

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023- 2024, #96</p> <p>Petitioners: SCOTT WASSERMAN and ED RAMEY</p> <p>v.</p> <p>Ballot Title Board: THERESA CONLEY, CHRISTY CHASE, and KURT MORRISON</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioners:</p> <p>Edward T. Ramey, #6748 Tierney Lawrence LLC 225 East 16th Avenue, Suite 350 Denver, CO 80203 Telephone: 303-949-7676 Email: eramey@TLS.legal</p>	<p>Supreme Court Case No. 2023SA336</p>
<p>PETITIONERS' 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).

The brief contains 2,235 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/ Edward T. Ramey
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Petitioners Scott Wasserman and Ed Ramey, Designated Representatives of the Proponents for Proposed Initiative 2023-2024 #96, respectfully submit their Opening Brief.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

If a citizen-initiated ballot measure authorizes a new conditional statewide tax for the purpose of offsetting a future, purely hypothetical and presently unquantifiable, restriction upon the amount or growth of statewide property tax revenue – tailored to ensure an overall net-zero impact upon statewide property tax revenue – does Colo. Const. art. X, §20(3)(c) require the ballot title to begin with the misleading phrase “State taxes shall be increased”?

STATEMENT OF THE CASE

Petitioners are the designated representatives of the proponents of Proposed Initiative 2023-2024 #96 (the “Proposed Initiative”). The Proposed Initiative would conditionally impose a supplemental statewide tax upon “luxury residential real property”¹ in any property tax year in which the amount of statewide property tax revenue has been otherwise reduced by imposition of a separate limitation upon the amount or growth of such revenue. The new supplemental tax would be

¹ “Luxury residential real property” is defined as residential real property, excluding multi-family residential and apartment property, with actual value of at least two million dollars, adjusted for inflation.

constitutionally exempt from the triggering limitation upon statewide property tax revenue, and it would be tailored specifically to generate revenue in an amount sufficient to replace the revenue lost through imposition of the separate triggering limitation. The revenue from the conditional supplemental tax would then be distributed to local communities pursuant to criteria to be developed by the Department of Local Affairs.²

Petitioners 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. (2023), on November 17, 2023. The Title Board held a hearing on December 6, 2023, at which it proceeded to set a title, ballot title and submission clause for the Proposed Initiative. Proponents filed a Motion for Rehearing regarding several issues on December 13, 2023. The Title Board conducted a rehearing on December 20, 2023, at which it granted in part and denied in part Proponents' Motion and made changes to the title accordingly. Petitioners filed their Petition for Review by this Court on the single issue noted above on December 27, 2023, pursuant to §1-40-107(2), C.R.S. (2023).

² The Department would be required to consider disparate impacts upon local communities of the triggering general statewide limitation, as well as disparities in local property values caused by the presence of luxury residential real properties.

SUMMARY OF THE ARGUMENT

Colo. Const. art. X, §20(3)(c) – part of the citizen-initiated “Taxpayer’s Bill of Rights” – requires ballot titles for “tax increases” to begin with the phrase “Shall [district] taxes be increased ____ annually?” In the context of a proposed new tax that would be wholly conditioned upon and triggered by a separate, hypothetical, and presently unquantifiable future restriction upon statewide property tax revenue – and which is tailored specifically to create a net-zero impact upon the level of that revenue – such a ballot title would be manifestly misleading to the voters and would fail to correctly and fairly express the true intent and meaning of the measure as required by §1-40-106(3)(b), C.R.S. (2023). When the voters adopted Colo. Const. art. X, §20 in 1992, they did not intend the “election provision” requirements of subsection (3) to mandate or permit such a result.

ARGUMENT

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,’ and we will reverse the Board's decision only when a title is insufficient, unfair, or misleading.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶6, 500 P.3d 363, 366 (Colo. 2020), quoting *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*,

2014 CO 63, ¶8, 328 P.3d 155, 159 (Colo. 2014). “In reviewing Title Board title settings, ‘we employ all legitimate presumptions in favor of the propriety of the Board's actions.’” *Id.* at ¶7, quoting *In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645 (Colo. 2010).

“When setting a title, the Title Board ‘shall 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.* at ¶25, quoting §1-40-106(3)(b), C.R.S. (2023).

This issue was preserved. Please see Petitioners’ Motion for Rehearing, paras. 1 and 2, on the sixth page of the Department of State Certificate filed with the Petition for Review herein.

B. The “tax increase” ballot title language specified by Colo. Const. art. X, §20(3)(c) cannot reasonably be applied to the Proposed Initiative.

Proposed Initiative 2023-2024 #96 cannot fairly be characterized as a “tax increase.” Colo. Const. art. X, §20(3)(c). It may result in a future imposition of a new tax – but only in the context of a concurrent and counterbalancing *tax decrease* resulting from a completely separate imposition of a statewide limitation

upon the amount or growth of property tax revenue.³ The voters have a right to know – and to be clearly advised in the ballot title – precisely what “the effect of a ‘yes/for’ or ‘no/against’ vote” on this measure would be. Section 1-40-106(3)(b), C.R.S. (2023). Accordingly, the title is required to “correctly and fairly express the true intent and meaning” of the measure. *Id.* The “true intent and meaning” of this measure is *not* to enact a new unilateral “tax increase;” it would be precisely limited by its terms to counterbalancing – and neutralizing – a contemporaneous prospective and separately-engineered future tax decrease.⁴

The title-setting conundrum posed by this initiative was not lost on the Title Board. Acknowledging that it would be impossible even to make “some estimate as

³ The Fiscal Summary for the Proposed Initiative prepared by the Legislative Council Staff of the Colorado General Assembly accurately notes that “State revenue will not be impacted by the measure unless a statewide property tax revenue limit is imposed. If a limit is imposed, state revenue will increase by the amount that the limit reduces statewide property tax revenue”

⁴ “In sum, the clear title requirement seeks to accomplish two overarching goals: prevent voter confusion and ensure that the title adequately expresses the initiative's intended purpose. If a title accomplishes these goals, the end result is that voters, ‘whether or not they are familiar with the subject matter of a particular proposal,’ should be able to “determine intelligently whether to support or oppose the proposal.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶11, 413 P.3d 151, 153 (Colo. 2016), quoting *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶22, 369 P.3d 565, 568 (Colo. 2016).

to the upper limits” of Proponents’ proposed counterbalancing tax, the Board did not attempt to do so in the title. *Cf., Bickel v. City of Boulder*, 885 P.2d 215, 236-37 (Colo. 1994).⁵ Indeed, any effort to have done so would necessarily have been a purely fictional and misleading exercise.

Nevertheless wary of Colo. Const. art. X, §20(3)(c)’s content specifications for ballot titles, the Title Board at rehearing adjusted the title to commence “State taxes shall be increased” – albeit “conditionally” – the “condition” being identified six lines later as “only . . . when a statewide limit on property tax revenue causes a reduction in statewide property tax revenue;” and leaving it unclear that the new “conditional” tax “increase” may only be “in an amount sufficient to replace” the as yet unquantifiable *reduction* in revenue resulting from the unrelated (and purely hypothetical at this point) triggering imposition of a “statewide limit.” It is not a stretch to say that any reasonable voter wading through this quagmire will come away with one overriding and unqualified message – the first and dominant

⁵ In *Bickel, supra*, in the context of City Question C – discussed in part VII of this Court’s opinion – even though it was impossible to estimate the potential shortfall in future sales and use tax revenues that might require a backfill by way of an increase in the City’s ad valorem property tax at issue to repay the City’s open space acquisition bonds, the Court noted that it was at least possible in that case to make “some estimate as to the upper limits of this possible tax increase” (failing which the title was held to be “constitutionally deficient”). *Bickel, supra*, 885 P.2d at 236-37. Even such an “upper limit” estimate would not be possible in the present case.

pronouncement that “**state taxes shall be increased**” – with no qualification or triggering condition or evident limitation.

The problem is not so much one of attempted accuracy on the part of the Title Board; Petitioners would struggle to offer an improvement under the constraints we are extracting – unnecessarily – from Colo. Const. art. X, §20(3)(c). And those interpretive constraints are painfully antithetical in this case to the “clear title” requirements of §1-40-106(3)(b), C.R.S. (2023).

While constitutional mandates must be given effect – notwithstanding arguably incompatible statutory guidelines – they must be interpreted and applied in a manner consistent with the intent of the voters who adopted them. “When interpreting a constitutional amendment adopted by citizen’s initiative, we give effect to the electorate’s intent in enacting the amendment.” *In re Dwyer*, 2015 CO 58, ¶19, 357 P.3d 185, 191 (Colo. 2015). “If the language of an amendment is clear and unambiguous, then it must be enforced as written.” *Id.* If the language “is susceptible to multiple interpretations” we may “look beyond it to ascertain the voters’ intent.” *Id.* “If the intent of the voters cannot be discerned from the language . . . [c]ourts may determine [it] 'by considering other relevant materials such as the ballot title and submission clause and the biennial ‘Bluebook’” *Id.* Critically, “[a]ny interpretation which results in an unreasonable or absurd result

should be avoided.” *Bolt v. Arapahoe County School Dist. No. 6*, 898 P.2d 525, 532 (Colo. 1995), citing *Bickel, supra*, 885 P.2d at 229.⁶

Colo. Const. art. X, §20(3)(c) states that “[b]allot titles for tax . . . increases shall begin, ‘Shall (district) taxes be increased (first, or if phased in, final, full fiscal year dollar increase) annually...?’” As such a statement would misrepresent the actual intent and meaning of the Proposed Initiative in this case, as an estimate of even a contingent dollar impact attributable to the Proposed Initiative would be impossible, and as such introductory language would affirmatively misrepresent the revenue-neutral effect of the measure – the Title Board defaulted to “Shall state taxes be increased conditionally” (without a dollar estimate). From a voter’s

⁶Reference to the 1992 ballot information booklet – or “Blue Book” – is instructive in this case. The ballot title for “Amendment 1” – which became Colo. Const. art. X, §20 – stated its purpose was “to require voter approval for certain state and local government tax revenue increases” (emphasis added). The proponents represented that “[t]he language in the proposal is tightly crafted to prevent its intent from being misinterpreted” (Arguments For #3). Stating that “voters should be the ultimate authority on matters of taxation and should be trusted to exercise sound judgment,” the arguments represented that “[e]lection notice and information requirements . . . will result in a more informed electorate.” (Arguments For #5). The intent of the voters in adopting the voter-approval mandates of Colo. Const. art. X, §20 incorporated and depended upon an informed electorate – and thus the provision of election materials (assuredly including ballot titles) that “correctly and fairly express the true intent and meaning” of the measures submitted to them. This is consistent with – not antithetical to – the “clear title” requirements of §1-40-106(3)(b), C.R.S. (2023). It was not the voters’ intention that the canned introductory language strictures of subsection (3)(c) be allowed or utilized to muddy or obstruct such clarity.

perspective, this is at least confusing – if not all but incomprehensible. It affirmatively suggests an unconstrained (sky’s-the-limit?) tax increase at odds with the net-zero qualification in overall property tax revenue to follow. Not only is this language confusing, it affirmatively misinforms and misleads the voters. That was not the intention manifested by Colorado’s voters when they adopted Colo. Const. art. X, §20 in 1992.

Petitioners respectfully submit that Colo. Const. art. X, §20(3)(c) can and should be read compatibly with the “clear title” requirements of §1-40-106(3)(b), C.R.S. (2023). Clarifying here that the Title Board may – and indeed must – do so will enable the Board to very quickly craft a new title upon remand that clearly, succinctly, and accurately “express[es] the true intent and meaning” of this Proposed Initiative and conveys and clarifies “the effect of a ‘yes/for’ or ‘no/against’ vote.” It will also enable this Court to review a title, if requested, that has been crafted by the Title Board to fairly and accurately convey “the true intent and meaning” of the measure. If commencing the title with the stock language “State taxes shall be increased” is facially misleading and misrepresentative of the actual content and effect of the measure, the Title Board should not consider itself bound to use that language.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request the Court to return this Proposed Initiative to the Title Board with direction to prepare a title, ballot title and submission clause that complies with the “clear title” requirements of §1-40-106(3)(b), C.R.S. (2023).

Respectfully submitted this 16th day of January, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2024, I electronically filed this Opening Brief with this Court via the Colorado Courts E-Filing system and electronically served a copy upon Counsel for the Ballot Title Board at:

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