

SUPREME COURT, STATE OF  
COLORADO  
2 East 14<sup>th</sup> Avenue  
Denver, CO 80203

Original Proceeding  
Pursuant to Colo. Rev. Stat. § 1-40-107(2)  
Appeal from the Ballot Title Board  
In the Matter of the Title, Ballot Title, and  
Submission Clause for Proposed Initiative  
2015-2016 #143 (“New Cigarette and  
Tobacco Taxes”)

**Petitioners:** Keith Pearson and Wilson  
Buckley Croom,

v.

**Respondents:** Jacob Williams and Frank  
McCurdy,

and

**Title Board:** Suzanne Staiert, David  
Blake, and Sharon Eubanks.

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**^ COURT USE ONLY ^**

Case No.: 2016SA155

**TITLE BOARD’S ANSWER BRIEF**

## 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 1,722 words.

B. The brief complies with C.A.R. 28(b) because it contains, under a separate heading placed before the discussion of the issue, a statement whether the Title Board agrees with the Petitioners' statements concerning the standard of review with citation to authority and preservation for appeal, and if not, why not.

*/s/ Christopher M. Jackson*  
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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**

The Board adopts the statement of the case presented in its May 19, 2016 Opening Brief.

## **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 Board correctly found that #98 contains a single subject.**

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

Petitioners do not directly address the applicable standard of review in their Opening Brief, focusing instead on the legal standard governing initiative titles. *See* Pet’rs Opening Br. at 6 (“The Board is

required by statute to set a title that fully, fairly, and accurately informs voters of the central elements of the proposed measure ....”). However, this Court has made clear that 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.” *In re Title, Ballot Title, & Submission Clause for 2009-2010, #45*, 234 P.3d 642, 648 (Colo. 2010) (citation omitted).

The Board agrees that Petitioners properly preserved this issue for review.

**B. *The Board properly described the tax increased proposed by #143.***

Petitioners contend that #143’s title is “unfair and misleading” because it does not “specify the existing or total proposed tax rates that would be imposed if the voters were to approve the initiative ....” Pet’rs Opening Br. at 7. But as the Board noted in its Opening Brief, including all of the information Petitioners demand would serve only to engender the kind of “public confusion” the Board is charged with preventing. *See* § 1-40-106(3)(b), C.R.S. According to Petitioners, any

initiative that increases taxes must include in its title (1) the existing tax rate, Pet'rs Opening Br. at 7; (2) the total proposed tax rate, *id.*; (3) the increase in the taxes expressed as a percent, *id.* at 8; (4) and the increase in taxes expressed as a dollar figure, *id.* at 9. Moreover, because the initiative increases taxes for cigarettes and other tobacco products at different rates, these figures would have to be included for both categories.

To the extent Petitioners contend that only some—but not all—of this information should be included in the title, *see* Pet'rs Br. at 9 (suggesting the title should include existing tax rates, the total tax imposed, or the percentage increases of the taxes), that is a decision that is committed to the Board's discretion. 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). Number 143's title accurately describes the proposed tax increase both in terms of absolute dollars collected and the value of the tax increase itself. The title does not become affirmatively misleading

merely because it does not also include the information Petitioners are requesting.

Petitioners cite to *In re Title, Ballot Title, & Submission Clause for 2015-2016, #73*, 2016 CO 24 (2016), in support of their argument, but in that case the Court did not require the kind of fulsome description Petitioners demand. Rather, it recognized that “generally stating ... that the initiative specifies recall and successor election procedures *without in any way describing those procedures* does not provide sufficient information ....” *Id.* ¶ 32 (emphasis added).

Similarly, while Petitioners are correct that the Board has, in other contexts, provided additional numerical values to describe an initiative, *see* Pet’rs Br. at 11 (citing *In re Title, Ballot Title, & Submission Clause*, 646 P.2d 916 (Colo. 1982), that does not mean the Board is required to include that information. As the Respondents pointed out in their opening brief, the Court has upheld titles that omit this information and provide even less detail than #143’s. *See In re Proposed Tobacco Tax*, 830 P.2d 984, 990 (Colo. 1992) (“It is sufficient that voters are apprised, in general, that taxes on cigarette and other tobacco products



would increase under the proposed measure.”); *In re Increase of Taxes on Tobacco Prods Initiative*, 756 P.2d 995, 997 (Colo. 1998). In short, a deferential standard of review presupposes that in many cases a decision maker has a “choice between two permissible views of the weight of the evidence”—cases, in other words, where it can appropriately go either way. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). In these kinds of circumstances, a reviewing court may “not substitute [its] judgment.” *People v. Scott*, 626 P.3d 1130, 1131 (Colo. 1981) (citations omitted).

**C. *No. 143’s title need not state that it curtails the General Assembly’s powers of taxation and appropriation.***

Petitioners argue that #143’s title fails to apprise voters of a “central feature” of the initiative relating to the General Assembly’s powers. They argue that the “Final Title [] fails to reflect this restraint on the General Assembly’s power to appropriate funds, as well as a related provision that stripes the legislature of its ability to reduce existing taxes.” Pet’rs Opening Br. at 14. But as the Board discussed in its own Opening Brief, #143 is an amendment to the state constitution.

It would come as no surprise to voters that the General Assembly is bound by a constitutional amendment, and cannot override it: “[V]oters ‘must be presumed to know the existing law at the time they amend or clarify that law.’” *Siewiyumptewa v. State*, 357 P.3d 185, 191 (Colo. 2015) (quoting *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000)). Moreover, an initiative’s title need not include every minute detail about its provisions and its effects; it need only distill the measure down into a “reasonably ascertainable expression of [the initiative’s] purpose.” *In re Title, Ballot Title, & Submission Clause for 2009-2010, #45*, 234 P.3d 642, 648 (Colo. 2010) (citation omitted). And as this Court has already held, describing a provision that preserves a certain funding level is precisely the kind of detail the Board does not need to include. *See In re Title, Ballot Title & Submission Clause, & Summary Pertaining to the Proposed Tobacco Tax Amendment 1994*, 872 P.3d 689, 696 (Colo. 1994) (provision in the initiative “that spending categories and required appropriations contained in the proposed amendment may only be changed by a subsequent constitutional amendment” is not a “central feature[] to the proposal in this case”).

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

Next, Petitioners assert that #143's title is improper because it "fails to disclose the required funding allocations of revenue set forth" in the initiative. Pet'rs Opening Br. at 15. But the title does disclose the existence of those required allocations; it says that the initiative will "allocat[e] specified percentages of the new tobacco tax revenue to" a certain set of programs, and goes on to list each of them. Certified R., at 15. The only information not included in the title is the specific percentage given to each of the various programs receiving the funding. But as noted above, the Board need not include every minute detail in the title it sets. *See, e.g., In re #45*, 234 P.2d at 648. While Petitioners may be correct that "[t]itles for similar initiatives having included specific funding allocations," that does not mean that the Board is *required* to include those funding allocations in the title for every initiative. Rather, the Board has "considerable discretion in resolving the interrelated problems of length, complexity, and clarity in designating a title," and it must make these kinds of decisions on a

case-by-case basis. *In re Title, Ballot Title, & Submission Clause Pertaining to Proposed Tobacco Tax*, 830 P.2d 984, 989 (Colo. 1992).

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

Finally, Petitioners say that #143's title is misleading because it does not inform voters that it is exempt from TABOR's spending limits. *See* Pet'rs Opening Br. at 20. They suggest that "[a] voter could reasonably conclude that the new \$315 million in government spending required by Initiative 143 would necessarily *decrease* existing government expenditures in other areas ...." *Id.* But no reasonable voter could make such a mistake. The initiative's title asks voters whether "[s]tate taxes shall be increased \$315.7 million annually by an amendment to the Colorado constitution *increasing tobacco taxes* ...." Certified R. at 15 (emphasis added). The title makes clear that state taxes *as a whole* will be increased, and that this will be accomplished by increasing the tax rate on tobacco products. Petitioners argue that "even if voters are aware that Initiative 143 proposed to raise tax

revenue, there is no corresponding expectation that the amendment would necessarily expand the government's spending power, as well." Pet'rs Opening Br. at 21. The argument is that while #143 may increase total state revenue, a voter might think that TABOR would require those additional revenues to be offset by a decrease in spending in some other area. But again, no reasonable voter could reach this conclusion. Number 143's title says that state taxes will increase, and that the initiative will "allocat[e] specified percentages of the *new tobacco tax revenue*" to a variety of programs. Certified R. at 15 (emphasis added). The title, in other words, makes clear that (i) state taxes as a whole will go up, (ii) the new revenue will be collected by imposing a higher tax on tobacco products, and (iii) the new revenue will be used to increase funds for a variety of programs. A voter could not read the a title that describes "new" revenue and explains how it will be allocated, yet conclude that this new revenue is actually just "reallocated" revenue that is offset by a reduction to some other government program. In short, the title makes clear that #143 would

increase the total amount of money the state government will collect  
spend in a given fiscal year.

### CONCLUSION

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

Respectfully submitted on this 2<sup>nd</sup> day of June, 2016.

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## CERTIFICATE OF SERVICE

This is to certify that I electronically served the **TITLE BOARD'S ANSWER BRIEF** and related documents upon the following parties through ICCES this 2<sup>nd</sup> day of June, 2016:

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