

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.

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Case No. 2021SA316

THE TITLE BOARD'S ANSWER 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 1,668 words.

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

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INTRODUCTION

The title for 2021-2022 #46 begins by stating that the measure proposes “a reduction to the state sales and use tax rate.” Record (Oct. 25, 2021), p 5. Voters will therefore have no trouble understanding the purpose and effect of #46 is to do just that: reduce the state sales and use tax rate. This should be enough to defeat Proponents’ clear title objection.

Proponents mainly argue that the title has become unclear because it includes statutorily-required language stating that the proposed tax cut will reduce funding for state expenditures. But the inclusion of this language does not make the title unclear. The title for #46 accurately states that either funding for state expenditures will be reduced or a taxpayer refund will be reduced. Because this language is correct and clear, the title should be affirmed.

ARGUMENT

I. The title satisfies the constitutional clear title requirement.

Proponents argue that by including the language required by H.B. 21-1321, the title for #46 violates the constitutional clear title requirement. Proponents' Opening Br. at 7. H.B. 21-1321 requires the Board to include certain language for initiatives that propose tax cuts, including that the measure "will reduce funding for state expenditures." § 1-40-106(3)(e), C.R.S. (2021).

"Statutes are entitled to a presumption of constitutionality, rooted in the doctrine of separation of powers, through which the judiciary respects the roles of the legislature and the executive in the enactment of laws." *Rocky Mtn. Gun Owners v. Polis*, 2020 CO 66, ¶ 30 (quotations omitted). This presumption especially applies here because the legislature has historically played a significant role in defining what constitutes a clear title. In fact, the General Assembly incorporated the clear title standard "into the statutes governing the initiative process in 1993," one year before the standard was added to the relevant

constitutional provisions. *See In re Title, Ballot Title & Submission Clause for 2007-08 #62*, 184 P.3d 52, 57 (Colo. 2008) (citing § 1-40-106(3)(b) (“[T]he title board shall consider the public confusion that might be caused by misleading titles[;] shall . . . avoid titles for which the general understanding of the effect of a ‘yes/for’ or ‘no/against’ vote will be unclear[; and] shall correctly and fairly express the true intent and meaning [of the measure.]”)).

The constitutional clear title requirement provides: “No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title” Colo. Const. art. V, § 1(5.5). The title for #46 satisfies this standard because it clearly expresses its subject. The measure proposes a .34% reduction to the state sales and use tax rate. The title begins: “There shall be a reduction to the state sales and use tax rate by 0.34 percent” Record at 5. The title thus complies with the constitutional clear title provision.

Proponents argue that H.B. 21-1321 caused the Board to draft an unconstitutionally unclear title, but their arguments all fail.

A. The title does not contain false information.

Proponents first contend that, by using the language required by H.B. 21-1321, the Board “put false information in the Title.” Proponents’ Opening Br. at 10; *see also id.* at 13. According to Proponents, because current fiscal projections show a likely TABOR refund for the two years #46’s tax cut will be in effect, the title falsely states that the tax cut “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.” Record at 5. This language is not false, for two reasons.

First, as argued in the Title Board’s opening brief, the title correctly states the measure will reduce funding for expenditures or will reduce the size of a TABOR refund. Board Opening Br. at 8-9. The title must be read as a whole. *See, e.g., In re Title, Ballot Title & Submission Clause for 2015-16 #63*, 2016 CO 34, ¶ 7 (Court examines “whether the title as a whole is fair, clear, and accurate”). While Proponents argue that the language required by H.B. 21-1321 in isolation is false given the likelihood of a TABOR refund, they do not argue that the title taken

as a whole is false. The Board’s discussion at the rehearing makes clear that it added the “or” clause specifically to ensure that the language required by H.B. 21-1321 would not be read in isolation and create a potentially misleading title. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #46* (Oct. 20, 2021), <https://tinyurl.com/2p9p89ux>, at 22:15 (statement of J. Pelegrin).

Second, Proponents’ argument that the required language from H.B. 21-1321 is “false” is based on projections of future government revenues. But those projections may never come to pass, or other future events could counteract them. *Cf. Leece v. Griffin*, 150 Colo. 132, 135, 371 P.2d 264, 265 (1962) (“It is well settled in Colorado that one of the essential elements of . . . deceit is that there be a false representation of a material fact, which fact either exists in the present or has existed in the past”) (quotations omitted). For example, a global pandemic or other unanticipated event could significantly reduce state revenues. Or Colorado’s voters could approve a revenue change that authorizes the state government to keep any surplus. In such an event, the tax cut would reduce state expenditures. Accordingly, because Proponents’

objection is based only on projected future events that may or may not occur, they cannot establish the title is false.

B. The authority relied on by Proponents supports the Board's position.

Proponents argue that this Court's recent holding in *In re Title, Ballot Title & Submission Clause for 2019-20 #315* supports their argument that the title for #46 should not list out three separate categories of government expenditures that could be impacted by the proposed tax cut. In that case, the Court rejected an argument by opponents of the measure that the title was not clear because it did not identify the "key programs" that would face funding cuts as a result of the measure. 2020 CO 61, ¶ 32. The Court held "it was sufficient for the Board to summarize generally the category of programs from which funds" would be cut. *Id.* But that case does not support Proponents' position, and in fact supports the Board's position, for three reasons.

First, H.B. 21-1321 was not the law when the Court ruled in #315. So the Court's holding there that the Board was not required to list specific programs facing cuts has no bearing here on whether the Board

properly listed specific “categories of spending by issue area,” as statute now requires. § 1-40-106(3)(i)(I).

Second, the title approved of in #315 was more similar to the title for #46 than Proponents suggest. Just as #46 broadly lists three general categories of spending facing funding cuts, #315 specifically mentioned that its funding would come from “certain health-related programs and other state purposes” funded by current taxes on tobacco. 2020 CO 61, ¶ 3. The Court approved of this approach, where the Board “summarize[d] generally the category of programs from which funds would be reallocated”; the title for #46 does effectively the same for three categories of spending. *Id.* ¶ 32.

Third, even if the differences between the title for #315 and for #46 are material, the Court did not hold that the Board was prohibited from including further detail, only that it was not required to do so. In fact, the Court acknowledged that the Board “is given discretion in resolving interrelated problems of length, complexity, and clarity.” *Id.* ¶ 26.

C. The title is not “unnecessarily long.”

Proponents also contend that the title “is unnecessarily long,” in particular that the additional words required by H.B. 21-1321 make the title too long. Proponents’ Opening Br. at 9. But H.B. 21-1321 expressly says that the language required by the statute “may not be considered” when “determining whether a ballot title qualifies as brief.” § 1-40-106(3)(h). Notably, only statutes, and not the Constitution, expressly require brief titles. *See* § 1-40-102(10) (“‘Title’ means a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative.”); § 1-40-106(3)(b) (“Ballot titles shall be brief[.]”). So the additional language required by H.B. 21-1321 cannot be counted when determining whether the title is brief, and Proponents have failed to show the remainder of the title is unduly prolix.

D. The Board was not required to provide additional “context” in the title.

Finally, Proponents object that the title does not provide sufficient “context” for the size of the tax cut. Proponents’ Opening Br. at 13-14. Proponents did not detail in their opening brief what language they

believe should have been included, and their suggested language for the title contains no additional context about the size of the proposed cut. *See id.* at 9. In any event, the Board acted within its discretion to omit any further language from the proposed title.

The title already mentions the size of the tax cut three times: as a .34 percent reduction in the sales and use tax rate; as a \$14.6 million reduction; and as a reduction of the rate from 2.90 percent to 2.89 percent. Record, p 5. Further description of the cut is simply not necessary, particularly given the Board’s obligation, and broad discretion, to balance length and complexity in its titles. *See In re 2019-20 #315*, 2020 CO 61, ¶ 32 (“requiring that level of detail in the title would render the title unnecessarily long and potentially confusing”). Additional language may be appropriate for the ballot information booklet but is not required for the title. *See Colo. Const. art. V, § 1(7.5)(a)(II)* (booklet must contain “major arguments both for and against the measure, and . . . may include any other information that would assist understanding the purpose and effect of the measure”).

CONCLUSION

The Board respectfully requests that the Court affirm the titles set by the Board.

Respectfully submitted this 6th day of December, 2021.

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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 CCEF, at Denver, Colorado, this 6th day of December, 2021, addressed as follows:

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