

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding Under C.R.S. § 1-40-107(2) Appeal from the Ballot Title Board</p>	<p>▲ COURT USE ONLY ▲</p>
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015–2016 #143</p> <p>Petitioners: Keith Pearson and Wilson Buckley Croom v. Respondents: Jacob Williams and Frank McCurdy</p> <p>and Title Board: Suzanne Staiert, David Blake, Sharon Eubanks</p>	<p>Supreme Court Case No.: 16SA155</p>
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<p>PETITIONERS’ ANSWER BRIEF ON PROPOSED INITIATIVE 2015–2016 #143 (“NEW CIGARETTE AND TOBACCO TAXES”)</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 C.A.R. 28(g).

It contains 3,233 words.

The brief complies with C.A.R. 28(b).

For the party responding to the issue:
It contains under a separate heading a statement whether the party agrees with the other party's statement of standard of review.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/ Timothy R. Macdonald

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SUMMARY OF ARGUMENT

All parties agree that this Court must strike the title of Initiative 143 if the Board omitted a central feature of the proposed measure. Such an error would mislead voters and result in a title that is incomplete, unfair, and thus invalid. Resp't Br. 4; Board Br. 3. In arguing that the title need not disclose several key features of Initiative 143, respondents and the Title Board make three overarching errors. First, they misinterpret the historical record of similar tobacco tax initiatives in which identical features were disclosed to voters. Second, they misstate petitioners' position about which features of Initiative 143 must be disclosed. And third, they contend incorrectly that an amended title would be complex and confusing. None of these arguments withstands scrutiny, and this Court should remand the matter to the Title Board to set a valid title.

STANDARD OF REVIEW

Petitioners set forth the applicable standard of review in their opening brief (at 6–7), which is consistent with the standard proposed by respondents (Resp't Br. 4) and by the Board (Board Br. 3).

ARGUMENT

I. RESPONDENTS AND THE BOARD FAIL TO JUSTIFY THE OMISSION OF CENTRAL FEATURES OF INITIATIVE 143 FROM THE TITLE

A. Disclosing the existing or total proposed tax rates provides voters with necessary context

Initiative 143 would impose the largest tax increase on cigarettes and tobacco products in Colorado history. The title, however, fails to apprise voters of either the current or proposed total tax rates, thereby omitting critical context necessary for voters to understand the magnitude of the proposed amendment. Neither respondents nor the Board disputes the salient facts: (1) Initiative 143 would “materially alter current law,” *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 31; (2) the title does not convey any information about the current law; and (3) the relative magnitude of the proposed changes “might well be of significance to voters,” *id.* Where, as here, a proposed measure significantly changes current law, the title must sufficiently “alert voters” of the extent of that change. *Id.* at ¶ 28.

The Board itself applied this principle last week in resetting the title for Proposed Initiative 73, after this Court held that the original title failed to apprise voters of the extent to which the proposed amendment would materially alter current law. The new title for Proposed Initiative 73 discloses both the existing law

and the proposed modification: it alerts voters that the amendment would “chang[e] the number of recall petition signatures required to trigger a recall election from . . . 25% of the votes cast at the last preceding election for all candidates for the position at issue [*i.e.*, the current law] to 5% of the active registered electors in the recall area, not to exceed 100,000 [*i.e.*, the proposed new law].”¹ The new title also alerts voters to the proposed total number of signatures required for a successor petition: “0.25% of active registered electors in the petition area, not to exceed 5,000.”

The revised title for Proposed Initiative 73 thus does not simply inform voters that the required number of signatures would decrease by some fixed amount or percentage from an unidentified starting point; *it says what the law would be*. This information is not improper, as respondents argue, on the theory that it “provide[s] specific explanations of a proposal.” Resp’t Br. 5. Rather, this Court has recognized that a title must sometimes go beyond the four corners of an initiative’s text to explain the measure’s impact on existing law. *See In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2001-2002 #21 & #22*, 44 P.3d 213, 221–22 (Colo. 2002); *In re Title, Ballot Title, Submission Clause &*

¹ Title, Proposed Initiative #73, <http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2015-2016/73Results.html> (May 27, 2016).

Summary by the Title Bd. Pertaining to a Proposed Initiative on “Obscenity”, 877 P.2d 848, 850–51 (Colo. 1994). Such context allows voters to determine if the initiative reflects the law they wish to enact—in other words, the consequence of a “yes” or “no” vote. In the same manner, the title of Initiative 143 should provide voters with the existing or proposed total tax rates so that voters can understand the intended consequence of the proposed measure.

Respondents misconstrue the historical record on a related ballot measure. They argue that the title for Initiative 143 should not reference current or proposed total tax rates because the ballot title for a 1992 initiative to increase tobacco taxes made “no reference” to “the ultimate cigarette and tobacco products taxes.” Resp’t Br. 6. However, respondents overlook the content included in the Title Board’s *summary* of the 1992 initiative. Prior to 2000, the Title Board was required to set a title, submission clause, *and summary* for each proposed initiative. C.R.S. § 1-40-106(3) (1999). All three components were required to “fairly reflect the proposed initiative” in a manner that would “not mislead the signers of the initiative petition and, if the petition results in the measure appearing on the ballot, the voters.” *In re Title, Ballot Title, Submission Clause, & Summary, Adopted Aug. 26, 1991, Pertaining to the Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991). The summary drafted by the Title Board was an integral

and indispensable feature of the ballot process, complementary to the titles. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1099 (Colo. 2000) (“The titles and summary are critical to the voters’ accurate understanding of a proposal.”). As a result, the Court would “determine whether the summary impartially reflects the true sense of the proposed law.” *In re Increase of Taxes on Tobacco Prods. Initiative Adopted on Mar. 2, 1988*, 756 P.2d 995, 998 (Colo. 1988) (“*Tobacco Tax I*”).

In drafting the summary of the 1992 initiative, the Title Board made the necessary disclosure regarding the ultimate tax on tobacco products, explaining that the measure “increases the state excise tax on tobacco products to 55% of the manufacturer’s list price.” *In re Proposed Tobacco Tax*, 830 P.2d 984, 987 (Colo. 1992) (“*Tobacco Tax II*”). Because the Title Board set the title and summary in tandem, respondents’ argument that the “ballot title” alone omitted the total tax rate (Resp’t Br. 6) is a half-truth and explains why the ballot title for the 1992 initiative was “much less detailed than the one set for #143” (*id.*). The fact that the 1992 summary included the total tax imposed on tobacco products also refutes respondents’ argument that “voters d[id] not need” such information. *Id.* at 7.

Providing the necessary context need not be “complex,” “confusing,” or longwinded. Board Br. 6. Petitioners have never contended that the ballot title

should represent the tax increases “in four different ways.” *Id.* A complete title would state the existing and proposed tax rates *or* state the percentage increase. Either formulation would provide voters with context to evaluate the magnitude of the proposed tax increases. As one board member expressed during the rehearing below, “context is important,” and “voters care about the context for the amount of the increase.” Reporter’s Transcript of Proceedings before Title Board, 31:20–32:4 (App. 16a). Conveying important information about the tax rates can be accomplished in a simple manner. As the example title at the end of this brief illustrates, the existing and total tax rates can be included by adding only 14 words to the current title.

B. Curtailing the General Assembly’s power to alter existing appropriations is a central feature of Initiative 143

Respondents maintain that the initiative’s restriction on the General Assembly’s plenary spending power is not central to the proposed measure. That contention, however, is belied by the fact that *respondents* listed this feature in their description of Initiative 143’s purposes to the Court. Resp’t Br. 2 (noting that “revenues generated . . . must supplement existing appropriations for the programs funded”). Given that respondents did not include every feature of Initiative 143 (or even all of the contested features) in their description, this disclosure tacitly

acknowledges the importance of this restriction on the General Assembly's power to reallocate state funds to existing programs.

Respondents' and the Board's arguments misstate petitioners' position. Petitioners have never argued that the title should state that the General Assembly "is bound by amendments to the state constitution," Board Br. 7, or that the General Assembly cannot alter provisions of a constitutional amendment approved by Colorado voters, Resp't Br. 11. Petitioners acknowledged in their opening brief (at 13) that "the General Assembly holds plenary power to appropriate state funds, subject only to constitutional limitations." *In re Interrogatories Submitted by the Gen. Assembly on House Bill 04-1098*, 88 P.3d 1196, 1200 (Colo. 2004). But Initiative 143 does more than constitutionalize the allocation of revenue from new taxes; it also would forever foreclose the General Assembly's power to reduce existing *statutory* allocations of non-tobacco-tax revenue to numerous state programs. Final Draft, Initiative #143, § (10)(g) (mandating that new tax revenues "shall not be used to supplant those [existing] appropriated revenues") (App. 3a). This aspect of Initiative 143 limits the legislature's "plenary power to appropriate state funds," *In re Interrogatories*, 88 P.3d at 1200—a power reserved to the General Assembly by the state constitution, Colo. Const. art. V, § 33.

Respondents' reliance on *In re Title, Ballot Title & Submission Clause, & Summary Pertaining to the Proposed Tobacco Tax Amendment 1994*, 872 P.2d 689 (Colo. 1994) ("*Tobacco Tax III*"), is thus inapt. See Resp't Br. 12–13. When the Court declined to require a statement that “appropriations contained in the proposed amendment may only be changed by a subsequent constitutional amendment,” the Court was referring to appropriations mandated *in* the proposed constitutional amendment. *Tobacco Tax III*, 872 P.2d at 696. Whereas here, Initiative 143 also restricts the General Assembly's power to alter certain existing *statutory* allocations for numerous state programs. Respondents sidestep this critical distinction. Likewise, Initiative 143 limits the General Assembly's power to reduce existing *statutory* taxes imposed on cigarettes and other tobacco products. Final Draft, Initiative #143, § (10)(c) (App. 1a). Where, as here, “a proposed constitutional amendment . . . seek[s] to alter the powers of a constitutional body,” such limitations on the legislative power must be disclosed to voters. *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 No. 265*, 3 P.3d 1210, 1213 (Colo. 2000).

Petitioners agree with respondents that the Board should set ballot titles in a uniform and consistent manner, relying as appropriate on past precedent.

Resp't Br. 13. In this case, that approach requires the Board to disclose limitations

on the legislature’s spending and taxing authority, just as the Board did in 2004 for Amendment 35—a precedent that respondents and the Board conspicuously fail to address. Like Initiative 143, Amendment 35 limited the legislature’s spending and taxing authority. The title for Amendment 35 accordingly explained “that the appropriations of additional tobacco tax revenues shall be in addition to and not substituted for appropriations for such programs on January 1, 2005” and disclosed that the measure “prohibit[ed] the repeal or reduction of existing taxes imposed on cigarettes and other tobacco products.” Ballot Title to Amendment 35 (2004) (App. 24a). The fact that respondents themselves “proposed that kind of language” for inclusion in the title of Initiative 143 undercuts their contrary argument now. Reporter’s Transcript at 28:3 (App. 15a). The limitation on the legislature’s power is a central feature that must be included in Initiative 143’s title, just as it was included in Amendment 35’s title.

C. The required funding allocations are central to Initiative 143

Initiative 143 creates an inflexible spending mandate of over \$315 million in taxpayer revenue. But the title set by the Board does not disclose *how* that money will be allocated, leaving voters to speculate. Although respondents maintain that the funding percentages “are not central elements of this initiative,” Resp’t Br. 8, it is hard to imagine voters being indifferent to a constitutional amendment that

allocates taxpayer money to state programs in indeterminate amounts, give or take \$300 million. *See* Pet’r Br. 16; *see also* Final Draft, Initiative #143, § (10)(d)(II) (App. 2a) (specifying funding percentages ranging from 5% (\$15 million) to 27% (\$85 million)).

Respondents argue that an allocation cap included in the initiative precludes a precise description of funding for all programs because the percentages listed in the measure may change based on the amount of revenue collected; this uncertainty, respondents contend, might confuse or mislead voters. Resp’t Br. 8–9. Under that logic, the title’s current reference to “specified percentages” would be equally misleading to voters. Respondents have no objection to stating that the percentages are “specified,” and the title would be no less accurate for stating what those “specified percentages” actually are. Respondents’ argument also requires this Court to interpret and consider a potential future application and effect of the initiative, which this Court cannot do in reviewing titles. *Blake v. King*, 185 P.3d 142, 145 (Colo. 2008).

Respondents again rely (wrongly) on earlier tobacco tax initiatives. Although the *ballot titles* in 1988 and 1992 may not have “list[ed] the percentages of tax revenue to be allocated to each program,” Resp’t Br. 9, the *summaries* of those initiatives did precisely that. The summary for the 1988 initiative stated that

“[n]inety-five percent of the revenue attributable to these additional taxes is to be used as funding for programs to provide health care for the medically indigent, and five percent is to be credited to a fund for support of prevention, education, and research programs in smoking-related diseases.” *Tobacco Tax I*, 756 P.2d at 997.

Likewise, the summary of the 1992 initiative stated how revenues would be distributed:

Not less than 50% for health care programs for persons who cannot afford or qualify for medical insurance and for the medically indigent; not more than 25% for research and public education on tobacco-related illnesses; not more than 1% to cover the administrative costs of the commission; and any remaining amounts for teacher-training programs.

Tobacco Tax II, 830 P.2d at 988. The summary of the 1994 tobacco tax initiative includes the same level of detail:

50% for health care for people who cannot pay for care; 30% for school and community educational programs to reduce tobacco use; 10% for research on tobacco-related illnesses and the prevention of tobacco use; 5% for economic development including health-related business activities; 4% for municipalities and counties, and 1% for administration.

Tobacco Tax III, 872 P.2d at 692. As these examples illustrate, the exclusion of similar funding percentages in the title for Initiative 143 is an aberration.

It is not sufficient that the percentages could be provided to voters *after the petition is circulated* in a general publication under C.R.S. § 1-40-124, *see*

Resp't Br. 9, or simply by attaching the entire text of the measure to the petition.

The *title* serves the purpose of relaying sufficient information to allow voters to decide whether to sign the petition in the first place. *In re Proposed Constitutional Amendment under the Designation "Pregnancy"*, 757 P.2d 132, 134 (Colo. 1988).

As such, the summaries for the 1988, 1992, and 1994 tobacco tax initiatives all contained revenue allocation percentages, *see* C.R.S. § 1-40-102(6) (1999); voters were not forced to sift through each entire measure to tease out its central features.

The Title Board reiterates its misimpression that including percentages in the title "would unreasonably encumber the title and serve only to confuse the voters."

Board Br. 8. As petitioners explained in their opening brief, inserting the percentages would add seven words (at most). Pet'r Br. 17. Respondents apparently agree, admitting that only "six different percentages" would be needed in a revised title. Resp't Br. 8.

D. Respondents and the Board continue to conflate independent provisions of TABOR, highlighting the potential for voter confusion

At the rehearing below, the Title Board rejected petitioners' request to reference Initiative 143's exemption from TABOR's fiscal year spending limitation on the ground that the title complied with TABOR's *revenue* restrictions—an entirely different provision of TABOR. *See* Pet'r Br. 20–21.

The Board’s opening brief confirms its confusion:

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.

Board Br. 9–10. Respondents offer a similar argument: that the present title “communicated to voters the nature of the proposed tax increases.” Resp’t Br. 11.

As this Court has explained, TABOR’s revenue provisions (Colo. Const. art. X, § 20(4) & (8)) and its spending limitation (Colo. Const. art. X, § 20(7)) “operate separately and independently.” *In re Title, Ballot Title & Submission Clause, & Summary for 1997-98* #30, 959 P.2d 822, 826 (Colo. 1998). Thus, even if voters understand that Initiative 143 raises new taxes under TABOR, that understanding does not require a corollary conclusion that revenues from tax increases would be exempt from TABOR’s fiscal year spending limits. For this reason, numerous ballot titles specifically disclose exemptions from TABOR’s spending limits, including the most recent tobacco tax initiative—Amendment 35 in 2004. *See* Ballot Title to Amendment 35 (2004) (“excluding all additional tobacco tax revenues from fiscal year spending for purposes of section 20 of article X of the Colorado constitution”) (App. 24a); *see also* Pet’r Br. 19–20 (collecting additional examples).

* * *

Although this Court “will not rewrite the titles,” *In re Title, Ballot Title & Submission Clause, & Summary for 1997-98 #62*, 961 P.2d 1077, 1082 (Colo. 1998), it is worth noting that each deficiency described above can be cured without sacrificing the brevity required by C.R.S. § 1-40-106(3)(b). For example, the following title would satisfy the concerns identified on this appeal (with underlined words showing additions and strikethroughs showing deletions):

State taxes shall be increased \$315.7 million annually by 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 (from \$0.84 per pack of 20 cigarettes to \$2.59~~\$1.75~~ per pack of 20 cigarettes) and on other tobacco products by 22 percent of the manufacturer’s list price (for a total tax of 62%); ~~and allocating specified~~ the following percentages of the new tobacco tax revenue to health-related programs and tobacco education, prevention, and cessation programs currently funded by existing constitutional tobacco taxes (34%); ~~and also allocating new revenue for tobacco-related health research (27%), veterans’ programs (14%), child and adolescent behavioral health (10%), construction and technology improvements for qualified health providers (10%), and educational loan repayment for health professionals in rural and underserved areas, and health professional training tracks (5%); specifying that the appropriations of additional tax revenues shall be in addition to and not substituted for appropriations for such programs on January 1, 2016; and excluding additional tax revenues from fiscal year spending for purposes of section 20 of article X of the Colorado Constitution.~~

Even with the additions set forth above, this title would be 119 words *shorter* than the title of Amendment 35 that appeared on the ballot in 2004.

PRAYER FOR RELIEF

Petitioners respectfully ask this Court to remand the matter to the Title Board with instructions to redraft the title to account for the objections above.

Respectfully submitted this 2nd day of June, 2016.

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