

<p>SUPREME COURT, STATE OF COLORADO</p> <p>2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: March 23, 2017 10:59 AM</p>
<p>In Re The Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #4</p> <p>Petitioners: D. Michael Kopp and Scott E. Smith,</p> <p>v.</p> <p>Respondents: Daniel Hayes and Julianne Page,</p> <p>and</p> <p>Title Board: Suzanne Staiert, Sharon Eubanks, and Glenn Roper</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>PETITIONER D. MICHAEL KOPP'S SUPPLEMENTAL BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in the Court's March 2, 2017 Order.

It contains 1,943 words (supplemental brief not to exceed 2,500 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).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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 or 28.1, and C.A.R. 32.

/s/ Jason R. Dunn

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Petitioner D. Michael Kopp submits his Supplemental Brief, as requested by the Court, in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2017-2018 #4 (“Proposed Initiative #4” or “the Initiative”), and states as follows.

ISSUES PRESENTED FOR SUPPLEMENTAL BRIEFING

- A. Whether the Colorado Supreme Court has the authority to review the abstract prepared pursuant to section 1-40-105.5, C.R.S. (2016), identifying specifically the source, if any, of such authority.
- B. If the abstract is reviewable by this Court, what standard of review applies to such review.

SUMMARY OF THE ARGUMENT

Section 1-40-107, C.R.S., grants this Court authority to review the Title Board’s decision at the rehearing on whether to approve a proposed initiative’s abstract. The language added to section 1-40-107 by House Bill 15-1057 makes clear that this Court’s authority to review the abstract is based on the same sources that provide this Court the authority to review the Title Board’s decisions on whether a measure contains a single subject and has clear title.

The standard of review applicable to this Court's review of an abstract, which should reflect the standard of review utilized by this Court when it reviewed fiscal impact statements in the past under since-repealed statutes, is reasonableness.

ARGUMENT

I. THIS COURT HAS AUTHORITY TO REVIEW THE ABSTRACT

Just like this Court has the authority to review the Title Board's decisions at a rehearing on whether to approve a proposed initiative's title and submission clause and approve that the measure contains a single subject pursuant to section 1-40-106.5, this Court also has the authority to review the Title Board's decision at a rehearing on whether to approve a measure's abstract that is prepared pursuant to section 1-40-105.5.

This Court has long possessed the authority to review decisions of the Title Board. Ever since Colorado voters approved a referendum in 1994 that extended the single subject and clear title limitations applicable to legislative bills to proposed initiatives, this Court has reviewed the Title Board's decisions as to whether a proposed initiative contains multiple subjects or lacks a clear title. *See, e.g., Matter of*

Title, Ballot Title, and Submission Clause for 2013-2014 #76, 333 P.3d 76, 78–79 (Colo. 2014). This Court’s authority derives from section 1-40-107, which assigns this Court “the duty of reviewing whether the Title Board has discharged its responsibilities in accordance with the applicable law.” *Id.* at 79.

Section 1-40-107 provides the appeal process for reviewing Title Board decisions. Section 1-40-107(1)(a)(I) allows proponents of an initiative, along with any registered elector, to file a motion for rehearing if they are not satisfied with the title and submission clause provided by the Title Board or the Title Board’s decision as to whether the measure contains a single subject. If dissatisfied after such rehearing, the proponents, along with any registered elector who filed a motion for rehearing or appeared before the Title Board, can file a petition for review with this Court. C.R.S. § 1-40-107(2). The filing shall include “a certified copy of the petition with the titles and submission clause of the proposed law or constitutional amendment,” which the Secretary of State must provide upon request. *Id.* Once filed, “the matter shall be disposed of promptly, consistent with the rights of the parties, either affirming the action of the title board or reversing it,

in which latter case the court shall remand it with instructions, pointing out where the title board is in error.” *Id.*

Relevant here, when the General Assembly passed House Bill 15-1057,¹ which added section 1-40-105.5’s requirement for an initial fiscal impact statement and abstract to Title 40, the legislature also added language to section 1-40-107 giving this Court the authority to review a Title Board’s decision on whether to approve an abstract. The additional language provides the same process to appeal the Title Board’s decision on whether to approve an abstract as the already existing language in section 1-40-107 does for appealing Title Board decisions on single-subject and clear title.

First, House Bill 15-1057 added section 1-40-107(1)(a)(II), which permits a proposed initiative’s proponents, or any registered elector dissatisfied with the measure’s abstract, the ability to file a motion for rehearing based on three specific grounds:

- The estimate included in the abstract is incorrect;
- The abstract is misleading or prejudicial; or

¹ Text of House Bill 15-1057 can be found at the Colorado General Assembly’s website at:
http://www.leg.state.co.us/clics/clics2015a/csl.nsf/fsbillcont3/F5635E116840715F87257D90007659C2?Open&file=1057_enr.pdf.

- The abstract does not comply with the requirements set forth in section 1-40-105.5(3).

In other words, section 1-40-107(1)(a)(II) provides a third source, in addition to single subject and clear title, for a person to challenge a measure and obtain a rehearing. Together, Petitioners Kopp and Smith filed motions for rehearing on numerous grounds, including that Proposed Initiative #4's abstract was misleading or prejudicial and failed to comply with section 1-40-105.5(3). Although "[t]he title board may modify the abstract based on information presented at the rehearing," C.R.S. § 1-40-107(1)(b), the Title Board declined to do so for this measure.

Second, House Bill 15-1057 also added language to section 1-40-107(2), which specifies which documents must be attached to any petitions for review. Per the addition to subsection (2), when a proponent or registered elector is dissatisfied with the Title Board's decisions at the rehearing and wants to appeal to this Court, the person can request not only a certified copy of the petition with the titles and submission clause but also "the abstract." Therefore, the addition of "the abstract" to subsection (2), which would be requested only if it were

to be filed as part of the appeal, confirms that this Court has authority to review the Title Board's ruling on the abstract at the rehearing. The General Assembly simply could not have meant otherwise in adding that language.

Based on this statutory language, Petitioners Kopp and Smith are appealing the Title Board's refusal to amend the abstract at the rehearing. The Title Board has the power to amend the abstract at the rehearing pursuant to section 1-40-107(1)(b); section 1-40-105.5(2)(a), which states that the abstract may be "modified in accordance with section 1-40-107"; and section 1-40-107(5.5), which states that "[i]f the title board modifies the abstract pursuant to this section, the secretary of state shall provide the director of research of the legislative council of the general assembly with a copy of the amended abstract, and the director shall post the new version of the abstract on the legislative council website." This is no different than the Title Board's power to amend a measure's title at the rehearing. Such power is subject to this Court's review.

Therefore, just like this Court has authority to review a Title Board's decision on single-subject and clear title grounds, this Court has

authority to review a Title Board’s decision to approve an abstract based on the grounds specified in section 1-40-107(1)(a)(II).

II. THE PROPER STANDARD OF REVIEW IS REASONABLENESS

As discussed in Petitioner Kopp’s Answer Brief, the proper standard of review is two-part: (1) *de novo* for construing the meaning of the requirements for an abstract; and (2) reasonableness for reviewing a Title Board’s decision to approve a measure’s abstract. Petitioner Kopp’s Answer Brief, at 5–8. A reasonableness standard is consistent with how this Court reviewed fiscal impact statements in the past under since-repealed statutes. In contrast, the Title Board’s preferred “abuse of discretion” standard of review is too deferential. *See* Title Board’s Opening Brief, at 12. Such a standard would allow the Title Board and Legislative Council Staff (“LCS”) to skirt their responsibility in situations such as this one where they claim that a measure is too indeterminate to provide a meaningful abstract for voters.

The proper standard of review for an abstract is thus as follows. First, this Court should apply *de novo* review in construing the meaning of the requirements for an abstract under section 1-40-105.5(3) and assuring that the abstract met such requirements. *See, e.g., Smith v.*

Exec. Custom Homes, Inc., 230 P.3d 1186, 1189 (Colo. 2010) (“Statutory interpretation involves only questions of law, which we review de novo”).

Second, if there is a question as to whether the abstract meets those requirements, as is this case, then this Court should apply a reasonableness standard in reviewing the Title Board’s decisions to approve the abstract drafted by LCS. Because LCS drafts the abstract, C.R.S. § 1-40-105.5(1), (2)(a), and the Board has no discretion to modify the abstract unless someone files a motion for rehearing, C.R.S. § 1-40-107(1)(a)(II), the Title Board, which plays only a minimal role in the abstract process, should receive little deference. Instead, the Title Board should make material representations as to each requirement listed in section 1-40-105.5(3), and, if the abstract fails to adequately meet any of these requirements, must explain, with the assistance of LCS, why that information was not reasonably determinable. This will allow this Court to assess whether Title Board’s decision has support in the record. If the explanations do not meet this reasonableness standard, then, similar to what this Court does when a measure fails on single-subject or clear title grounds, this Court must return the abstract

to the Title Board with directions to rewrite it. Because the Title Board does not draft the abstract, the Court should direct the Title Board to seek the input of LCS, who drafted the abstract, and the parties.

The genesis of this reasonableness standard of review is found in this Court's opinions reviewing fiscal impact statements when the Title Board was required to produce them under since-repealed law. Under former section 1-40-101(2) (1973) and former section 1-40-106(3)(a), which was repealed in 2000, if the Title Board determined that a proposed measure "will have a fiscal impact on the state or any of its political subdivisions," then the Title Board added to a measure's summary "an estimate of any such fiscal impact, together with an explanation thereof." This Court, which had the authority to review the fiscal impact statements, noted that while the Title Board had discretion, this discretion "is not unlimited and must have some support in the record." *In re Proposed Initiative for an Amendment to Article XVI, Section 5 Colorado Constitution, Entitled "W.A.T.E.R."*, 831 P.2d 1301, 1306 (Colo. 1992). The Court then stated its role as determining "whether the summary contains an estimate and explanation of any fiscal impact which the proposed law may have upon the state or any of

its political subdivisions, to the extent that such impact is **reasonably determinable.**” *In re Increase of Taxes on Tobacco Products Initiative*, 756 P.2d 995, 998 (Colo. 1988) (emphasis added).

This Court however, should give the Title Board even less discretion in reviewing an abstract than what it provided the Title Board under the since-repealed statutes. Because the since-repealed statutes required less factual information on a measure’s fiscal impact than current section 1-40-105.5’s requires for the abstract, and the Title Board plays at most a passive role in drafting the abstract, this Court should give the Title Board and LCS less discretion when reviewing an abstract. Such minimal discretion comports with this Court’s statement that its “goal in construing a statute is to ascertain and give effect to the General Assembly’s intent.” *Hayes v. Ottke*, 293 P.3d 551, 554 (Colo. 2013). The legislature’s clear intent in passing House Bill 15-1057 was to ensure voters had meaningful information on a proposed measure’s fiscal impacts before they sign the petition. *See* Petitioner Kopp’s Opening Brief, at 20–28.

CONCLUSION

Petitioner Kopp therefore requests that this Court determine that (1) it has authority to review the abstract prepared pursuant to section 1-40-105.5, and (2) the proper standard of review for reviewing the abstract is reasonableness.

Respectfully submitted this 23rd day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2017, I electronically filed a true and correct copy of the foregoing PETITIONER D. MICHAEL KOPP'S ANSWER BRIEF via the Colorado Courts E-Filing system and was served via electronic mail to the following:

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