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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to §1-40-107(2), C.R.S. 2019 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") **Petitioners**: KENNETH NOVA, v. **Respondents**: CHAD COOKINHAM and CAMILLE HOWELLS, and **Title Board:** THERESA CONLEY, DAVID POWELL, and JULIE PELEGRIN.	▲COURT USE ONLY▲
Benjamin J. Larson, #42540 William A. Hobbs, #7753 IRELAND STAPLETON PRYOR & PASCOE, PC 717 17th Street, Suite 2800 Denver, Colorado 80202 Telephone: 303-623-2700 Facsimile: 303-623-2062 E-mail: blarson@irelandstapleton.com bhobbs@irelandstapleton.com	Supreme Court Case No.: 2020SA91
RESPONDENTS' ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) because it contains 2,114 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, as applicable, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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.

By: */s/ Benjamin J. Larson*
Benjamin J. Larson, #42540

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Respondents Chad Cookinham and Camille Howells ("Proponents"), registered electors of the State of Colorado and the designated representatives of the proponents of Initiative 2019-2020 #250 ("Initiative #250"), through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit their Answer Brief in support of the title, ballot title, and submission clause (the "Title(s)") set by the Title Board for Initiative #250 and in response to the Opening Brief submitted by Petitioner Kenneth Nova ("Objector").

SUMMARY OF ARGUMENT

Objector concedes that Initiative #250 reduces net state taxes and does not require prior voter approval under section (4)(a) of TABOR. Accordingly, Initiative #250 is not a ballot issue arising under TABOR, and thus the TABOR election provision at section (3)(c) does not apply. This conclusion is confirmed by Objector's failure to cite a single instance in which the TABOR tax-increase language was required for a non-TABOR measure that—like Initiative #250—reduces state taxes. In fact, Objector's legal position continues to be based on his misapplication of a single case, *Bruce v. Colorado Springs*, which concerned a TABOR measure that increased district taxes.

Aside from his misapplication of *Bruce*, Objector makes a policy argument that voter-notice considerations warrant requiring the TABOR tax-increase

language because voters will otherwise be hoodwinked into unknowingly approving a revenue-neutral tax policy change that shifts tax burden amongst taxpayers. That is a false narrative. Colorado law requires the Title Board to set clear titles that identify a measure's central features. Here, the Titles clearly and unambiguously describe the limit on the NOL deduction as offsetting state revenues lost from the new tax credit. Accordingly, Objector's purported voter-notice considerations cannot justify requiring misleading Titles that falsely ask voters, first and foremost, if state taxes shall be increased when Initiative #250 reduces state taxes.

ARGUMENT

A. Standard of Review/Preservation.

Proponents agree that matters of constitutional construction are reviewed *de novo*. However, this is not merely a question of constitutional construction. This appeal also involves the Title Board's obligation to set clear titles. The Court grants "great deference to the Title Board's decisions" in drafting titles that are clear and not misleading. *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 23.

As stated in the Opening Brief, Proponents agree the issue was preserved.

B. Objector's Position Ignores Applicable Colorado Law and the Plain Language of Section (3)(c).

Objector's Opening Brief ignores Colorado law that directly contradicts his proposed rule that would apply TABOR's election provision in section (3)(c) to non-TABOR measures that reduce state taxes. As explained in both Proponents' and the Title Board's Opening Briefs, the specialized TABOR election provisions in section (3) apply only to those fiscal ballot issues that are "matters arising under [TABOR]" as set forth in section 1-41-101 *et seq.*, C.R.S. *Zaner v. City of Brighton* 899 P.2d 263, 267 (Colo. App. 1994), *as modified on denial of reh'g* (Jan. 19, 1995), *aff'd,* 917 P.2d 280 (Colo. 1996); *see also* Title Board's Op. Br. at 6-8; Proponents' Op. Br. at 10-11. Because Objector concedes that Initiative #250 does not require prior voter approval under section (4)(a), Initiative #250 cannot be a ballot issue arising under TABOR and the specialized TABOR election provision at section (3)(c) does not apply. § 1-41-102(4)(a), C.R.S. (defining, in pertinent part, "state matters arising under [TABOR]" as those items enumerated in section (4)(a)).

As outlined in Proponents' Opening Brief, the plain language of section (3)(c)—which requires TABOR ballot issues for tax increases to ask voters, "**SHALL <u>STATE TAXES</u> BE INCREASED...**?"—confirms that this section does not apply to measures that reduce net state tax revenues. Colo. Const. art. X,

§ 20(3)(c) (underlined emphasis added); Proponents' Op. Br. at 9. While a review of the plain language is fundamental to the constitutional inquiry here, Objector fails to analyze the plain language of section (3)(c) in his Opening Brief. *See Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006) (assessing plain language in determining whether section (3)(c) applied to ballot measure).

Instead, Objector twice quotes the language of section (3)(c) as stating, "shall taxes be increased," omitting the important word "state" from the actual language of section (3)(c). Objector's Op. Br. at 4, 9. Objector's omission of the word "STATE" is telling because that word indicates that section (3)(c) applies where the aggregate effect of a measure increases state taxes, *i.e.*, where a measure requires prior voter approval in the first instance under section (4)(a). Objector ignores the plain language of section (3)(c) because it undermines his proposed rule requiring ballot titles to misleadingly ask voters, first and foremost, if state taxes should be increased any time a single taxpayer (or subset of taxpayers) would pay more as part of a measure that reduces total state tax revenues.

C. Objector's Legal Position Hinges on His Misapplication of a Single Case.

In his Opening Brief, Objector's legal analysis continues to rely heavily on the misapplication of this Court's decision in *Bruce v. City of Colorado Springs*, 129 P.3d 988 (Colo. 2006). Objector's Op. Br. at 6. Objector does not address the

fundamental problem with applying *Bruce* to the facts here. The municipal measure in *Bruce* was a local fiscal ballot issue arising under TABOR because it proposed an extension of an expiring tax. *Bruce*, 129 P.3d at 990; *Zaner*, 89 P.2d at 267; § 1-41-103(4), C.R.S. Section 4(a) of TABOR expressly requires prior voter approval for extensions of expiring taxes. Colo. Const. art. X, § 20(4)(a).

Thus, TABOR's election provision in section (3)(c) applied to the ballot issue in *Bruce* in the first instance unless the definition of "tax increase" in section (3)(c) is narrower than section (4)(a)'s prior-voter-approval list. *See Bruce*, 129 P.3d at 990-91. In contrast, here, TABOR's election provisions do not apply in the first instance because Initiative #250 is not a TABOR ballot issue. *Zaner*, 89 P.2d at 267; § 1-41-102(4), C.R.S. Accordingly, there is no need to assess whether Initiative #250 falls within the definition of a "tax increase" as set forth in section (3)(c).

Because Objector begins with this false assumption that TABOR's election provisions apply, his analysis of *Bruce* is incorrect. For instance, this Court's discussion of the tax burden on "individual" taxpayers was not the holding of *Bruce* as Objector contends. *See Bruce*, 129 P.3d at 995. This Court never insinuated, let alone held, in *Bruce* that the section (3)(c) tax-increase language is

required any time an "individual" taxpayer pays more under a measure that reduces net district tax revenues and does not require prior voter approval.

Rather, this Court explained that the taxpaying electorate might not view the extension of an expiring tax—which undoubtedly increases district tax revenues and requires prior voter approval—as a "tax increase" because the voters continue to pay the same while the district has a net tax revenue gain. *See Bruce*, 129 P.3d at 995 (explaining how "an increase in a tax's duration does not necessarily imply an 'increase' merely because both result in a net revenue gain") (emphasis added). Thus, the Court rejected Mr. Bruce's argument that section (4)(a)'s prior-voter-approval list sets the outside limits of what a "tax increase" is for purposes of section (3)(c). *Id.* at 994. The Court did not conclude, however, that section (3)(c) is somehow broader than section (4)(a) as Objector now contends in turning the *Bruce* case on its head. *See id.* at 994-96.

Additionally, Objector's analysis of this Court's policy discussion in *Bruce* is meritless. Objector first concedes that Initiative #250 does not increase the size of government and thus does not present the risk of unrestrained government growth that TABOR was designed to prevent. Objector's Op. Br. at 6. But Objector then relies on this policy rationale to support his conclusion that the TABOR tax-increase language should be required here when the Court relied on

that rationale to reach the opposite conclusion in *Bruce*. 129 P.3d at 995-96. That is, if the policy reasons behind TABOR are not implicated, "the concerns underlying [TABOR] are largely peripheral" and section (3)(c)'s tax-increase language is unnecessary. *See id.*

Objector also cites this Court's discussion in *Bruce* regarding the purpose of ballot titles in providing accurate information to voters. Objector's Op. Br. at 6-7. Again, Objector has *Bruce* backwards. The Court reasoned that the TABOR-tax increase language would likely confuse voters and thus it was not required. *Bruce*, 129 P.3d at 996. Likewise, here, voters would be confused and misled if the Titles asked, first and foremost, whether state taxes should be increased when Initiative #250 reduces state taxes. As the Court reasoned in *Bruce*, starting the Titles with this misleading initial position is much more likely "to cause voter confusion than assist voters," particularly where the limit on the NOL deduction is clearly described later in the Titles. *Id.*; R., p. 10.

In short, the only legal authority cited by Objector contradicts his position and supports the Title Board's action in not requiring the TABOR tax-increase language for Initiative #250.

D. Objector's Arguments about Alleged Policy "Implications" Are Illogical and Overstated.

Aside from his misplaced reliance on *Bruce*, Objector's only other argument is that policy warrants including the TABOR tax-increase language any time a single taxpayer or group of taxpayers will pay more under a proposed measure that otherwise reduces state taxes. Objector's Op. Br. at 7. Objector warns of "far-reaching implications" and a TABOR "loophole" if the tax-increase language is not required here because voters will purportedly not have adequate notice of what they are voting on as part of Initiative #250. *Id.* This policy argument is not persuasive because, separate and apart from TABOR, Colorado law requires the Title Board to set titles that clearly describe a measure's central features. 1-40-106(3)(b), C.R.S. If a tax policy change is a central feature of a measure, it must be explained in the titles, as it is here. The Titles explain Initiative #250's revenue-neutral funding mechanism as follows:

> [A]llowing a state income tax credit of 100% of a taxpayer's contribution to fund the program; and temporarily limiting 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 net tax revenue loss resulting from the allowed income tax credit.

R., p. 10. Notably, Objector has not asserted a clear-title challenge because the Titles unambiguously describe Initiative #250's central features.

Given Colorado's clear-title requirements, the voter-notice considerations raised by Objector cannot justify the misleading TABOR tax-increase language for measures that do not increase state taxes. Indeed, as explained in both the Title Board's and Proponents' Opening Briefs, the voter confusion that would result from requiring the misleading TABOR tax-increase language weighs in favor of the Title Board's decision to exclude it. Proponents' Op. Br. at 13-15; Title Board's Op. Br. at 8.

Further, Objector's reliance on the 1992 Blue Book to prop up his policy argument is misplaced. Objector's Op. Br. at 8. Objector contends that the 1992 Blue Book's discussion of TABOR evinces voter intent to require the section (3)(c) tax-increase language for measures that do not increase state taxes. *Id.* However, Objector fails to alert the Court that the excerpts he quotes are from the "arguments for" section of the Blue Book, and that they concern arguments for requiring prior voter approval under section 4(a), not the title requirements in section (3)(c). *Id.* (citing arguments in favor of requiring "voter approval for replacement revenue" and the purported "accountability" derived from requiring prior voter approval for measures that raise district taxes) (emphasis added). Arguments in favor of requiring prior voter approval are irrelevant here because Objector has conceded that Initiative #250 does not require prior voter approval.

In fact, nowhere does the 1992 Blue Book even discuss section (3)(c)'s title requirements for TABOR ballot issues that increase state taxes.[1] Consequently, the Blue Book does not represent voter intent to require the TABOR tax-increase language for non-TABOR measures that do not increase state taxes and that do not require prior voter approval in the first place. *See id.*

CONCLUSION

The Title Board correctly determined that the TABOR tax-increase language is not required here because Initiative #250 is a non-TABOR measure that does not increase state taxes. The Titles set by the Title Board clearly inform voters of the tax effects of Initiative #250, whereas beginning the Titles with "SHALL STATE TAXES BE INCREASED…?" would mislead voters. Accordingly, Proponents respectfully request that the Court deny the Petition and affirm the Title Board's setting of the Titles for Initiative #250.

[1] Legislative Council, Colo. Gen. Assembly, Research Pub. No. 369, An Analysis of 1992 Ballot Proposals at 5-8 (1992), *available at* http://hermes.cde.state.co.us/drupal/islandora/object/co:2548/datastream/OBJ/view (last visited April 16, 2020).

Respectfully submitted this 20th day of April, 2020.

IRELAND STAPLETON PRYOR & PASCOE, PC

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2020, a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF** was duly filed with the Court and served via CCEF upon the following:

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