

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 3, 2022 3:00 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021-2022) 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>Petitioners: Brenda Dickhoner</p> <p>v.</p>	
<p>Respondents/Proponents: Lea Steed and Donald “DJ” Anderson, Proponents,</p> <p>and</p> <p>Title Board: Theresa Conley, David Powell and Ed DeCecco.</p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No. 2022SA97</p>
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<p>THE TITLE BOARD’S OPENING BRIEF</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, 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 2,028 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/ Stefanie Mann

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Title Board set a clear and accurate title for Proposed Initiative 2021-2022 #63.

STATEMENT OF THE CASE

Proponents Lea Stead and Donald “DJ” Anderson seek to circulate Proposed Initiative 2021-2022 #63 (“#63”) to obtain the necessary signatures to place an initiative on the ballot to amend section 22-55-102, C.R.S., and add section 22-55-102.3, C.R.S. The proposed initiative dedicates additional revenue to the state education fund. *Attachments to Petition for Review* (“Record”) at 2-4.

The Title Board held an initial public hearing on March 16, 2022. *Hearing Before Title Board on Proposed Initiative 2021-2022 #63* (March 16, 2022), available at https://csos.granicus.com/player/clip/292?view_id=1&redirect=true (beginning at 1:48:30). The Board concluded the measure contained a single subject and therefore proceeded to set a title. *Id.* (statement at 2:01:54).

Petitioner Brenda Dickhoner filed a motion for rehearing, asserting objections based on violations of both the single subject requirement and the clear title requirement. Record at 11-14.

The Board conducted a rehearing on April 6, 2022. *Rehearing Before Title Board on Proposed Initiative 2021-2022 #63* (Apr. 6, 2022), available at

https://csos.granicus.com/player/clip/301?view_id=1&redirect=true

(beginning at 1:35:28). During the rehearing, Petitioner objected to the initial language set by the Board, specifically the phrase “without raising taxes.” *Id.* (statement at 19:50).¹ The Board reaffirmed its decision that #63 contained a single subject but granted the motion for rehearing in part and modified the title by replacing the phrase “without raising taxes” with “without raising the existing state income

¹ While this statement, and others cited throughout this brief, were made while the Board was discussing Proposed Initiative 2021-2022 #62 (#62), it is referencing language that is identical to the language at issue in #63, and the Board incorporated all discussions regarding #62 into the record for #63. *Id.* at 1:36:30.

tax rate.” Record at 6. The title as fixed by the Board at the rehearing

is:

A change to the Colorado Revised Statutes concerning additional funding for preschool through twelfth-grade public education, and, in connection therewith, without raising the existing state income tax rate, requiring revenue collected by the state from one-third of one percent of all federal taxable income of every individual, estate, trust, and corporation, as modified by law, to be deposited in the state education fund; allowing 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; requiring the additional revenue to be used for attracting, retaining, and compensating teachers and student support professionals; specifying appropriations of the additional revenue do not supplant existing appropriations for public education; and requiring an annual report describing the allocation of the additional revenue.

Id.

Dickhoner filed a timely petition for review with this Court on April 13, 2022, raising only clear title arguments. Petition at 2-4.

Dickhoner argues that the title “does not correctly and fairly express the true intent and meaning of the proposed initiative,” and may cause voter confusion, and asks this Court to strike “without raising the existing state income tax rate.” *Id.* at 4.

SUMMARY OF ARGUMENT

This Court should affirm the Board's actions in setting title for #63. The Board properly exercised its drafting discretion in setting a title that complies with the clear title requirement.

The title for #63 is accurate. It clearly states that one-third of one percent of all federal taxable income must be deposited in the state education fund. By including the phrase "without raising the existing state income tax rate," the Board clarified that the transfer of funds is from existing revenue sources. In clarifying that transfer of one-third of one-percent is from existing revenue, the Board took a middle-of-the-road approach that appropriately balances the competing interests of brevity and completeness.

Further, the title is not confusing to voters. By including the phrase "without raising existing state income tax rate," the Board was clarifying a central feature of the initiative: one-third of one percent of all federal taxable income is transferred to the state education fund. Read as a whole, the title is not confusing. This more adequately

advises voters that the initiative will not result in an increase in the tax rate.

Finally, Dickhoner ask this Court to strike “without raising the existing state income tax rate” from the ballot title, but 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). Striking language from the ballot title is beyond this Court’s scope of review.

ARGUMENT

I. The title accurately describes #63 and is not confusing or misleading.

A. Standard of review and preservation.

The Court grants “great deference” to the Board in the exercise of its drafting authority. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). This Court reads the title as a whole to determine whether it properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26

(Colo. 1996). The Court will reverse the Board's decision only if the titles are insufficient, unfair, or misleading. *In re 2009-2010 #45*, 234 P.3d at 648. It thus follows that the Court does not "consider whether the Title Board set the best possible title." *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). 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.*

This Court also employs "all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case will the Court reverse a decision of the Board. *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Dickhoner preserved her clear title arguments in her motion for rehearing. Record at 13-14.

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

Section 1-40-106(3)(b), C.R.S. establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). Among other requirements, the title must “be brief,” it must be in the form of a question which may be answered “yes/for” or “no/against,” and it must “unambiguously state the principle of the provision sought to be added, amended, or repealed.” § 1-40-106(3)(b).

In this case, Dickhoner’s clear title argument is two-fold: (1) the phrase “without raising the existing state income tax rate” does not correctly and fairly express the true intent of the proposed initiative because there is “no justification for including information about something the Proposed Initiative does not do, particularly when such language is not comprehensive”; and (2) the title as set by the Board may cause voter confusion. Petition at 3-4.

First, the title as set by the Board is accurate and fairly expresses the true intent of the proposed initiative. The title states that “without raising the existing state income tax rate. . . revenue collected by the state from one-third of one percent of all federal taxable income . . . [must] be deposited in the state education fund.” Record at 6. Petitioner cannot dispute that this accurately describes the measure. Instead, Petitioner argues that it is improper to mention something the measure does not do: raise taxes. But by including the phrase “without raising the existing state income tax rate,” the Board clarified that the transfer of funds is from existing revenue. *Rehearing Before Title Board on Proposed Initiative 2021-2022 #63* (Apr. 6, 2022), available at https://csos.granicus.com/player/clip/301?view_id=1&redirect=true (statements at 46:50 and 1:25:35). In taking all legitimate presumptions in favor of the propriety of the Board’s actions, it was proper for the Board to make this clarification as it accurately and fairly expresses the true intent of the proposed initiative. *See In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91*, 235 P.3d at 1076.

To the extent Dickhoner is arguing the title is not comprehensive because “[v]oters should be informed that the Initiative would reduce their TABOR refund in years where a refund is required,” record at 13, the Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for Proposed Initiatives 2001-02 #21& #22*, 44 P.3d 213, 222 (Colo. 2002). Rather, the Board must summarize only the “central features” of the proposal. *In re Proposed Initiated Petitions*, 907 P.2d 586, 591 (Colo. 1995). In doing so, the Board must balance the need for brevity in the title against the need for completeness. *See In re Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d 853, 857 (Colo. 1994) (stating Title Board “must navigate the straits between brevity and unambiguously stating the central features”). By clarifying that transfer of one-third of one-percent is from existing revenue sources, the Board took a middle-of-the-road approach that appropriately balances the competing interests of brevity and completeness. *See In re Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d at 857.

Second, the title will not cause voter confusion. 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). By including the phrase “without raising existing state income tax rate,” the Board was clarifying a central feature of the initiative: one-third of one percent of all federal taxable income is transferred to the state education fund. If anything, the language chosen by the Board reduces voter confusion: without the phrase “without raising existing state income tax rate,” voters may think the initiative would result in an increase to the tax rate.

Dickhoner may wish that the Board adopted different language, 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 accurately describes the initiative, the title will not cause voter confusion.

II. The Court is without authority to strike language from the ballot title as requested by Petitioner.

Dickhoner ask this Court to strike “without raising the existing state income tax rate” from the ballot title. Petition at 4. Such 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 Petitioner 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). Thus, striking the requested language is beyond this Court’s scope of review under § 1-40-107(2).

CONCLUSION

This Court should affirm the Title Board’s action in setting title for #63.

Respectfully submitted this 3rd of May, 2022.

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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 CCES, at Denver, Colorado, this 3rd day of May, 2022, addressed as follows:

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