SUPREME COURT OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) (2011) Appeal from the Ballot Title Board In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2011-2012 #67, #68 and #69 **Petitioner:** PHILIP HAYES, **v.** **Respondents:** DAVID OTTKE and JOHN SLOTA, **and** **Title Board:** SUZANNE STAIERT; DANIEL DOMENICO; and SHARON EUBANKS.	FILED IN THE SUPREME COURT JUN - 8 2012 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Attorney for Respondents Ottke and Slota (Proponents): Jessica K. Peck, #41299 Jessica K. Peck, Attorney at Law, LLC 100 Fillmore Street Fifth Floor Denver, Colorado 80206 Telephone: (720) 628-5756 Jessica@JPDenver.com	**Supreme Court Case Number: 2012SA117**
RESPONSE BRIEF OF RESPONDENTS/PROPONENTS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable 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 4,252 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

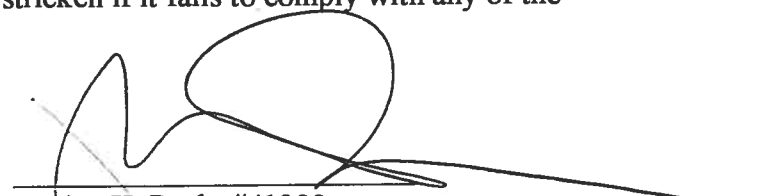
For the party raising issue:

__X__ 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, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

__X__ 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.



Jessica K. Peck, #41299
Attorney for Respondents/Proponent

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STATEMENT CONCERNING ISSUES PRESENTED FOR REVIEW

In response to Petitioner's Opening Brief, Proponents/Respondents (hereafter "Proponents") refer the Court to the discussion of the pertinent issues as presented in their Opening Brief. Petitioner provides three issues for review in his opening brief. Proponents generally agree as to the nature of the three issues in dispute before this Court, but contend that each issue should each be restated due to Proponent's reliance on facts in dispute and misreading of controlling law.

1. As restated by Proponents: After the Title Board set the titles on proposed initiatives #67, #68, and #69, the Title Board perfunctorily denied all aspects of opponent's rehearing motion, and added two words to the title, by inserting "at least" before "three-fourths." Did the failure of one of the two initiative proponent to attend the rehearing deprive the Title Board of jurisdiction to make a minor clarification to the title that it had previously set?

2. As restated by Proponents: Do the Initiatives contain multiple subjects sufficiently unrelated to each other such that the Board erred in setting title?

3. As restated by Proponents: Whether Title Board set titles that adequately inform voters on key topics?

STATEMENT OF THE CASE

A. **Nature of the Case.** Proponents agree with Petitioner's statement regarding nature of the case.

B. **Nature of the Measures, Course of Proceedings, and Disposition Before Title Board:** Proponents agree with Petitioner's statement on these matters.

SUMMARY OF ARGUMENT

The absence of one of the Proponents from the April 19, 2012 hearing on rehearing of Initiatives #67, 68 and 69 (hereafter "Initiatives") does not deprive Board of jurisdiction to set titles, as authorized under C.R.S. 1-40-106(4). The absence of Mr. Slota was due to a previously scheduled out-of-state commitment he was unable to move due to the short notice of Petitioner's motion for rehearing. Mr. Ottke was able to adequately represent Proponents' interest in his absence. Petitioner misinterprets state law and Secretary of State guidance on attendance requirements, as neither expressly or implicitly require both proponents' attendance at any procedural hearing after title has been set. Here, title had been set prior to the hearing in question in this case.

Further, and as expressed by the Board at this hearing, accepting Petitioner's position that state law required that the hearing's postponement until both Proponents could attend would be improper as the statute denies adequate remedies for Proponents in such situations. The Court shall, therefore, affirm the Board's denial of rehearing.

In addition, while Petitioner contends that the Initiatives each comprise multiple subjects due to title language permitting retroactive amendment of initiated statutes previously adopted by voters, state law does not deny retroactive application or otherwise exclusively limit Initiatives to prospective application.

Petitioner maintains that the Board erred in setting title by not more adequately highlighting each Initiative's language providing for retroactive repeal of existing initiated statutes. But, in fact, the title language of each Initiative provides three distinct references to the "repeal" of previously passed initiated statutes, in which detailed requirements for repeal

are articulated. "Repeal" can only be reasonably construed as to apply to initiated statutes that were approved in the past. Petitioner maintains that because voters would be asked to approve the proposed standards for all initiated statutes "adopted over the last century", this may provide "positive and negative" implications for individuals voters depending on each initiated statute's subject matter. This is the case with many constitutional provisions that do not articulate a specific ideological or policy agenda. If a voter supports only prospective application of the Initiatives, or alternatively only retroactive application, however, he or she can vote no on the Initiatives. While Petitioner may not agree with such broad application, this argument is insufficient to conclude that titles, as set, are improper.

ARGUMENT

Petitioner's position violates three pillars of this court's title-setting decisions. It construes the two-proponent-attendance requirement technically, to hamper, rather than facilitate, preserve, and protect, the right of initiative. *Armstrong v. Davidson,* 10 P.3d 1278, 1281 and 1282 (Colo. 2000) ("The initiative law favors placing matters before the voters . . ."; "principal object" of appellate review is to "preserve and protect the right to initiative"; statutory provisions governing initiative process construed "in a manner that facilitates the right of initiative instead of hampering it with technical statutory provisions or constructions.") It demands strict, rather than substantial, compliance with statutory procedures. *Fabec v. Beck,* 922 P.2d 330, 341 (Colo. 1996) (requiring only "substantial compliance" with statutory provisions governing initiative process and allowing technical provisions and constructions "no further than necessary to fairly guard against fraud and mistake."). And it fails to properly defer to the Title Board by resolving all legitimate presumptions in favor of the Title Board's non-misleading language. *Armstrong,* 10 P.3d at 1282 (Supreme Court "defer[s] to the Title Board'

language if not clearly misleading" and "resolves all legitimate presumptions in favors of the Title Board's choice.")

A. The attendance of one of two initiative proponents at the Title Board's rehearing substantially complied with the attendance requirement's purpose.

1. Standard of Review.

Proponents agree that Petitioner has preserved this issue, but do not agree with Petitioner's statement of standard of review. The issues presented in this case should not be viewed purely as a question of law to be addressed de novo by court, as this Court has established that it should provide great deference to the Title Board's decisions in setting title. *In re Ballot Title (Petitions)*, 907 P.2d 586, 590 (Colo. 1995). Further, as this Court has previously established, if reasonable dispute exists as to the proper plain reading of a statute, the Court shall review Board's actions under a "substantial compliance" analysis of whether the Board or Proponents adequately adhered to statutes regulating initiative and petition rights. *Loonan v. Woodley*, 882 P.2d 1380, 1385 (Colo. 1994) (citing to *Brownlow v. Wunsch*, 83 P.2d 775, 781 (Colo. 1938)).

2. Argument.

Petitioner argues that Board lacked jurisdiction to deny rehearing due to one Proponent's absence, basing this argument in part on *In re Title, Ballot Title and Submission Clause, and Summary of Initiative 1997-98 #109*, 962 P.2d 252 (Colo. 1998), where the Court concluded that Board "properly refused to set ballot title where designated representatives failed to submit correct drafts of original, amended and final initiative to Title Board." (Pet. Op. Br., 5). The present case facts, however, are wholly distinguishable for at least two reasons. First, heard more than a decade before the adoption of C.R.S. 1-40-107(4), this 1998 case concerns

incomplete submission of all initiative drafts, not attendance at hearings where title has already been set. These are very different requirements as one concerns compliance with substantive requirements, including production of initiative language, and the second is of a technical nature, concerning the absence by one Proponent after title has already been set and where second Proponent indicates on the record that he was authorized to represent the absent Proponent. (Tr. 13:1-13:18). Second, and similar to C.R.S. 1-40-107(4), the case does not address or mandate attendance after Title has been set. Rather, C.R.S. 1-40-107(4)(d), requires only that "The title board shall not set a title" (emphasis added) for a measure where both Proponents are not in attendance. It is silent on hearings where title has already been set. The most natural way to harmonize any seeming conflict between the "no set" requirement of section 4(d) with section 4(a)'s requirement that each designated representative must appear at any hearing at which a ballot issue "is considered," is to construe "considered" to include only hearings before the Board sets a title. This fulfills the statutory purpose of requiring an initiative's designated representatives to be present to inform the Board about an initiative before a title is set. Similarly, the Secretary of State's instructions concerning attendance, which require attendance at any Board hearing where the measure "is to be heard" provides no instruction for attendance at any hearing after title has already been set. Although *Armstrong* held that a proponent cannot circulate a petition until a petition for rehearing is denied or the time for filing such a rehearing petition has expired (*Armstrong*, *supra* at 1283; Pet. Op. Br, 9-10), *Armstrong* did not alter the statutory language that only prohibits the Board from setting (not technically amending or clarifying) a title unless both designated representatives are present, and does not vitiate proponents' post-setting substantial compliance with this requirement.

Petitioner advocates for an overly strict statutory interpretation that fails in at least two respects. First, if accepted, Proponents unable to comply with attendance at rehearings for any reason whatsoever would be without adequate remedies, including the ability for one Proponent authorizing the other Proponent from serving as the Initiative's designated representative at the hearing in question. Prior to the rehearing, the Secretary of State acknowledged that Proponents would substantially comply with the attendance requirement by having only one proponent attended. In an email sent from Steven Ward of the Secretary of State's elections division on April 12, 2012, and in response to an inquiry by Proponents Ottke and Slota concerning attendance requirements, Ward wrote, "This email is to inform you that you are not required to appear at the rehearing. I apologize for giving you incorrect information in my previous email. Although you are not required to appear at the rehearing for your initiative, you may still wish to attend. The agenda for the upcoming Title Board hearing will be finalized tomorrow, and we will send it to you by email when it is available."[1] (See Appendix). It was this guidance on which Proponents relied to determine whether both Proponents needed to attend the rehearing.

Second, as articulated by the Board's Dan Domenico at the rehearing, interpreting the statutory language "technically" as to mandate Proponent attendance at rehearings would give Proponents the "strange incentive if they like the title we set originally" to avoid attendance at rehearings, thus preventing any further consideration of title language. (Tr. 13:20-16.19). In sum, the overly technical adoption of the Petitioner's interpretation of attendance would not aid

[1] Proponents candidly acknowledge that the then pro se proponents did not present this email to the Title Board at the rehearing or otherwise. As such, it might be considered to be outside of the formal record. However, as a communication from the Secretary of State on which proponents relied, proponents believe that it is proper for the court to consider this email as part of the accelerated Title Board appeal process. Counsel was unable to append this email to proponent's Opening Brief because she first learned of it the day proponents' Opening Brief was due. Counsel desires to be candid with the court, given the somewhat informal process in which Petitioners and proponents collectively present the record below to this Court.

in assisting Board's consideration of substantive matters at issue and would only prevent Initiatives in compliance with all substantive requirements from appearing on the ballot.

Moreover, the purpose of the two-proponent attendance requirement was fulfilled here. Both proponents demonstrated sufficient commitment to the initiative to appear when the Title Board set the initiatives' titles. The rehearing transcript shows that the Title Board members were adequately informed of the initiative's purpose. The statements of the attending proponent, Mr. Ottke, consumes only a page and a quarter of a 15-page hearing transcript (Tr. 2:23-4:2; 11:20-12:2). In response, no Title Board members asked questions, substantive or otherwise. Opponents' counsel acknowledged that the Board was adequately informed by standing his motion with respect to the title language (Tr. 12:6-8), and the Board members' statements of their respective positions show that they ably understood the issues.

B. Proposed Initiatives comply with the single subject requirement of Colo. Const. Art. V, Sec. 1 and §1-40-106.5 (C.R.S).

1. Standard of Review.

Proponents agree that Petitioner has preserved this issue and with Petitioner's statement of standard of review.

2. Argument.

In his opening brief, Petitioner takes issue with Initiatives' public policy goal of protecting (and arguably enhancing) citizen access to Colorado's ballot initiative process. Petitioner claims that Initiatives, as written, contain "hidden topics" as to retroactive authority Initiatives seek to establish in the context of initiated statutes. (Pet. Op. Br., 11).

Petitioner does not argue against the constitutional authority of voters to approve and enact new procedures for initiative statute repeal or amendment. Instead, he argues that changes to legislative power (as contrasted with voters' power to initiate statutory changes through the ballot) as altered through Initiative Titles, are not explained in adequate detail. But, in fact, such specificity is not required for Titles. That a proposed constitutional amendment may affect the powers exercised by government under preexisting constitutional provisions does not by itself demonstrate that the proposal embraces more than one subject. *In re #258(A)*, 4 P.3d at 1097-98.

While some dire scenarios may draw emotional appeal, including those theoretical examples utilized by Petitioner, such examples fail to aid the Court in fulfilling its obligations in the present case. As articulated in Petitioner's own statement of standard for review, the Court shall not base its analysis here on alleged future possible public policy implications of an initiative's approved language, but rather must determine whether subjects presented are sufficiently related to each other and the central purpose of an initiative as to not mislead or confuse voters. In conducting this review, the Court must grant great deference to the Board's determination, only reversing the Board if title as set is clearly misleading. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #256*, 12 P.3d 246, 255 (Colo. 2000).

Here, where Titles include specific guidance for repealing, amending and approving initiated statutes, a plain reading provides voters more than adequate guidance as to Initiative applicability to existing initiated statutes, as well as those passed, amended or repealed in the future. Petitioner's response brief implicitly acknowledges this. Just as "any" is all inclusive (Pet. Op. Br., 8), the natural meaning of term "statute" includes all

statutes, not just statutes that are enacted after the initiative is adopted. Ultimately, Petitioner is left only with speculative theories as to what passage might mean years from now, and confuses the many and varied subjects of previously-enacted initiatives that proponents' initiatives would shelter from legislative action with the simple and single subject of initiatives #67, #68, and #69: protecting the effectiveness of the right to initiative, Given that Petitioner's speculative arguments prove insufficient to compel the Court to overturn Title as set by Board, Proponents request that Court affirm Board's Initiative titles, set in compliance with all single subject requirements.

C. **Initiative titles, as set by Title Board, adequately disclose major provisions of each initiative and are not misleading or inaccurate.**

1. Standard of Review.

Proponents agree with Petitioner with regard to standard of review as set forth under C.R.S. C.R.S. § 1-40-106(3)(b) and that Petitioner has preserved this issue.

2. Argument.

Petitioner maintains that Initiatives contain "hidden topics" including provisions that would allow for repealing initiated statutes approved by voters in the past. Petitioner makes this argument in spite of the fact that the words "repeal" and "amend" appear at least three times in each of the three Initiatives. Petitioner also maintains that two subjects exist because subject matter concerns not only procedures for repealing or amending initiated statutes but also because, if passed, the language would alter the existing legislative powers of state lawmakers. While Proponent agrees with Petitioner that the "breadth of subject matters addressed by each of these three measures is substantial," none of them include any subject unrelated to the central core of each, which is the protection of citizen-approved statutes. Petitioner cites the work of

petition expert Dennis Polhill, who concluded that between 1912, when the initiative process was adopted in Colorado, up until the 2004 election, Colorado voters had adopted at least 26 different statutes, equal to about one initiated statute per every four years. Pet. Op. Br., 11 citing Pollhill, Dennis, *Initiative and Referendum in Colorado* at 15-16. This is just a small fraction of the total number of statutes approved by the legislature during this same time period. According to the General Assembly's preliminary bill digest, 152 new laws were passed in 2012 alone.

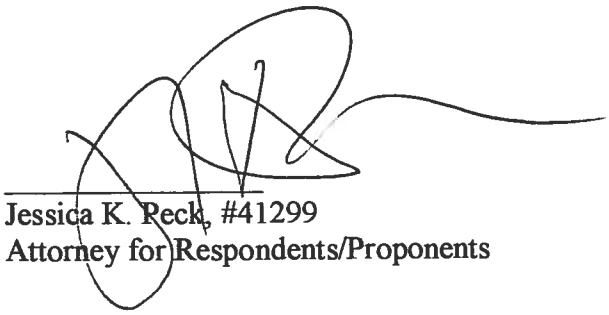
Petitioner expresses political concerns about the speculative impact of the Initiatives. While some dire scenarios may draw emotional appeal, including those theoretical examples introduced in Petitioner's opening brief, such examples fail to aid the Court in fulfilling its obligations in the present case. As articulated in Petitioner's own statement of standard for review, the Court shall not base its analysis here on alleged future possible public policy implications of an initiative's approved language, but rather must determine whether subjects presented are sufficiently related to each other and the central purpose of an initiative as to not mislead or confuse voters. In conducting this review, the Court must grant great deference to the Board's determination, only reversing the Board if title as set is clearly misleading. In sum, any alleged concerns about sufficiency of detail in the language are insufficient grounds for overturning Titles as set by Board. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #256,* 12 P.3d 246, 255 (Colo. 2000).

CONCLUSION

For each of the foregoing reasons set forth in this brief, Proponents respectfully request the Court find that the Title Board had jurisdiction to deny Motion for Rehearing, and thus, affirm the Board's approval of Initiative titles as set by Board in compliance with C.R.S. 1-40-

107(2). Further, Proponents request that the Court affirm the Board's findings that each of the Initiative properly comply with the single subject requirement and that titles set by Board are not misleading or vague.

Respectfully submitted June 8, 2012.



Jessica K. Peck, #41299
Attorney for Respondents/Proponents

APPENDIX

From: Steven Ward <Steven.Ward@sos.state.co.us>
Date: Thu, Apr 12, 2012 at 4:36 PM
Subject: RE: Motion for Rehearing
To: David Ottke <dottke@gmail.com>, Dennis Polhill <Dpolhill@aol.com>, John Slota <john.slota@gmail.com>
Cc: Andrea Gyger <Andrea.Gyger@sos.state.co.us>

Good day!

This email is to inform you that you are not required to appear at the rehearing. I apologize for giving you incorrect information in my previous email.

Although you are not required to appear at the rehearing for your initiative, you may still wish to attend. The agenda for the upcoming Title Board hearing will be finalized tomorrow, and we will send it to you by email when it is available.

Please be sure to CC Andrea Gyger on any email as I may be out of the office on Friday, and we want to ensure that your emails receive prompt attention.

Thank you,
Steven Ward
Colorado Department of State
Elections Division
303-894-2200 x6318
steven.ward@sos.state.co.us

From: Steven Ward
Sent: Wednesday, April 11, 2012 4:58 PM
To: David Ottke; Dennis Polhill; John Slota
Cc: Andrea Gyger
Subject: Motion for Rehearing

Good day!

This email is to inform you that a Motion for Rehearing has been filed on your initiatives that were heard at the April 4, 2012 Title Board hearing. A copy of the Motion for Rehearing is attached.

Pursuant to the requirements of Section 1-40-106 (4)(a), C.R.S., both designated representatives will need to appear at the rehearing. We will be hearing 18 new issues and five motions for rehearing at the Title Board hearing that is scheduled for April 18, 2012. Because of the amount of business before the board on April 18, we may need to extend the April 18 hearing into April 19. I will provide exact scheduling and agenda information to you when it is available. I hope to be able to release an official agenda by close of business on April 13, 2012.

Please feel free to contact me with any questions.

Thank you,

Steven Ward
Colorado Department of State
Elections Division
303-894-2200 x6318
steven.ward@sos.state.co.us

CERTIFICATE OF SERVICE

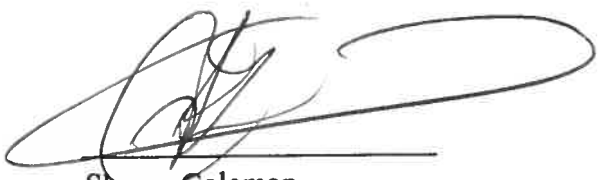
I hereby certify that on June 8, 2012, the original and ten copies of the foregoing ANSWER BRIEF OF RESPONDENTS/PROPONENTS were filed with:

Clerk of the Colorado Supreme Court
101 West Colfax Avenue, Suite 800
Denver, Colorado 80202:

I further certify that true and correct copies of the foregoing ANSWER BRIEF OF RESPONDENTS/PROPONENTS were served via hand courier upon the following:

Mr. Mark Grueskin, Esq.
Heizer Paul Grueskin, LLP
2401 15th Street, Suite 300
Denver, Colorado 80202
Attorneys for Petitioner

Ms. Suzanne Staiert
Mr. Daniel Domenico
Mr. Sharon Eubanks
Colorado Secretary of State
1700 Broadway
Denver, Colorado 80290
Members of the Title Board



Shawn Coleman