

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to §1-40-107(2), C.R.S. (2019) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019- 2020, #271</p> <p>Petitioners: Kelly Brough and Tyler Sandberg,</p> <p>v.</p> <p>Respondents/Proponents: Carol Hedges and Steve Briggs,</p> <p>v.</p> <p>Ballot Title Board: Theresa Conley, David Powell, and Jason Gelender.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Carol Hedges and Steve Briggs:</p> <p>Edward T. Ramey, #6748 Tierney Lawrence LLC 225 East 16th Avenue, Suite 350 Denver, CO 80203 Telephone: 720-242-7585 Email: eramey@tierneylawrence.com;</p>	<p>Supreme Court Case No. 2020SA93</p>
<p>OPENING BRIEF OF RESPONDENTS/PROPONENTS CAROL HEDGES AND STEVE BRIGGS</p>	

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, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 2,083 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.___, p.___), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: s/Edward T. Ramey

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Respondents/Proponents Carol Hedges and Steve Briggs, through counsel, respectfully submit their Opening Brief:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW¹

1. Does Proposed Initiative 2019-2020 #271 impermissibly contain more than a single subject in violation of COLO. CONST. art. V, §1(5.5) and §1-40-106.5, C.R.S. (2019)?

2. Did the Title Board set an unfair, false, and misleading title in violation of §1-40-106(3)(b), C.R.S. (2019)?

STATEMENT OF THE CASE

Respondents Carol Hedges and Steve Briggs are the designated representatives of the proponents of the Proposed Initiative. The Proponents submitted the Proposed Initiative to the Title Board for the setting of a title, ballot title and submission clause pursuant to §1-40-106, C.R.S. (2019), on February 7, 2020.

The Title Board held a hearing on February 19, 2020, determined the Proposed Initiative contained a single subject as required by COLO. CONST. art. V, §1(5.5), and §1-40-106.5, C.R.S. (2019), and set a title, ballot title and submission clause pursuant to §1-40-106, C.R.S. (2019).

¹ These issues are as presented by the Petitioners in their Petition for Review.

Petitioner Brough and one additional objector – Rebecca Sopkin – timely filed motions for rehearing on February 26, 2020. A rehearing was conducted by the Title Board on March 4, 2020, at which time the Title Board also received oral comments on behalf of Petitioner Sandberg (who had not theretofore requested a rehearing) through separate counsel appearing on his behalf. The Title Board denied all motions and requests for rehearing except to the extent that the Board made changes to the title in response to Ms. Sopkin’s motion.

Petitioners Brough and Sandberg jointly filed a Petition for Review with this Court pursuant to §1-40-107(2), C.R.S. (2019), on March 11, 2020. Ms. Sopkin has not requested review by this Court.

SUMMARY OF THE ARGUMENT

1. The Title Board was correct in its determination that Proposed Initiative 2019-2020 #271 contains a single subject. The initiative proposes enactment of a new graduated income tax structure for individuals, estates, and trusts. In connection therewith, it (necessarily) repeals the constitutional requirement that all taxable net income be taxed at one rate, dedicates the uses of the specific increased revenue that would result from this new income tax structure, requires the Legislative Council and a new oversight committee to monitor and report annually to the public on the amounts and uses of that specific

revenue, and establishes a commission to evaluate and report on the effects of this new income tax rate structure after ten years. There is nothing in the measure that is incongruous, not necessarily or properly connected, or surreptitious.

2. The Title Board set a title for the Proposed Initiative that accurately and fairly expresses the true intent and meaning of the measure, incorporates all principal aspects of the measure, and is clear as to the meaning of a “yes” or “no” vote on the measure.

ARGUMENT

I. Proposed Initiative 2019-2020 #271 Contains a Single Subject.

A. Standard of Review and Preservation of Issue.

In reviewing Title Board decisions, this Court “employ[s] all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶7; 328 P.3d 155, 158 (Colo. 2014). “We will only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.*; *accord, In re Title, Ballot Title and Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶6; 274 P.3d 562, 565 (Colo. 2012). “We also liberally construe the single subject requirement to ‘avoid unduly restricting the initiative process.’” *In re 2013-2014 #90*, ¶12, 328 P.3d at

160, quoting *In re Title, Ballot Title and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009).

This issue was preserved. Pet. Brough’s Motion for Rehearing, §I.

B. The Proposed Initiative Contains a Single Subject.

COLO. CONST. art. V, §1(5.5) states that “[n]o measure shall be proposed by petition containing more than one subject.” “The single subject requirement serves two functions: (1) ‘[t]o forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits’; and (2) ‘[t]o prevent surreptitious measures and apprise the people of the subject of each measure, that is, to prevent surprise and fraud from being practiced upon voters.’” *In re 2013-2014 #90*, ¶11, 328 P.3d at 159, quoting §1-40-106.5(1)(e), C.R.S. (2019). “Thus, ‘the subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.’” *Id.*, quoting *In re 2011-2012 #3*, ¶9, 274 P.3d at 565.

Importantly, “a proposed initiative that ‘tends to affect or carry out one general objective or purpose presents only one subject,’ and ‘provisions necessary

to effectuate the purpose of the measure are properly included within its text.” *In re 2013-2014 #90*, ¶11, 328 P.3d at 159, quoting *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #256*, 12 P.3d 246, 253 (Colo. 2000).

Proposed Initiative 2019-2020 #271 would amend §39-22-104 of the Colorado Income Tax Act of 1987 to establish a specifically delineated graduated – rather than single flat rate – income tax structure for individuals, estates, and trusts. The “objective” and “purpose” of the measure, as recited in the initiative’s preamble, is to create a more fair and just overall tax system in Colorado.

As a graduated income tax would be facially unconstitutional under COLO. CONST. art. X, §20(8)(a), the initiative would – necessarily – repeal that specific and directly applicable constitutional prohibition (and only that specific and directly applicable prohibition). As the proposed new graduated income tax structure would be anticipated to generate additional net annual revenue for the state, the initiative would statutorily dedicate the initial uses for that additional revenue – and only that additional revenue – free of other spending limitations (*i.e.*, a “voter approved revenue change” as contemplated by COLO. CONST. art. X, §20(7)(d)). Finally, the initiative would mandate creation by the General Assembly of a citizens’ oversight committee and annual public reports regarding the receipt

and actual uses of the dedicated net additional revenue, as well as a commission to review the effects of this specific income tax restructure after ten years.

There is nothing in Proposed Initiative 2019-2020 #271 that is not clearly directed and related to the other aspects of the measure. Whether or not the proposal is a good idea, there is nothing “incongruous,” not properly “connected,” or “surreptitious” in the measure. The measure is very much self-limiting – only dedicating uses of incremental new revenue specifically created by the new graduated income tax structure and only addressing constitutional impediments directly applicable to the measure. Far from being “surreptitious,” the measure mandates extensive disclosure, evaluation, and public reporting as to its operation and effects.

As discussed above, the measure “affect[s] or carr[ies] out one general objective or purpose” – creating a graduated income tax structure for individuals, estates, and trusts which the Proponents submit (and recite in their preamble) is an essential step toward the policy objective of making the overall tax system in Colorado more fair and just. This “objective or purpose” requires the production of adequate revenues to meet public needs, while also assuring that the overall tax system in Colorado does not – as it unfortunately does now – create a disproportional burden on those taxpayers with lower incomes. Proponents have

tailored their proposed marginal personal income tax rate adjustments – both up and down from the current mandated flat rate – to precisely that overriding objective. The rest of the measure is implementational – removing the specific constitutional prohibition directed to exactly what the Proponents are seeking to accomplish, providing an initial statutory dedication of the increased net revenue expected to result specifically from this proposed restructure of the personal income tax, and overlaying a focused assurance of monitoring, evaluation, and public accountability. There is nothing included in this proposed initiative that is not directed to, and that the Proponents believe nonessential to, “effectuate the purpose of the measure.” *In re 2013-2014 #90*, ¶11, 328 P.3d at 159, *supra*.

II. The Title Board Set a Fair and Accurate Title that Expresses the True Intent and Meaning and Incorporates All Principal Aspects of the Measure.

A. Standard of Review and Preservation of Issue.

“When reviewing a challenge to the title and ballot title and submission clause, [this Court] employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions.” *In re 2013-2014 #90*, ¶25, 328 P.3d at 162. “We will not consider whether the Title Board set the best possible title [*citation omitted*]. Rather, the title must fairly reflect the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed

by the Title Board.” *Id.* “The Title Board is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause. *[citation omitted]* The Title Board's duty in setting a title is to summarize the central features of a proposed initiative; in so doing, the Title Board is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme.” *Id.* at ¶24.

This issue was preserved as to the points raised in Petitioner Brough’s Motion for Rehearing, §§II, III. Petitioner Sandberg raised no additional issues in the comments presented on his behalf at the rehearing.²

B. The Title Board Set a Fair and Accurate Title that Expresses the True Intent and Meaning and Incorporates All Principal Aspects of the Measure.

Petitioner Brough raised three objections in her motion for rehearing regarding the contents of the title, ballot title and submission clause set by the Title Board. First, she suggested that the measure itself was unclear as to whether “exactly 50%” or “at least 50%” 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. The language of the measure itself is clear

² Title Board rehearing, Mar. 4, 2020: https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151 at 2:01:54, 2:02:52.

that “*At least* fifty per cent of such revenue shall be appropriated and expended” on the referenced education programs, and the title adopted by the Title Board so reflects.³

Second, Petitioner Brough suggested that it was unclear in the measure, and therefore in the title, who would determine exactly what percentage of the net increased revenue would be dedicated to education programs rather than addressing “the impacts of a growing population and a changing economy.” The Title Board concurred with Board Member Gelender’s observation that the measure changed nothing whatsoever regarding the current budgeting processes, that the legislature was generally understood to exercise this power, and that titles do not generally include a recitation of items not being altered in some fashion by the underlying measure.⁴

³ One of the Board members, Mr. Gelender, accurately noted that the arguably inconsistent reference to “*the* 50%” a few lines later in the measure referred in context only to the implementational “supplement and not supplant” restriction regarding existing appropriations from the general fund, and was neither misleading nor confusing. Title Board rehearing, Mar. 4, 2020: https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151 at 2:04:52.

⁴ Title Board rehearing, Mar. 4, 2020: https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151 at 2:01:10.

Finally, Petitioner Brough submitted that the delineation of the new graduated income tax brackets in the measure – *e.g.*, “taxable income over two hundred fifty thousand dollars, but not over five hundred thousand dollars” – should not be represented in the title as commencing at \$1.00 above the preceding bracket, *e.g.*, “income from \$250,001 to \$500,000.” Board Member Gelender explained, with Board concurrence, that the title language was consistent with both Colorado Department of Revenue and Internal Revenue Service practice of automatically rounding up or down to the nearest dollar and that the language used in the title was thus accurate and most consistent with and understandable in practice.⁵

Proponents respectfully submit that the actions of the Title Board in formulating the title, ballot title and submission clause were well within the discretion accorded it by this Court, and that the titles are fair and accurate, express the true meaning and intent of the proposed initiative, and incorporate all principal aspects of the proposed measure.

⁵ Title Board rehearing, Mar. 4, 2020:
https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=151 at 1:58:20.

CONCLUSION

The Respondents/Proponents respectfully request the Court to affirm the actions of the Title Board.

Respectfully submitted this 31st day of March, 2020.

s/Edward T. Ramey

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2020, a true and correct copy of the foregoing was filed and served via the Court's E-filing system upon the following:

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