

COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR INITIATIVE 2021-2022 #63

MOTION FOR REHEARING

On behalf of Dr. Brenda Dickhoner, registered elector of the State of Colorado, and President of Ready Colorado, a leading state nonprofit organization focused strengthening Colorado's education system, the undersigned counsel hereby submit this Motion for Rehearing for Initiative 2021-2022 #63 (the "Initiative") pursuant to Section 1-40-107, C.R.S., and as grounds therefore state as follows:

I. THE TITLE BOARD LACKS JURISDICTION TO SET A TITLE

A. The Initiative contains multiple separate and distinct subjects in violation of the single-subject requirement.

The Colorado General Assembly Legislative Council Staff and Office of Legislative Legal Services stated that the single subject of the Initiative appears to be to "require an additional defined percentage of state revenue to be appropriated to the state education fund." However, the measure actually contains multiple separate subjects. The first subject is, in fact, that it requires an additional defined percentage of state revenue to be appropriated to the state education fund, but the measure also contains two other separate and distinct subjects: 1) it requires that the additional funds "shall be used to supplement, and not supplant, the level of general fund and state education fund appropriations existing on the effective date of [the Initiative]," and 2) it changes the education fund spending priorities by dedicating the funds "specifically to efforts to attract, retain, and compensate teachers and student support professionals." As explained in further detail below, the Initiative contains more than a single subject in violation of Colo. Const. art. V, §1(5.5) and C.R.S. § 1-40-106.5.

1. The Initiative mandates existing funding levels.

The Initiative requires that the defined percentage of revenue "deposited in and appropriated from the state education fund ... shall be used to supplement, and not supplant, the level of general fund and state education fund appropriations existing on the effective date of [the initiative]." This provision restricts the general assembly's plenary authority; by prohibiting use of the funds to supplant the level of general fund and state education fund appropriations, it mandates a certain level of funding and appropriations for the state education fund from existing sources.¹

¹ Cf. *Colo. Cmty. Health Network v. Colo. Gen. Assembly*, 166 P.3d 280, 284 (Colo. App. 2007).

Mandating that the state maintain existing appropriations levels does not have a necessary or proper connection to the purpose of defining a percentage of revenue for transfer to the state education fund. Asking voters to attempt to restrict the general assembly's authority to appropriate funds raises different and conflicting interests. Including this separate and significant provision in the Initiative which is purported to have the single subject of defining the percentage of state revenue to be appropriated to the state education fund could lead to the enactment of this provision that may fail on its own merits.²

In addition, this provision that mandates a certain level of general fund and state education fund appropriations going forward is a surreptitious provision is coiled up in the folds of the Initiative, and voters may be surprised to find that they have restricted the general assembly's plenary power.³

2. The Initiative adds to the constitutional list of allowable state education fund expenditures.

Under current statute, revenue in the state education fund is subject to annual appropriation by the general assembly for purposes of complying with the requirements of Colo. Const. art. IX, § 17(1), and for such purposes as may be authorized by law and that are consistent with the constitution.⁴ The constitution states that education fund dollars “may only be used...for accountable education reform, for accountable programs to meet state academic standards, for class size reduction, for expanding technology education, for improving student safety, for expanding the availability of preschool and kindergarten programs, for performance incentives for teachers, for accountability reporting, or for public school building capital construction.”⁵

The Initiative attempts to add a category of state education fund allowable expenditures: to attract, retain, and compensate teachers and student support professionals. This proposed change to the permissible uses of state education fund dollars is not necessarily or properly connected with the diversion of revenue into the education fund. Combining these subjects may garner support for the initiative from voters with different interests, leading to enactment of a measure that would fail on its own merits.

B. The Initiative is confusing and cannot be understood in violation of the single-subject requirement.

This attempt to limit the plenary power of the legislature over appropriations to the state education fund is confusing and misleading.⁶ The Initiative provides that the funds “shall be

² Combining subjects with no necessary or proper connection for the purposes of garnering support for an initiative from various factions that may have different or even conflicting interests could lead to the enactment of measures that would fail on their own merits. *In re Ballot Title 2011-2012 No. 45*, 274 P.3d 576 (Colo. 2012); *In the Matter of the Title, Ballot Title & Sub. Clause for 2015-2016 No. 63*, 2016 CO 34, 370 P.3d 628 (Colo. 2016).

³ The single-subject rule helps avoid voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of an initiative. *Id.*

⁴ C.R.S. § 22-55-103(3)(a).

⁵ Colo. Const. art. IX, § 17(1)(4)(b).

⁶ The intent of the single-subject requirement is to prevent voters from being confused or misled and to ensure that each proposal is considered on its own merits. *Matter of Ballot Title 1997-98 No. 74*, 962 P.2d 927 (Colo. 1998).

used to supplement, and not supplant, the level of general fund and state education fund appropriations existing on the effective date of [the initiative].” As discussed above, this provision purports to prohibit the general assembly from exercising its legislative authority over appropriations, but limiting future state education fund appropriations to existing levels is in violation of the general assembly’s plenary appropriations authority.⁷ If this is not the intent of the measure, and the provision is somehow interpreted not to freeze current state education fund appropriation level at a minimum amount going forward, then voters would be misled by a title indicating that diverted funds will necessarily provide an overall increase in state education fund dollars.

II. THE TITLE IS UNCLEAR AND MISLEADING

If the Title Board has jurisdiction to set a title for the Initiative, the 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.⁸ The Objector disagrees with the titles and submission clause set by the Title Board because the title is not only unclear and misleading, it is inaccurate and in direct conflict with the substance of the measure itself.

The Initiative will result in increased taxes in certain years, but the title states that the initiative will not raise taxes. Therefore, the title is misleading in contravention of C.R.S. § 1-40-106(3)(b) because it states that the initiative provides funding “*without raising taxes.*” The title should make clear that the measure allows for retention of revenue that, in years where a refund would be due, is a tax increase.

The Initiative would allow the revenue diverted to the state education fund to be spent by the state as a voter-approved revenue change under Colo. Const. art. X, § 20(7)(d).⁹ In years where state revenue from sources not excluded from fiscal year spending exceed TABOR limits, the excess shall be refunded.¹⁰ If voters approve this proposed retention and expenditure of additional education fund revenues, there is an “offset” to the state’s otherwise applicable refund obligation.¹¹

Therefore, by diverting funds from currently collected income tax revenue and exempting them from the TABOR refund requirement, this functions to increase the amount of future tax dollars the state can retain rather than refunded to taxpayers. Simply put, when your refund is decreased, then your taxes have increased.

It is misleading to state that the Initiative provides funding “*without raising taxes,*” and that phrase should be stricken from the title. Voters should be informed that the Initiative would reduce their TABOR refund in years where a refund is required.

⁷ See Colo. Const. art. III.

⁸ *In re Title, Ballot Title & Submission Clause for 2009–2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010).

⁹ See Initiative #63, Section 3 proposing adding C.R.S. § 22-55-102.3(2).

¹⁰ Colo. Const. art. X, § 20(7)(d).

¹¹ *Havens v. Bd. of County Comm’rs*, 924 P.2d 517, 522 (Colo. 1996).

Finally, the title may or may not result in “additional” appropriations to the state education fund, depending upon whether or not the General Assembly retains its plenary authority to appropriate funds under the Initiative. Therefore, it would be more accurate to refer to the funds as “transferred” funds.

Opponent requests the following changes to the proposed title:

A change to the Colorado Revised Statutes concerning ~~additional~~ funding for preschool through twelfth-grade public education ~~without raising taxes~~ TRANSFERRED THROUGH A REVENUE CHANGE THAT WILL RESULT IN INCREASED TAXES IN YEARS WHERE REFUNDS ARE REQUIRED BY REDUCING TAXPAYER REFUND AMOUNTS DUE UNDER TABOR, and, in connection therewith, requiring revenue collected by the state from one-third of one percent of all federal taxable income of every individual, estate, trust, and corporation, as modified by law, to be deposited in the state education fund; allowing the ~~additional~~ TRANSFERRED revenue to be spent by the state and local school districts as a voter-approved revenue change; requiring the ~~additional~~ TRANSFERRED revenue to be used for attracting, retaining, and compensating teachers and student support professionals; specifying appropriations of the ~~additional~~ TRANSFERRED revenue do not supplant existing appropriations for public education; and requiring an annual report describing the allocation of the ~~additional~~ TRANSFERRED revenue.

III. CONCLUSION

The Objector respectfully requests that this Motion for Rehearing be granted and a rehearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 23rd day of March, 2022.

s/ Gwen Benevento
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