court may not address the merits of a proposed initiative or interpret its

[3] Although potentially outside the scope of this Court's scope of review in this appeal, applying section 1-40-106(3) to the measures such as Initiative #75 violates the Colorado Constitution for this reason. The Title Board should not have applied an unconstitutional statute.

language or predict its application. *See In re Petition on Campaign & Political Fin.*, 877 P.2d 311, 313 (Colo. 1994).

B. Initiative #75 is not inherently confusing.

The Title Board correctly determined that it could set a title for Initiative #75. Petitioner/Cross-Respondent argues that the measure is so inherently confusing that a title reflecting its true meaning cannot be set because the measure does not strike "residential real property" from among the exceptions in section 39-1-103(5)(a). *See In re Title, Ballot Title, Submission Clause, & Summary for 1999-2000 # 25*, 974 P.2d at 465 ("[I]f the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters."). This, however, is a strained reading of the measure in light of its other provisions.

Initiative #75 is clear that it would alter the constitutional and statutory property valuation provisions to provide that the actual value real property, including residential real property, for property tax valuation shall not be increased annually by more than inflation,

limited to 3 percent. This central feature is found near the beginning of the title that the Title Board adopted. The measure would amend section of article X of the Colorado Constitution to add this language. (*See* Initiative #75, § 1.) The measure also would add that language to sections 39-1-103(5)(a), 39-1-104(10.2)(a), and 39-5-121(1)(a)(I). (*See id.*, §§ 3–5.)

In light of these ***four*** amendments to the Colorado Constitution and statutes all stating the very same thing, no voter would think separate language earlier in section 39-1-103(5)(a) contradicts them. *See, e.g.*, *Lang. v. Colo. Mental Health Inst. in Pueblo*, 44 P.3d 262, 266 (Colo. App. 2001) (explaining that where the state constitution conflicts with a state statute, the constitution is "paramount" and prevails over the statute); *accord Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) (collecting cases). The language earlier in section 39-1-103(5)(a) provides that actual value other than certain categories, including residential real property, shall be measured in one way. It does not provide a contrary calculation for the actual value of residential real property. If a voter is wondering how the actual value of residential

real property would be calculated, they only need to look at those four other, clearly indicated, provisions in the measure.

IV. The Title Board Did Not Violate the Statutory "Clear Ballot Title" Requirement.

A. Standard of review.

"When reviewing a title for clarity and accuracy, the Court will only reverse the Title Board's decision if the title is "insufficient, unfair, or misleading." *In re Initiative for 2009-2010 #45*, 234 P.3d at 648.

B. Initiative #75's central features are found in the title.

Petitioner/Cross-Respondent's second argument—that the Title Board violated the statutory "clear ballot title" requirement by setting a title that does not state that agricultural land, mines, and oil and gas producing lands or leaseholds are exempt from the cap on the annual increase of the actual value of property—fairs no better.

The Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water,"* 910 P.2d 21, 24 (Colo. 1996) (citing *In re Proposed Petition on Campaign and Political Fin.*, 877 P.2d 311, 313 (Colo. 1994)). The Title Board is

"to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice in pursuit of the initiative rights of Colorado citizens." *In re Title, Ballot Title & Submission Clause for 1999-2000 #29,* 972 P.2d 257, 266 (Colo. 1999). A title should "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 2009-2010 #24*, 218 P.3d at 356 (quoting *In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). A title need not set out every detail of the initiative. *In re Title, Ballot Title & Submission Clause Summary for 2005-2006 #73,* 135 P.3d 736, 740 (Colo. 2006).

Here, the title set by the Title Board captures the central features of Initiative #75: (1) limiting the annual increase of a property's value to inflation or to 3 percent, whichever is less; and (2) allowing a property to be reappraised when a property suffers a decline in value or is in a county that has suffered a sustained economic downturn. The changes the measure would make to the constitutional and statutory provisions

concern these two features. In contrast, nowhere in the text of the measure is there any change to language concerning agricultural land, mines, and oil and gas producing lands or leaseholds. (*See generally* Initiative #75.) Instead, the provisions exempting agricultural land, mines, and oil and gas producing lands or leaseholds are left untouched in section 39-1-103(5)(a). (*See id.*, § 3.) Because that language is unchanged by Initiative #75, there does not need to be any mention of it in the measure's title. To do otherwise would mislead voters by suggesting that Initiative #75 would change how the actual value is calculated for agricultural land, mines, and oil and gas producing lands or leaseholds.

Therefore, except for the inclusion of the language from section 1-40-106(3)(f), the title clearly, accurately, and fairly describes Initiative #75, incorporates all of its central features, and voters can understand the meaning of a "yes" or "no" vote.

CONCLUSION

Respondents/Cross-Petitioners respectfully request that the Court reverse the Title Board's denial of their Motion for Rehearing and

direct the Title Board to strike the following language from the ballot title: "Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of $1.3 billion in property tax revenue." Respondents/Cross-Petitioners also respectfully request that the Court affirm the Title Board's decision to deny Petitioner/Cross-Respondent's Motion for Rehearing and set a title.

Respectfully submitted on May 3, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2022, I electronically filed a true and correct copy of the foregoing **OPENING BRIEF OF RESPONDENTS/CROSS-PETITIONERS** with the clerk of Court via the Colorado Courts E-Filing system which will send notification of such filing and service upon the following:

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