

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to §1-40-107(2), C.R.S. (20210-22) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021- 2022 #63</p> <p>Petitioner: Brenda Dickhoner</p> <p>v.</p> <p>Respondents/Proponents: Lea Steed and Donald “DJ” Anderson</p> <p>v.</p> <p>Ballot Title Board: Theresa Conley, David Powell, and Ed DeCeco</p>	
<p>Attorneys for Respondents/Proponents:</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. 2022SA97</p>
<p style="text-align: center;">OPENING BRIEF OF RESPONDENTS/PROPONENTS LEA STEED AND DONALD “DJ” ANDERSON</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 2,031 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 Lea Steed and Donald “DJ” Anderson, through counsel, respectfully submit their Opening Brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Petitioners have presented two related issues for review:

1. Does the title set for Proposed Initiative 2021-2022 #63 fail to correctly and fairly express the true meaning and intent of the initiative by advising the voters that the additional funding dedicated by the initiative for pre-school through twelfth grade public education would occur “without raising the existing state income tax rate”?

2. Is the title for Proposed Initiative 2021-2022 #63 deficient by not characterizing the initiative as “increas[ing] state revenue from taxes in years where a TABOR refund would otherwise be required”?

STATEMENT OF THE CASE

Respondents are the designated representatives of the proponents of Proposed Initiative 2021-2022 #63 (the “Proposed Initiative”).

The Proposed Initiative would statutorily dedicate an additional one third of one percent of the state’s income tax revenue – under whatever income tax rate(s) may independently exist – to the state education fund established by COLO. CONST. art. IX, §17(4). The initiative stipulates that this newly dedicated revenue is

intended to supplement current appropriations and is to be directed specifically to efforts to attract, retain, and compensate teachers and student support professionals consistent with the general purposes of the state education fund. While the initiative provides that the newly dedicated revenue may be appropriated and spent as a voter-approved revenue change – *i.e.*, excepted from the “spending limits” of COLO. CONST. art. X, §20(7)(d) – it does not raise taxes or tax rates or otherwise increase existing state revenue.

Respondents 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. (2021-22), on March 3, 2022. The Title Board held its initial hearing on the measure on March 16, 2022, determined the Proposed Initiative addressed a single subject as required by COLO. CONST. art. V, §1(5.5), and §1-40-106.5, C.R.S. (2021-22), and proceeded to set a title. Two motions for rehearing were filed on March 23, 2022, and a rehearing was held on April 6, 2022. The rehearing resulted in revisions to the title. One of the movants for rehearing – Brenda Dickhoner – filed a Petition for Review in this Court pursuant to §1-40-107(2), C.R.S. (2021-22), on April 13, 2022.

SUMMARY OF THE ARGUMENT

The title set by the Title Board at the rehearing on April 6, 2022, correctly and fairly expresses the true intent and meaning of the initiative and clearly advises the voters of the effect of a “yes/for” or “no/against” vote as required by §1-40-106(3)(b), C.R.S. (2021-22). As pertinent to Petitioner’s Petition for Review, (1) inclusion of the phrase “without raising the existing state income tax rate” in the title appropriately and fairly informs the voters that the dedication of additional percentage of income tax revenue to the state education fund is not accomplished through a tax rate increase; and (2) the title expressly and clearly advises the voters that this specific dedicated revenue is “from revenue that the state or a local district is otherwise required to refund to taxpayers in years in which a refund is due.”

ARGUMENT

I. The Title Appropriately and Fairly Advises the Voters that the Additional Revenue Dedication in the Initiative Is Not Facilitated by an Income Tax Rate Increase.

A. Standard of Review and Preservation of Issue.

“The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause.” *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶8, 328 P.3d 155, 159 (Colo. 2014). “We will reverse the Title Board's decision only if a title is insufficient, unfair, or

misleading.” *Id.* “The title and submission clause should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *Id.* at ¶23, 328 P.3d at 162; *Cf., In re Title, Ballot Title, and Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶24, 245 P.3d 576, 581 (Colo. 2012).

This issue was preserved in Part II of Petitioner’s Motion for Rehearing (pp. 3-4) to the extent that she argued that the phrase “without raising taxes” in the initial title was misleading as it did not disclose that “the measure allows for retention of revenue that, in years when a refund would be due, is a tax increase.” This led to a revision of the title at the rehearing to clarify that the initiative’s new dedication of revenue was (1) “without raising the existing state income tax rate” and (2) “allowing the additional revenue to be from revenue that a state or local school district is otherwise required to refund to taxpayers in years in which a refund is due.” Petitioner now appears to object to these revisions.

B. The Title Board Set a Fair and Accurate Title That Clearly Advises the Voters of the True Meaning and Intent of the Initiative and the Meaning of a “Yes/For” or “No/Against” Vote.

Petitioner’s first objection to the title – as revised at the rehearing specifically to address her (and another movant’s) concerns – now appears to be that “[t]here is no justification for including information about something the

Proposed Initiative does not do, particularly when such language is not comprehensive.”¹ The object of this objection is the phrase “without raising the existing state income tax rate.” There is no question that this phrase is accurate – indeed it was adopted by the Title Board at the rehearing in direct response to Petitioner’s objection to the earlier more general phrase “without raising taxes.” Nor does Petitioner acknowledge that this revision at the rehearing was accompanied by further clarification of precisely the point at the heart of her objection – that the measure would “allow[] the additional revenue to be from revenue that the state or a local school district is otherwise required to refund to taxpayers in years in which a refund is due.” In short, the Title Board did precisely what Petitioner asked it to do.

As far as Respondents can discern, Petitioner’s lingering dissatisfaction with the title is her wish to equate retention and usage (*i.e.*, non-refunding) of revenue exceeding the COLO. CONST. art. X, §20(7) (“TABOR”) “spending limit” – under *existing tax rates* – with a *tax rate increase*. These are very different things – and to equate one with the other in a ballot title would be manifestly inaccurate and misleading.

¹ Respectfully, Respondents are at loss as to how the title could be more “comprehensive” in this case without including even more “information about something the Proposed Initiative does not do.”

To Petitioner’s specific argument, the charge to the Title Board is to produce a title “which shall correctly and fairly express the true intent and meaning” of the initiative. §1-40-106 (3)(b), C.R.S. (2021-22). The Board is directed to “consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a ‘yes/for’ or ‘no/against’ vote will be unclear.” *Id.* There is no prohibition on “including information about something the Proposed Initiative does not do” if that information will contribute to voter understanding of what the initiative does. *Cf., In re Title, Ballot Title and Submission Clause, and Summary Pertaining to the Sale of Table Wine in Grocery Stores Initiative*, 646 P.2d 916, 921 (Colo. 1982) (the fact that specific wording is not found in the text of an initiative “does not preclude the Board from adopting language which explains to the signers of a petition and the voter how the initiative fits in the context of existing law”).² The paramount duty is to the voter – “whether familiar or unfamiliar with the subject

² It may be noted that the General Assembly routinely includes “without raising taxes” language in directives to the Secretary of State regarding the specific content of referred measures to be submitted to the voters for approval. *See, e.g.,* Amendment B (“Repeal Gallagher Amendment”), 2020 State Ballot Information Book, p. 1 (https://leg.colorado.gov/sites/default/files/blue_book_english_for_web_2020_1.pdf); Senate Bill 19-263 (p. 6) (https://leg.colorado.gov/sites/default/files/2019a_263_signed.pdf); Senate Bill 18-001 (p. 21) (https://leg.colorado.gov/sites/default/files/2018a_001_signed.pdf).

matter of a particular proposal.” *In re Title, Ballot Title and Submission Clause for 2013-2014 #90, supra*, 2014 CO 63, ¶23, 328 P.3d at 162.

This initiative would dedicate an additional percentage of revenue produced under existing income tax rates to a specific purpose. It would not “raise taxes” or “raise the existing income tax rate.” It is important, and certainly relevant, for the voters to know this. Respondents do not quibble with also advising the voters that the initiative would allow this newly dedicated revenue to be retained and spent – rather than refunded to taxpayers – in years when a refund would otherwise be required to avoid exceeding a “spending limit” under COLO. CONST. art. X. §20(7). But Respondents would object to mischaracterizing this refund adjustment directed to existing revenue as a “tax increase.”

II. The Title Is Not Confusing or Misleading as to the Effect of the Initiative on Revenue or Refunds.

A. Standard of Review and Preservation of Issue.

Respondents adopt their statement of the standard of review in Section I(A), above.

Respondents further state that the issue was preserved by the Petitioner in Part II of her Motion for Rehearing (pp. 3-4).

B. The Title Set By the Title Board is Neither Misleading Nor Confusing as to the Effect of the Initiative on Revenue or Refunds.

Petitioner states in her Petition to this Court that, under the title as revised at rehearing per her request, “voters may not understand that the Proposed Initiative will increase state revenue from taxes in years where a TABOR refund would otherwise be required.”

As discussed in Part I, above, the initiative would not “increase state revenue from taxes” in any year. It would neither raise taxes or tax rates, nor create additional revenue in any form. The initiative would only allow existing revenue subject to the specific new dedication to be retained and spent for those purposes in years when all or a portion of that revenue would otherwise have to be refunded to taxpayers as a result of a COLO. CONST. art. X, §20(7) “spending limit” overage.

The title set by the Title Board at rehearing is very clear and accurate about two things. First, the initiative does not “rais[e] the existing state income tax rate.” Second, the initiative allows the newly dedicated existing revenue (under existing taxes and tax rates) to be used, rather than refunded, “in years in which a refund is due” – *i.e.*, years in which available revenue exceeds the COLO. CONST. art. X, §20(7) “spending limit.” The title fairly and adequately conveys this point.³

³ “In determining whether a title is clear, we do not consider whether the Title Board set the best possible title. . . . Instead, our role is to ensure that the title fairly

CONCLUSION

Respondents respectfully request to the Court to affirm the actions of the Title Board and to enter such further Orders as it may deem appropriate in these proceedings.

Respectfully submitted this 3rd day of May, 2022.

s/Edward T. Ramey

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reflects 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.” *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶24, 369 P.3d 565, 569 (Colo. 2016), citing *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, *supra*, 2014 CO 63, ¶25, 328 P.3d at 162.

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of May, 2022, a true and correct copy of the foregoing was filed via the Court's e-filing system and served by electronic mail upon the following:

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