DATE FILED: May 20, 2019 4:42 PM

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue 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 Initiative 2019-2020 #74 ("Establishment of Expanded Learning Opportunities Program") **Petitioner**: KENNETH NOVA **v.** **Respondents**: MONICA R. COLBERT and JULIET SEBOLD TITLE BOARD MEMBERS: BEN SCHLER, LEEANN MORRILL, and JASON GELENDER.	▲COURT USE ONLY▲ Supreme Court Case No.: 2019SA88
ATTORNEYS FOR RESPONDENTS: William A. Hobbs, #7753 Benjamin J. Larson, #42540 IRELAND STAPLETON PRYOR & PASCOE, PC 717 17th Street, Suite 2800 Denver, Colorado 80202 Telephone: 303-623-2700 Facsimile: 303-623-2062 E-mail: bhobbs@irelandstapleton.com blarson@irelandstapleton.com	
RESPONDENTS' OPENING BRIEF	

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 limits set forth in C.A.R. 28(g) because it contains 2,745 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, as applicable, 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.

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.

By: */s/ Benjamin J. Larson*
Benjamin J. Larson, #42540

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Respondents Juliet Sebold and Monica R. Colbert ("Proponents"), registered electors of the State of Colorado and the Designated Representatives of the proponents of Initiative 2019-2020 #74 ("Initiative #74"), through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit their Opening Brief in support of the title, ballot title, and submission clause (the "Title(s)") set by the Title Board for Initiative #74.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Section 1-40-107, C.R.S. provides that the "decision of the title board on any motion for rehearing shall be final, except [for the right to appeal to this Court], and no further motion for rehearing may be filed or considered by the title board." Did the Title Board correctly rule that it lacked jurisdiction to hear Objector Kenneth Nova's motion for rehearing on Initiative #74 when the Title Board had already heard and decided on a motion for rehearing at its prior meeting?

STATEMENT OF CASE

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. of the title setting for Initiative #74. Proponents filed Initiative #74 with the Secretary of

State on April 5, 2019. *See* R., p. 2.[1] Initiative #74 is one in a set of eight measures advanced by Proponents for the creation of an expanded learning opportunities program.[2] The measures differ in how the new program is funded.

The Title Board, on behalf of the Secretary of State, held a title hearing on all these measures on April 17, 2019, finding, in pertinent part, that Initiative #74 contains multiple subjects and denying title setting. *See* R., p. 27. Proponents filed a motion for rehearing ("First Motion for Rehearing"), arguing, in pertinent part, that Initiative #74 contains a single subject. *See* R., p. 18. The rehearing was held on April 26, 2019. The Title Board granted the First Motion for Rehearing and set the Titles. R., p. 20.

While counsel for Petitioner Kenneth Nova ("Objector") was present at the April 26, 2019 rehearing to argue motions for rehearing Objector had filed on

---

[1] Citations to the Title Board Record are to the certified copy of the Title Board Record submitted with the Petition. Because the Title Board Record is not paginated, page number references are to the electronic page number.

[2] The Title Board's action on these measures—setting titles on four of the measures and denying title setting on others—are on appeal to this Court in case numbers 2019SA82, 2019SA83, 2019SA84, 2019SA85, 2019SA86, 2019SA87, 2019SA88, 2019SA89. The measures can be grouped together for purposes of issues on appeal as follows: 2019-2020 ##68, 69, 72, and 73 (Title Board denied title setting on single subject grounds because of tax credit offset); 2019-2020 ##70 and 71 (Title Board set titles, but measures have since been withdrawn and a stipulation of dismissal filed); 2019-2020 ##74 and 75 (Title Board set titles, and the sole issue on appeal is whether the Title Board had jurisdiction to hear Objector Nova's second motion for rehearing).

Proponents' related measures, Objector elected not to appear or otherwise make any argument in opposition to the First Motion for Rehearing or to the Titles set by the Title Board on rehearing.[3] Instead, on April 29, 2019, Objector filed a motion for rehearing ("Second Motion for Rehearing") on the Title Board's decision to grant the First Motion for Rehearing, arguing that Initiative #74 contains multiple subjects and that its Titles are deficient. R., pp. 21-25. The Title Board denied the Second Motion for Rehearing because it lacked jurisdiction to consider it under section 1-40-107(1)(c), C.R.S. R., p. 27.

On May 3, 2019, Objector petitioned this Court pursuant to section 1-40-107(2), C.R.S. for review of the Title Board's ruling on the Second Motion for Rehearing. The only issue on appeal is whether the Title Board correctly determined that it lacked jurisdiction to hear the Second Motion for Rehearing. Notice of Appeal at 4.[4]

---

[3] *See In re Proposed Initiative 2019-2020 #70*, Case No. 2019SA84, R., pp. 15-20, 22 (reflecting that Objector filed motions for rehearing on Proponents' related measures, which motions were heard and denied at the same April 26, 2019 Title Board hearing).

[4] On May 6, 2019, Objector filed a Supplement to Advisory List of Issues on Petition for Review, seeking to add a second, discrete issue on appeal. The Court construed this filing as a Motion to Amend the Petition for Review and denied the Motion to Amend in an Order that same day.

SUMMARY OF ARGUMENT

Subsection 1-40-107(1)(c), C.R.S. states, in pertinent part: "The decision of the title board on any motion for rehearing shall be final, except as provided in subsection (2) of this section [authorizing appeals to this Court], and no further motion for rehearing may be filed or considered by the title board." (Emphasis added). By the plain language of this provision, the Title Board cannot hear further motions for rehearing after deciding a motion for rehearing. This provision was added by a bill amending the statute in 2012 and reflects the General Assembly's intent to ensure expediency in the title setting process.

Objector argued below that subsection (1)(c) merely codified the then-existing Colorado Supreme Court holding that the same objector cannot raise in a second motion for rehearing a challenge that the objector could have raised in his first motion for rehearing. However, that is not what subsection (1)(c) says, and if the General Assembly had intended such a narrow application, it could have easily crafted language to accomplish that. In fact, the legislative history reflects that the General Assembly meant precisely what it said in subsection (1)(c). Accordingly, the Title Board correctly determined that it did not have jurisdiction to hear the Second Motion for Rehearing. The Court should deny the Petition and affirm the Title Board's decision.

ARGUMENT

The Title Board Lacked Jurisdiction to Consider the Second Motion for Rehearing Because It Had Already Decided the First Motion for Rehearing.

I. Standard of Review/Preservation.

"[E]very tribunal," including the Title Board, "has jurisdiction to determine the facts on which its own jurisdiction depends and to make a jurisdictional ruling based on the facts." *See Keystone, a Div. of Ralston Purina Co. v. Flynn*, 769 P.2d 484, 488 n.6 (Colo. 1989).

With respect to the Title Board's application of the statute limiting its jurisdiction in the case of follow-on motions for rehearing, the Court reviews issues of statutory construction *de novo*. *Johnson v. People*, 2016 CO 59, ¶ 17. The Court's "primary task in interpreting a statute is to give effect to the legislative purpose underlying its enactment." *In re Title, Ballot Title, & Submission Clause for 1999-2000 No. 219*, 999 P.2d 819, 820 (Colo. 2000). To do so, the Court looks first to the language of the statute, "giving words and phrases their plain and ordinary meaning . . . according to the rules of grammar and common usage." *Johnson*, 2016 CO 59, ¶ 17. The Court applies the statute as written by the General Assembly and does not add or subtract words from it. *Turbyne v. People*, 151 P.3d 563, 567 (Colo. 2007).

If, based on this application, the statutory language is clear and unambiguous, the Court does "not resort to legislative history or other interpretive rules of statutory construction." *City of Littleton v. Indus. Claim Appeals Office*, 2016 CO 25, ¶ 27. If a statute is ambiguous, the Court "construe[s] [it] in light of the General Assembly's objective, employing the presumption that the legislature intended a consistent and sensible effect." *In re 1999-2000 No. 219*, 999 P.2d at 820-21.

With respect to preservation of the issue on appeal, Proponents do not dispute that the jurisdictional question was raised and addressed below.

II. The Plain Language of the Statute Is Unambiguous and Precluded the Title Board from Considering the Second Motion for Rehearing.

At the end of the statutory provisions addressing motions for rehearing to the Title Board—and prior to the subsection addressing appeals to this Court—the General Assembly added the following emphasized language in 2012:

> The motion for rehearing shall be heard at the next regularly scheduled meeting of the title board; except that, if the title board is unable to complete action on all matters scheduled for that day, consideration of any motion for rehearing may be continued to the next available day, and except that, if the titles and submission clause protested were set at the last meeting in April, the motion shall be heard within forty-eight hours after the expiration of the seven-day period for the filing of such motions. The decision of the title board on any motion for rehearing shall be final, except as provided in subsection (2) of

> this section, and no further motion for rehearing may be filed or considered by the title board.

An Act Concerning Procedures Related to the Statewide Initiative Title Board, H.B. 12-1313, 2012 Colo. Legis. Serv. Ch. 141 (emphasis added) (codified as amended at § 1-40-107(1)(c), C.R.S.).

By the plain language of the statute, after the Title Board decides "any" motion for rehearing, it cannot hear further motions for rehearing. Instead, the remedy for a party who disagrees with the Title Board's decision on rehearing is to appeal to this Court pursuant to subsection (2). § 1-40-107(2), C.R.S. (permitting any party who filed a motion for rehearing or "who appeared before the title board in support of or in opposition to a motion for rehearing" to appeal the Title Board's decision on rehearing).

Objector argued below that this provision merely codified the existing rule laid down by the Colorado Supreme Court a dozen years earlier that the same objector "may not raise in a second motion for rehearing a challenge that the objector could have raised in his first motion for rehearing." *In re Title, Ballot Title, & Submission Clause for 1999-2000 No. 215*, 3 P.3d 447, 449 (Colo. 2000). In *In re 1999-2000 No. 215*, the Court recognized that its rule left open situations where follow-on motions for rehearing could potentially be filed. *See id.*

To address this gap in the law, the General Assembly drew a bright-line rule with its 2012 amendment. Had the General Assembly intended what Objector suggests, it could have simply repeated verbatim the Court's "clear" holding in *In re 1999-2000 No. 2015*, 3 p.3d at 449 ("Our holding was clear: an objector may not raise in a second motion for rehearing a challenge that the objector could have raised in his first motion for rehearing.") Instead, the General Assembly chose different words—with no limiters—that unambiguously foreclose further motions for rehearing after the Title Board has decided a motion for rehearing. The only way the Court could twist the statute to fit its prior rule would be to add words that are not there. The Court should decline to rewrite the statute and should affirm the Title Board's decision as consistent with the plain language of the statute.

III. Legislative History Confirms the Plain-Meaning Interpretation.

Because subsection 1-40-107(1)(c), C.R.S. is unambiguous, the Court need not resort to legislative history or other tools of statutory construction. However, the legislative history confirms that the Title Board's application of the plain language is correct. As recognized by the Title Board in denying Objectors' Second Motion for Rehearing, the bill summary to H.B.12-1313 (pursuant to which the provision at issue was added) provided that the bill "[s]pecifies that after the title board takes action on a motion for rehearing, no further motions for

rehearing may be heard." Act Concerning Procedures Related to the Statewide Initiative Title Board, H.B.12-1313, 68th Gen. Assembly (2012) (as introduced) (attached hereto as **Exhibit A**).[5] The bill summary plainly articulates the rule applied by the Title Board. The General Assembly therefore understood the rule it was enacting, and the Court should not undermine the General Assembly's authority by recasting the rule to say something different.

IV. Applying the Plain Meaning Gives Effect to the General Assembly's Legislative Purpose.

Applying the statute as written also gives effect to the General Assembly's purpose of ensuring expediency in the title setting process. As this Court has recognized, to provide proponents of initiatives with sufficient time to collect signatures and for public debate, "stringent time restraints are placed on the proponents and opponents of initiatives, as well as on the Title Board." *In re 1999-2000 No. 219*, 999 P.2d at 821. Without such restraints, opponents of initiatives are incentivized to strategically delay the critical signature gathering process through motions for rehearing and appeals to this Court. By adding the statutory

[5] H.B.12-1313 passed without amendment, so the summary reflected in the bill as introduced reflects the bill as passed. *See* Summarized History for Bill No. H.B.12-1313, *available at:*

http://www.leg.state.co.us/CLICS/CLICS2012A/csl.nsf/BillFoldersAll?OpenFrameSet (last visited May 13, 2019).

language at issue, the General Assembly foreclosed any such gamesmanship on multiple motions for rehearing.

On the other hand, if the Court were to adopt the statutory application suggested by Objector, the General Assembly's strict limitation on further motions for rehearing would lose its teeth. Nothing would prevent an initiative's political opponents from lining up different objectors to file multiple motions for rehearing. This is not a challenging task given that objectors can be represented through counsel and are not required to appear in person at Title Board meetings on motions for rehearing. In contrast, pursuant to section 1-40-106(4)(a), C.R.S., each designated representative of the proponents is required to appear in person "at any title board meeting at which the designated representative's ballot issue is considered." The Title Board will not set the titles if the Designated Representative is unable to attend the meeting in person—regardless of the reason for her absence. *See* § 1-40-107(4)(d), C.R.S. The requirement that designated representatives appear in person provides another opportunity for gamesmanship and prejudice if initiative proponents were forced to respond to multiple motions for rehearing.[6]

[6] In this case, for example, the Designated Representatives and their counsel were forced to appear for a third time to attend the hearing on the Second Motion for Rehearing.

The statutory application proposed by Objector would also permit back-and-forth rehearings by proponents and opponents. For example, here, if the Title Board had heard the Second Motion for Rehearing and elected to reset the titles, proponents or any other registered elector could have filed a third round of motions for rehearing on the reset titles. Because the Supreme Court's prior rule left open the possibility for multiple rehearings that could delay the title setting process, the General Assembly closed that door by adding the unambiguous statutory language at issue.

Objector argued below that applying the plain meaning of the statute would prejudice objectors because they will not have an opportunity to be heard if they cannot file a second motion for rehearing. Objector is incorrect because every Title Board meeting is publicly noticed, including the initial meeting and the meeting on any rehearing. If an objector opposes a motion for rehearing filed by the proponents of a measure, the objector can appear in opposition to the motion for rehearing, including in opposition to any titles set on rehearing. If the objector is dissatisfied with the ruling on rehearing, he can file an appeal to this Court. § 1-40-107(2), C.R.S. (allowing any party who appeared "in opposition to a motion for rehearing" to appeal the Title Board's decision on rehearing).

Here, Objector did not appear in opposition to the First Motion for Rehearing, despite Objectors' counsel being present at the hearing to argue Proponents' other related measures and despite significant deliberations on both single subject and the title setting.[7] Instead, Objector elected to sit on the sidelines and employed the strategic option of waiting to raise his arguments on single subject and the Titles for the first time in the Second Motion for Rehearing. But the statutory language at issue does not permit this tactic once a motion for rehearing has been filed. The objector must appear and make his arguments at the rehearing. This was the General Assembly's clear directive to the citizens of Colorado in balancing expediency and fairness in the title setting process by amending the statute in 2012.

CONCLUSION

WHEREFORE, Proponents respectfully request that the Court deny the Petition and affirm the Title Board's decision denying the Second Motion for Rehearing for lack of jurisdiction.

[7] *See In re Proposed Initiative 2019-2020 #70*, Case No. 2019SA84, R., pp. 15-20, 22 (reflecting that Objector filed motions for rehearing on Proponents' related measures, which motions were heard and denied at the same April 26, 2019 Title Board hearing).

Respectfully submitted this 20th day of May, 2019.

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Benjamin J. Larson
William A. Hobbs, #7753
Benjamin J. Larson, #42540

ATTORNEYS FOR RESPONDENTS

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May, 2019, a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was filed and served via CCEF, and served upon the following:

Emily Buckley
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
emily.buckley@coag.gov

Attorney for Title Board

Mark G. Grueskin
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202

Attorney for Petitioner

/s/ Hannah N. Pick
Hannah N. Pick

Second Regular Session
Sixty-eighth General Assembly
STATE OF COLORADO

INTRODUCED

DATE FILED: May 20, 2019 4:42 PM

LLS NO. 12-0707.01 Ed DeCecco x4216 **HOUSE BILL 12-1313**

HOUSE SPONSORSHIP

Szabo,

SENATE SPONSORSHIP

Bacon,

House Committees
State, Veterans, & Military Affairs

Senate Committees

A BILL FOR AN ACT

CONCERNING PROCEDURES RELATED TO THE STATEWIDE INITIATIVE TITLE BOARD.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://www.leg.state.co.us/billsummaries.)

The bill makes the following changes related to the statewide initiative title board:

- Clarifies the authority of the secretary of state and attorney general to designate a representative to serve on the title board;

Shading denotes HOUSE amendment. Double underlining denotes SENATE amendment.
Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

EXHIBIT
A

- ! Requires a person who submits a motion for rehearing to the title board to specify the grounds for the rehearing and requires the motion to be typewritten;
- ! Specifies that after the title board takes action on a motion for rehearing, no further motions for rehearing may be heard; and
- ! Codifies case law that appeals of title board decisions must be filed with the Colorado supreme court within 5 business days.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 1-40-106, **amend** (1) and (3) (b) as follows:

1-40-106. Title board - meetings - titles and submission clause. (1) For ballot issues, beginning with the first submission of a draft after an election, the secretary of state shall convene a title board consisting of the secretary of state, the attorney general, and the director of the office of legislative legal services or ~~the director's designee~~ THEIR DESIGNEES. The title board, by majority vote, shall proceed to designate and fix a proper fair title for each proposed law or constitutional amendment, together with a submission clause, at public meetings to be held at the hour determined by the title board on the first and third Wednesdays of each month in which a draft or a motion for reconsideration has been submitted to the secretary of state. To be considered at such meeting, a draft shall be submitted to the secretary of state no later than 3 p.m. on the twelfth day before the meeting at which the draft is to be considered by the title board, and the designated representatives of the proponents must comply with the requirements of subsection (4) of this section. The first meeting of the title board shall be held no sooner than the first Wednesday in December after an election, and the last meeting shall be

held no later than the third Wednesday in April in the year in which the measure is to be voted on.

(3) (b) In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed, EXCEPT AS OTHERWISE REQUIRED BY SECTION 1-40-107, within two weeks after the first meeting of the title board. Immediately upon completion, the secretary of state shall deliver the same with the original to the designated representatives of the proponents, keeping the copy with a record of the action taken thereon. Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered "yes" (to vote in favor of the proposed law or constitutional amendment) or "no" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

SECTION 2. In Colorado Revised Statutes, 1-40-107, **amend** (1) and (2) as follows:

1-40-107. Rehearing - appeal - fees - signing. (1) (a) Any person presenting an initiative petition or any registered elector who is not satisfied with a decision of the title board with respect to whether a petition contains more than a single subject pursuant to section 1-40-106.5, or who is not satisfied with the titles and submission clause provided by the title board and who claims that they are unfair or that they

do not fairly express the true meaning and intent of the proposed state law or constitutional amendment may file a motion for a rehearing with the secretary of state within seven days after the decision is made or the titles and submission clause are set.

(b) A MOTION FOR REHEARING MUST BE TYPEWRITTEN AND SET FORTH WITH PARTICULARITY THE GROUNDS FOR REHEARING. IF THE MOTION CLAIMS THAT THE PETITION CONTAINS MORE THAN A SINGLE SUBJECT, THEN THE MOTION MUST, AT A MINIMUM, INCLUDE A SHORT AND PLAIN STATEMENT OF THE REASONS FOR THE CLAIM. IF THE MOTION CLAIMS THAT THE TITLE AND SUBMISSION CLAUSE SET BY THE TITLE BOARD ARE UNFAIR OR THAT THEY DO NOT FAIRLY EXPRESS THE TRUE MEANING AND INTENT OF THE PROPOSED STATE LAW OR CONSTITUTIONAL AMENDMENT, THEN THE MOTION MUST IDENTIFY THE SPECIFIC WORDING THAT IS CHALLENGED.

(c) The motion for rehearing shall be heard at the next regularly scheduled meeting of the title board; except that, if the title board is unable to complete action on all matters scheduled for that day, consideration of any motion for rehearing may be continued to the next available day, and except that, if the titles and submission clause protested were set at the last meeting in April, the motion shall be heard within forty-eight hours after the expiration of the seven-day period for the filing of such motions. THE DECISION OF THE TITLE BOARD ON ANY MOTION FOR REHEARING SHALL BE FINAL, EXCEPT AS PROVIDED IN SUBSECTION (2) OF THIS SECTION, AND NO FURTHER MOTION FOR REHEARING MAY BE FILED OR CONSIDERED BY THE TITLE BOARD.

(2) If any person presenting an initiative petition for which a motion for a rehearing is filed, any registered elector who filed a motion

for a rehearing pursuant to subsection (1) of this section, or any other registered elector who appeared before the title board in support of or in opposition to a motion for rehearing is not satisfied with the ruling of the title board upon the motion, then the secretary of state shall furnish such person, upon request, a certified copy of the petition with the titles and submission clause of the proposed law or constitutional amendment, together with a certified copy of the motion for rehearing and of the ruling thereon. If filed with the clerk of the supreme court within five BUSINESS days thereafter, 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.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.