

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2021-2022)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2021-2022 #46

Petitioners: Suzanne Taheri and Michael
Fields

v.

Title Board: Theresa Conley, Julie
Pelegrin, and David Powell.

PHILIP J. WEISER, Attorney General
MICHAEL KOTLARCZYK, Assistant
Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: (720) 508-6187
E-Mail: mike.kotlarczyk@coag.gov
Registration Number: 43250
*Counsel of Record
Attorneys for the Title Board

▲ COURT USE ONLY ▲

Case No. 2021SA316

THE TITLE BOARD'S OPENING BRIEF

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 2,684 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/ Michael Kotlarczyk

MICHAEL KOTLARCZYK, #43250
Assistant Attorney General

TABLE OF CONTENTS

STATEMENT OF THE CASE 1

 A. H.B. 21-1321 1

 B. The hearing and rehearing on 2021-2022 #46 2

SUMMARY OF ARGUMENT 5

ARGUMENT 7

 I. The title accurately describes #46 and is not confusing or misleading. 7

 A. Standard of review and preservation. 7

 B. The title complies with the statute, accurately describes the measure, and is not confusing..... 8

 II. To the extent the Proponents ask the Court to strike § 1-40-106(3)(e), the Court is without authority to do so. 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES	PAGES
<i>Hayes v. Ottke</i> , 2013 CO 1	14
<i>In re Proposed Initiated Con'l Amend. Concerning Ltd. Gaming</i> , 873 P.2d 733 (Colo. 1994).....	14
<i>In re Title, Ballot Title & Submission Clause for 1997-98 #74</i> , 962 P.2d 927 (Colo. 1998).....	12
<i>In re Title, Ballot Title & Submission Clause for 2009-2010 #45</i> , 234 P.3d 642 (Colo. 2010).....	9
<i>In re Title, Ballot Title & Submission Clause for 2015-2016 #156</i> , 2016 CO 56	7
<i>In re Title, Ballot Title & Submission Clause for 2019-2020 #3</i> , 2019 CO 107	7, 11
<i>In re Title, Ballot Title, & Submission Clause for 2019-2020 #315</i> , 2020 CO 61	11

<i>In re Title, Ballot Title & Submission Clause, & Summary for a Petition on School Finance, 875 P.2d 207 (Colo. 1994)</i>	14
<i>Martinez v. People, 2020 CO 3</i>	12
<i>State v. Borquez, 751 P.2d 639 (Colo. 1988)</i>	13

STATUTES

§ 1-40-106, C.R.S. (2021)	11, 14
§ 1-40-106(3)(b), C.R.S. (2021)	11, 12
§ 1-40-106(3)(e), C.R.S. (2021).....	2, 8, 11, 12, 13
§ 1-40-106(3)(h), C.R.S. (2021)	2
§ 1-40-106(3)(i)(I), C.R.S. (2021)	2
§ 1-40-107(2), C.R.S. (2021).....	5, 6, 13, 14
§ 2-4-205, C.R.S. (2021)	12
§ 2-4-206, C.R.S. (2021)	12
H.B. 21-1321	passim

OTHER AUTHORITIES

Hearing Before Title Board on Proposed Initiative 2021-2022 #45

(Sept. 1, 2021), <https://tinyurl.com/vxhnm4xt> 3

Hearing Before Title Board on Proposed Initiative 2021-2022 #46

(Oct. 6, 2021), <https://tinyurl.com/eyx3jfv> 3

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Title Board set a clear and accurate title for Proposed Initiative 2021-2022 #46.

STATEMENT OF THE CASE

Proponents Suzanne Taheri and Michael Fields seek to circulate #46 to obtain the necessary signatures to place an initiative on the ballot. The measure proposes a .01% reduction in the sales tax rate for two years. *See Record (Oct. 25, 2021), p 7.*

A. H.B. 21-1321

Earlier this year, the General Assembly passed H.B. 21-1321. As relevant here, the legislation requires the Title Board to begin initiatives that propose a tax cut with certain mandatory language.

For measures that reduce state tax revenue through a tax change, the ballot title must begin “Shall there be a reduction to the (description of tax) by (the percentage by which the tax is reduced in the first full fiscal year that the measure reduces revenue) thereby reducing state revenue, which will reduce funding for state expenditures that include but are not limited to (the three largest areas of program expenditure) by an estimated (projected dollar figure of revenue reduction to the state in the first full fiscal year that the measure reduces revenue) in tax revenue . . . ?”.

§ 1-40-106(3)(e), C.R.S. (2021). The “three largest areas of program expenditure” that must be listed in the title are the three largest recipients of operating appropriations from the general fund as listed in the Joint Budget Committee’s annual appropriations report. § 1-40-106(3)(i)(I).

This additional language required by H.B. 21-1321 “may not be considered” in determining “whether a ballot title qualifies as brief.” § 1-40-106(3)(h).

B. The hearing and rehearing on 2021-2022 #46

The Title Board held an initial hearing for #46 on October 6, 2021. The Board concluded the measure contained a single subject and set a title that included the mandatory language from H.B. 21-1321. *See Record at 4.*

In previous iterations of this measure, Proponents objected to the inclusion of the language from H.B. 21-1321. They argued that because the state projects a taxpayer refund (or “TABOR refund”) for the years 2023 and 2024, the funding for “the three largest areas of program expenditure”—namely, health and human services programs, K-12

education, and corrections and judicial operations—will not actually be reduced. *See, e.g., Hearing Before Title Board on Proposed Initiative 2021-2022 #45* (Sept. 1, 2021), <https://tinyurl.com/vxhnm4xt> (statement at 47:40). Instead, Proponents argued, their measure would more likely decrease the size of the TABOR refund. *Id.*

The Board proposed addressing this at the initial hearing on #46 by including the phrase “unless the state is required to refund excess revenue” after the language required by H.B. 21-1321. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #46* (Oct. 6, 2021), <https://tinyurl.com/eyx3jfzv> (statement at 12:30). Proponents objected to that phrase as making the title “confusing,” and the Board agreed to remove it. *Id.* at 15:00-24:30. The Board left the language required by H.B. 21-1321 in the measure.

Proponents moved for a rehearing on October 12. Record at 6. Proponents argued that inclusion of the required language in H.B. 21-1321 would cause voter confusion and result in a misleading and inaccurate title. *Id.* at 6-7. Although Proponents objected at the initial hearing when the Board suggested including the possibility of a TABOR

refund in the title, the Proponents argued in their motion that “[t]he Board’s title fails to even mention TABOR refunds as a program that may be reduced by the passage of Proposed Initiative 2021-2022 #46.” *Id.* at 7. While Proponents continued to object to the inclusion of the language required by H.B. 21-1321, Proponents argued that if it had to be included, the title should conclude with the following: “except in years where a TABOR refund is due in which years the TABOR refund will be reduced and there would be no reduction to the departments and programs listed above.” *Id.* at 8.

The Title Board conducted a rehearing on #46 on October 20, 2021. The Board granted the motion for rehearing in part and modified the title by inserting the following after the H.B. 21-1321 language: “or will reduce the amount of the taxpayer refund if a refund is required under TABOR.” *Id.* at 5. The full title as set by the Board now reads:

There shall be a reduction to the state sales and use tax rate by 0.34 percent, thereby reducing state revenue, which will reduce funding for state expenditures that include but are not limited to health and human services programs, K-12 education, and corrections and judicial operations by an estimated 14.6 million dollars in tax revenue in the first full fiscal year, or will reduce the amount of the taxpayer refund

if a refund is required under TABOR, by a change to the Colorado Revised Statutes that reduces the state sales and use tax rate from 2.90 percent to 2.89 percent from January 1, 2023, through December 31, 2024.

Id. Proponents timely initiated this Court’s review under § 1-40-107(2), arguing that the title is inaccurate and confusing to voters, and asking the Court to “strike the legislative mandate for specific language to be added to the title of this initiative.” Pet. for Review (Oct. 25, 2021), p 4.

SUMMARY OF ARGUMENT

Proponents do not dispute that the Title Board applied H.B. 21-1321 according to its terms. Instead, they argue that including the language required by H.B. 21-1321 in the title for #46 creates an inaccurate and confusing title.

The title for #46 is accurate. It states the tax cut will either reduce funding for state expenditures or reduce the size of a TABOR refund, language which closely mirrors the same language Proponents suggested in their motion for rehearing before the Board. Proponents cannot dispute that, as the title states, funding for either state expenditures or a TABOR refund would be reduced if #46 is passed.

Further, the title is not confusing to voters. By its plain terms, the title states that the measure will cut funding for state expenditures or cut the size of a TABOR refund. Read as a whole, the title is not confusing. Nor does the Title Board's decision not to include additional language concerning the relative size of the tax cut create confusion in the title, as Proponents argue. The title already mentions the size of the tax cut three different ways—as a percentage cut (.34%), as the total size of the tax cut in its first full year (\$14.6 million), and by showing the current and proposed tax rate (2.90% to 2.89%). This more than adequately advises voters of the size of the tax cut.

Finally, to the extent Proponents ask this Court to invalidate H.B. 21-1321, such relief is not available in this special statutory proceeding. This proceeding authorizes expedited Supreme Court review for the narrow purpose of “either affirming the action of the title board or reversing it.” § 1-40-107(2). A facial challenge to H.B. 21-1321 cannot be pursued in this action.

ARGUMENT

I. The title accurately describes #46 and is not confusing or misleading.

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.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶ 8 (quotations omitted). The Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions,” and will “only reverse the Title Board’s decision if the titles are insufficient, unfair, or misleading.” *Id.* (quotations omitted). It thus follows that the Court does 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 Board agrees that Proponents preserved their objections to the clarity of the title and the application of H.B. 21-1321 to this measure. Record, pp 6-9.

B. The title complies with the statute, accurately describes the measure, and is not confusing.

The title set by the Board includes the language required by H.B. 21-1321, which is codified at § 1-40-106(3)(e). Proponents do not dispute that #46 is a measure that “reduce[s] state tax revenue through a tax change” to which the statute applies. § 1-40-106(3)(e). Nor do they argue that the Title Board failed to include any of the required language from the statute. Rather, Proponents argue that, even though the Board included the statutorily required language in § 1-40-106(3)(e), the Court should nevertheless strike the title because it is inaccurate and may cause voter confusion.

The title is not inaccurate. The title states that the tax cut “will reduce funding for state expenditures . . . or will reduce the amount of the taxpayer refund if a refund is required under TABOR.” Record, p 5. Proponents themselves suggested adding similar language to the title in

their motion for rehearing. *See id.* at 8 (“except in years where a TABOR refund is due in which years the TABOR refund will be reduced and there would be no reduction to the departments and programs listed above”). While Proponents have consistently maintained that the title would be better if it made no mention of reducing funding or a TABOR refund, they cannot credibly maintain that the title is inaccurate for including language that closely mirrors their proposal before the Board. Accordingly, because the title correctly states that the measure will either reduce funding for state expenditures or will reduce a TABOR refund, the title is accurate.

Proponents have also argued that the title may cause voter confusion because (a) voters may not realize that the tax cut may only affect a TABOR refund, and (b) the title fails to mention the small scale of the tax cut. *See Pet. for Review* at 3. A title is not misleading if “the title read as a whole fairly and accurately” describes the initiative. *In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 649 n.3 (Colo. 2010). Here, the plain language of the title, read as whole, refutes both Proponents’ objections.

First, the title expressly says the tax cut may only affect the size of a TABOR refund. *See* Record, p 5 (“ . . . or will reduce the amount of the taxpayer refund if a refund is required under TABOR”). Voters will not be confused by something that the title directly addresses in plain English.

Second, the title will not cause voter confusion as to the size of the tax reduction because the title already addresses the size of the tax cut in plain language. The title describes the size of the tax cut in three different ways: it states that the proposed cut is a .34% cut to the sales and use tax; that the amount of the tax cut is \$14.6 million in its first full fiscal year; and that the actual rate of the tax will decrease from 2.90% to 2.89%. Proponents argue that the Board should have included additional language to emphasize how small the tax cut is, but the Board was under no obligation to include this superfluous language, because the title as drafted by the Board already accurately describes the size of the tax cut.

Proponents may wish that the Board adopted different language in describing the size of the tax cut, but the choice of particular

language is the sort of decision where the Board is owed the greatest deference. *See, e.g., In re Title, Ballot Title, & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 27 (“We will generally defer to the Board’s choice of language unless the titles set contain a material and significant omission, misstatement, or misrepresentation.”) (quotations omitted). Because the title already accurately describes the size of the tax cut three times, the title will not cause voter confusion by failing to include Proponents’ suggested language. *See In re 2019-2020 #3*, 2019 CO 107, ¶ 18 (“we cannot discern how voters could be confused by this title or how the effect of a yes/for or no/against vote would be unclear”).

Finally, in addition to its specific arguments about voter confusion, Proponents generally argue that including the language required by § 1-40-106(3)(e) will cause voter confusion. *See Pet. for Review* at 3. But the General Assembly rejected this position by amending § 1-40-106 to require this language for measures that propose tax cuts. It is this same statute, in § 1-40-106(3)(b), that “directs the Title Board to consider the possibility of voter confusion when setting titles.” *In re Title, Ballot Title & Submission Clause for 1997-98 #74*,

962 P.2d 927, 929 (Colo. 1998). By passing H.B. 21-1321, the General Assembly thus concluded that the inclusion of this language for measures that propose tax cuts does not cause voter confusion.

While this title does not cause voter confusion for the reasons given above, to the extent there is any conflict between -106(3)(b)'s admonishment that the Board "shall consider the public confusion that might be caused by misleading titles" and -106(3)(e)'s requirement of specific language for tax cut measures, the requirements of -106(3)(e) must prevail under two commonly accepted principles of statutory construction. First, the more recently enacted provision prevails over the older provision. *See* § 2-4-206. Second, "the more specific provision typically 'prevails as an exception to the general provision,'" *Martinez v. People*, 2020 CO 3, ¶ 18 (quoting § 2-4-205). As the more recent and more specific provision, -106(3)(e) should be given effect over the older, more general guidance that the Board should consider voter confusion.

II. To the extent the Proponents ask the Court to strike § 1-40-106(3)(e), the Court is without authority to do so.

Proponents ask this Court to “strike the legislative mandate for specific language to be added to the title of this initiative.” Pet. for Review at 4. It is unclear if Proponents are asking the Court to invalidate the statute as a whole. To the extent they are, such facial relief is not available in this special statutory proceeding under § 1-40-107(2). That statute specifies the only relief available in this proceeding: “the matter shall be disposed of promptly, consistent with the rights of the parties, either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the title board is in error.” § 1-40-107(2). Section 1-40-107(2) prescribes the Court’s power in this proceeding and thus limits the relief Proponents can obtain. *See State v. Borquez*, 751 P.2d 639, 644 (Colo. 1988) (“In an action which is entirely statutory, the procedure therein prescribed is the measure of the power of the tribunal to which jurisdiction of causes arising under the statute is given.”) (quotations omitted).

Accordingly, the Court’s “review of the Board’s action is limited to whether the title, ballot title and submission clause, and summary fairly reflect the intent of the initiative.” *In re Title, Ballot Title & Submission Clause, & Summary for a Petition on School Finance*, 875 P.2d 207, 210 (Colo. 1994). The Court previously declined to address a constitutional challenge to § 1-40-107(2) “[b]ecause such considerations are far beyond the scope of our review.” *In re Proposed Initiated Con’l Amend. Concerning Ltd. Gaming*, 873 P.2d 733, 737 n.2 (Colo. 1994), *superseded on other grounds as stated in Hayes v. Ottke*, 2013 CO 1; *see also In re Petition on School Finance*, 875 P.2d at 210 (A “constitutional challenge to the initiative is beyond the scope of this court’s review of the Board’s decisions . . . and therefore we need not address it.”). A broader challenge to H.B. 21-1321 is thus beyond this Court’s scope of review under § 1-40-107(2).

CONCLUSION

The Title Board correctly applied its governing statute, § 1-40-106, as recently amended. In doing so, it set an accurate title that is not confusing to voters. The title should be affirmed.

Respectfully submitted this 15th day of November, 2021.

PHILIP J. WEISER
Attorney General

/s/Michael Kotlarczyk

MICHAEL KOTLARCZYK, 43250*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCES, at Denver, Colorado, this 15th day of November, 2021, addressed as follows:

Suzanne M. Taheri
MAVEN LAW GROUP
1600 Broadway, Suite 1600
Denver, CO 80202
staheri@mavenlawgroup.com

Attorney for Petitioners

/s/ Xan Serocki

Xan Serocki