

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

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 **3,303** words (opening brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A).

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

s/ Sarah M. Mercer

Sarah M. Mercer

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Does Proposed Initiative #271 impermissibly contain more than a single subject in violation of Colo. Const. art. V, §1(5.5.) and Colo. Rev. Stat. § 1-40-106.5?

2. Does the title of Proposed Initiative #271 violate Colo. Rev. Stat. § 1-40-106(3)(b) because it is unfair, false, and misleading?

STATEMENT OF THE CASE

Respondents/Proponents Carol Hedges and Steve Briggs have filed 55 proposed initiatives seeking, broadly and abstractly, to replace Colorado's flat income tax with a graduated one.¹ This appeal from the Title Board concerns one of those initiatives, Proposed Initiative 2019-2020 #271 (Initiative #271). If passed, among other things, Initiative #271 would:

¹ The initiatives filed by Respondents/Proponents include: Proposed Initiatives 2019-2020 #137, #138, #139, #140, #141, #142, #143, #144, #145, #146, #147, #148, #149, #150, #151, #152, #153, #154, #155, #156, #157, #158, #159, #160, #161, #162, #163, #164, #165, #166, #183, #184, #185, #186, #187, #188, #189, #190, #191, #192, #193, #194, #195, #251, #252, #253, #254, #255, #256, #267, #268, #269, #270, #271, #272. At this time, Respondents/Proponents are pursuing only Initiative

- Create authority under the Colorado Constitution for a graduated income tax by repealing long-established constitutional language that all taxable net income in Colorado is taxed at one rate. (Sec. 2.)
- Create three income tax brackets and increase the state individual income tax rates on income in these brackets as follows:
 - For federal taxable income “over” \$250,000 but “not over” \$500,000, the state individual income tax rate would increase from 4.63 percent to 7.00 percent;
 - For federal taxable income “over” \$500,000.00 but “not over” \$1,000,000.00, the state individual income tax rate would increase from 4.63 percent to 7.75 percent; and
 - For federal taxable income “over” \$1,000,000.00, the state individual income tax rate would increase from 4.63 percent to 8.90 percent.
- Create a fourth income tax bracket for federal taxable income “not over” \$250,000 and decrease the state individual income tax rate on such income from 4.63 percent to 4.58 percent. (Sec. 3.)
- Adjust annually the income brackets by the percentage change in Colorado personal income. (Sec. 3.)
- Create a 25-member Fair Tax Review Commission to review and file reports on the effectiveness of the graduated tax income rates and to recommend changes. (Sec. 3.)
- Exempt from the state TABOR limit, or de-Bruce, the increased individual income tax revenue. (Sec. 4.)

- Require individual income tax revenue to be spent as follows:
 - Fifty percent, or at least 50 percent, to supplement current funding for preschool through 12th grade education;
 - Any remaining revenue to address the impacts of a growing population and a changing economy, and
 - No more than 10 percent for administrative costs. (Sec. 4.)
- Create a Citizen’s Oversight Committee to oversee the distribution of the revenue. (Sec. 4.)

The Title Board conducted its initial public hearing on Initiative #271 and set the title on February 19, 2020. Petitioner Brough timely filed a motion for rehearing challenging Initiative #271 and the titles set by the Title Board on the following grounds: *first*, that Initiative #271 contains multiple separate and distinct subjects in violation of the single-subject requirement in Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106.5 (Mot. for Reh’g 1-3); *second*, that Initiative #271 is so vague, ambiguous, and confusing with respect to how much revenue is dedicated to education funding and with respect to who decides how the revenue is spent that Initiative #271 cannot be understood and the title setting requirements of Colo. Rev. Stat. § 1-40-106(3)(b) cannot be met (Mot. for Reh’g 3-4); and *third*, that the title set by the Title Board

erroneously describes the proposed graduated income tax brackets also in violation of Colo. Rev. Stat. § 1-40-106(3)(b) (Mot. for Reh'g 4). The Title Board considered and denied Petitioner Brough's motion at its March 4, 2020 hearing.

Petitioner Tyler Sandberg did not file a motion for rehearing, but spoke in objection to the title for Initiative #271 at the Title Board's March 4, 2020 hearing,² arguing: *first*, that Initiative #271 contains multiple separate and distinct subjects in violation of the single-subject requirement in Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106.5; and *second*, that Initiative #271 is so vague, ambiguous, and confusing with respect to how much revenue is dedicated to education funding and with respect to the role of the Citizen's Oversight

² The audio record of Petitioner Sandberg's objections at the Title Board's March 4, 2020 hearing are preserved and can be accessed at the following web address; the rehearing for Initiative #271 begins at the recording's 1:39:05 time stamp:
https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151
(see also Colo. Sec. of State website, Audio Broadcasts, Available Archives, Title Board,
https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html, last visited Mar. 31, 2020).

Committee that Initiative #271 cannot be understood and the title setting requirements of Colo. Rev. Stat. § 1-40-106(3)(b) cannot be met. The Title Board considered Petitioner Sandberg's objections and denied them.

Accordingly, the Title Board set the final ballot title for Initiative #271 as:

SHALL STATE TAXES BE INCREASED \$2,000,000,000 ANNUALLY BY AN AMENDMENT TO THE COLORADO CONSTITUTION AND A CHANGE TO THE COLORADO REVISED STATUTES CONCERNING A GRADUATED STATE INCOME TAX FOR ALL INDIVIDUAL TAXPAYERS, INCLUDING JOINT FILERS, ESTATES, AND TRUSTS, AND, IN CONNECTION THEREWITH, REPEALING THE CONSTITUTIONAL REQUIREMENT FOR A SINGLE RATE INCOME TAX; DECREASING THE INDIVIDUAL INCOME TAX RATE FROM 4.63% TO 4.58% FOR INCOME UP TO \$250,000, INCREASING THE INDIVIDUAL INCOME TAX RATE FROM 4.63% TO 7% FOR INCOME FROM \$250,001 TO \$500,000, FROM 4.63% TO 7.75% FOR INCOME FROM \$500,001 TO \$1,000,000, AND FROM 4.63% TO 8.90% FOR INCOME OVER \$1,000,000; ANNUALLY ADJUSTING THE INCOME BRACKETS BY THE PERCENTAGE CHANGE IN COLORADO PERSONAL INCOME; ALLOWING THE STATE TO KEEP AND SPEND THE ADDITIONAL TAX REVENUE GENERATED BY THE TAX RATE CHANGES; REQUIRING AT LEAST 50% OF THE ADDITIONAL REVENUE TO BE USED FOR PRESCHOOL THROUGH

TWELFTH GRADE PUBLIC EDUCATION AND THE
REMAINDER TO BE USED TO ADDRESS THE IMPACTS
OF A GROWING POPULATION AND A CHANGING
ECONOMY; AND REQUIRING THE CREATION OF A
CITIZEN'S OVERSIGHT COMMITTEE TO ASSURE THAT
THE ADDITIONAL REVENUE IS USED AS REQUIRED
AND A TAX REVIEW COMMISSION TO REPORT ON THE
EFFECTS OF THE INCOME TAX RATE STRUCTURE ON
OR BEFORE 2031?

Petitioners timely sought review of the Title Board's action under
Colo. Rev. Stat. § 1-40-107(2). (*See* Pet. for Review of Final Action of
Ballot Title Setting Bd. Concerning Proposed Initiative #271).

SUMMARY OF THE ARGUMENT

Respondents/Proponents have strategically and improperly
combined multiple separate subjects into Initiative #271 to sweeten the
pot for voters who might otherwise be disinclined to change the state's
flat income tax to a graduated tax, including not only increasing the
individual income tax rate for income over \$250,000 but also marginally
decreasing the individual income tax rate for income not over \$250,000.
Further, Initiative #271 logrolls provisions like de-Brucing state
revenue into the measure even though such provisions have nothing to

do with the primary objective of the measure, which is to replace the state's flat individual income tax with a new graduated individual income tax scheme. These provisions impermissibly violate the single-subject rule and Initiative #271 therefore must be returned to the Respondents/Proponents.

In addition, Initiative #271 contains vague, ambiguous, and confusing provisions with respect 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. Because these provisions cannot be understood, the title setting requirements cannot be met and Initiative #271 must be returned to the Respondents/Proponents.

Last, the title set by the Title Board incorrectly describes two of the four proposed graduated income tax brackets, an error that should have been corrected by the Title Board before the measure is delivered to voters.

ARGUMENT

I. Initiative #271 impermissibly contains multiple subjects.

A. Standard of review and preservation.

Colo. Const. art. V, § 1(5.5) requires that “[n]o measure shall be proposed by petition containing more than one subject.” (*see also* Colo. Rev. Stat. § 1-40-106.5 containing the statutory single-subject requirement). No title can be set for an initiative that contains multiple subjects, meaning there are at least two distinct and separate purposes that are neither dependent upon nor connected with each other. *See People ex rel. Elder v. Sours*, 74 P. 167, 177 (1903).

Petitioner Brough preserved this issue for review in her motion for rehearing before the Title Board during its March 4, 2020 hearing (Mot. for Reh’g 1-3), and Petitioner Sandberg by making such objection during that hearing.

B. The single-subject requirement protects voters against two dangers present in Initiative #271.

The single-subject requirement protects voters against two dangers. First, allowing multiple subjects with no necessary or proper

connection risks garnering support for the measure from various factions, leading to the enactment of provisions of the measure that would fail on their own merits. *See In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012). Second, prohibiting impermissible multiple subjects avoids “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *In re Title, Ballot Title, Submission Clause for 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002).

Here, the Respondents/Proponents have strategically and improperly combined separate proposals into Initiative #271 to sweeten the pot for voters who might otherwise be disinclined to create a graduated income tax. For example, Initiative #271 increases the individual income tax rate for all income over \$250,000, but **decreases** (albeit marginally) the individual income tax rate for income \$250,000 and less, thus attracting voters who disfavor a graduated individual income tax scheme – which is the objective of Initiative #271 – but who are enticed to vote for the measure because it will result in a lower

individual income tax rate for them.

Further, Initiative #271 dedicates individual income tax revenue to preschool through 12th grade education funding and “to address the impacts of a growing population and changing economy.” Here, voters who support increased funding for education, and agree that the state should address the impacts of a growing population and changing economy, may be enticed to vote for Initiative #271 even though they do not support replacing the state’s flat individual income tax with a new graduated individual income tax scheme.

Another provision of Initiative #271 allows the state to retain the new revenue generated by the graduated income tax rather than having to return it to taxpayers in accordance with TABOR, a provision reminiscent of the legislatively referred measure voters rejected in 2019.³ Whereas increasing and decreasing individual income tax rates in order to entice voters to accept a graduated individual income tax

³ Proposition CC would have allowed the state to retain revenue above the TABOR spending cap to provide funding for education and transportation. The measure failed on the November 5, 2019 ballot,

scheme and making commitments for the expenditure of the new revenues on education is logrolling, overriding TABOR's spending limit is a surprise provision. Initiative #271 deals with graduated tax collection and the de-Brucing provisions deal with revenue limitations, which are separate and distinct policy issues; one addresses how tax rates apply to individuals, while the other deals with spending limitations for the state government. De-Brucing state revenue is neither necessarily nor properly connected to creating a graduated income tax, which is the primary objective of Initiative #271. Voters who may otherwise support replacing the state's flat individual income tax with a graduated individual income tax scheme, but who would not otherwise support de-Brucing state revenue would be surprised to find that Initiative #271's new graduated individual income tax scheme comes with the condition that surplus individual income tax revenue will no longer be returned to taxpayers. The de-Brucing provision does not apply just in the first year of the new tax system or to defined

with 53.66% of voters voting no and only 46.34% of voters voting yes.

amounts, and because the tax rates automatically adjust in the future, Initiative #271 de-Bruces an unknown and constantly changing amount of revenue.

For these reasons, Initiative #271 should be returned to the Respondents/Proponents to pare back the provisions of the measure to achieve a true single subject that eliminates the dangers currently present to voters.

II. Initiative #271 is too vague and ambiguous for the Title Board to be able to set clear title.

A. Standard of review and preservation.

The Title Board has broad discretion in “the exercise of its drafting authority.” *In re Title, Ballot Title, Submission Clause for 2001-2001 #21 & #22*, 44 P.3d 213, 219 (Colo. 2002). However, it is up to this Court to determine whether the titles set by the Title Board are clear. *See In re Title, Ballot Title, Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014). Initiatives that are too vague and ambiguous to comprehend cannot be sent to voters. *See In re Title, Ballot Title, Submission Clause for 1999-2000 #44*, 977 P.2d 856, 858

(Colo. 1999).

Petitioner Brough preserved this issue for review in her motion for rehearing before the Title Board during its March 4, 2020 hearing (Mot. for Reh'g 3-4), and Petitioner Sandberg by making such objection during that hearing.

B. Initiative #271 contains several confusing provisions that cannot be reconciled or cured in the title.

The constitution requires an initiated measure's subject to be "clearly expressed in its title." Colo. Const. art. V, § 1(5.5). "In setting a title, the title board shall consider the public confusion that might be caused by misleading titles" and "shall unambiguously state the principle of the provision sought to be added." Colo. Rev. Stat. § 1-40-106(3)(b). The Title Board cannot cure an initiative's incomprehensible language simply by copying it into or omitting it from the title. *See Matter of Title, Ballot Title, Submission Clause, & Summary re Proposed Initiatives on Obscenity*, 877 P.2d 848, 850 (Colo. 1994).

Here, it is unclear from the text of Initiative #271 whether the measure requires individual income tax revenue to be split evenly

between education funding and addressing the impacts of a growing population and changing economy, or whether over half of the new revenue can be used for education funding leaving some lesser balance for addressing the impacts of a growing population and changing economy. Section 4 of the measure reads both that “[a]t least fifty percent of such revenue shall be appropriated and expended for pre-primary-12 education,” and that “[t]he fifty percent [of such revenue appropriated and expended for pre-primary-12 education] shall be used to supplement and not supplant general fund and state education fund appropriations.” The measure further provides that “[t]he remainder of such revenue shall be appropriated and expended to address the impacts of a growing population and changing economy.”

If the proponents intend that exactly 50 percent of the revenue appropriated be spent on education, then the other 50 percent of the revenue could be allocated to address the impacts of population or economic changes. Alternatively, if the proponents envision spending at least 50 percent of the increased revenue on education, it is possible

that 90 percent of the increased revenue is expended for that purpose. In that instance, little to none of the measure's increased revenue could be allocated to "address the impacts of a growing population and a changing economy." In addition to being vague and ambiguous about how the revenue is going to be split between these two goals, Initiative #271 is unclear about what exactly "addressing the impacts of a growing population and a changing economy" is and it is confusing whether revenue could be appropriated in years when Colorado's population does not grow.

Relatedly, Initiative #271 is silent as to who determines how the revenue is split between education funding and "addressing the impacts of a growing population and changing economy." A voter with detailed knowledge of the state budgetary and fiscal process may assume the state legislature is the decision maker, but a voter without such knowledge may believe the decision maker to be the newly created Citizen's Oversight Committee, the newly created Fair Tax Review Commission, or the governor, or even believe the money would go

directly to their local school board. Because Initiative #271 does not expressly state who is responsible for appropriating and expending the revenue “through current funding distributions,” the options are left to the voters’ imaginations.

Because these provisions of Initiative #271 are vague and ambiguous, the title cannot fully inform voters and the measure should be returned to the Respondents/Proponents to correct and clarify.

III. The title set by the Title Board contains a plain error that requires correction and can be easily accomplished.

A. Standard of review and preservation.

The Title Board is “vested with considerable discretion in setting the title and the ballot title and submission clause,” but the Court must reverse the Title Board’s decision if a title “is insufficient, unfair, or misleading.” *See In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 442 P.3d 867, 869 (Colo. 2019) (quoting *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 159 (Colo. 2014)). In examining an initiative’s wording to determine whether its title comports with the clear-title requirement, the Court “employ[s] the

general rules of statutory construction and give[s] words and phrases their plain and ordinary meanings.” *In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016).

Petitioner Brough preserved this issue for review in her motion for rehearing before the Title Board during its March 4, 2020 hearing (Mot. for Reh’g 4).

B. The title set by the title board inaccurately describes two of the four proposed graduated income tax brackets.

Initiative #271 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; (3) for income “over” \$500,000 but “not over” \$1,000,000; and (4) for income “over” \$1,000,000. The language of the initiative is plain and clear. Yet, the language of the title set by the Title Board 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.”

Although only a matter of cents, “over” \$250,000 and “over”

\$500,000 are different than “from” \$250,001 and “from” \$500,001. Most importantly, though, “from” \$250,001 or \$500,001 is not reflective of the language of Initiative #271, which seeks to capture every cent of income “over” \$250,000 but “not over” \$500,000 and every cent of income “over” \$500,000 but “not over” \$1,000,000 in the second and third graduated individual income tax brackets, respectively.

Moreover, this is a straightforward change to the title that provides clarity and accuracy in accordance with the clear-title requirement of Colo. Rev. Stat. § 1-40-106(3)(b). As such, Initiative #271 should be returned to the Title Board with instructions to correct this error by making two simple changes that are easily accomplished: (1) change “from \$250,001” to “over \$250,000”; and (2) change “from \$500,001” to “over \$500,000.”

CONCLUSION

The Title Board erred in denying Petitioners’ motion for rehearing and objections raised at the March 4, 2020 Title Board hearing.

Accordingly, Petitioners respectfully request that the Court reverse the

actions of the Title Board and order Initiative #271 to be returned to the Respondents/Proponents 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 the Court reverse the actions of the Title Board and remand Initiative #271 to the Title Board for redrafting to correct the error in the way the title describes the proposed graduated income tax brackets.

Dated: March 31, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2020, I electronically filed a true and correct copy of this **Petitioners' Opening 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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