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

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

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024, #96

Petitioners: Scott Wasserman and Ed Ramey

v.

Title Board: Theresa Conley, Christy Chase, and Kurt Morrison.

▲ **COURT USE ONLY** ▲

Case No. 2023SA336

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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 1,904 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.

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ISSUE ON REVIEW

Whether the title for issue #96 satisfied the clear title standard.

STATEMENT OF THE CASE

Proposed initiative 2023-2024 #96 seeks to create a supplemental luxury residential property tax triggered only in the event of a statewide limitation on the amount or growth of property tax revenue. *See* Record, p. 2, filed Dec. 27, 2023. The luxury residential property tax, once triggered, would be held in a state fund for "replacing and backfilling revenue lost to local communities as a result of imposition of any statewide limitations upon the amount or growth in amount of statewide or local property tax revenue." *Id.* at p. 10. In other words, the measure would only create a new tax if either the voters or the general assembly enacted a law imposing a statewide or local cap on property tax revenue and the tax would "ensure a net-zero impact on taxes – no net increase or decrease" in revenue. Record, p. 6.

The Title Board set a title on the measure at its December 6, 2023 hearing. *Id.* at 2. Petitioners Scott Wasserman and Ed Ramey then filed

a timely motion for rehearing under section 1-40-107. *Id.* at p. 6. The Petitioners contended that the Board's use of the language required by article X, section 20(c)(3) of the Colorado Constitution ("TABOR")—specifically the phrase "State taxes shall be increased"—was not applicable to a ballot measure creating a conditional tax that, if enacted, would have a net-zero impact on revenue. *Id.* The Petitioners next contended that incorporation of the TABOR language also rendered the title "misleading" to voters and "obscure[ed]—in fact substantially misrepresent[ed]—the meaning and effect of a 'yes' or 'no' vote" in violation of section 1-40-106(3)(b). *Id.*

The Board held the rehearing on December 20, 2023. *Id.* at 4. After an hour of argument, the Board granted the motion for rehearing, in part, and made changes to the original title. *Id.* at 5. The title is set as follows:

> State taxes shall be increased conditionally in order to increase or improve levels of public service provided through property taxes by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes that create a new statewide conditional tax on certain residential real property, and, in connection therewith,

> removing the constitutional prohibition on any new statewide real property tax; creating a new conditional statewide tax upon single-family residential real property worth at least two million dollars, adjusted for inflation, that will only be imposed when a statewide limit on property tax revenue causes a reduction in statewide property tax revenue; requiring that the new tax revenue be distributed to local communities to replace revenue otherwise lost by imposition of the statewide limit; and exempting the new tax revenue from the Taxpayer's Bill of Rights revenue cap?

Id. at 2 and 4. Petitioners Wasserman and Ramey filed a timely appeal to this Court.

SUMMARY OF THE ARGUMENT

The Petitioners contend that the Board's revised title should not include any phrasing related to an increase in taxes because the Board was not constrained by the TABOR requirements where the measure only creates a conditional tax that will be redistributed by the state to offset tax losses.

Although the Board was not constrained by TABOR in setting the title, it was within the Board's discretion to still use some of the TABOR language. The Board reasoned that the phrase would help elucidate

some of the nuances of the ballot initiative for the electorate. Because such a use is within the discretion of the Board and meets the clear title requirement, the Court should affirm the Board's title in this case.

ARGUMENT

I. The title set by the Board accurately informs the voters of the conditional tax rate increase created by initiative #96.

A. Standard of review and preservation.

"The Title Board's duty in setting a title is to summarize the central features of a proposed initiative." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board "is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause." *Id.* The Court will reverse the title set by the Board "only if a title is insufficient, unfair, or misleading." *Id.* ¶ 8. 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*, 454 P.3d 1056, 1060 (Colo. 2019).

The Board agrees that the Petitioners preserved both of their challenges to the title set by the Board in the motion for rehearing. Record, pp. 6-7.

B. By using some of the TABOR language, the Board struck the appropriate balance by alerting voters to the authorization of a new conditional tax.

The Petitioners contend that the TABOR (3)(c) requirement does not apply to this initiative at all, given that the measure creates a conditional tax offsetting the concurrent imposition of a separate tax decrease; the amount of the tax is indeterminate; and the result of the tax would be net-zero. Petition, pp. 3-4. These contentions are based, in part, on this Court's holding in *Bickel v. City of Boulder*, 885 P.2d 215 (Colo. 1994). The Petitioners misapprehend the scope of the Court's holding in that case.

In *Bickel*, two city questions were challenged for violating TABOR (3)(c) in that both failed to begin with the words "shall City of Boulder taxes be increased…" 885 P.2d at 234-35. As characterized by the Court, the first city question sought voter authorization for a contingent tax

increase implemented only "if a highly unlikely event were to occur." *Id.* at 234. The Court concluded that "[t]he primary purpose and effect of [this question] is to grant a franchise to Public Service to furnish gas and electricity to the City and its residents" rather than creating a tax or bonded debt increase. *Id.* The grant of such a franchise was not subject to the requirements of TABOR. *Id.*

Here, the luxury real estate tax proposed by initiative #96 is akin to the first question addressed in *Bickel.* The initiative intends that the luxury real estate tax proposed would *only* come into effect if there is an action limiting the amount or growth in amount of local property tax revenue. Record, p. 10. The holding in *Bickel*, however, left open the question of whether the Board could still use the TABOR language in circumstances where it was not strictly required to. Given the complexity of the ballot initiative, the Board's decision to use some of the TABOR language falls within its considerable discretion in setting the title. *See In re 2019-2020 #3*, 454 P.3d at 1059. The Board was

therefore still able to utilize some of the TABOR language, even if it was not required to by the statute.

During the rehearing, the Board expressed concern about how best to inform the electorate about creating a new conditional tax. Hearing Before Title Board on Proposed Initiative 2023-24 #96 (Dec. 20, 2023), http://tinyurl.com/ywv3vmz5 ("Rehearing") at 29:48. The *Bickel* Court noted that one of the primary purposes of the TABOR disclosure provisions is to "provide the electorate with the information necessary to make an intelligent decision on ballot issues involving debt and/or tax increases." *Bickel*, 885 P.2d at 236. In conformity with that duty, the Board determined that it was best to use some of the TABOR language to make clear to voters that the measure authorized a new tax.

The Petitioners argued that *Bickel* requires TABOR language only in cases where there is some "outer limit" of revenue that can be calculated. Rehearing, 30:59. Further, because the initiative purportedly creates a "net-zero" effect for tax revenue, the Petitioners

contended that *Bickel* supported the position that there needn't be any language related to a tax increase whatsoever, since any such language would confuse the voter. *Id.* Taking these concerns into consideration, the Board still used some of the TABOR language to strike the appropriate balance in informing the electorate. This use is within the Board's discretion to "summarize the central features of a proposed initiative." *In re Title 2019-2020 #3*, 454 P.3d at 1060.

The Board's use of this language is supported by the complex mechanism of the ballot initiative. First, the initiative authorizes a *new* tax increasing the tax rate for the residents affected, since it is not a tax that currently exists. In other words, the initiative "does not decrease the tax burden on the [State's] residents." *Bickel*, 885 P.2d at 236. Because the initiative creates a new tax—albeit conditionally—the Board's determination to include some of the TABOR language struck an appropriate compromise and ensures that the electorate will be informed about what the initiative does.

Second, it is questionable whether the revenue raised by the initiative would be counted as "net-zero" for the purposes of TABOR. TABOR applies to any new tax "directly causing a net tax revenue gain to any district," internally defining district as "the state or any local government." Colo. Const. Art. X, § 20(4)(a) and (2)(b). Here, the creation of the luxury real estate tax would directly cause a net tax revenue gain to the state in the event of a property tax cap. Even though the initiative requires those newly raised tax revenues to be redistributed to other local tax districts, the initial tax increase would create a new source of revenue resulting in a net tax gain to the state. Characterizing the initiative as "revenue-neutral," given the context of prior TABOR initiatives, could therefore also result in a misleading title for the electorate.

The Board therefore struck the appropriate balance in this case by informing voters at the outset that the initiative authorizes a new tax.

C. The TABOR language does not confuse the effect of a yes or no vote and expresses the true intent and meaning of the initiative.

The Petitioners contend that, by using any TABOR language, the title does not express the true intent and meaning of the measure. Petition, p. 6. The title set by the Board meets the clear title requirement.

Pursuant to section 1-40-106(3)(b), C.R.S., the Board "shall, whenever practicable, avoid titles for which the general understanding of a 'yes/for' or 'no/against' vote will be unclear." Generally, the Board "is given discretion in resolving interrelated problems of length, complexity, and clarity in designating a title." *In re Title, Ballot Title and Submission Clause for 2019-2020 #315*, 500 P.3d 363, 369 (Colo. 2020). In deciding whether a title complies with the constitution's clear title requirement, the Court need only "ensure 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 employed by the Title Board." *Id.*

Here, given the complexity of the conditional tax imposed by #96, the title set by the board struck an appropriate balance. Although the title characterizes the newly proposed tax as an "increase" in taxes, the Board also included the word "conditional" in the first line and later in the text. Including language about the conditional tax alerts voters that the new tax would only be imposed under certain conditions. Further, adding the word conditional was amenable to the Petitioners during the rehearing. *See* Rehearing, 46:30. The title therefore fairly reflects the proposed initiative.

CONCLUSION

The Court should affirm the title set by the Title Board.

Respectfully submitted on this 16th day of January, 2024.

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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 16th day of January, 2024, addressed as follows:

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