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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' OPENING 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 3,165 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 Opening Brief in support of the title, ballot title, and submission clause (the "Title(s)") set by the Title Board for Initiative #250.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Title Board correctly determined that the Titles for Initiative #250 should not begin with the TABOR tax-increase language ("**SHALL [STATE] TAXES BE INCREASED...?**") when Initiative #250 does not increase state taxes.

STATEMENT OF CASE

I. Nature of the Case and Proceedings before the Title Board.

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. of the title setting for Initiative #250. Proponents filed Initiative #250 with the Secretary of State on February 7, 2020. R., p. 2.[1] The Title Board, on behalf of the

[1] Citations to the Title Board Record are to the certified copy of the Title Board Record submitted with the Petition. Because the Title Board Record is not paginated, page number references are to the electronic page number.

Secretary of State, held a title hearing on February 19, 2020, unanimously finding that Initiative #250 contains a single subject and setting the Titles. R., p. 11.

Petitioner Kenneth Nova ("Objector") filed a motion for rehearing ("Motion for Rehearing") on February 26, 2020, contending that Initiative #250 contains multiple subjects, that its Titles are flawed, and that its Titles violate article X, section 20 of the Colorado Constitution ("TABOR"). *See* R., pp. 12-16. The rehearing was held on March 4, 2020, at which the Title Board unanimously denied Objector's Motion for Rehearing except to the extent the Title Board made certain changes to the Titles as requested by Objector. R., p. 11. On March 11, 2020, Objector petitioned this Court pursuant to section 1-40-107(2), C.R.S., seeking review of only the TABOR issue. Notice of Appeal at 4.

II. Statement of Relevant Facts.

Initiative #250 creates an expanded learning opportunities program ("Program") that provides out-of-school learning experiences for Colorado children. R., pp. 2-9. The Program allows parents of Colorado children to apply for need-based financial aid to be used towards qualified learning experiences, such as tutoring, foreign language study, the arts, or technical education training. R., pp. 2-9.

The only issue on appeal concerns the funding of the Program, which does not increase net state tax revenues. The Program is funded through private contributions to the administering nonprofit that issues financial aid awards for out-of-school learning opportunities. R., p. 4, § 22-86.1-103(2)(g), C.R.S. Initiative #250 incentivizes contributions to the administering nonprofit by providing a state income tax credit of 100% of the taxpayer's contributions to the nonprofit. R., pp. 8-9, § 39-22-121.5(1), C.R.S. Tax credits are initially capped at $50 million and step up by $50-million increments to a maximum cap of $300 million if an annual threshold of credits is used by taxpayers. *Id.* at § 39-22-121.5(2).

The new tax credits will decrease state tax revenues by the amount of credits taken. To ensure that the new Program is revenue neutral to the state, Initiative #250 reduces the state net operating loss ("NOL") deductions that corporations may take by an amount "that equals as nearly as practicable," without exceeding, the decrease in net tax revenue from the new tax credits.[2] R., p. 9, § 39-22-504(7), C.R.S. Consequently, the net tax revenue change to the state, if any, would be a net tax decrease. *See id.*

[2] Initiative #250 expressly requires that, "[I]n no event shall the additional net tax revenue for any fiscal year attributable to the limit [on the NOL deduction] exceed the decrease in net tax revenue attributable to the credits allowed under section 39-22-121.5 for that fiscal year." R., p. 9, § 39-22-504(7), C.R.S.

In assessing Initiative #250's funding mechanism, the Initial Fiscal Impact Statement prepared by Legislative Council Staff recognized that Initiative #250 is revenue-neutral to the state: "The measure is assumed to have no net change on state revenue from the General Fund, as it decreases General Fund revenue by up to $50.0 million from the new income tax credit, and increases it by up to $50.0 million in FY 2021-22 from limiting the NOL." R., p. 20. Objector does not dispute that Initiative #250 is revenue-neutral to the state.

The Titles clearly and unambiguously describe Initiative #250's revenue-neutral funding mechanism:

> [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.

SUMMARY OF ARGUMENT

Initiative #250 is not a TABOR measure and does not require prior voter approval under any provision of TABOR because net state tax revenues would actually decrease under the measure. Objector does not dispute this. Nevertheless, Objector illogically contends that the Titles must begin with TABOR's tax-increase language ("**SHALL STATE TAXES BE INCREASED...?**") because

Initiative #250 includes a limitation on the NOL deduction for corporate taxpayers. Objector reasons that, if a tax policy change results in a net decrease in state taxes but requires a single taxpayer to pay more while others pay less, the TABOR tax-increase language is required.

Objector's argument contradicts Colorado law, including TABOR's election provisions, along with Colorado statute and this Court's precedent. Moreover, Objector's argument lacks common sense and would require the Title Board to set confusing and misleading titles that ask voters, first and foremost, whether state taxes should be increased when a measure reduces state taxes. Such a requirement would violate the Title Board's duty to set clear titles that are not misleading. The Court should reject Objector's argument and affirm the Title Board's title setting for Initiative #250.

ARGUMENT

The Titles Should Not Begin with the TABOR Tax-Increase Language Because TABOR Section (3)(c) Does Not Apply; Additionally, this Language Would Mislead Voters Because Net State Tax Revenues Will Decrease.

I. Standard of Review; Preservation of Issues on Appeal.

This appeal concerns whether the Titles set for Initiative #250 comply with applicable law. With respect to whether the Titles are clear and not misleading as required by section 1-40-106(3)(b), C.R.S., the Title Board has broad discretion in

drafting the Titles. *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 23. As a result, when reviewing the Titles, the Court grants "great deference to the Title Board's decisions." *Id.*

With respect to whether the Titles comply with TABOR, this inquiry involves an interpretation of a constitutional provision and is therefore a question of law that is reviewed *de novo*. *Rocky Mtn. Animal Def. v. Colo. Div. of Wildlife*, 100 P.3d 508, 513 (Colo. App. 2004). Where ambiguities exist, the Court interprets constitutional provisions as a whole and attempts to harmonize all of the contained provisions. *Id.* at 513-14 (citing *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)). The Court also gives effect to the intent of the electorate in adopting the amendment. *See Zaner*, 917 P.2d at 288; *Rocky Mtn. Animal Def.*, 100 P.3d at 513. Because TABOR was enacted by voter initiative and is not a statute enacted by the General Assembly, the Court does not assume that all legislative drafting principles apply. *Bruce v. City of Colorado Springs*, 129 P.3d 988, 993 (Colo. 2006). Nonetheless, the Court applies generally accepted construction principles, such as according words their plain or common meaning. *Id.*

Proponents do not dispute that the issue raised on appeal was preserved below.

II. Requiring the TABOR Tax-Increase Language Would Conflict with Applicable Law Because Initiative #250 Does Not Increase State Taxes.

Section 3(c) of TABOR states, in pertinent part, "Ballot titles for tax increases shall begin, '**SHALL [STATE] TAXES BE INCREASED (first . . . full fiscal year dollar increase) ANNUALLY**…?'" Colo. Const. art. X, § 20(3)(c).[3] While the tax policy change effected by Initiative #250 would decrease net state tax revenues and does not require voter approval under TABOR, Objector asserts that the Titles must still begin with the TABOR tax-increase language because a group of taxpayers may pay more while another group pays less under Initiative #250. R., p. 15 (arguing that regardless of tax decrease, the tax increase language is required "if the tax burden borne by certain taxpayers [will be] greater than its present amount"). However, requiring the Titles of a non-TABOR measure such as Initiative #250 to begin with the TABOR tax-increase language contradicts the purpose and text of TABOR, along with applicable statute and case law.

TABOR's purpose is to protect Colorado citizens by requiring prior voter approval for tax revenue increase resulting from "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a

[3] The reference to "District" in section 3(c) refers to the state in this instance. Colo. Const. art. X, § 20(2)(b).

property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4)(a); *see also Griswold v. Nat'l Fed'n of Indep. Bus.*, 2019 CO 79, ¶ 12. TABOR "also limits the growth of state revenues, usually met by tax increases, by restricting the increase . . . unless voter approval for an increase in spending is obtained." *Griswold*, 2019 CO 79, ¶ 13 (quoting *In re Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 4 (Colo. 1993) (citing Colo. Const. art. X, § 20(7)(a)).

Here, Initiative #250 does not create a new tax or increase a tax rate. Rather, Initiative #250 proposes a tax policy change that does not cause a net revenue gain to the state. Further, because Initiative #250 does not increase state tax revenue, it "does not evoke the specter of unchecked government growth contemplated by [TABOR]". *Bruce*, 129 P.3d at 995. It would defy logic to require the TABOR tax-increase language for a measure that does not increase state tax revenues, does not require voter approval in the first place, and does not present any of the risks TABOR was designed to guard against.

This conclusion is supported by the plain meaning of TABOR's election provisions. The election notice provisions at sections (3)(b) and (3)(c) speak in terms of whether there will be a tax increase for the applicable "district"—which is

the state[4] here—not whether a specific group of taxpayers will pay more as a result of a tax policy change that shifts tax burdens without raising net state tax revenue. Colo. Const. art. X, § 20(3)(c) (requiring titles to ask voters "**SHALL STATE TAXES BE INCREASED**…?" *Id.* (underlined emphasis added). Moreover, the plural "taxes" indicates that all of a ballot measure's effects on taxes must be considered collectively in determining whether "state taxes" are increased.

Under Objector's argument, however, a ballot title would have to ask voters if state taxes should be increased any time a single taxpayer (or subset of taxpayers) would pay more as part of a measure that reduced total state tax revenues. This would lead to the absurd result that, even where a measure's central purpose is to reduce total state taxes, the titles would first and foremost ask voters, "**SHALL STATE TAXES BE INCREASED...**?" if the measure had the effect of increasing the tax burden on a single taxpayer while reducing the tax burden on millions of others. Colo. Const. art. X, § 20(3)(c) (underlined emphasis added).

For instance, under Objector's rule, the titles for the following hypothetical measures would have to begin with the TABOR tax-increase language: (1) a measure that reduced net state tax revenues by $1 billion dollars by setting income

[4] TABOR defines "district" to mean "the state or any local government, excluding enterprises." Colo. Const. art. X, § 20(2)(b).

tax brackets such that the bottom 99% of income earners paid less state income taxes than under the current flat tax, while the top 1% paid more; (2) a measure that reduced net state tax revenues by $250 million by increasing the cap on an existing tax credit while adjusting eligibility requirements such that taxpayers above a certain income level were no longer eligible for the credit; or (3) a measure that eliminated a $50 million tax credit for Colorado airplane manufacturers and established a $100 million tax credit for Colorado wind turbine manufacturers. These absurd and misleading results are not required by TABOR's election provisions, which apply to measures that increase state taxes, not reduce them.

Colorado statute also supports the conclusion that section (3)'s election provisions, including the TABOR tax-increase language, should not apply to non-TABOR measures that do not require prior voter. Shortly after TABOR was adopted, the General Assembly passed implementing legislation interpreting and clarifying the TABOR election provisions at section (3). § 1-41-101 *et seq.*, C.R.S. Under the implementing statutes, a TABOR election is one that "concern[s] state matters arising under [TABOR]." § 1-41-102(1), C.R.S. "[S]tate matters arising under [TABOR]" are defined as those items enumerated in section (4)(a) of TABOR and the other instances in which TABOR requires voter approval, none of which is applicable here. *Id.* at § 102(4). These implementing statutes confirm

that the tax-increase language in TABOR's election provisions does not apply to non-TABOR measures.

This Court has upheld the statutory definition of "matters arising under [TABOR]" in rejecting the argument that the TABOR election provisions should apply to measures that do not arise under TABOR. *Zaner v. City of Brighton*, 917 P.2d 280, 284, 286-87 (Colo. 1996) (recognizing TABOR's general purpose in "setting various revenue limits and requiring voter approval of measures that would increase debt, spending, or taxes" and upholding the district court's conclusion that section (3)(a) applies only to fiscal ballot measures "arising under TABOR" as defined in § 1-41-101 *et seq.*, C.R.S. (emphasis added)); *see also Bruce v. City of Colorado Springs*, 971 P.2d 679, 682 (Colo. App. 1998) (recognizing this Court's determination that "the special election provisions under Colo. Const. art. X, § 20, appl[y] only to elections on government fiscal issues that [are] controlled by [TABOR]") (emphasis added)).

In the face of these authorities, Objector has failed to cite a single instance where the TABOR tax-increase language was required for a non-TABOR measure that did not require voter approval. Rather, Objector's position is based solely on this Court's decision in *Bruce v. City of Colorado Springs*, 129 P.3d 988 (Colo. 2006). However, as the Title Board recognized below, *Bruce* contradicts

Objector's position and confirms that the Titles should not begin with the TABOR tax-increase language. In *Bruce*, this Court determined that, while the measure at issue was indisputably a TABOR measure that required prior voter approval under section (4)(a), the measure's titles did not need to begin with the tax-increase language provided in section (3)(c). *Bruce*, 129 P.3d at 993-94 (determining that, while a "tax extension" requires advance voter approval as a district tax revenue increase described in section (4)(a), a tax extension was not a "tax increase" under section (3)(c)). The Court reasoned that section (3)(c)'s reference to "tax increase" was narrower than section (4)(a)'s list of tax revenue increases that require advance voter approval. *Id.* (rejecting Bruce's argument that section 4(a) should set the outer limits for what constitutes a tax increase under section 3(c)).

Here, Objector asks the Court to reach the opposite conclusion of that reached in *Bruce*, i.e., to require the TABOR tax-increase language for a non-TABOR measure that does not increase district (state) tax revenue and does not require advance voter approval. Objector's position contradicts the Court's reasoning in *Bruce* because it would make section (3)(c)'s reference to "tax increase" broader than the categories of tax revenue increases that require prior voter approval under section (4)(a). Therefore, the Court should deny the Petition

and uphold the Title Board's title setting because the only authority cited by Objector does not support his position.

III. Requiring the TABOR Tax-Increase Language Would Mislead Voters.

Because Initiative #250 does not present any risk of the unrestrained government growth that TABOR was designed to prevent, the primary objective in construing TABOR's election notice provisions here is to ensure the Titles are clear and not misleading. *See Bruce*, 129 P.3d at 995 (quoting *Bickel v. City of Boulder*, 885 P.2d 215, 236 (Colo. 1994)). This objective is consistent with the Title Board's statutory obligation to provide clear titles that are not misleading:

> In setting a title, the Title Board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes/for" or "no/against" vote will be unclear. The title for the proposed law or constitutional amendment, [which] shall correctly and fairly express the true intent and meaning thereof . . . .

§ 1-40-106(3)(b), C.R.S. (emphasis added).

Here, it would not only be misleading but false to revise the Titles to ask voters if state taxes should be increased. Initiative #250 expressly requires that, "in no event shall the additional net tax revenue for any fiscal year attributable to the limit [on the NOL deduction] exceed the decrease in net tax revenue attributable to

the credits allowed under section 39-22-121.5 for that fiscal year." R., p. 9, § 39-22-504(7), C.R.S. Simply put, Initiative #250 cannot increase state tax revenues.

As currently set, the Titles clearly and succinctly describe Initiative #250. The Titles first identify and describe the measure's single subject, which is the creation of the Program, and then describe how the new Program is funded in a revenue neutral manner. R., p. 10. Specially, with respect to funding, the Titles clearly and unambiguously describe the new tax credit that incentivizes donations to fund the Program and then describe the corresponding limit to the NOL deduction that will offset the state tax revenue lost from the tax credit. R., p. 10.

In contrast, if the Titles began with the TABOR tax-increase language, that language would need to be immediately followed by a contradictory statement attempting to explain that state tax revenues are not actually increasing. Such an explanation would confuse voters, muddy the Titles, and make the Titles unnecessarily lengthier in violation of the requirement that ballot titles must be brief. § 1-40-106(3)(b), C.R.S.; *In re Proposed Initiative Concerning "Automobile Coverage*", 877 P.2d 853, 857 (Colo. 1994) ("Board must navigate the straits between brevity and unambiguously stating the central features of the provision sought to be added, amended, or repealed.") Lengthier Titles that misleadingly ask voters to approve a nonexistent state tax increase may serve Objector's political

goals, but such Titles are not required by TABOR and would violate the Title Board's statutory duty to set clear and concise titles.

CONCLUSION

WHEREFORE, Proponents respectfully request that the Court deny the Petition and affirm the Title Board's title setting for Initiative #250.

Respectfully submitted this 31st day of March, 2020.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Benjamin J. Larson
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ATTORNEYS FOR PROPONENTS/RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2020, a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was duly filed with the Court and served via CCEF upon the following:

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