

SUPREME COURT OF COLORADO  
101 West Colfax Avenue, Suite 800  
Denver, Colorado 80203

Original Proceeding  
Pursuant to Colo. Rev. Stat. §1-40-107(2)  
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and  
Submission Clause for Proposed Initiatives 2011-  
2012 #67, #68, #69 ("Citizen Initiative Process")

**Petitioner: PHILIP HAYES**

v.

**Respondents: DAVID OTTKE and JOHN  
SLOTA**

**and**

**Title Board: SUZANNE STAIERT; DANIEL  
DOMENICO; and SHARON EUBANKS**

Attorneys for Petitioner:

Mark G. Grueskin, #14621  
Heizer Paul Grueskin LLP  
2401 15<sup>th</sup> Street, Suite 300  
Denver, CO 80202  
Telephone: 303-376-3703 (direct)  
Telephone: 303-595-4747  
Facsimile: 303-595-4750  
Email: mgrueskin@hpgfirm.com

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OF THE STATE OF COLORADO  
Christopher T. Ryan, Clerk

**▲ COURT USE ONLY ▲**

Case No. 2012 SA 117

**PETITIONER'S ANSWER 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, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 2,732 words.

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

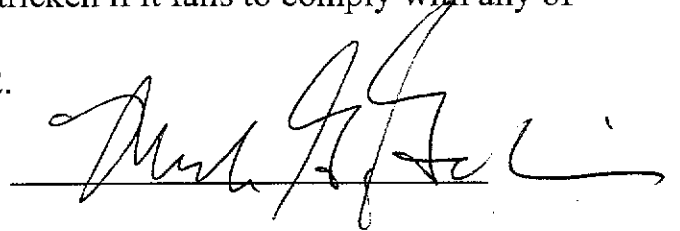
For the party raising the issue:

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.

  
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## SUMMARY

These proposed ballot measures expressly apply their terms retroactively, thus protecting a wide array of initiated statutes that have been enacted over time from the slightest amendment or outright repeal without a  $\frac{3}{4}$  majority in each house of the legislature. The real and substantial limit on legislative power as to laws that deal with topics ranging from labor law to open government to gun control to campaign finances is a concealed element of these measures. It either is a second subject or, at the very least, a topic that the Title Board should have briefly described in the titles. Having failed to do so, the Board erred.

Further, given recent statutory amendments, both Proponents were required to attend the rehearing in order that their measure could proceed forward in the process. Having failed to do so, the Board should not have considered the motion for rehearing when it did, and these matters should be returned to the Board so that they can be considered under the regimen now required of initiative proponents.

## LEGAL ARGUMENT

### **I. Title Board Jurisdiction If Both Proponents Do Not Attend Rehearing**

#### **A. Respondents' Statement of Standard of Review is Incorrect**

Respondents do not actually set forth a standard of review to be applied as to claims that the proponents failed to comply with the statutorily specified duties of

designated representatives. That issue of statutory interpretation is, of course, a matter for this Court to evaluate on a *de novo* basis. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1997-1998 #109*, 962 P.2d 252 (Colo. 1998) (holding that designated representatives had not substantially complied with statutory requirements for submission of measure to Title Board). “As with all matters of statutory interpretation, we proceed *de novo* with the goal of effectuating the intent of the General Assembly.” *In re Associated Gov'ts of Northwest Colo. v. Colo. PUC*, 275 P.3d 646, P11 (Colo. 2012).

B. Title Board Lacked Jurisdiction

Proponents disagree that both of them were required to attend the Title Board rehearing.

First, they state that “no actual rehearing on the merits of Proposed Initiatives ever occurred.” Opening Brief at 9. Actually, that is incorrect. The titles set in each of these matters states, “Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.” See **Exhibit G**, attached hereto. Thus, the Board did not renounce jurisdiction as to the Motion for Rehearing; it simply limited the issues that the Objector could raise after deciding that both Proponents’ attendance was not required.

The Board had no authority to proceed when it did, as the statute clearly states that both proponents must attend “any” hearing at which their measures’ titles are set. C.R.S. § 1-40-106(4)(a).<sup>1</sup> If they fail to appear, the issues concerning their measure(s) are simply put off until the next time the Board meets. The reason their attendance is necessary is uncomplicated. Presumably, if one proponent can skip a rehearing, both proponents can do so. If the statute does not apply at this stage of the process, it cannot require anyone associated with those supporting the measure to attend and assist the Board in understanding the measure and setting an accurate ballot title. Of course, this result is untenable, as the Board could not fulfill its statutory obligations in a way that best served voters if it could not obtain the proponents’ counsel about what the measure(s) sought to achieve.

Proponents also seek to evade their responsibilities on the grounds that the ballot title is actually “set” when it is first considered by the Title Board, not when it is reconsidered upon the filing of a motion for rehearing. Proponents Opening Brief at 8-9. However, a title is “set” when it has been “fixed” by the title setting agency. *Cacioppo v. Eagle County Sch. Dist. Re-50J*, 92 P.3d 453, 460 (Colo. 2004). And a title is not simply “fixed” under C.R.S. § 1-40-106; the process of fixing a title clearly incorporates the rehearing process, as set forth in C.R.S. § 1-

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<sup>1</sup> This statute was incorrectly cited as C.R.S. § 1-40-107(4)(a) in Hayes’ Opening Brief.



40-107. Specifically, the title setting process is complete and signatures may be collected when “the titles and submission clause have been fixed and determined as provided in section 1-40-106 and this section.” C.R.S. § 1-40-107(4) (emphasis added).

Thus, the Board acted precipitously and without statutory authority at the rehearing and should have deferred the matter until its next meeting.

## **II. The Proponents Violated the Single Subject Requirement, and the Title Board Should Not Have Fixed a Title.**

### **A. Respondents’ Standard of Review is Incomplete**

Respondents are accurate in their statement of the considerations undertaken by this Court in reviewing a ballot title for single subject compliance. However, they fail to note that the Court must also “examine the proposal sufficiently to enable review of the Title Board’s action,” and in so doing, “apply the general rules of statutory construction and accord the language of the measure its plain meaning.” *In re Title, Ballot Title and Submission Clause for Initiative 2007-2008 #17*, 172 P.3d 871, 874 (Colo. 2007). That exercise necessarily means the review of the Title Board’s decision, in light of constitutional, statutory, and caselaw standards, is more thorough than just a superficial “first glance,” particularly where a measure’s single subject is justified in broad terms. *Id.* at 873. This review for compliance with the requisite legal standards is *de novo* in nature.

B. Single Subject Requirement Was Violated

Proponents argue that "Citizen Initiative Process" is the single subject of their three measures. Respondents' Opening Brief at 7. That argument fails for two reasons.

First, a broad topic can be a single subject, but on multiple occasions, this Court has also held that the "broad topic" rationale cannot be used to justify measures that stray beyond the necessary connection to facilitate fair consideration of the measure by voters. For instance, an initiative cannot link an array of tangentially related provisions through a common characteristic or theme such as "revenue" or "government revenue changes."

[E]ven applying the liberal standards of review set forth by this court for the consideration of the single subject requirement for bills, the Initiative fails to meet the standards of the single subject requirement.... [W]e do not recognize a necessary or proper connection between the establishment of specific tax credits and the amendment of procedures relating to future voter initiatives.

*In re Title, Ballot Title and Submission Clause, and Summary With Regard to Amend TABOR 25*, 900 P.2d 104, 109 (Colo. 1995). The same is true for a purported single subject such as "the judiciary" which is simply too vague to comply with the single subject requirement. *In re Title, Ballot Title and Submission Clause, and Summary With Regard to Initiative 1997-1998 #64*, 960 P.2d 1192, 1199-1200 (Colo. 1998). The single subject analysis thus requires

more than a conceptual or theoretical thread. If voters could not immediately discern a discreet legislative topic in which the particulars are necessarily connected, the measure violates Article V, section 1(5.5) of the Constitution and is properly rejected until proponents hone proposal to meet this legal requirement.

As it pertains to the matter before this Court, it is one thing to address, even comprehensively, the *process* by which initiatives are placed on the ballot. Proponents argue here that this is all their measures entail. However, where a ballot proposal goes beyond ballot qualification processes and also addresses substantive issues that are at the heart of division of governmental power, that measure contains an additional subject that is not merely procedural in nature. #64, *supra*, 960 P.2d at 1198-1199 (initiative that reestablished judicial qualification standards but also contained provisions that “reallocate[ed] governmental authority and control” over a subset of judicial personnel contained multiple subjects). The same can be said of a measure that directly, intentionally, and explicitly reconfigures the legislature’s power to deal with the substance of multiple, unrelated laws. For instance, an initiative violated the single subject mandate where, among its various provisions, it codified “standards for judicial review of filed petitions” and also “establishe[d] the retroactive creation of substantive fundamental rights in all charter or constitutional” provisions approved

after a specified date. *In re Title, Ballot Title and Submission Clause, and Summary With Regard to a Proposed Petition Pertaining to Section 2 of Article VII*, 900 P.2d 104, 109 (Colo. 1995).

Initiatives #67, #68, and #69 change petition procedures by altering the rules dealing with how initiated statutes can be repealed or amended after 2012. In addition to that procedural change, though, these measures insulate all previously enacted initiated statutes – no matter what the subject – behind a wall of a “ $\frac{1}{4} + 1$ ” minority of either house of the legislature. This change applies to massive statutory overhauls (and outright repeals) as well as even the most minor or technical of statutory amendments. More problematically, this new limit on legislative power applies to a wide array of measures that, as discussed in Hayes’ Opening Brief, have no substantive connection to one another. That such a variety of topics is removed from the ordinary statutory amendment process would be unknown to voters, a chief concern that led to the voters’ enactment of the single subject requirement.

The measure’s retroactivity in limiting otherwise plenary legislative power is not a tertiary element of these measures. It is not a mere detail like enforcement of a substantive provision, a definition, or a “minor provision[] necessary to effectuate the purpose of the measure.” *In re Title, Ballot Title and Submission*

*Clause and Summary for Proposed Petitions*, 907 P.2d 586, 590 (Colo. 1995).

Instead, what is presented here are changes to the thresholds for ballot qualification (from 5% to 4% or 3%), significant limitations on the legislative power of the general assembly to act as to future initiated statutes, and the retroactive insulation of all previously approved initiated statutes, no matter what the topic, from the regular legislative process.

Second, Proponents incorrectly justify the Title Board's single subject decision by using the rubric of "Citizen Initiative Process." However, this phrase was simply the caption assigned by a legislative staffer to describe the measures when the first drafts were initially filed with Legislative Council. See fn. 1 to final titles set for Initiatives #67, #68, and #69 ("Unofficially captioned '**Citizen Initiative Process**' by legislative staff for tracking purposes. This caption is not a part of the titles set by the Board.") (attached hereto as **Exhibit G**). Where, as here, an encapsulation of the measures is merely reflected in a footnote written by legislative staff (as opposed to the Title Board) and that footnote will not appear as part of the ballot title itself, the phrase in question plays no part in this Court's review. *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #215 (Prohibiting Certain Open Pit Mining)*, 3 P.3d 11, 15 (Colo. 2000). "Citizen Initiative Process" is simply an abbreviated summary that is used

as an administrative device when a proposed initiative is first submitted to begin the initiative process; it is not a legal conclusion. Thus, the Proponents embrace of that overly brief summary now is of no legal consequence in this appeal of the Title Board's titles.

**III. Because the Title Board Made No Reference to the Initiatives' Explicit Retroactivity as to All Initiated Statutes Ever Adopted in Colorado, the Ballot Title was Incomplete, Inaccurate, and Misleading.**

A. Respondents' Statement of Standard of Review is Accurate

Generally, Respondents accurately state the nature of the legal review of the misleading title. However, it is still up to the Court, on a *de novo* basis, to "examine the Titles as a whole to determine if they are fair, clear, accurate, and complete" in light of the applicable legal standards, using "the general rules of statutory construction." *In re Title, Ballot Title, & Submission Clause for 2011-2012 #3*, 274 P.3d 562, P8 (Colo. 2012).

B. Ballot Title Was Misleading

The ballot titles, which fail to ever refer to the express retroactivity of these measures, are misleading for that reason.

Proponents argue that Hayes seeks speculation on the issue of how these measures would affect existing law. Respondents' Brief at 8. This argument ignores the express wording of the proponents' own measures, each of which

states: "This subsection (11) shall apply prospectively to actions of the general assembly relating to **statutes enacted by citizen initiative** pursuant to this article, whether the initiative statute was **enacted before or is enacted after the effective date of this section.**" (Emphasis added.) These measures freeze thus more than two dozen initiated statutes into place unless newly defined legislative super-majorities are assembled. There is no speculation involved here as to this purpose of these measures.

The material nature of retroactivity of proposed initiatives has been addressed by this Court in a challenge to a proposed ballot measure dealing with judicial term limits. In that matter, this Court held that the ballot title set for an initiative addressed term limits for "certain state judges" and set the effective date as the day before that year's general election. By failing to state that this measure actually applied to all justices and judges in office at that time, the ballot title was deemed to be confusing to voters. They could not know that it would apply to the justices and judges they retained at the election, held the day after the effective date of the initiative. "The constitutional and statutory prohibitions against misleading titles and summaries are aimed at preventing just such abuse of the voters' right to be presented with straightforward distinct proposals." *In re Title,*

*Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 268 (Colo. 1999).

Here, the ballot titles do not reference “certain” initiated statutes, but their silence runs headlong into the “general rule” that state constitutional amendments are only to be applied prospectively. *Bolt v. Arapahoe County Sch. Dist. No. Six*, 898 P.2d 525, 533 (Colo. 1995). Voters are deemed to be aware of the existing law in performing their law-making function. *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000). Thus, absent additional direction from the Title Board, this central element of the initiative – its retroactive nature – would not be broadly understood.

Avoiding voter confusion is at the heart of the title setting process, #29, *supra*, 972 P.2d at 268, and leaving voters to wonder about a measure’s explicit retroactivity is not an option that is available to the Board. This is not an instance where the Board relied on the proponents’ statement of intent that a measure was retroactive, when the actual words they had employed meant that it could only be prospective in nature. *See In re Title, Ballot Title and Submission Clause for Initiative 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006). Here, the final subsection in each of the three initiatives at issue make the retroactivity of this measure indisputable.



Further, a title is deficient where voters must wonder whether the measure applies to initiated statutes (or judicial appointments) that are ratified in the future, initiated statutes (or judicial appointments) that are ratified at the current general election, or all of the previous adopted initiated statutes (or appointed judges in office) that have been ratified in the many years leading up to the election. This lack of clarity reflects a measure – and a ballot title – that “contains either a material ambiguity or concealed intent with regard to” its retroactive application. #29, *supra*, 972 P.2d at 268. In such an instance, voters are prohibited from fully appreciating the impact of their “yes” or “no” vote, and thus the title will not meet the statutory requirements for a legally sufficient ballot title. *Id.*

Because the ballot title fails to address the central concept of retroactive application and is thus materially incomplete and misleading, the decision of the Title Board erred, and the ballot titles should be corrected before proponents are permitted to take the next steps in the initiative process.

### **CONCLUSION**

The Title Board committed multiple errors in connection with Initiatives #67, #68, and #69, and the effects of these errors are harmful to the initiative process generally and voters who would be confronted with these proposed

initiates either as petitions or on the ballot. As such, the measures at issue in this appeal should be returned to the Board and/or the Proponents.

Respectfully submitted this 4<sup>th</sup> day of June, 2012.



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Mark G. Grueskin, #14621  
Heizer Paul Grueskin LLP  
2401 15<sup>th</sup> Street, Suite 300  
Denver, CO 80202  
Telephone: 303-376-3703  
Facsimile: 303-595-4750  
Email: [mgrueskin@hpgfirm.com](mailto:mgrueskin@hpgfirm.com)  
**ATTORNEYS FOR PETITIONER**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4<sup>th</sup> day of June, 2012, a true and correct copy of the foregoing **PETITIONER'S ANSWER BRIEF** was served via Federal Express, to the following:

Jessica K. Peck, Esq.  
Jessica K. Peck, Attorney at Law, LLC  
100 Fillmore Street  
Fifth Floor  
Denver, Colorado 80206  
*Attorney for Respondents Ottke and Slota*

Maurice G. Knaizer, Esq.  
Assistant Deputy Attorney General  
Office of the Colorado Attorney General  
1525 Sherman Street, 7<sup>th</sup> Floor  
Denver, Colorado 80203  
*Attorney for Title Board*

Jason R. Dunn, Esq.  
Michael D. Hoke, Esq.  
Brownstein Hyatt Farber Schreck, LLP  
410 Seventeenth Street, Suite 2200  
Denver, CO 80202-4432  
*Attorneys for Amicus Curiae Parties*

  
\_\_\_\_\_  
Amy Knight

Ballot Title Setting Board

Proposed Initiative 2011-2012 #67<sup>1</sup>

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution requiring a vote of at least 3/4ths of the members of each house of the state legislature to amend or repeal any statute enacted by citizen initiative, unless the initiated statute includes a provision allowing for its amendment or repeal by a majority vote of the legislature or unless the legislature refers the amendment or repeal of an initiated statute to the voters.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution requiring a vote of at least 3/4ths of the members of each house of the state legislature to amend or repeal any statute enacted by citizen initiative, unless the initiated statute includes a provision allowing for its amendment or repeal by a majority vote of the legislature or unless the legislature refers the amendment or repeal of an initiated statute to the voters?

*Hearing April 4, 2012:  
Single subject approved; staff draft amended; titles set.  
Hearing adjourned 10:05 a.m.*

*Hearing April 19, 2012:  
Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.  
Hearing adjourned 10:50 a.m.*

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<sup>1</sup> Unofficially captioned "Citizen Initiative Process" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Ballot Title Setting Board

Proposed Initiative 2011-2012 #68<sup>1</sup>

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning statutes enacted by citizen initiative, and, in connection therewith, reducing the minimum number of signatures required to propose an initiated statute from 5% to 4% of the votes cast in the previous election for secretary of state; and requiring a vote of at least 3/4ths of the members of each house of the state legislature to amend or repeal any initiated statute, unless the initiated statute includes a provision allowing for its amendment or repeal by a majority vote of the legislature or unless the legislature refers the amendment or repeal of an initiated statute to the voters.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning statutes enacted by citizen initiative, and, in connection therewith, reducing the minimum number of signatures required to propose an initiated statute from 5% to 4% of the votes cast in the previous election for secretary of state; and requiring a vote of at least 3/4ths of the members of each house of the state legislature to amend or repeal any initiated statute, unless the initiated statute includes a provision allowing for its amendment or repeal by a majority vote of the legislature or unless the legislature refers the amendment or repeal of an initiated statute to the voters?

*Hearing April 4, 2012:*

*Single subject approved; staff draft amended; titles set.*

*Hearing adjourned 10:17 a.m.*

*Hearing April 19, 2012:*

*Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.*

*Hearing adjourned 10:51 a.m.*

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<sup>1</sup> Unofficially captioned "Citizen Initiative Process" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

**Ballot Title Setting Board**

**Proposed Initiative 2011-2012 #69<sup>1</sup>**

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning statutes enacted by citizen initiative, and, in connection therewith, reducing the minimum number of signatures required to propose an initiated statute from 5% to 3% of the votes cast in the previous election for secretary of state; and requiring a vote of at least 3/4ths of the members of each house of the state legislature to amend or repeal any initiated statute, unless the initiated statute includes a provision allowing for its amendment or repeal by a majority vote of the legislature or unless the legislature refers the amendment or repeal of an initiated statute to the voters.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning statutes enacted by citizen initiative; and, in connection therewith, reducing the minimum number of signatures required to propose an initiated statute from 5% to 3% of the votes cast in the previous election for secretary of state; and requiring a vote of at least 3/4ths of the members of each house of the state legislature to amend or repeal any initiated statute, unless the initiated statute includes a provision allowing for its amendment or repeal by a majority vote of the legislature or unless the legislature refers the amendment or repeal of an initiated statute to the voters?

*Hearing April 4, 2012:*

*Single subject approved; staff draft amended; titles set.*

*Hearing adjourned 10:20 a.m.*

*Hearing April 19, 2012:*

*Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.*

*Hearing adjourned 10:52 a.m.*

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<sup>1</sup> Unofficially captioned "Citizen Initiative Process" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.