SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: March 31, 2020 4:17 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 OPENING 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:

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

Choose one:

X It contains 1,972 words.

☐ It does not exceed 30 pages.

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X 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/ Thomas M. Rogers III
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STATEMENT OF THE ISSUES

Whether 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.

STATEMENT OF THE CASE

A. Statement of Facts.

Chad Cookinham and Camille Howells (the "Proponents") proposed Initiative 2019-2020 #250 ("Initiative #250" or "#250"). This measure would amend Colorado statutes to 1) create an out-of-school learning program, 2) create a new state income tax credit for donors who support the program (up to an cumulative annual maximum of $300 million), and 3) limit state corporate income tax deductions for net operating losses to generate revenue in an amount necessary to off-set the cost of the new state income tax credit. *See* Initiative #250.

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

A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, Proponents submitted a final version of the proposed initiative to the Secretary of

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

A Title Board hearing was held on February 19, 2020, at which time titles were set for the measure. On February 26, 2020, Petitioner Kenneth Nova filed a Motion for Rehearing, alleging *inter alia*, that the titles violate TABOR because they do not include the language required for measures that include a tax increase. *See* Colo. Const., art. X, § 20(3)(c). Rehearing was held on March 4, 2020, at which time the Title Board granted in part and denied in part the Motion for Rehearing.

The title set by the Board at rehearing follows:

> *Shall there be a change to the Colorado Revised Statutes to create an out-of-school learning opportunities program for Colorado children, and, in connection therewith, providing parent-directed financial aid to be used for out-of-school learning opportunities such as tutoring, supplemental instruction in core subjects, support for students with special needs, language programs, art and music, and career and technical education training; requiring the award of financial aid to prioritize low-and middle-income students; creating a state agency independent of the department of education to oversee the program and to select a nonprofit to administer the program; repealing the program in 2035; allowing a state income tax credit of 100% of a taxpayer's contribution to fund the program; and temporarily limiting, until 2035, the state income tax net operating loss deduction for corporations by an amount set annually by the department of revenue to offset, as nearly as practicable, the tax revenue loss resulting from the allowed income tax credit?*

SUMMARY OF ARGUMENT

The titles set by the Title Board for Initiative #250 violate the legal requirements for initiative titles because they do not include the language required for measures that include a tax increase under Section (3)(c) of the TABOR Amendment. Colo. Const., art. X, § 20.

LEGAL ARGUMENT

A. Standards of Review and Preservation of Issue Below.

1. Standard of review.

In most cases, when the Court reviews decisions of the Title Board with regard to the language chosen for particular titles, it defers to the Board's discretion in choosing whether and how to summarize particular provisions of an initiative. *In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016). However, the sole question presented here is whether the Title Board ignored its constitutional responsibility to use mandated ballot title language found in Section 3(c) of TABOR. In this case, where the issue presented to the Court concerns interpretation of a constitutional provision, a pure question of law, this Court's review is done under the *de novo* standard. *Gessler v. Smith*, 419 P.3d 964, 969 (Colo. 2018).

2. Preservation of issues below.

The issue of the titles' violation of TABOR was presented to the Title Board in Petitioner's Motion for Rehearing, was considered at the rehearing, and is preserved for review. *See Motion for Rehearing on Initiative 2019-2020 #250* at 4.

B. The Titles Violate TABOR.

There is no dispute around the central issue in Initiative #250. This measure increases corporate taxes by making corporate net operating losses non-deductible. The only limit on the magnitude of this tax increase is the amount necessary to pay for a so-called "learning opportunities" program. That program utilizes a new tax credit, created by the measure, which revenue drain is offset by the corporate tax increase outlined above. *Initiative #250*, sec. 3. The measure limits the tax credit, after a ramp-up period, to $300 million per year. *Initiative #250, language proposed as* C.R.S. § 39-31-121.5(2). Despite the fact that the measure will result in an annual nine-figure tax increase for Colorado corporate income tax filers, the Title Board concluded that the mandatory "shall taxes be increased" language of Section 3(c) of TABOR is not required for the measure.

The Board accepted Proponents' argument that the measure does not fall within any category triggering the voter approval requirement of Section 4(a) of TABOR ("Section 4(a)"), and thus does not require the language of Section 3(c) of

TABOR ("Section 3(c)"). *See Proponents' Response in Opposition to Motion for Rehearing*, pp. 5-6. Considering the possible triggers for voter approval, Proponents argued that the measure does not include a new tax, a new tax rate or any other provision covered by Section 4(a). *Id.* With regard to the possibility that the measure includes a tax policy change resulting in a net revenue gain for the State, proponents argued that the revenue generated by the limit on the net operating loss deduction and the cost of the measure's new tax credits are offsetting. *Id.* Thus, Proponents argue, there is no net revenue gain, Section 4(a) is not triggered, and the language of Section 3(c) is not required. *Id.* This argument is inconsistent with TABOR and this Court's prior holdings.

Proponents' reliance on Section 4(a) is misplaced. Section 3(c) requires the use of mandatory language in "[b]allot titles for tax…increases." The operative question is whether the measure includes a tax increase as that term is used in Section 3(c). It does. The measure's limitation of the net operating loss deduction will cause the tax burden borne by individual taxpayers to be greater than its present amount by as much as $300 million per year. The offsetting effect of the measure's new tax credit is irrelevant to the Section 3(c) analysis. TABOR requires notice to voters that the measure includes a tax increase and the amount of that increase. The title must include the mandatory language of Section 3(c).

This conclusion is required by the Court's prior analysis of Sections 3(c) and 4(a). In *Bruce v. City of Colorado Springs*, 129 P. 3d 988, 994 (Colo. 2006) (holding that extension of an existing tax increase did not require Section 3(c) language), this Court held that "section (4)(a) does not guide our understanding of the term 'tax increase' as it appears in section 3(c)." Instead, based on the plain meaning of the term, the Court held that "a tax 'increase' is present when the tax burden borne by an individual taxpayer will be greater than its present amount." *Id.* at 995. In this case, the burden on corporate income tax filers in Colorado will increase by up to $300 million per year. Initiative #250 clearly includes a tax increase and, under the plain language of Section 3(c) and *Bruce*, the language of Section 3(c) is required.

The *Bruce* Court went on to note that, where as here, a measure would not increase the size of government, TABOR's goal of limiting the size of government is not implicated, and the analysis must turn to the policy principles behind Section 3. Specifically, "the principle underlying the election provisions" of Section 3 is "that the electorate should be provided with sufficient information to make intelligent decision on ballot issues." *Id.* Here, that principle supports (and TABOR requires) telling voters that the measure includes a $300 million tax increase, regardless of the fact that there will be no net revenue gain under the measure.

The Board's embrace of a ballot title that ignores Section 3(c) has far-reaching implications. Certain tax increases, coupled with a comparable drain on public resources, would never be highlighted as such to voters. That result would undermine a central feature of TABOR, the requirement that voters know, because of the language of Section 3(c), that they are being asked to approve a measure that includes a tax increase on specific taxpayers.

Future measures could include a tax increase of any magnitude, imposed on any taxpayer, without including the Section 3(c) language. A measure would simply have to generate tax revenue without creating a new tax or increasing a tax rate and create an offsetting tax credit to fund a popular program. The result—again, regardless of the magnitude or target of the tax increase—would be a revenue-neutral measure that could be presented to voters without regard to the requirements of Section 3(c).

When interpreting a constitutional amendment, the Court "should ascertain and give effect to the intent of those who adopted it." *Urbish v. Lamm*, 761 P.2d 756, 760 (Colo. 1988). If, as in the case of TABOR, the provision was adopted by popular vote, the Court must determine what the people believed the language of the amendment meant when they approved it and in doing so, should give the language the natural and popular meaning usually understood by the voters. *Id.*

When interpreting a constitutional amendment, the Court may also look to the explanatory publication of the Legislative Council of the Colorado General Assembly, otherwise known as the Blue Book. *See Macravey v. Hamilton*, 898 P.2d 1076, 1079, n.5 (Colo. 1995)(the Blue Book provides helpful source equivalent to the legislative history of a proposed amendment). While not binding, the Blue Book provides important insight into the electorate's understanding of the amendment when it was passed and also shows the public's intentions in adopting the amendment. *See Colorado Common Cause v. Bledsoe, 810 P.2d 201, 209 (Colo. 1991).*

In adopting TABOR, the electorate was clear that no TABOR exemption exists for taxes increased to provide replacement revenue for new tax concessions. "The voters should be the ultimate authority on matters of taxation and should be trusted to exercise sound judgment. Granting tax concessions to special interest groups will be more difficult if **governmental units are required to seek voter approval for replacement revenue**." Legislative Council, Colo. Gen. Assembly, Research Pub. No. 369, An Analysis of 1992 Ballot Proposals 7 (1992) (the "1992 Blue Book")(emphasis added)(http://hermes.cde.state.co.us/drupal/islandora/object/co:2548/datastream/OBJ/view).

Here, Initiative #250's "tax concession" goes to one group of taxpayers and is funded by a tax increase on a second, entirely unrelated group of taxpayers. In adopting TABOR, however, voters sought to "impose[] the discipline and accountability that is needed to require government to **consider the ability of taxpayers to support new** or expanded **programs before it raises taxes**." *Id.* (emphasis added). TABOR was therefore enacted to prevent enactment of "new… programs" such as the one established by Initiative #250 unless voters are properly notified and approve that ballot measure by means of a question that includes the "shall taxes be increased" language of Section 3(c) of TABOR.

A contrary holding that sustains the Title Board's constitutional deviation from TABOR requirements would create a loophole in TABOR that is inconsistent with the amendment's plain language, this Court's precedent, and voters' documented expectations of this provision's operation. This outcome should not be permitted.

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 31st day of March, 2020.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #250 ("STATE OUT-OF-SCHOOL LEARNING OPPORTUNITIES PROGRAM")** was sent via CCEF this day, March 31, 2020, to the following:

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