

<p>SUPREME COURT, STATE OF COLORADO 2 East 14<sup>th</sup> Avenue Denver, CO 80203</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #143 (“New Cigarette and Tobacco Taxes”)</p> <p><b>Petitioners:</b> Keith Pearson and Wilson Buckley Croom,</p> <p>v.</p> <p><b>Respondents:</b> Jacob Williams and Frank McCurdy,</p> <p>and</p> <p><b>Title Board:</b> Suzanne Staiert, David Blake, and Sharon Eubanks.</p>	
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<p><b>TITLE BOARD’S OPENING BRIEF</b></p>	

## **CERTIFICATE OF COMPLIANCE**

I 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, I certify that:

A. The brief complies with C.A.R. 28(g) because it contains 1,799 words.

B. The brief complies with C.A.R. 28(k) because for the party raising the issue, it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority and (2) a citation to the precise location in the record, and not to an entire document, where the issue was raised and ruled on.

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## **STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

1. Whether the title the Title Board (“Board”) set for Proposed Initiative #143 (“#143”) complies with Colorado law.

## **STATEMENT OF THE CASE**

Respondents Jacob Williams and Frank McCurdy seek to circulate #143 to obtain the required number of signatures to place the measure on the ballot. If enacted, #143 would amend the state constitution to impose additional taxes tobacco products—\$1.75 per pack of cigarettes and 22 percent of the manufacturer’s list price for all other tobacco products. May 5, 2015 Certified Record #143 (“Certified R.”), at 8. The initiative makes clear that these taxes “shall be in addition to any other cigarette and tobacco taxes existing as of the effective date of this subsection.” *Id.* It also specifies how the additional revenues must be appropriated, providing that certain percentages must be used to fund, among other things, tobacco-related research, veteran’s programs, and child and adolescent behavior health. *Id.* at 8-10. Finally, under #143 “revenues appropriated pursuant to [this initiative] shall not be subject

to the state statutory limitation on general fund appropriations growth or any other spending limitation existing in law.” *Id.* at 10.

The Board held a hearing on #143 on April 21, 2016, at which it granted single-subject approval and set a title. *Id.* at 11. Petitioner-objectors Pearson and Croom filed a motion for rehearing. *Id.* at 12.

The Board held a second hearing on April 28 and made certain changes to #143’s title; Pearson and Croom’s motion was denied in all other respects. *Id.* at 15-16. The final version of the ballot title reads:

State taxes shall be increased \$315.7 million annually by an amendment to the Colorado constitution increasing tobacco taxes and, in connection therewith, beginning January 1, 2017, increasing taxes on cigarettes by 8.75 cents per cigarette (\$1.75 per pack of 20 cigarettes) and on other tobacco products by 22 percent of the manufacturer’s list price; and allocating specified percentages of the new tobacco tax revenue to the health-related programs and tobacco education, prevention, and cessation programs currently funded by existing constitutional tobacco taxes; and also allocating new revenue for tobacco-related health research, veterans’ programs, child and adolescent behavioral health, construction and technology improvements for qualified health providers, educational loan repayment for health professionals in rural and underserved areas, and health professional training tracks.

*Id.* at 15. After the title and submission clause were set, Pearson and Croom filed their petition for review in this Court.

## **SUMMARY OF THE ARGUMENT**

The title the Board set for #143 complies with Colorado law. It “correctly and fairly express[es] the true intent and meaning” of the measure and would not lead to “public confusion.” The Board’s decision should be affirmed.

## **ARGUMENT**

### **I. The title the Board set for #143 was proper.**

#### **A. *Standard of review.***

This Court does not demand that the Board “set the best possible title.” *In re Title, Ballot Title, & Submission Clause for 2009-2010, #45*, 234 P.3d 642, 648 (Colo. 2010). Rather, it “give[s] great deference to the Title Board in the exercise of its drafting authority and will reverse its decision only if the titles, are insufficient, unfair, or misleading.” *Id.* (citation omitted).

This issue was properly preserved. The Board held a hearing and set a title for #143 on April 21, 2016. Certified R., at 11. The

Petitioners moved for rehearing on April 27, and the Board held a hearing on April 28. *Id.* at 12-16. Pearson and Croom then timely filed their petition for review with this Court on May 5.

**B.    *The title the Board set for #143 was proper.***

The state constitution requires that the subject of a proposed initiative “shall be clearly expressed in its title ....” COLO. CONST., art. V, § 1(5.5). Section 106(3)(b) establishes the standard for setting titles:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment... shall correctly and fairly express the true intent and meaning thereof .... Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.



§ 1-40-106(3)(b), C.R.S. In short, a title must be fair, clear, accurate, and complete. *In re Title, Ballot Title, & Submission Clause for 2007-2008, #62*, 184 P.3d 52, 58 (Colo. 2008).

Here, the Board's title plainly expresses the measure's core purpose—to impose additional taxes on tobacco products. It not only provides the total amount of new revenue generated, but also details the amount that taxes are increased for the affected tobacco products. Finally, the title explains that the new revenues will be used to fund a particular set of governmental programs. Because the title clearly and briefly explains the true intent and meaning of the measure, it complies with state law.

**C. *The Board's decision to omit a reference to the amount of the existing tax on tobacco products or the percentage increase from the current tax rate from the title was proper.***

Petitioners suggest that to comply with Section 106(3)(b), #143's title must, in addition to the information already contained in the Board's title, add both the current tax rate on tobacco products and the percentage increase in taxes #143 would impose. But such a

requirement would serve only to engender the “public confusion” the Board is charged with preventing. *See* § 1-40-106(3)(b), C.R.S. Under Petitioners’ interpretation, a tax increase would have to be described in four different ways: (1) the total amount of revenue generated by the measure; (2) the current tax rate on each affected product; (3) the new tax rate for each affected product; and (4) the amount, expressed as a percentage, that the measure would increase the tax rate on each affected product. Such a complex title that describes a single rate increase in so many different ways could hardly qualify as “brief,” as Section 106(3)(b) requires, and it would only confuse the public by describing such a simple measure in such a roundabout way.

***D. No. 143’s title need not state that the measure takes away or curtails the General Assembly’s powers of taxation and appropriation.***

Petitioners suggest in their petition for review that #143’s title is misleading because it does not “reflect that the Initiatives takes away or curtails the General Assembly’s powers of taxation and appropriation.” Pet. at 4. The argument seems to be that #143 imposes

a new tax on tobacco product and directs how that money should be appropriated; and because the measure amends the state constitution, the legislature cannot change or override it. But an initiative's title need not list out every detailed exception, implication, and ramification of the measure; it is enough to distill the measure down into a "reasonably ascertainable expression of [its] purpose." *In re Title, Ballot Title, & Submission Clause for 2009-2010, #45*, 234 P.3d 642, 648 (Colo. 2010) (citation omitted). A voter who reads the measure's title will understand that #143 amends the state constitution by requiring the imposition of a tax on tobacco products. The title need not separately explain that the General Assembly is bound by amendments to the state constitution.

**E. *No. 143's title need not indicate the percentage of funding it devotes to each budgetary program.***

Next, the Petitioners say the title is improper because it does not "indicate the percentage of funding the Initiative devotes to each budgetary program noted in the Initiative." Pet. at 4. But again, the law does not require that the ballot title spell out each and every detail

of the measure; indeed, it explicitly mandates that titles be “brief.” § 1-40-106(3)(b), C.R.S. Here, #143 has eight provisions regarding the minute details about how the newly raised revenue must be spent. *See* Certified R. at 4. The title the Board set accurately summarizes these provisions, explaining that the initiative “allocate[es] specified percentages of the new tobacco tax revenue to” a variety of different programs, and then goes on to list them. *Id.* at 15 (referencing, among other things, “tobacco education, prevention, and cessation programs,” “tobacco-related health research, veterans’ programs, child and adolescent behavioral health, [and] construction and technology improvements for qualified health providers”). But the Board “need *not* include every detail” of the measure. *In re Title, Ballot Title, & Submission Clause for 2001-2002, #22 & #23*, 44 P.3d 213, 222 (Colo. 2002). Adding the particular percentage of the new revenue devoted to each program as Petitioners demand would unreasonably encumber the title and serve only to confuse the voters.

**F. *No. 143's title need not state that the additional tax revenues are exempt from the fiscal year spending limited imposed by TABOR.***

Finally, Petitioners contend that the title is deficient because it does not “inform the voters that the additional tobacco tax revenues are being exempted from the fiscal year spending limits imposed by the Taxpayers’ Bill of Rights, Colo. Const. art. X, § 20.” Pet. at 4. But the Taxpayers’ Bill of Rights does not impose absolute an absolute prohibition on any increase in state spending; it says only that “districts must have *voter approval* in advance for ... any new tax, tax rate increase, mill levy above that for the prior year ....” COLO. CONST. art. X, § 20(4)(a) (emphasis added). Here, #143’s title explicitly asks whether the voters approve of an increase in “[s]tate taxes [of] \$315.7 million annually by an amendment to the Colorado constitution increasing tobacco taxes ....” Certified R. at 15. Any reasonable voter would understand that the measure increases taxes and does so by amending the state constitution; inserting another clause explaining that the measure seeks the requisite voter approval under the

Taxpayers' Bill of Rights would be superfluous, serving to do no more than lengthen the title.

In short, the law does not require the title the Board sets to be perfect; it need only "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 Title, Ballot Title, & Submission Clause for 2009-2010, #24*, 218 P.3d 350, 356 (Colo. 2009) (quotation omitted). No. 143's title satisfies that standard. Particularly under this Court's deferential standard of review, the Board's decision should be affirmed.

## **CONCLUSION**

For the reasons given above, the Court should affirm the title the Board set for #143.

Respectfully submitted on this 19<sup>th</sup> day of May, 2016.

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## CERTIFICATE OF SERVICE

This is to certify that I electronically served the **TITLE BOARD'S OPENING BRIEF** and related documents upon the following parties through ICCES this 19<sup>th</sup> day of May, 2016:

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