

<p>COLORADO SUPREME COURT 2 East 14th Ave. Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #293 (“Tobacco Tax Revenue for New State Preschool Program”)</p> <p>PETITIONER: Anna Jo Haynes,</p> <p>v.</p> <p>RESPONDENTS: Monica Vondruska and Jon Caldara</p> <p>and</p> <p>TITLE BOARD: Theresa Conley, David Powell, and Jason Gelender.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>THE TITLE BOARD’S ANSWER BRIEF</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 the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,880 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

s/ Grant T. Sullivan

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SUMMARY OF THE ARGUMENT

This Court should affirm the title as set by the Title Board for Proposed Initiative 2019-2020 #293 (“#293”), for the reasons stated in the Board’s opening brief. This answer brief responds to the arguments raised by Petitioner/Objector Anne Jo Haynes’ opening brief.

I. The Board correctly determined that #293 satisfies the single subject rule. The funding provision in #293 that redirects tobacco tax funds away from local governments that ban tobacco products is a mere implementing provision, not an impermissible second subject. Unlike the precedent Haynes relies on, #293 does not impose a complete moratorium on local legislation concerning tobacco products. Local governments remain free to regulate tobacco products within their respective jurisdictions.

II. The Board also properly exercised its drafting discretion in crafting a title that accurately captures each of #293’s central features. The case law cited by Haynes confirms this; the title need not set forth detailed examples of #293’s several funding sources. Rather, describing the general categories is sufficient. Similarly, itemizing the nearly one

dozen existing government programs that will see reduced funding under #293 is not required. Mandating such detail would wrongly deprive the Board of its drafting discretion and violate the statutory requirement that initiative titles “be brief.”

ARGUMENT

I. Haynes’ single subject precedent is inapposite.

Haynes resists the Board’s finding that #293 contains a single subject, asserting that the measure’s “penalty” on local governments that ban tobacco products amounts to a “restriction on lawmaking” that constitutes a second subject. Haynes’ Br. 8. Haynes’ single subject argument relies extensively on *In re Title, Ballot Title, Submission Clause for 2009-2010 #91*, 235 P.3d 1071 (Colo. 2010). Haynes’ Br. 8-11. But that case bears stark differences from the case at bar.

In re #91 sought to levy a beverage container tax to “protect and preserve the waters of the state.” 235 P.3d at 1073. The bulk of the funds collected through the beverage container tax were distributed to Colorado’s nine basin roundtables and the interbasin compact committee for uses specified in the measure, including protecting,

administering, and developing the state's water resources. *Id.* at 1074. But in addition to levying a new tax and directing the use of its proceeds, the measure also imposed a four-year moratorium on legislative action by the General Assembly, preventing it from modifying or repealing the initiative's provisions granting the basin roundtables and the interbasin compact committee broad new powers. *Id.* at 1075. The four-year moratorium, this Court explained, was not necessarily and properly connected with the initiative's subject of establishing and administering a beverage container tax that benefited the state's water resources. *Id.* at 1078. Voters would be surprised to learn that the beverage container tax, if adopted, would also "deprive the legislators they elect from exercising any authority over the basin roundtables and the interbasin compact committee for a substantial period of time." *Id.* at 1079.

Unlike the complete legislative moratorium in *In re #91, #293* does not impose a moratorium of any kind on local legislative action. Local governments under #293 continue to hold flexibility in regulating—even banning—tobacco and nicotine products within their

borders. The only consequence is that, if a local government enacts a ban, it will not receive a portion of the state cigarette and tobacco tax revenue currently authorized by Colorado law. Record at 5-6 (proposed § 39-22-623(1)(a)(II)(A), C.R.S.). Such revenue is instead reallocated to #293's new preschool program.

This reallocation mechanism within #293 is necessarily and properly connected to its single subject of creating and administering a new preschool program funded by the reallocation of existing taxes and other revenues on tobacco and nicotine products. While a voter might be surprised to learn that an initiative imposes a complete moratorium on future legislative changes involving tobacco products—something #293 does *not* do—he or she would not be taken aback to learn that a local government considering a ban on tobacco products will lose out on tax revenue generated by such products if the ban passes.

Board member Gelender articulated the point succinctly at the rehearing: “when a government bans something that previously was not banned and was taxed, there is an expectation that the tax revenue will

be lost, so I don't know that would be that surprising [to voters] down the road.”¹

As stated in the Title Board's opening brief, this reallocation mechanism affecting local governments is a mere implementing provision that has differing effects on other provisions of Colorado law. Title Bd. Br. 9. This Court has made clear that it requires “more than the omission of a full accounting of potential effects” before it concludes that an initiative contains multiple subjects. *In re Matter of Title, Ballot Title and Submission Clause for 2015-2016 #63*, 370 P.3d 628, 632 (Colo. 2016). Under this Court's precedent, the Board correctly concluded that #293 satisfies the single subject rule.

II. The Board's title for #293 satisfies the clear title requirement.

Haynes' clear title arguments are two-fold: (1) the title should inform voters about the “penalty” created for local jurisdictions that ban the sale of tobacco or nicotine products; and (2) the title should inform

¹ *Rehearing Before Title Board on Proposed Initiative 2019-2020 #293* (Apr. 15, 2020), available at <https://tinyurl.com/y9pc2k5n> (statement beginning at minute 3:00:50).

voters about major cuts to existing government programs. Haynes' Br. 12-17. Both arguments should be rejected.

A. The title adequately summarizes #293's funding sources.

As stated in the Board's opening brief, #293's reallocation of state cigarette and tobacco tax funds away from local governments that ban tobacco and nicotine products is not a central feature of the measure. Rather, it is one of several funding mechanisms within #293. Haynes' opening brief cites no authority suggesting that a measure's title must lay out the detailed nuances of each of its many funding sources, as opposed to only the general categories of funding sources. *See In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991) ("The board is not required to describe every nuance and feature of the proposed measure.").

The one case cited by Haynes actually supports the Board, not Haynes, demonstrating that the Board's title need not set forth every detail of the proposed measure. Haynes' Br. 13-14 (citing *In re Matter of Title, Ballot Title and Submission Clause for 2013-2014 #90*, 328 P.3d

155 (Colo. 2014)). In that case, this Court held that a measure expanding local governments’ authority to regulate “oil and gas development” need not mention “hydraulic fracturing.” 328 P.3d at 165. Hydraulic fracturing is just one example of oil and gas development, this Court explained, and omitting it from the title is not misleading to voters. *Id.*

So too here. The title set by the Board for #293 properly alerts voters to the general categories of the measure’s funding: “taxes on tobacco and nicotine products” and “money the state receives from tobacco litigation settlements” that previously went to “certain health-related programs” and “other state purposes.” Record at 26.² Omitting the details of one discrete funding source within #293 does not render the overall title misleading to voters. Again, Board member Gelender summarized well the Board’s thinking on this point: “I don’t think the complexity it [the local ban provision] adds to the title, or the difficulty,

² The Board is aware of the typographical error in its title—misspelling “statutes”—and has administratively corrected the error. *See* Proponents’ Br. 5 n.4.

is worth the relatively minimal benefit in notice it's providing. ... In a balance, it ends up being more of a distraction than an improvement.”³

The level of detail settled on by the Board after a lengthy drafting process was well within its drafting discretion. *See In re #90*, 328 P.3d at 162 (“The Title Board is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause.”). The Board’s title both complies with the statutory requirement that titles “be brief,” § 1-40-106(3)(b), C.R.S. (2019), and adequately informs voters of the measure’s central features. Adding additional length or complexity as Haynes urges may cause frustrated voters to refrain from reading the title altogether. Applying this Court’s deferential standard of review, the Board’s title for #293 should be upheld. *See Say v. Baker*, 137 Colo. 155, 159, 322 P.2d 317, 319 (1958) (“[I]f reasonable minds may differ as to the sufficiency of the title, the title should be held to be sufficient.”).

³ *Rehearing Before Title Board on Proposed Initiative 2019-2020 #293* (Apr. 15, 2020), available at <https://tinyurl.com/y9pc2k5n> (statement beginning at minute 3:01:20).

B. Itemizing the programs that will see reduced funding under #293 is not required by the clear title rule.

For similar reasons, the Board's title need not specify each and every existing government program that will face reduced funding if #293's new preschool program is approved by the voters.

The reduction of funds for existing health-related programs is a mere effect of #293, not a central feature. Drafting a "brief" title that both summarizes #293's central features and identifies each of the 11 existing programs that will see reduced funding is simply not possible. Haynes' Br. 14. The Board appropriately exercised its drafting discretion when it elected to describe the general category of affected programs—"health-related programs"—rather than itemize each affected program individually. *See Matter of Title, Ballot Title for 1997-98 No. 62*, 961 P.2d 1077, 1082 (Colo. 1998) (stating "an item-by-item paraphrase" would undermine the General Assembly's intent for a "relatively brief and plain statement").

While Haynes now suggests that the Title Board should have identified the "key programs" that will be affected, Haynes' Br. 16, she

does not explain how the Board is to determine which programs are “key programs” worthy of mention and which fall short of that threshold. Indeed, the Board has no principled way of making that type of normative judgment, and this Court’s precedent cautions against it. *Cf. In re Title, Ballot Title, Submission Clause for 2009-2010 #45*, 234 P.3d 642, 652 (Colo. 2010) (explaining the Court will disapprove of titles that express a “value judgment about the program”).

Last, Haynes relies on *In re Matter of Title, Ballot Title, and Submission Clause for 2015-2016 #73*, 369 P.3d 565 (Colo. 2016), as an example of a case where this Court disapproved of a title that used mere “overarching generalities.” Haynes’ Br. 15. But Haynes overstates the holding of *In re #73*. The Court in that case disapproved of the title because five “central elements” of the measure pertaining to recall elections were omitted. But here, the reduction in funds for existing health-related programs is not one of #293’s central elements or features; it is a mere effect of the measure that need not be included in the title. *See In re Title Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916, 921 (Colo. 1982) (“There is no requirement that

every possible effect be included within the title or the ballot title and submission clause.”). Such effects are “capable of being brought to the attention of the voters by public debate,” or through the more detailed format provided by the Blue Book. *Id.*

CONCLUSION

This Court should affirm the Title Board’s actions in setting the title for #293.

Respectfully submitted this 20th day of May, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via CCE and/or via U.S. first class mail at Denver, Colorado this 20th day of May, 2020, addressed as follows:

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