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| <p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <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>Petitioners: Keith Pearson and Wilson Buckley Croom</p> <p>v.</p> <p>Respondents: Jacob Williams and Frank McCurdy</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; DAVID BLAKE; and JASON GELENDER</p> | <p style="text-align: right;">DATE FILED: May 19, 2016 5:27 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| <p>Attorney for Respondents: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1000 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com</p> | <p>Case No. 2016SA155</p> |
| <p style="text-align: center;">RESPONDENTS’ OPENING 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).

Choose one:

It contains 2,807 words.

It does not exceed 30 pages.

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

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, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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/ Mark G. Grueskin _____

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ISSUES PRESENTED

1. Whether a ballot title for an initiative that increases cigarette and tobacco products taxes is legally sufficient without stating the following details:

- the current tax rates on cigarettes and tobacco products or the percentage increase from the existing tax rates;
- the percentage of new revenues that the initiative allocates to each of seven sets of programs; or
- the fact that revenues generated by the Initiative are exempt from TABOR spending and revenue limits.

2. Whether the ballot title should state the initiative “takes away or curtails the General Assembly’s powers of taxation and appropriation” because tax revenues generated by the initiative are to supplant funding for specified programs.

STATEMENT OF THE CASE

A. Statement of Facts.

In 2004, the voters of Colorado adopted a constitutional amendment to increase cigarette and tobacco products taxes. See Colo. Const., art. X, § 21. Initiative #143 is a proposed constitutional amendment that would impose additional taxes on cigarettes and tobacco products. The tax increase on cigarettes is 8.75 cents per cigarette or \$1.75 per pack of 20 cigarettes; the tax increase on

tobacco products is 22% of the manufacturer's list price. Proposed Article X, § 21(10)(b). The tax is effective January 1, 2017. Proposed Article X, § 21(10)(i).

The revenue generated by this proposal is estimated to be \$315.7 million in the first year. This revenue would be expended on a number of programs, including certain programs that are funded by the existing constitutional tobacco tax; tobacco education, prevention, and cessation; tobacco-related health research; veterans' programs; child and adolescent behavioral health; construction, improvement, and new technologies for qualified medical providers, as defined; and educational loan repayment and professional training tracks for certain health professionals. Proposed Article X, § 21(10)(c), (d).

The measure requires the General Assembly's legislative research offices to provide information on the legislature's website concerning the expenditure of the funds. Proposed Article X, § 21(10)(e). The revenues generated by these tax increases are exempt from TABOR and must supplement existing appropriations for the programs funded. Proposed Article X, § 21(10)(f), (g).

B. Nature of the Case, Course of Proceedings, and Disposition Below.

Frank McCurdy and Jacob Williams (hereafter "Proponents") proposed Initiative 2015-2016 #143 ("#143"). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legal Services. Thereafter the Proponents submitted a final version of the Proposed Initiative to

the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member.

A Title Board hearing was held on April 21, 2016 to establish the Proposed Initiative's single subject and set a title. On April 27, 2016, Petitioners filed a Motion for Rehearing, alleging that the Board did not have jurisdiction to set a title. The rehearing was held on April 28, 2016, at which time the Title Board granted in party and denied in party the Motion for Rehearing. The Board set the following title:

SHALL STATE TAXES 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 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?

SUMMARY

In recent years, several tobacco tax increase initiatives have been proposed. Each time, their ballot titles were challenged to this Court, and they were upheld. In light of the analogous challenges made, the Title Board correctly set this title. The proposed ballot title changes were not required to be made, and the Board acted within its discretion to reject the additional language that would have likely confused more voters than it would have assisted. Thus, the Court should affirm the Title Board's decision and uphold the title set.

LEGAL ARGUMENT

I. The title set for Initiative #143 is fair and clear.

A. Standard of review.

The Title Board has considerable discretion in setting the titles for a ballot initiative. *In re Title, Ballot Title, Submission Clause for Initiative 2011-2012 No. 3*, 274 P.3d 562, 565 (Colo. 2012) (citations omitted). This Court will only reverse the Board's designation if the titles are “insufficient, unfair, or misleading.” *Id.*

In reviewing a challenge to the Title Board's decision, the Court will employ all legitimate presumptions in favor of the propriety of the Board's actions. *Id.* To make that determination, the Court examines the titles as a whole to determine if they are fair, clear, accurate, and complete. *Id.* As such, the Court accords the

language of the proposed initiative and the titles set by the Board their plain meaning. *Id.*

B. The Title Board correctly focused the title on the measure's central features and omitted details of Initiative #143.

Petitioner argues that the title is legally deficient because it does not address Initiative #143's details, and specifically:

- the current tax rates on cigarettes and tobacco products or the percentage increase from the existing tax rates;
- the percentage of new revenues allocated to each of seven program areas by the initiative; and
- the fact that revenues generated by the Initiative are exempt from TABOR spending and revenue limits.

Yet, “the Board is not required to include every aspect of a proposed measure in the title and submission clause, **provide specific explanations of a proposal**, or discuss every possible effect of an initiated measure.” *In re Petition on Campaign and Political Finance*, 877 P.2d 311, 313 (Colo. 1994) (emphasis added). Rather, the title and submission clause “need only fairly reflect the content of the measure.” *Id.*

1. *The title did not need to state current tax rates or percentage tax increases for cigarettes and tobacco products.*

The Petitioner is incorrect that the title needed to provide existing tax rates or percentage increases.

This Court has used a clear standard in challenges to ballot titles for earlier tobacco tax initiatives. “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 Proposed Tobacco Tax*, 830 P.2d 984, 990 (Colo. 1992) (emphasis added) (“*Tobacco Tax II*”). The ballot title in that case was much less detailed than the one set for #143. It merely asked:

SHALL THERE BE AN ACT TO INCREASE TAXES ON CIGARETTES AND TOBACCO PRODUCTS AND TO AUTHORIZE A STATE COMMISSION TO DISTRIBUTE A PORTION OF REVENUES MADE AVAILABLE FROM THE INCREASE FOR HEALTH CARE PROGRAMS FOR THE MEDICALLY INDIGENT AND UNINSURED, FOR RESEARCH AND EDUCATION ABOUT AND PREVENTION OF TOBACCO-RELATED ILLNESS, AND FOR TEACHER TRAINING?

Id. There is no reference in this ballot title to current tax rates or percentage increases or any other measurement of the ultimate cigarette and tobacco products taxes. Yet, that measure proposed to increase cigarette taxes by 17.5 mills per cigarette on top of the then-existing 10 mill per cigarette tax. *Id.* at 995. The tobacco products tax was proposed to be increased from 20% to 55%. *Id.* Thus,

both taxes would have more than doubled. But the title sufficiently apprised voters of the essential topic, an increase in cigarette and tobacco products taxes.

The same was true for a predecessor tobacco tax measure. That ballot title asked:

SHALL THERE BE AN ACT TO INCREASE TAXES ON TOBACCO PRODUCTS AND TO DISTRIBUTE REVENUES FROM THE INCREASE TO HEALTH CARE FOR THE MEDICALLY INDIGENT AND PROGRAMS FOR SMOKING-RELATED DISEASES?

In re Increase of Taxes on Tobacco Products Initiative, 756 P.2d 995, 997 (Colo. 1988) (“*Tobacco Tax I*”). That initiative doubled the tax on cigarettes – from 10 mills on each cigarette to 20 mills on each cigarette. *Id.* at 1001. Yet, the measure was adequately described without a reference to that fact. The Title Board’s framing of a measure is overturned only where it is “clearly misleading,” *id.* at 998, and there is nothing misleading by the omission of a detail that voters do not need in order to appreciate the central focus of the measure.

The ballot title for Initiative #143 already states the amount of the per cigarette tax increase (8.75 cents) as well as the per pack tax increase (\$1.75 per pack of twenty cigarettes). The title’s reference to the tobacco products tax increase is also clear: “increasing taxes... on tobacco products by 22 percent of the manufacturer’s list price.” No additional context was required for the titles set for previous tobacco tax measures, and none is required here.

2. *The title did not need to state the percentages of new tax revenue that will be allocated to specific programs.*

The title alerts voters that the measure allocates “specified percentages” to a variety of programs. Petitioner argues that the title should have stated that the initiative provides a percentage of the total funding provided to each category of funding.

Voters know how the new revenue will be spent in terms of which programmatic priorities will be the beneficiaries of the increased taxes. Those programs are specifically stated in the title. The percentages associated with each of those programs are not set forth in the ballot title but they are not central elements of this initiative. The evaluation of whether voters would materially benefit from the listing of six different percentages was a matter reserved to the Board’s “considerable discretion in resolving the interrelated problems of length, complexity, and clarity in designating a title and ballot title and submission clause.” *Tobacco Tax II*, 830 P.2d at 989.

In fact, clarity in the title would have been frustrated, had the percentages been included. To be accurate, the ballot title would have also had to state that #143’s allocation to existing programs funded by constitutionally imposed tobacco taxes is capped at \$36 million. Once the \$36 million revenue cap is exceeded, the remaining funds under that portion of the formula must be distributed

proportionately according to the relative distribution of revenue provided elsewhere in the amendment. Proposed Article X, § 21(10)(d)(I). Thus, the actual percentages of total tax revenue could be different than those set out in the measure, depending on whether the \$36 million had been met. Where an additional level of detail “could lead to voter confusion over the true meaning of the initiative,” *Tobacco Tax II*, 830 P.2d at 990, the Board is justified in omitting the extra language.

In any event, the titles approved in *Tobacco Tax I* and *Tobacco Tax II* indicate the sufficiency of a tobacco tax ballot title that does not list the percentages of tax revenue to be allocated to each program. *See pp. 6-7, supra.* The central feature of this measure is the cigarette tax increase and the tobacco tax increase. The title describes those tax increases in sufficient detail to fully and fairly inform voters of the measure on which they are voting.

This information is not concealed from voters, as in enacting C.R.S. § 1-40-124, the “General Assembly has provided for the publication of all proposed initiatives.” *In re Proposed Tobacco Tax Amendment 1994*, 872 P.2d 689, 695 n.8 (Colo. 1994) (“*Tobacco Tax III*”). The ballot title is “not intended to fully educate the people on all aspects of a proposed law or constitutional amendment.” *Id.*; *see also Bickel v. City of Boulder*, 885 P.2d 215, 236 (Colo. 1994) (the mandatory election notice for TABOR measures “will provide voters with an understanding of

the need for new revenue and will result in a more informed electorate”), citing Legislative Council of the Colorado General Assembly, *An Analysis of 1992 Ballot Proposals* 10 (1992). Therefore, the Board correctly rejected the language change advocated by Petitioner.

3. *The title did not need to state that the new revenue is exempt from TABOR spending and revenue limits.*

Petitioner argues that the de-Brucing language was a central feature of Initiative #143.

In the tobacco tax increase context, this Court has rejected Petitioner’s argument. In *Tobacco Tax III*, objectors to the ballot title argued that the ballot title was deficient because it did not reflect the impact of the newly-passed section 20 of Article X of the Constitution, also known as TABOR, on the proposed tax increase. “There is no requirement that every possible effect of a measure be included within the title or the ballot title and submission clause... Article X, Section 20 does not alter this principle.” 872 P.2d at 695 (citation and internal quotation marks omitted).

Instead, the Court required compliance with TABOR’s ballot question format – “SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY ...?” – and enough information to communicate, “in general, that taxes on cigarettes and other tobacco products

would increase under the proposed measure.” *Id.* (citation omitted), citing Colo. Const., art X, § 20(3)(c). Even the “adoption of Article X did not obligate the Board to disclose every ramification of a proposed tax measure.” *Id.* Here, the ballot title set for Initiative #143 complied with TABOR and also communicated to voters the nature of the proposed tax increases. Therefore, the Board properly applied the fair title requirements in statute, and its decision should be upheld.

C. The Board correctly rejected Petitioner’s argument that the ballot title should state Initiative #143 constrains the legislature’s taxing and appropriation powers.

The Petitioner is incorrect that the title should have addressed restrictions on either the authority of the General Assembly to reduce tobacco taxes or the legislature’s appropriation authority.

Before the Title Board, Petitioner argued this measure “would take away the General Assembly’s power to repeal or reduce taxes.” Motion for Rehearing at 1, ¶3. But enactment of a tax in the Constitution is, by definition, subject to repeal or reduction only by the voters. As the voters have dealt with TABOR elections for more than two decades and are deemed to understand the law they are amending, *Common Sense Alliance v. Davidson*, 955 P.2d 748, 754 (Colo. 2000), the effect of this amendment will come as no surprise to them. In fact, this measure does nothing to affect the TABOR rubric as to tobacco taxes. In any event, as addressed more fully above, it is not the job of the Title Board to “discuss every possible

effect of an initiated measure.” *In re Petition on Campaign and Political Finance*, *supra*, 877 P.2d at 313.

The Petitioner also argued before the Title Board that the title should state the General Assembly could not “reduce existing funding... for the same programs designated as new beneficiaries of tobacco tax revenues under this measure.”

Motion for Rehearing at 1, ¶4. The implication behind this argument is that voters would consider an increase in taxes for specified programs but do so without any intention that the new revenue was to add to the funding base for, and thus expand, those programs. That is a patently unreasonable view toward a tobacco tax increase measure and voter understanding of its goal. “It is clear from reading the proposed law that its primary purpose is to raise additional revenues through a tax increase on tobacco products and to use these revenues to fund” the programs specified in the initiative. *Tobacco Tax III*, 872 P.2d at 696, citing *Tobacco Tax I*, 756 P.2d at 998. Thus, the objective of a “tax increase” is to generate new revenue, and voters will understand it as such.

As importantly, this Court has determined that ballot titles need not refer to a constitutional amendment’s provisions that preserve certain funding levels.

Neither the failure to refer to the creation of a citizens' commission on tobacco and health in the title or submission clause **nor the lack of a specific statement that spending categories and required appropriations contained in the proposed amendment may only be changed by a subsequent constitutional amendment are central features to the proposal** in this case.

Tobacco Tax III, 872 P.2d at 696.

The Title Board was entirely consistent with this Court’s ruling. The rule of stare decisis applies in ballot title matters in order to afford petition proponents “uniformity, certainty, and stability of the law and the rights acquired thereunder.” *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 29*, 972 P.2d 257, 262-63 (Colo. 1999). The Board’s decision in this regard should be upheld.

CONCLUSION

The Title Board’s decision should be upheld, as it is consistent with the statutory clear titles requirement and this Court’s opinions regarding the proper and necessary wording for a ballot title dealing with tobacco tax increases and expenditures of the revenue raised.

Respectfully submitted this 19th day of May, 2016.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF ON PROPOSED INITIATIVE 2015-2016 #143 ("NEW CIGARETTE AND TOBACCO TAXES")** was sent this day, May 19, 2016 via ICCES to counsel for the Title Board and counsel for the Objectors:

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