

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. Appeal from the Ballot Title Board</p> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019- 2020 #250 (“State Out-of-School Learning Opportunities Program”)</p> <p>Petitioner: Kenneth Nova,</p> <p>v.</p> <p>Respondents: Chad Cookinham and Camille Howells,</p> <p>and</p> <p>Title Board: Theresa Conley, David Powell, and Julie Pelegrin.</p>	
<p>THE TITLE BOARD'S OPENING BRIEF</p>	

PHILIP J. WEISER, Attorney General
EMILY BUCKLEY, Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: (720) 508-6403
FAX: (720) 508-6041
E-Mail: emily.buckley@coag.gov
Registration Number: 43002
*Counsel of Record
Attorneys for the Title Board

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, I certify 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 1,659 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

The brief contains, under a separate heading before the discussion of the issue, 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.

s/ Emily Buckley

EMILY BUCKLEY, #43002

Assistant Attorney General

TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

 I. Standards governing titles set by the Board..... 3

 II. The Board correctly determined that the proposed measure
 does not contain a state tax increase..... 5

 A. Standard of review and preservation. 5

 B. The proposed measure does not contain a state tax
 increase. 5

CONCLUSION..... 10

TABLE OF AUTHORITIES

CASES

<i>Bruce v. City of Colorado Springs</i> , 129 P.3d 988 (Colo. 2006)	5, 9
<i>In re Proposed Initiative on Trespass-Streams with Flowing Water</i> , 910 P.2d 21 (Colo. 1996).....	3
<i>In re Title, Ballot Title & Submission Clause for 2019-2020 #3</i> , 2019 CO 107	5
<i>In re Title, Ballot Title and Submission Clause for 2009-10 #45</i> (“ <i>In re #45</i> ”), 234 P.3d 642 (Colo. 2010).....	3
<i>In re Title, Ballot Title and Submission Clause for 2009-10 #91</i> , 235 P.3d 1071 (Colo. 2010).....	3
<i>In re Title, Ballot Title, and Submission Clause for 2007-08 #62</i> , 184 P.3d 52 (Colo. 2008).....	4
<i>In re Title, Ballot Title and Submission Clause Pertaining to</i> <i>Casino Gambling Initiative</i> , 649 P.2d 303 (Colo. 1982)	3

CONSTITUTIONS

Colo. Const., art. X, § 20.....	5
Colo. Const. art. X, § 20(3)(c)	1, 6, 7

Colo. Const. art. X, § 20(4)(a)6

STATUTES

§ 1-40-106(3)(b), C.R.S. (2019)4, 8

§ 1-41-103(4)(a)-(f), C.R.S. (2019)..... 7,8

OTHER AUTHORITIES

Hearing Before Title Board on Proposed Initiative 2019-2020 #250

(Mar. 4, 2020), available at <https://tinyurl.com/t9yrobp>8, 9

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the Title Board correctly determined that because Proposed Initiative 2019-2020 #250 is revenue neutral and does not raise state taxes, the title does not require specialized ballot language alerting voters to a state tax increase under Colo. Const. art. X, § 20(3)(c).

STATEMENT OF THE CASE

Proponents Chad Cookinham and Camille Howells seeks to circulate #250 to obtain the requisite number of signatures to place a measure on the ballot that would create an out-of-school learning opportunities program for Colorado children, create a state agency independent of the department of education to oversee the program and to select a nonprofit to administer the program; repeal the program in 2035; allow a state income tax credit of 100% of a taxpayer's contribution to fund the program; and temporarily limit, 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. Record for Initiative #250, p 2-9, filed March 11, 2020 (“Record”).

The Board concluded that the measure contained a single subject and proceeded to set a title at its February 19, 2020 meeting. *Id.* at 11. Petitioner Kenneth Nova filed a timely motion for rehearing, arguing that #250 contained multiple subjects, and that the title was misleading, and the title violates TABOR because the measure includes a tax increase. *Id.* at 12-16. On March 4, 2020, the Board denied the motion for rehearing, except to the extent the Board made changes to the title. *Id.* at 18.

SUMMARY OF ARGUMENT

The Board’s actions in setting #250 should be affirmed. The Title Board properly determined that because #250 is a revenue neutral measure that does not increase state taxes, it was not required to add language to the title indicating the measure would increase state taxes.

ARGUMENT

I. Standards governing titles set by the Board.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause for 2009-10 #45* (“*In re #45*”), 234 P.3d 642, 645, 648 (Colo. 2010). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board’s decision only if the title is insufficient, unfair, or misleading. *In re #45*, 234 P.3d at 648.

The Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause for 2009-10 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Section 1-40-106(3)(b), C.R.S., establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title, and Submission Clause for 2007-08 #62*, 184 P.3d 52, 58 (Colo. 2008). The statute provides:

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, together with the ballot title and submission clause, shall be completed...within two weeks after the first meeting of the title board. ...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered “yes/for” (to vote in favor of the proposed law or constitutional amendment) or “no/against” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S.

II. The Board correctly determined that the proposed measure does not contain a state tax increase.

A. Standard of review and preservation.

When considering a challenge to a title, the Court should not “consider whether the Title Board set the best possible title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. Rather, the Court only “ensure[s] that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words that the Title Board employed.” *Id.* The Court reviews the Title Board’s interpretation of a constitutional provision de novo. *Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006). The Board agrees that Petitioner preserved his challenge to the title of #250.

B. The proposed measure does not contain a state tax increase.

The Taxpayer Bill of Rights (“TABOR”), Colo. Const., art. X, § 20, requires a voter approval for, as relevant here: “any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a 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) (“Section 4(a)”). A separate provision of TABOR, Colo. Const. art. X, § 20(3)(c) (“Section 3(c)”) sets forth specific language that must be included in a narrower category of measures that arise under TABOR, specifically “ballot titles for tax or bonded debt increases,” requiring such titles to begin “SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY...?” Colo. Const. art. X, § 20(3)(c).

Here, the Board correctly determined that #250 does not fall within any category triggering the voter approval requirement of Section 4(a) of TABOR because the revenue generated by the limit on the net operating loss deductions and the cost of the measure’s new tax credits are structured to balance one another. *See* Record p 9 (net operating loss provision of #250). Because #250 is revenue neutral, it does not “caus[e] a net tax revenue gain to any district,” and therefore #250 does not fall within Section 4(a). Colo. Const. art. X, § 20(4)(a). The Board’s determination is supported by the fiscal impact statement,

which provides #250 “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 [net operating loss].” Record p 20.

On appeal, Petitioner does not appear to challenge the Board’s finding that #250 is revenue neutral and does not fall within Section 4(a). Instead, Petitioner argues that even if #250 does not arise under TABOR, the title should have included Section 3(c)’s specialized ballot language alerting voters to a state tax increase. Petitioner’s argument subverts TABOR’s structure.

Section 4(a) and § 1-41-103(4)(a)-(f), C.R.S. define which matters arise under TABOR. A narrow category of ballot questions that arise under TABOR—meaning they meet the definition of Section 4(a) or § 1-41-103(4)(a)-(f)—require the additional protections of the Section 3(c) language to alert voters that they are voting for an increase in state taxes, for example. *See* Colo. Const. art. X, § 20(3)(c). Contrary to Petitioner’s argument, Section 3(c) *limits* which questions arising under

TABOR require specialized ballot language; Section 3(c) does not expand the specialized ballot language requirements to questions that do not arise under TABOR.

As a revenue neutral measure that does not increase state taxes, #250 does not meet the definition of TABOR measures in Section 4(a) or § 1-41-103(4)(a)-(f). Because #250 does not meet the definition of a matter arising under TABOR, the Title Board was not required to include Section 3(c)'s specialized ballot language in the title.¹

Indeed, because #250 does not increase state taxes, if the Title Board had set a title that began with the Section 3(c) language, “shall state taxes be increased...,” that hypothetical title would have misstated the intent and meaning of the proposed measure, in contravention of the Title Board’s duty to “set[] titles that “correctly and fairly express the true intent and meaning” of a proposed law. *See* § 1–40–106(3)(b), C.R.S.

¹ *See also* Hearing Before Title Board on Proposed Initiative 2019-2020 #250 (Mar. 4, 2020), available at <https://tinyurl.com/t9yrobp> (statements of Proponents at 26:20-34:17).

Petitioner relies on *Bruce v. City of Colorado Springs*, 129 P. 3d 988 (Colo. 2006). In *Bruce*, this Court held that although a tax extension requires voter approval under Section 4(a), because a tax extension is not a “tax increase,” Colorado Springs was not required to include the specialized Section 3(c) language on the ballot alerting voters to a tax increase. *Bruce* does not support Petitioner’s argument; to the contrary, it illustrates that TABOR requires only a narrow category of matters arising under TABOR to include the additional safeguards of the Section 3(c) title language. Petitioner did not present the Title Board with any precedent holding that matters outside of TABOR’s ambit require Section 3(c)’s specialized ballot language.

The Title Board correctly determined that because #250—a revenue neutral measure that does not increase state taxes—does not arise under TABOR, the Title Board was not required to include specialized ballot language of Section 3(c) explaining to voters that the measure represented an increase in state taxes.²

² See Hearing Before Title Board on Proposed Initiative 2019-2020 #250 (Mar. 4, 2020), available at <https://tinyurl.com/t9yrobp> (statements of

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 31st day of March, 2020.

PHILIP J. WEISER
Attorney General

/s/Emily Buckley

EMILY BUCKLEY, 43002*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

Title Board members at 42:35-43:40). Statements of Proponents at 26:20-34:17)

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado, this 31st day of March, 2020, addressed as follows:

Mark G. Grueskin
Thomas M. Rogers III
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
mark@rklawpc.com
trey@rklawpc.com
Attorneys for Petitioner

Benjamin J. Larson
Ireland Stapleton Pryor and Pascoe P.C.
717 17th Street, Suite 2800
Denver, CO 80202
Attorneys for Respondents

s/ Xan Serocki

Xan Serocki