

<b>COLORADO SUPREME COURT</b> 2 East 14th Avenue, Denver, Colorado 80203	
Original Proceeding Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
<b>Petitioners:</b> Kelly Brough and Tyler Sandberg v. <b>Respondents/Proponents:</b> Carol Hedges and Steve Briggs and <b>Title Board:</b> Theresa Conley, David Powell, and Jason Gelender	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<b>Petitioners' Answer Brief</b>	

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 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 Colorado Appellate Rule 28(g).**

It contains **2,212** words (answer brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

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

**For each issue raised by Petitioner**, the opening 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 Colorado Appellate Rules 28 and 32.**

*s/ Sarah M. Mercer*

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Sarah M. Mercer

# TABLE OF CONTENTS

	<b>Page</b>
CERTIFICATE OF COMPLIANCE.....	i
TABLE OF CONTENTS .....	ii
TABLE OF AUTHORITIES.....	iii
SUMMARY OF THE ARGUMENT .....	1
ARGUMENT .....	2
I. Initiative #271 impermissibly contains multiple subjects because it both establishes a graduated tax system and increases funding for education and to address the impacts of a growing population and changing economy. ....	2
II. Initiative #271 includes vague and ambiguous provisions that prevent the setting of a clear title.....	8
III. Respondents agree that Petitioners’ proposed changes would add accuracy to the title.....	11
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	15

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Cases</b>	
<i>In re Initiative for 1997–98 # 113,</i> 962 P.2d 970 (Colo. 1998) .....	6
<i>In re Petitions,</i> 907 P.2d 586 (Colo. 1995) .....	6
<i>In re Title, Ballot Title &amp; Submission Clause for 1999–2000</i> <i>#258(A),</i> 4 P.3d 1094 (Colo. 2000) .....	6
<i>In re Title, Ballot Title &amp; Submission Clause for 2007-2008,</i> <i>#17, 172 P.3d 871 (Colo. 2007), as modified on denial of</i> <i>reh’g (Dec. 17, 2007).....</i>	5
<i>In re Title, Ballot Title, &amp; Submission Clause for 2013-14,</i> <i>#76,</i> 333 P.3d 76 (Colo. 2014) .....	6
<i>In re Title, Ballot Title &amp; Submission Clause, Summary</i> <i>Clause for 1997-1998 No. 74,</i> 962 P.2d 927 (Colo. 1998) .....	4
<i>In Re Title, Ballot Title, Submission Clause for 2011-2012</i> <i>#3,</i> 274 P.3d 562 (Colo. 2012) .....	2, 4
<b>Statutes</b>	
Colo. Rev. Stat. § 1-40-106(3)(b).....	9

## Other Authorities

[https://csos.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=151](https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151), starting at 1:54:50..... 12, 13

## SUMMARY OF THE ARGUMENT

In their Opening Briefs, Respondents and the Title Board present no compelling rationale as to how Initiative #271's various distinct subjects are properly connected to measure's central theme. They contend that the measure's secondary provisions are permitted implementing provisions that are necessary to establish a graduated tax system. However, at minimum, the measure's funding provisions are neither directly tied nor essential to establishing a graduated income tax. The measure therefore impermissibly contains multiple subjects.

Respondents and the Title Board also fail the rebut Petitioners' clear title arguments or Petitioners' argument that the title contains errors. Absent clarity in the measure's language, voters are left to fend for themselves as to how much revenue is dedicated to education funding versus funding "to address the impacts of a growing population and changing economy" and with respect to who decides how the revenue is spent. And Respondents have even agreed with Petitioners that Petitioners' proposed changes to the title regarding two of the four

proposed graduated income tax brackets would resolve the title's inaccuracies. For these reasons, the Title Board's actions must be reversed.

## ARGUMENT

**I. Initiative #271 impermissibly contains multiple subjects because it both establishes a graduated tax system and increases funding for education and to address the impacts of a growing population and changing economy.**

Petitioners explained in their Opening Brief why Initiative #271 strategically and improperly combines separate proposals into one measure to attract voters who might otherwise be disinclined to vote for a graduated income tax system for Colorado. Initiatives like this one violate the constitutional single-subject requirement because they risk garnering support for the measure from various factions, leading to the enactment of provisions that may fail on their own merits if they were separate measures. *See In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012). Initiative #271's omnibus nature risks garnering support from competing groups, such as those who favor a graduated tax system and want to raise taxes on wealthier

Coloradoans, those who do not favor such a system but like the provision lowering taxes for them, and those who see this measure as a creative means to increase statewide funding for education or to “address the impacts of a growing population and changing economy.”

Respondents and the Title Board, however, assert in their Opening Briefs that Initiative #21 complies with the single-subject requirement because the measure contains one central subject—establishing a graduated income tax system<sup>1</sup>—and numerous other permissible implementing provisions. Resp’ts’ Opening Br., at 5; Title Board’s Opening Br., at 5. Respondents go so far as to contend that everything in the measure is essential to effectuate the measure’s purpose. Resp’ts’ Opening Br., at 7.

This is more than an overstatement. There is simply no necessary or proper connection between Initiative #271’s central subject and the provisions directing the uses of the new revenue generated by the new

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<sup>1</sup> Respondents use the impermissible catch phrase “a more fair and just overall tax system in Colorado” to describe the measure in their Opening Brief. Resp’ts’ Opening Br., at 5.

tax system. Case law is clear that multiple provisions fall under a single subject only if they have a “necessary and proper relationship.” *In re Title, Ballot Title & Submission Clause, Summary Clause for 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998); *see also In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012) (explaining that a measure violates the single-subject rule where no necessary connection exists between at least two of the measure’s provisions).

Here, Initiative #271’s central purpose is to repeal the constitutional prohibition on a graduated income tax system and, in turn, contains provisions to replace the current flat income tax with a new graduated one. However, the measure also includes various funding provisions are not necessary to carrying out the measure’s central purpose. For example, the measure specifies that new revenue collected from the increased individual income tax would fund preschool through twelfth-grade education and address the impacts of a growing population and a changing economy. In addition, the measure de-

Bruces the revenue collected from the increased individual income tax

by exempting it from the TABOR requirement that excess revenue be returned to taxpayers. These provisions are far from essential to effectuating the measure's purpose as Respondents contend because the new tax revenue could go to the state's general fund (or really anywhere else) without affecting the efficacy of establishing a new graduated tax system.

Instead, Respondents surreptitiously created a secondary (or even tertiary) purpose—funding education and addressing growth challenges—that is separate and apart from the measure's central purpose of establishing a graduated income tax system. Moreover, because the Respondents have specifically targeted hot button issues as the funding provisions of the measure, Initiative #271, if it is on the ballot, almost certainly will garner support from advocates of education funding and those concerned with growth who may otherwise not favor a new tax policy.

Nor are these surreptitious funding provisions true implementing provisions. "Implementing provisions that are directly tied to an initiative's central focus are not separate subjects." *In re Title, Ballot*

*Title & Submission Clause for 2007-2008*, #17, 172 P.3d 871, 874 (Colo. 2007), *as modified on denial of reh'g* (Dec. 17, 2007) (citing *In re Title, Ballot Title & Submission Clause for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000)). Examples of implementing provisions include provisions in a measure to limit pollution from hog farms for reporting waste disposal information to the Health Department, *In re Initiative for 1997-98 # 113*, 962 P.2d 970 (Colo. 1998), and provisions in a measure establishing comprehensive rules governing petitions that pertain to procedures and authorization for citizen lawsuits to ensure compliance, *In re Petitions*, 907 P.2d 586 (Colo. 1995).

Initiative #271's funding and de-Brucing provisions are not directly tied to establishing a graduated income tax system. Initiative #271 is unlike the initiative in *In re Title, Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d 76 (Colo. 2014). Although the initiative in that case contained a large number of procedural and substantive provisions, each provision there clearly and directly related

to the manner in which state and local recall elections are triggered and conducted.<sup>2</sup>

The funding provisions in Initiative #271, in contrast, do not add to or otherwise change the measure's proposed new tax policy. In fact, the funding mechanism in Initiative #271 has its very own implementing provisions—the creation of a Citizen's Oversight Committee to oversee the distribution of the revenue garnered through the graduated income tax. In other words, Initiative #271 would create both a graduated income tax system (with tax policy oversight) and a means to overcome TABOR restrictions to fund hot-button issues (with its own oversight committee over the allocation of that money).

Accordingly, Initiative #271 violates the single-subject requirement and should be returned to the Respondents.

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<sup>2</sup> As noted by the Title Board, these provisions include “new enforcement provisions,” a new “threshold requirement for the number of valid petition signatures,” different rules regarding the “content of recall ballots,” a different “manner of filling vacancies caused by recall elections,” the “elimination of the application of existing campaign finance laws to recall petitions and elections,” and different “[r]equirements applicable to petition circulation.” Title Board's

## **II. Initiative #271 includes vague and ambiguous provisions that prevent the setting of a clear title.**

Nothing stated in Respondents' Opening Brief alters the fact that Initiative #271 contains two provisions that prevent the setting of a clear title. Rather, Respondents' argument<sup>3</sup> is that even though these provisions in the measure are not models of clarity, voters may eventually figure out what they mean. This cannot be the standard.

First, Respondents contend that the measure is clear that "at least fifty per cent" of the net increased revenue to be generated by the proposed new graduated income tax structure would be dedicated to pre-primary through 12th grade education, despite the fact that the measure later states that "[t]he fifty percent" will be used to supplement general fund and state education fund appropriations. Resp'ts' Opening Br., at 8–9. Respondents base this argument on a statement made by one of the Title Board members during the

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Opening Br. at 81–83.

<sup>3</sup> Respondents' argument is presumably shared by the Title Board. However, the Title Board did not address Petitioners' clear title arguments in its Opening Brief.

rehearing that “[t]he fifty percent” serves to “supplement and not supplant” the measure’s restriction regarding existing appropriations from the general fund, and thus is neither misleading nor confusing.

*Id.* at 9, n.3.

Respectfully, these two conflicting phrases—“at least fifty per cent” and “[t]he fifty percent”—are located in consecutive sentences and cannot be reconciled. Both phrases refer to how much of the revenue from the proposed graduated income tax would be allocated to education funding. As a result, voters are left guessing whether the measure would always allocate exactly 50 percent or could allocate some potentially unknown amount above 50 percent to this purpose. Confusion is bound to occur, especially because the measure does not define what it means by “addressing the impacts of a growing population and a changing economy” or address where revenue could be appropriated in years when Colorado’s population does not grow. Before a clear title can be set, this conflict or ambiguity must be resolved to avoid public confusion. *See* Colo. Rev. Stat. § 1-40-106(3)(b)

(requiring that “[i]n setting a title, the title board shall consider the public confusion that might be caused by misleading titles”).

Second, as to the measure’s failure to specify who determines how the revenue is split between fund education and growth issues, Respondents again rely on the Title Board’s interpretation of the measure. *See Resp’ts’ Opening Br.*, at 9. Respondents (and the Title Board) assume voters will reach a particular conclusion absent direction. Here, although voters with detailed knowledge of the state budgetary and fiscal process may assume the state legislature is the makes the decision, many other voters will be left guessing whether the decision-maker is the newly created Citizen’s Oversight Committee, the newly created Fair Tax Review Commission, the governor, or some other entity.

Therefore, Initiative #271 should be returned to the Respondents to correct and clarify these vague and ambiguous provisions.

### **III. Respondents agree that Petitioners' proposed changes would add accuracy to the title.**

Initiative #271's language is clear. The measure would establish four new graduated individual income tax brackets: (1) for income "not over" \$250,000; (2) for income "over" \$250,000 but "not over" \$500,000; (2) for income "over" \$500,000 but "not over" \$1,000,000; and (4) for income "over" \$1,000,000. The title is inconsistent with the language of Initiative #271, and inaccurately describes the second and third graduated individual income tax brackets as being "from \$250,001 to \$500,000" and "from \$500,001 to \$1,000,000."

To correct this error, two simple changes to the title must be made: (1) change "from \$250,001" to "over \$250,000"; and (2) change "from \$500,001" to "over \$500,000."

In their Opening Brief, Respondents rely for a third time on the Title Board's interpretation of the measure during the rehearing. There, the Title Board reasoned that the convention used in the Initiative #271's title was consistent with both the Colorado Department of Revenue's and the Internal Revenue Service's practice of

automatically rounding up to the nearest dollar. *See* Resp'ts' Opening Br., at 10. But over \$250,000, which includes \$250,000.01, \$250,000.02, and so on, does not necessarily "round up" to \$250,001 when rounding to the nearest dollar. In fact, a number of amounts would "round down" to \$250,000. There also is no statutory or constitutional requirement that the Title Board use the same conventions as the Colorado Department of Revenue and Internal Revenue Service, especially when such conventions could cause inaccuracy and voter confusion. Moreover, those tax conventions could change at any time.

Additionally, Respondents even admitted during the rehearing that they agree with Petitioners' proposed revisions to the title and do not oppose amending the title accordingly.<sup>4</sup> In fact, counsel for Respondents commented that Petitioners' proposed revisions are "technically accurate" and that the inaccuracies should probably be

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<sup>4</sup> Title Board Rehearing, Mar. 4, 2020: [https://csos.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=151](https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151), starting at 1:54:50.

fixed.<sup>5</sup> Despite the consensus among these parties, the Title Board did not make the requested changes to the title.

Therefore, at minimum, Initiative #271 should be returned to the Title Board with instructions to correct the erroneous language.

### **CONCLUSION**

For the foregoing reasons and those stated in Petitioners' Opening Brief, the Title Board erred in denying Petitioners' motion for rehearing and objections raised at the March 4, 2020 Title Board rehearing.

Accordingly, Petitioners respectfully request that this Court reverse the actions of the Title Board and order Initiative #271 to be returned to the Respondents on grounds that Initiative #271 contains more than a single subject, and/or that Initiative #271 is so vague, ambiguous, and confusing that it cannot be understood and the title setting requirements cannot be met. Alternatively, Petitioners respectfully request that this Court reverse the actions of the Title Board and

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<sup>5</sup> *Id.* at 1:57:10 – 1:58:18.

remand Initiative #271 to the Title Board to correct the error in the way the title describes the proposed graduated income tax brackets.

Dated: April 20, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2020, I electronically filed a true and correct copy of this **Petitioners' Answer Brief** with the Clerk of Court via the Colorado Courts E-Filing System which will send notification of such filing and service upon counsel of record:

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