SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: April 20, 2020 5:00 PM
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 2019-2020 #250 ("State Out-of-School Learning Opportunities Program") **Petitioner:** Kenneth Nova **v.** **Respondents:** Chad Cookinham and Camille Howells **and** **Title Board:** Theresa Conley, David Powell, and Julie Pelegrin	▲ COURT USE ONLY ▲
Attorneys for Petitioner: Mark G. Grueskin, #14621 Thomas M. Rogers III, #28809 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com; trey@rklawpc.com	**Case No. 2020SA000091**
PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #250 ("STATE OUT-OF-SCHOOL LEARNING OPPORTUNITIES PROGRAM")	

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:

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s/ Thomas M. Rogers III
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SUMMARY

The Title Board erred when it refused to include constitutionally mandated language for a measure that, by its express terms, will increase an identified tax, which language is required by Section (3)(c) of the TABOR Amendment, Colo. Const., art. X, §20 ("(3)(c)").

LEGAL ARGUMENT

I. The mandatory "SHALL (DISTRICT) TAXES BE INCREASED" language of (3)(c) is required in the #250 titles.

It is undisputed that one central objective of proposed Initiative 2019-2020 #250 ("Initiative #250" or "#250") is to raise taxes by as much as $300 million per year on Colorado corporations. *Initiative #250, language proposed as* C.R.S. § 39-31-121.5(2). This single fact requires the titles for #250 to include the "SHALL (DISTRICT) TAXES BE RAISED" language mandated by (3)(c). In their effort to avoid this outcome, Respondents and the Title Board (collectively, the "Defenders") rely on the same flawed argument: that unless a proposed measure trips a trigger found in Section (4)(a) of the TABOR Amendment, Colo. Const., art. X, §20 ("(4)(a)"), (3)(c) does not apply. *Respondents' Opening Brief* at 8; *The Title Board's Opening Brief* at 7. Their position is inconsistent with TABOR and this Court's prior holdings.

A. The plain language of (3)(c) requires its "SHALL (DISTRICT) TAXES BE INCREASED" language in the #250 titles.

The argument that (3)(c) does not apply unless a measure triggers (4)(a) is inconsistent with the express language of TABOR. Section (3)(c) plainly states that "[b]allot titles for tax…increases shall begin, 'SHALL (DISTRICT) TAXES BE INCREASED…'" Despite the Defenders' efforts to read more into this language, (3)(c) requires only one question: will the measure increase taxes? In answering that question, neither Defender quibbles with this Court's common sense holding in *Bruce v. City of Colorado Springs*, 129 P.3d 988, 995 (Colo. 2006), that the term "tax increase" as used in (3)(c) "indicates that the tax burden borne by an individual taxpayer will be greater than its present amount." Initiative #250 would cause a tax increase of up to $300 million per year on corporate taxpayers who could otherwise deduct net operating losses. *Initiative #250, language proposed as* C.R.S. § 39-31-121.5(2). Accordingly, #250 includes a tax increase and the language of (3)(c) is required in the titles.

B. The Defenders' argument is not supported by TABOR's express language and is inconsistent with its structure.

Nothing in TABOR itself that suggests (4)(a) must be triggered before (3)(c) applies. Certainly, this is not an express requirement. The drafters of TABOR

could have included language in (3)(c) making it applicable only "to any tax increase measure that requires voter approval under (4)(a)" but no such language was included in TABOR.

Moreover, there is nothing about the structure of TABOR that suggests this requirement. Indeed, the amendment's structure suggests the opposite. Section (3)(c) precedes (4)(a). Surely it would have made more sense to place the language of (3)(c) after (4)(a) if the intention was that (3)(c) would apply only after successful application of (4)(a) to a proposed measure. The fact that (3)(c) comes before (4)(a) suggests that (3)(c) is not intended to apply after (4)(a), but is instead independent of that later section.

Respondents suggest that two aspects of the language of (3)(c) support their position. They argue that the reference in (3)(c) to "district" taxes (presumably a reference to the required language, "SHALL (DISTRICT) TAXES BE INCREASED") and the use of the plural "TAXES" mean that some version of (4)(a)'s "net revenue gain" standard should apply to (3)(c). *Respondents' Opening Brief* at 8-9. This argument fails. First, (3)(c)'s use of the word "DISTRICT" in parenthesis is simply an indication that the name of the district in which the tax would be imposed should be identified. It in no way suggests that all aspects of the measure must be netted out to see if there is a net revenue gain to determine if the

language is required. The use of the plural "TAXES" as opposed to the singular "TAX" implies nothing other than an interest in using plain English. The money paid by taxpayers, as required by a single tax, would typically be referred to in common usage as "taxes". Whenever the TABOR language is used in a ballot title, that title reads "TAXES" whether or not the measure increases a single tax or multiple taxes. Any attempt to infuse more meaning into this plural noun is a stretch of logic and undisputed ballot title setting practice.

C. <u>The Defenders' argument is contrary to *Bruce*.</u>

The argument that (3)(c) only applies to measures that trigger a requirement of (4)(a) is inconsistent with this Court's prior holdings. In *Bruce*, this Court considered the relationship between (3)(c) and (4)(a) and held:

> [S]ection (4)(a) has a **separate and limited purpose** from both sections (2) and (3). Section (4)(a) sets forth which elections require advanced voter approval. It does not concern either term definitions or the election notice requirements of sections (2) and (3) respectively. **The election notice requirements are related only to the advance voter approval requirements insofar as both serve the same underlying purpose of accurately informing the electorate of proposed measures. Otherwise, they have distinct and rather narrow functions.** The relevant portions of section (3) set forth requirements for a valid election notice, including detailed language requirements for a valid election notice title and valid ballot title, whereas section (4)(a) determines which types of elections demand advance voter approval. **The plain language and purpose of these**

provisions offers no compelling reason to extend the reach of the items enumerated in section (4)(a) to section (3).

Bruce, supra, 129 P.3d at 995, *emphasis added.* The Defenders' suggestion of a connection between (4)(a) and (3)(c) is inconsistent with this holding.

Respondents next argue Petitioner's position is inconsistent with the purpose of TABOR. *Respondents' Opening Brief* at 7-8. Instead, it is Respondents' position that is inconsistent with the purpose and intent of TABOR as articulated by the Court in *Bruce*. There, the Court recognized that a purpose of TABOR is to reasonably restrain the growth of government, but that where "the size of government is neither expanding nor contracting" this concern is "largely peripheral." *Bruce, supra*, 129 P.3d at 995. In such a case, the principle underlying the election provisions, "that the electorate should be provided with sufficient information to make intelligent decisions on ballot issues" comes to the fore. *Id.* This is exactly the circumstance in this matter. Respondents have structured #250 to do two things: (1) increase corporate taxation; and (2) keep overall revenue to state government the same by using the tax increase to pay for an outflow of revenue through the measure's tax credits. *See* Record at 9 (net operating loss provision of #250). Accordingly, TABOR's purpose of limiting the size of government is "largely peripheral" here and the focus shifts to the purpose of

section 3, informing voters. That purpose must be accomplished by including the required (3)(c) language in the titles for #250 to notify voters that the measure includes a $300 million tax increase.

Respondents incorrectly assert that *Bruce* supports their position. *Respondents' Opening Brief* at 11-12. In *Bruce*, the Court held a measure that would extend an expiring tax (thus tripping a (4)(a) trigger) did not include a tax increase as that term is used in (3)(c). *Bruce*, *supra*, 129 P.3d at 996. Respondent interprets the case to mean that (3)(c) is more narrow than (4)(a), and concludes that a measure that doesn't trip a (4)(a) trigger could not possibly include a tax increase as that term is used in (3)(c). *Respondents' Opening Brief* at 12. This argument goes back to the core, legally incorrect argument advanced by Respondents – that 3(c)'s broad language relating to any "tax increase" is but a subset of measures that trip a (4)(a) trigger. That is simply not the case. Section (3)(c) is neither broader nor narrower than (4)(a); they work in tandem and have "separate" purposes and "distinct" functions. *Bruce*, *supra*, 129 P.3d at 994. The two subsections have one thing in common: they "both serve the same underlying purpose of accurately informing the electorate of proposed measures." *Id.* Omitting that information for voters is inconsistent with that common strand of shared purpose.

For these reasons, the Court held that (4)(a) did not inform its understanding of the term "tax increase" in 3(c). *Id.* at 994. That phrase operates independently of the identified fiscal acts under 4(a) and, for that reason, gives rise to the mandated ballot phrasing as provided in 3(c). As is the case for #250, a $300 million tax increase must be portrayed as such to voters regardless of the extent of any overlap with a (4)(a) trigger.

D. Neither (4)(a) nor C.R.S. § 1-41-102 require a different outcome.

As noted *supra,* in *Bruce*, this Court held that (4)(a) plays no role in its interpretation of section (3). *Id.* at 994. Nonetheless, the Defenders argue that C.R.S. § 1-41-102, a statutory provision implementing 3(a), requires a different result. *Respondents' Opening Brief* at 10; *The Title Board's Opening Brief* at 7. It does not.

Prior to TABOR, state-wide ballot issues were only permitted in even-numbered years. *See* Colo. Const. art. V, § 1(4). Section 3(a) of TABOR permits ballot issues in odd-numbered years. Passed after TABOR, C.R.S. § 1-41-102 clarifies that 3(a) only applies to "matters arising under" TABOR and specifies what measures meet this requirement. The Defenders argue that because the statute limits 3(a) to measures that meet the requirement of (4)(a), (3)(c) is similarly

limited. This argument fails for at least two reasons. First, the statute interprets only 3(a) and its odd-year elections provision, not the language requirement for tax increase measures under (3)(c). Second, even if the statute could somehow be construed as requiring application of (4)(a) triggers to (3)(c), it would be inconsistent with the express language of (3)(c) and would thus be unconstitutional. *See* Section I.A. *supra*. The statute is irrelevant to the issue at bar. *Zaner v. City of Brighton*, 917 P.2d 280 (Colo. 1996), cited by Respondents, is similarly irrelevant. The case simply affirms the constitutionality of the statute's limitation of 3(a) to fiscal measures. *Id.* at 286-287.

II. Compliance with (3)(c) will not render the titles misleading, unclear or inaccurate.

Proponents of every initiative that would raise taxes to pay for a program would prefer to begin their measure's titles with language describing the program instead of notice that the measure will raise taxes. However, if a measure includes a tax increase, the language of (3)(c) is required. The Title Board must do the best it can to craft a clear title for each measure, even those that must begin "SHALL (DISTRICT) TAXES BE INCREASED…"

In other words, while statute gives the Title Board discretion in setting ballot titles, that discretion does not extend to ignoring (3)(c), a constitutional

requirement. When (3)(c) requires particular language to be used, it must be used. Respondents' arguments about their perceived difficulty setting clear titles should be made to the Title Board on remand, not to this Court.

That said, the Title Board will be able to set a clear title for #250 that will not mislead voters, as it does for every other measure that requires (3)(c) language. Beginning the titles for #250 with the required (3)(c) language will not be misleading or false—it is not disputed that the measure would increase taxes on Colorado corporations by up to $300 million per year. Even if (3)(c) did not require the titles for #250 to begin with that information, any title that omitted it would be deficient. A $300 million tax increase is certainly a central feature of the measure. Respondents' concern is not—cannot be—with including this aspect of the measure in the titles. Instead, their issue is the placement of the information. Here, (3)(c) requires it at the beginning of the titles. The rest of the titles can provide sufficient context and any additional information necessary to make the titles clear and accurate. Voters can be told in the titles that the cost of the measure's tax credits will be offset by the tax increase on corporations that could otherwise use the net operating loss deduction.

CONCLUSION

The titles for Initiative #250 violate TABOR. The Court should reverse the decisions of the Title Board, declare the title deficient, and remand with directions to the Title Board to revise the titles for #250 accordingly.

Respectfully submitted this 20th day of April, 2020.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #250 ("STATE OUT-OF-SCHOOL LEARNING OPPORTUNITIES PROGRAM")** was sent via CCEF this day, April 20, 2020, to the following:

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