

<p>COLORADO SUPREME COURT 2 East 14th Ave. Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2017) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017- 2018 #83 (“State Income Tax”)</p> <p>PETITIONER: Mike Spalding,</p> <p>v.</p> <p>TITLE BOARD: Colorado Title Board.</p>	
<p>CYNTHIA H. COFFMAN, Attorney General GRANT T. SULLIVAN, Assistant Solicitor General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Phone: (720) 508-6349 Fax: (720) 508-6041 Email: grant.sullivan@coag.gov Registration Number: 40151 *Counsel of Record <i>Attorneys for the Title Board</i></p>	<p>▲ COURT USE ONLY ▲</p> <p>Case No.: 2017SA301</p>
<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, the undersigned certifies 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 1,135 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).

Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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/ Grant T. Sullivan

GRANT T. SULLIVAN, 40151*
Assistant Solicitor General

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The Colorado Title Board, by and through undersigned counsel, hereby submits the following Opening Brief.

STATEMENT OF THE ISSUE

Whether Petitioner Spalding preserved for judicial review either of his appellate arguments—that the Board’s “repealing, and replacing” language in the title setting is confusing, or that portions of the final clause in the title setting should be stricken.

STATEMENT OF THE CASE AND FACTS

Petitioner Mike Spalding seeks to circulate Proposed Initiative 2017-2018 #83 (“#83”) to obtain the requisite number of signatures to place a measure on the ballot to enact a new statute, § 39-22-130, in Colorado’s revised statutes. Mr. Spalding is one of the designated representatives for #83. *See* § 1-40-104, C.R.S. (2017). The proposed initiative seeks to reduce the state income tax from 4.63% to 4.6%, while also repealing all existing state income tax credits and replacing them with a new tax credit that will be divided equally among all full-year resident taxpayers. Under # 83’s proposed language, the sum to be

divided equally among full-year residents is equal to the sum of all current tax credits, plus certain other state revenues, like tobacco settlement revenue and vehicle registration fees.

The Board conducted an initial public hearing on December 6, 2017. After finding that #83 constituted a single subject, the Board proceeded to set title. As relevant here, the title as set stated in part, “A change to the Colorado Revised Statutes . . . repealing all current state income tax credits; . . .” *Petition for Review*, Attachment, p. 12; *Hearing Before Title Board on Proposed Initiative 2017-2018 #83, Part 2* (Dec. 6, 2017), available at <http://tinyurl.com/zar5zye> (hearing beginning at minute 3:35).

Mr. Spalding filed a one-page Motion for rehearing, asserting that the phrase “repealing all current state income tax credits” is misleading because, according to Mr. Spalding, the “credits are maintained and distributed to all adult resident taxpayers.” *Petition for Review*, Attachment, p. 13. The Motion for rehearing did not raise any argument concerning the final phrase in the title: “changing procedures for the

collection, enforcement, and administration of state income tax.” *Id.*
at 12.

At the December 20, 2017 rehearing, the Board granted in part Mr. Spalding’s Motion for rehearing. The Board’s modified slightly the title setting to make clear that the State’s current tax credits are not just repealed, but are also replaced with new tax credits that are available to individuals. The Board expressed concern that the title should clarify that the current tax credits are not maintained, since existing tax credits for corporations are eliminated under #83.

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(Dec. 20, 2017), available at <http://tinyurl.com/zar5zye> (rehearing beginning at minute 14:30).

As modified at rehearing, the relevant phrase states, “repealing, and replacing for all individuals, all current state income tax credits[.]”

Petition for Review, Attachment, p. 14. In response to this new language, Mr. Spalding stated, “Yea, that would be clearer, definitely.”

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(Dec. 20, 2017), available at <http://tinyurl.com/zar5zye> (statement at minute 23:30). He expressed no objection to this new “repealing, and replacing” language set by the Board.

Because it was not raised in Mr. Spalding’s rehearing motion or at the rehearing itself, the Board did not modify the final phrase of the original title setting: “changing procedures for the collection, enforcement, and administration of state income tax.” *Petition for Review*, Attachment, p. 14.

SUMMARY OF THE ARGUMENT

The Board’s actions in setting title for #83 should be affirmed. By not raising his current appellate arguments before the Board, Mr. Spalding failed to preserve his challenges for judicial review. Following familiar appellate procedure, this Court’s precedent makes clear that the Board must be permitted the opportunity in the first instance to address any perceived errors in the title setting before relief may be sought in this Court. Accordingly, Mr. Spalding waived his arguments that the Board’s “repealing, and replacing” language in the title is

confusing, and that portions of final clause in the title should be stricken. This Court should affirm.

ARGUMENT

I. Petitioner Spalding did not raise his objections before the Title Board, requiring affirmance.

Mr. Spalding's petition for review identifies the following issues for judicial review: "The title is not fair because it says tax credits are 'repealed,' which is not in the text, and now adds they are also 'replaced,' which will confuse voters." *Petition for Review*, p. 1. The petition also requests that this Court strike a portion of the last phrase in the title so that it reads only, "and changing tax procedures." *Id.*

A. Preservation.

A party seeking judicial review of the Title Board's actions must first raise their argument in front of the Board to preserve their contention for appeal. *See In re Ballot Title 1999-2000 #265*, 3 P.3d 1210, 1215-16 (Colo. 2000) (stating that, "Because [petitioners] did not raise the issue before the Board they cannot now urge this contention as a grounds for reversing the Board."); *In re Proposed Ballot Initiative on*

Parental Rights, 913 P.2d 1127, 1130 n.3 (Colo. 1996) (declining to address argument because “petitioners failed to raise this contention in their motion for rehearing” before the Board). This familiar and well-settled rule is consistent with this Court’s holdings in normal appellate litigation arising out of the district courts. *See People v. Salazar*, 964 P.2d 502, 507 (Colo. 1998) (“It is axiomatic that issues not raised in or decided by a lower court will not be addressed for the first time on appeal.”); *see also Colo. Office of Consumer Counsel v. Colo. Pub. Utils. Comm’n*, 275 P.3d 656, 661 n.3 (Colo. 2012) (same).

Here, Mr. Spalding did not raise either of his two appellate arguments in his Motion for rehearing, or at the December 20, 2017 rehearing. In fact, at the rehearing, Mr. Spalding responded to the Board’s new “repealing, and replacing” language by saying, “Yea, that would be clearer, definitely,” signaling his agreement with the Board’s setting. *Rehearing Before Title Board on Proposed Initiative 2017-2018 #83* (Dec. 20, 2017), available at <http://tinyurl.com/zar5zye> (statement at minute 23:30). If anything, Mr. Spalding’s statement to the Board

may have invited the alleged error. *See Horton v. Suthers*, 43 P.3d 611, 618–19 (Colo. 2002) (discussing the invited error doctrine). It certainly did not preserve any objection to the new language.

Moreover, at no time, either in the hearings or in his written submissions to the Title Board, did Mr. Spalding raise any concern with the final phrase of the title: “changing procedures for the collection, enforcement, and administration of state income tax.” *Petition for Review*, Attachment, p. 14.

Accordingly, Mr. Spalding waived the arguments that he now presses in this Court, requiring affirmance.

CONCLUSION

For the above-stated reasons, the Court should affirm the Title Board’s actions in setting the title for #83.

Respectfully submitted this 16th day of January, 2018.

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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 or their counsel electronically via CCEF and/or via overnight mail/FedEx, at Denver, Colorado this 16th day of January, 2018 addressed as follows:

Mike Spalding (via overnight mail/FedEx)
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s/ Xan Serocki

Xan Serocki