BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Scott Wasserman and Ann Adele Terry,
Objectors,

v.

Dave Davia and Michael Fields,
Designated Representatives of Initiative 2023-2024 #246.

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #246

Through their undersigned counsel, Scott Wasserman, a registered elector of Denver County, and Ann Terry, a registered elector of the City and County of Denver, hereby submit this motion for rehearing on Initiative 2023-2024 #246 (the "Initiative" or "Initiative 246"), and state:

On April 3, 2024, the Title Setting Board set the following ballot title and submission clause for Initiative 2023-2024 #246:

> *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 $3 billion in property tax revenue by a change to the Colorado Revised Statutes concerning reductions in assessment rates for valuation of certain taxable property, and, in connection therewith, reducing the assessment rate for certain nonresidential real and personal property to 25.5% of the property value; reducing the assessment rate for residential real property to 5.3% of the property value; and beginning June 30, 2025, requiring the state to reimburse local districts for revenue lost, to the extent practicable, and prohibiting the reduction in funding that school districts receive under the "Public School Finance Act of 1994" due to the reduction in assessment rates?*

The Board erred in setting this title because Initiative 246 violates the constitutional single subject requirement in several ways. The initiative's purported single subject is "keeping property taxes low," but wrapped into the measure are several distinct and unrelated subjects.

A. <u>The measure's requirement to hold K-12 education harmless from cuts constitutes another subject</u>.

Under Proposed C.R.S. § 39-3-210(1), "any revenue loss attributed to such reductions or revenue limit shall not reduce funding school districts receive under article 54 of title 22, otherwise known as the Public School Finance Act of 1994." This language is not intended to require the state to

increase its contribution to K-12 funding to make up for the reduction in local property tax revenue available for that purpose. As reflected in the fiscal summary, existing law would trigger that result, requiring an additional $870 million state K-12 obligation in the first fiscal year alone.

Instead, the the language is intended to prohibit the state from cutting education funding to avoid some or all of the new $870 million obligation. For instance, it is intended to stop the state from lowering the amount of per pupil funding or reinstituting a "budget stabilization" factor to reduce state K-12 spending to reduce or eliminate the new $870 million state K-12 obligation.

By prohibiting the state from cutting K-12 funding, that is, by leaving the state no alternative but to increase state spending on K-12 by $870 million, the Initiative would necessitate reductions in other state spending. Voters would be surprised to learn that, in approving cuts to local property taxes, they are cutting state spending on other programs. This necessary reduction in other state spending constitutes a second subject. Although the Supreme Court has recognized that "requiring the state to replace affected local revenue [that results from a measure's local tax cut] in itself sufficiently relates to a tax cut," a measure cannot at the same time mandate a cut in state programs. *In re Title, Ballot Title And Submission Clause, And Summary For 1997-98 # 84*, 961 P.2d 456, 460 (Colo. 1998). The measure in *#84* had that result, and thus violated the single subject requirement because it required the state backfill to local jurisdictions occur "within all tax and spending limits." Given TABOR's limits, the state would have to "lower the amount it spends on state programs." *Id.* at 460.

The K-12 backfill sits in a similar position to the "within all tax and spending limits" provision in *#84*. The measure is requiring a backfill for a local loss of revenue and, at the same time, prohibiting the state from making choices in how to accomplish the backfill. By protecting state funding for K-12 education, which goes to support local education, the measure is necessarily going to force a cut in other ***state*** programs to cover the cost. As the Supreme Court held in *#84*, a local tax measure that forces such a change in state spending violates the single subject requirement.

B. <u>The measure creates an additional subject by significantly increasing state funding for local education.</u>

The measure will create a windfall to local school districts in the amount of hundreds of millions of dollars per year. This will occur because Proposed C.R.S. § 39-3-210(1) requires that funding for schools remain constant ***and*** Proposed C.R.S. § 39-3-210(2) requires the state to provide local districts—including school districts--with a reimbursement warrant. In this case, local education is effectively receiving a double reimbursement—once through preserving funding under the Public Schools Act and a second time through a state reimbursement.

This double dip is the result of the requirement that, in addition to holding funding for schools constant, "the State Treasurer shall issue a warrant to be paid yearly to reimburse local districts for lost revenue…" The measure does not define what a "local district" is, and neither does Article 1 of Title 39, C.R.S. In fact, "local district" does not appear to be a concept that currently exists in Title 39. Undoubtedly, "local district" includes "school district." A school district is a district—it's in the name. School districts are local—there are more than 180 of them in the state, each

serving a particular geographic area (or district). Because school districts are local districts, the local district backfill provision found in Proposed C.R.S. § 39-3-210(2) would require the state to reimburse each local school district for local property tax revenue lost as a result of the Initiative's assessed value reductions.

Reimbursing local school districts for lost tax revenue is one thing, but giving those districts a double recovery of lost revenue is something entirely different. That type of ***increase***, not backfill, of local education funding is not "necessarily and properly connected" to cutting local property taxes. Moreover, it implicates both single subject concerns. For those who can determine that is occurring, they may vote for Initiative 246 to achieve an increase in school funding; it is generating a political constituency to support the measure that otherwise may not. For those who do not understand this is what the measure requires, they would be surprised to learn that in voting for property tax cuts they are approving a significant school funding increase that is coming at the cost of other state programs. C.R.S. § 1-40-106.5(1)(e)(I) & (II).

C. <u>The local backfill provision violates the single subject requirement</u>.

1. *The local backfill provision is so internally contradictory that a clear title cannot be set*.

Proponents' drafting of the local backfill provision creates an internal inconsistency. On the one hand, the backfill requirement is mandatory. The state treasurer "shall issue" warrants, and "reimbursements shall be made" by the General Assembly. "Shall" does not leave any discretion; rather, as the Court has often explained, "the generally accepted and familiar meaning[]" of shall is "mandatory". *People v. District Court, Second Judicial Dist*., 713 P.2d 918, 921 (Colo. 1986). Thus, Colorado courts have "consistently held that the use of the word 'shall' in a statute is usually deemed to involve a mandatory connotation." Id.

On the other hand, the measure then seems to suggest that, at the least, perhaps the General Assembly has some discretion to make reimbursements, because they are made "to the maximum extent practicable." So which is it: are the local backfill reimbursements mandatory or does the state have discretion? And even if the General Assembly has discretion, the state treasurer does not—the treasurer is obligated to issue the warrants.

As it is unclear from the measure how these questions are to be answered, the Board cannot understand the local backfill requirement sufficiently to set a clear title. *In re 1999-2000 #25*, 974 P.2d 458 at 468-69.

2. *The local backfill requirement violates Supreme Court precedent regarding tax cuts and backfills.*

Aside from the interplay with the K-12 backfill, the local backfill provision violates the single subject requirement and the Court's holding in *#84*. The prohibited second subject in *#84* was forced cuts in state spending to accomplish reimbursements to local jurisdictions due to local tax cuts. The Court explained it thus:

> First, the initiatives provide for tax cuts. Second, the initiatives impose mandatory reductions in state spending on state programs. These two subjects are distinct and have separate purposes. 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.

961 P.2d at 460. Although Initiative #246 does not include the "within all tax and spending limits" provision *#84* had, the absence of that language does not alter TABOR's reach.

Moreover, this measure does the same thing as *#84*. As the fiscal analysis explains, "The measure increases General Fund expenditures for local reimbursements up to $2.2 billion in FY 2025-26 and FY 2026-27, and larger amounts in later years." A reimbursement obligation of $2.2 ***billion*** is not spare change. With funding for K-12 education protected under the measure (if not increased or separately reimbursed to the tune of nearly $900 million), the General Assembly will have to look to other monies that support state programs to meet the reimbursement requirement. Forcing these types of changes to the state budget because of local tax cuts presents "precisely the types of mischief which the single subject requirement was intended to prevent." *Id.*

WHEREFORE, Objectors move the Title Board to strike the titles set and return Initiative #246 to Proponents for failure to comply with the single subject requirement of Article V, sec. 1(5.5) of the Colorado Constitution.

Respectfully submitted this 10th day of April 2024.

RECHT KORNFELD, P.C.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #246** was sent this day, April 10, 2024, via first-class mail, postage paid and via email to:

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