SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: June 3, 2019 4:56 PM
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 #75 ("Establishment of Expanded Learning Opportunities Program") **Petitioner: Kenneth Nova** **v.** **Respondents: Monica R. Colbert and Juliet Sebold** **and** **Title Board: BENJAMIN SCHLER; LEEANN MORRILL; and JASON GELENDER**	▲ COURT USE ONLY ▲
Attorney for Petitioner: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com	**Case No. 2019SA89**
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:

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s/ Mark G. Grueskin
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SUMMARY

The issue before the Court is what the legislature meant when it prohibited a "further" motion for rehearing at the Title Board. The Board and the Proponents assert, without any legal support or analysis of the specific statutory wording, that there is a plain meaning of "further" that supports the Board's decision. Courts that have considered this question have found the opposite: "further" is inherently ambiguous and thus requires judicial construction.

To the extent they acknowledge that judicial construction of this term is warranted, the Board and the Proponents point the Court to the bill's legislative history. Both maintain that the bill summary for HB12-1313 supports their position. But this Court has held that a bill summary does not provide legislative history upon which a court may rely. Thus, their shared source of legislative intent is not a basis for this Court's decision.

The Title Board also points to the general statement of the former Deputy Secretary of State before the House State Affairs Committee in a hearing on HB12-1313. He stated that there would be "only one set of motions for rehearing" and that this stage "would be the end of the process." Yet, the Board's Opening Brief did not address this witness's confirmation of the "exact" purpose of this provision: "one rehearing request, encompassing all objections, has to be it." Neither did the Title Board point the Court to the statement of the Deputy Attorney General (also a Title

Board member) who testified to the Senate State Affairs Committee that the new language was drafted so objectors to titles "cannot re-bring, and then re-re-bring, and then re-re-re-bring appeals." In other words, the provision in question was enacted to keep an opponent from filing any "further" motions for rehearing.

Moreover, both the Board and the Proponents assert this language was not intended to reflect this Court's decisions that all objections be filed simultaneously. But, again, the bill's legislative history contradicts this assertion. The then-Deputy Secretary of State specifically assured the House State Affairs Committee, "there is case law that supports this change."

As a companion means of giving full effect to legislative intent, the Court should use the rule of consistent usage when evaluating the meaning of "no further." As the initiative statute's other use of this phrase comports with Nova's interpretation, the Title Board erred below.

Nova filed his motion for rehearing, as required by statute, within seven days "after the (single subject) decision (was) made or the title and submission clause (were) set." Given the disjunctive "or" that is used in statute, Nova was not required to be a participant in the Proponents' rehearing and thus timely filed his motion for rehearing. The Title Board erred by refusing to hear his objections, and the Board should be ordered to do so upon remand.

LEGAL ARGUMENT

I. Standard of review; preservation of issues presented for appeal.

The parties do not dispute that this issue of statutory interpretation is to be considered de novo or that Nova raised the jurisdictional issue before the Title Board. Title Board's Opening Brief at 5; Respondents' Opening Brief at 6.

II. The Title Board and the Proponents are incorrect that the statute's use of "further" prevented the Board from considering Nova's motion.

A. "Further" does not have a single meaning, and thus the statute cannot be applied by use of a "plain language" approach.

The parties to this appeal urge the Court to apply "further" in inconsistent ways. The Title Board and the Proponents interpret a "further motion for rehearing" as any motion after a rehearing is held. Title Board's Opening Brief at 5-7; Respondents' Opening Brief at 6-8. Nova interprets "further" as a continued motion for rehearing that extends the process initiated by that objector. Petitioner's Opening Brief at 14-16. This differing view may not be surprising, given that courts find "further" to be an ambiguous term.[1]

Where language "chosen by the legislature" can be applied using "more than one reasonable understanding, it is considered to be ambiguous." *Marquez v. People*, 2013 CO 58 at ¶7, 311 P.3d 265, 268. A statutory term is "ambiguous"

[1] Respondent is unaware of any Colorado case law that defines "further," and neither the Title Board nor Proponents cite any such precedent.

when it is "reasonably susceptible of more than one meaning." *Danielson v. Castle Meadows*, 791 P.2d 1106, 1111 (Colo. 1990). Where such statutory language is used, "a court must construe the statute according to the legislative intent underlying the statute." *Id.*

"Further" is just such a term, as it is "reasonably susceptible" of multiple meanings. Consistent with the positions advocated by the Title Board and Proponents, it can mean "in addition, additionally; moreover;" as such, it communicates that "something else need not have any particular connection to what came before… [and will] suggest that two ideas are independent or distinct." *Wright's Well Control Servs., LLC v. Oceaneering Int'l, Inc.*, 2015 U.S. Dist. LEXIS 154559 at *18 (E.D. La. 2015) (citations, including dictionary definitions, omitted).

But consistent with Nova's position here, "further" can also mean "to a greater extent; more," as this meaning "suggests cumulativeness – an elaboration or continuation of a previously expressed concept or idea." *Id*. at *17 (citations, including dictionary definitions, omitted). The Tenth Circuit has used this latter interpretation, holding that "[u]se of the word 'further'" implied "a continuation" of the concept in dispute. *Metroplex Corp. v. Thompson Indus., Inc.*, 25 F. App'x 802, 807 (10th Cir. 2002).

As such, "further" is "reasonably susceptible to more than one meaning." *Wright's Well Control Serv., supra*, 2015 U.S. Dist. LEXIS 154559 at *17. It is

ambiguous where, as here, it is used to modify a term connoting another legal filing. For example, "further claims" could either mean the party's "future claims" or it could mean the claims a party "could have brought out of [an already-filed] action." *Hines v. G. Reynolds Sims & Assocs. P.C.*, 2013 U.S. Dist. LEXIS 59012 *13-14 (E.D. Mich. 2013).

The General Assembly was aware of this definitional thicket. The House sponsor of HB12-1313 discussed with a member of the House State Affairs Committee the circumstances under which this provision would come into play. Their concerns focused on whether this provision permitted a motion for rehearing to address an initiative's single subject after an earlier motion concerning ballot title accuracy and fairness. A committee member suggested that the single subject challenge is constitutionally assured, regardless of timing. But the bill sponsor admitted after that colloquy, "you know, it might not be completely clear."[2]

Given the fact that the parties disagree on the meaning of "further" and the bill sponsor thought the overall issue of which motions might be later filed seemed confused, this Court must establish meaning of the term "further."

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[2] *Hearings Before House State, Veterans, and Military Affairs Committee on H.B.12-1313 (Mar. 14, 2012), available at* http://coloradoga.granicus.com/MediaPlayer.php?view_id=16&clip_id=1142&meta_id=18904 (also: https://tinyurl.com/housecommHB1313) (statement of Rep. Szabvo at 15:55 of recording).

B. To resolve a statutory ambiguity, the Court looks to the legislature's intent.

This Court has prescribed the formula for implementing the Title Board statute. Whenever the statute that is at issue here is to be applied, this Court seeks to determine the General Assembly's intent. "It is important to note our charge in interpreting § 1-40-107. The first goal of the court in construing a statute is to ascertain and give effect to the legislature's intent; to ascertain legislative intent, courts must first look to the statutory language in question." *Byrne v. Title Board*, 907 P.2d 570, 573 n.2 (Colo. 1995) (using the "clear statutory language" at issue in that matter, the Title Board was required to hear a motion for rehearing within 48 hours for titles set at its last scheduled meeting).

The "no further motion for rehearing" provision does not use a clearly measurable test such as 48 hours. Instead, it uses a term the courts find to be ambiguous. In such instances, this Court will "interpret the statute to comport with the legislature's objectives." *Buckley v. Chilcutt*, 968 P.2d 112, 119 (Colo. 1998). Statutes that implement the right of initiative are treated no differently; the legislative history of the provision in question is "instructive as to the General Assembly's intent." *Id.* at 119.

"[A] statutory interpretation that defeats legislative intent… will not be followed." *AviComm, Inc. v. Colorado Public Util. Comm'n*, 955 P.2d 1023, 1031 (Colo. 1998). "Statutes are to be construed in such manner as to further the

legislative intent for which they were enacted." *Snyder Oil Co. v. Embree*, 862 P.2d 259, 262 (Colo. 1993). Thus, this Court must adhere to the actual objective of a statute. In this instance, that objective is precisely what Nova has contended throughout this proceeding.

C. A bill summary does not establish legislative intent.

Both the Proponents and the Title Board point to language in the summary of HB12-1313 to support their positions as to the meaning of the "no further motion for rehearing" phrase. Title Board's Opening Brief at 8; Respondents' Opening Brief at 8-9.

This Court rejects use of a bill summary as an indicator of legislative intent. The summary "may or may not have been relied on in some measure by legislators in considering the bill." *Dept. of Transp. v. Gypsum Ranch Co., LLC*, 244 P.3d 127, 131 (Colo. 2010) (rejecting contention that bill summary demonstrated legislative intent). Moreover, the bill summary is not reflected in the published revised statutes. *Id.; cf. In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #215*, 3 P.3d 11, 15 (Colo. 2000) (initiative's caption is not contained in ballot title and thus would not be considered in challenge to title accuracy).

Thus, HB12-1313's bill summary need not be given any weight in an attempt to determine what the legislature was seeking to accomplish by passing this bill.

D. HB12-1313's full legislative history makes clear that the bill was intended to apply just as Nova asserted to the Title Board.

1. The full legislative history, addressing the "no further motion for rehearing" provision, supports Nova's position in this action.

To establish the legislature's intent, the Title Board's Opening Brief cites a statement by a then-former Title Board member, indicating that "one set of motions for rehearing [and] one rehearing held by the Title Board… would be the end of the process." Title Board's Opening Brief at 8 (statement of Bill Hobbs, the outgoing deputy secretary of state). From that single citation, it might seem that the provision in question was only briefly discussed in legislative committee and was clearly understood to have the meaning advanced by the Board and the Proponents. But such an assumption would be wrong. This Court's "responsibility is to give **full meaning** to the legislative intent." *Conte v. Meyer*, 882 P.2d 962, 965 (Colo. 1994) (emphasis added).

In the House State, Veterans, and Military Affairs Committee, an extended discussion of this provision took place.[3] Rep. Lois Court was concerned that the bill might be read to preclude a motion for rehearing on single subject grounds – a challenge she asserted was constitutionally protected – if the only motion filed had addressed just the accuracy of the ballot title language. Rep. Court had been an

[3] *Hearings Before House State, Veterans, and Military Affairs Committee on H.B.12-1313 (Mar. 14, 2012), supra* at n. 2 (colloquy occurring throughout hearing from 8:28 through 19:46 of recording).

initiative proponent and a litigant over such matters before she was elected to the legislature. *See, e.g.*, *Court v. Pool*, 916 P.2d 528 (Colo. 1996). Mr. Hobbs walked her through the objective and workings of this new statutory language as applied to a hypothetical initiative.

> BILL HOBBS: All of your objections need to be made at that first, that first rehearing. And if you don't make…. Any objections you don't make, then you can't come back and say, "Well, now, **I've got another objection. I would like to file another motion for rehearing**.
>
> REP. LOIS COURT: So let's go through what we're currently doing. If we… if we have a title that is very contentious, we can have opponents who want to spread out the process, file numerous rehearing requests – for, you know, this word, this word, this word, and then single subject. And so, what we're saying here is, no more of that. **One rehearing request, encompassing all objections, has to be it.**
>
> BILL HOBBS: That's correct. **That's exactly what the purpose is.**[4]

To convince the Committee of the reasonableness of the new language, Mr. Hobbs told legislators that this provision would just "clarify" the law.[5] In so stating, he assured the Committee that it would address a fact-specific situation. "Sometimes we… we have had folks that believe they could do another motion after the first rehearing."[6] And in support of his contention that the "no further motion for rehearing" provision was a prudent approach, Mr. Hobbs assured the Committee

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[4] *Id.* (colloquy at 9:50 of recording) (emphasis added).
[5] *Id*. (statement at 7:57 of recording).
[6] *Id*. (statement at 7:50 of recording).

"there is case law that supports this change."[7] The only such case law were the two decisions from this Court in 2000 that held that a single objector could not file a second motion for rehearing to object to matters that could have been protested in the first such motion. *See* Petitioner's Opening Brief at 15-16, citing *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #215*, 3 P.3d 447, 448 (Colo. 2000); *In re Title, Ballot Title and Submission Clause, and Summary for Initiative #1999-2000 #219*, 999 P.2d 819, 821 (Colo. 2000).

David Blake, the then-deputy attorney general, stated that he, too, sat on the Title Board and gave that office's general backing to the Deputy Secretary of State's characterizations of the bill and its purposes. "I'm happy to echo what Mr. Hobbs has said…."[8] The bill sponsor, Rep. Szabo, did the same. "I think the intention is what Mr. Blake and Mr. Hobbs have said."[9]

The Senate Committee heard a parallel explanation of the "no further motion for rehearing" language. Mr. Blake told Committee members, "The third thing it (HB 1313) does is limit rehearings to only one, **such that opponents cannot re-bring, and then re-re-bring, and then re-re-re-bring appeals**. It's an efficiency matter as much as anything else."[10]

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[7] *Id*. (statement at 7:59 of recording).
[8] *Id*. (statement at 12:10 of recording).
[9] *Id.* (statement at 15:55 of recording).
[10] *Hearings before Senate State, Veterans, and Military Affairs Committee on H.B.12-1313* (April 9, 2012), *available at*

Thus, there was no dispute before the legislature. According to Rep. Court, the statute would make it clear that an objector was limited to "[o]ne rehearing request, encompassing all objections." As she noted, the statute was amended to prevent the serial filing of ballot title objections over "this word, this word, [and] this word" through "numerous rehearing requests." Mr. Hobbs stated that this provision was pointed at "folks that believe they could do another motion after the first rehearing." And Mr. Blake was equally specific: the statute was being amended to prevent an objector from "re-re-re-bring[ing]" motions for rehearing. In short, the statute means exactly what Nova has contended throughout this process.

Thus, the new language was aimed at gamesmanship by certain ballot title objectors. It was not meant to keep persons from objecting to a ballot title, consistent with the statute's express wording, "after" the title was actually set. The Title Board erred by rejecting jurisdiction over Nova's timely filed motion for rehearing.

2. The legislative history about requiring more than superficial objections to ballot titles also supports Nova's position here.

The Title Board and the Proponents argue Nova could have appeared at the Title Board when Proponents filed their motion for rehearing. Title Board's

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http://coloradoga.granicus.com/MediaPlayer.php?view_id=49&clip_id=1441&meta_id=24481 (also: https://tinyurl.com/sencommHB1313) (statement at 11:30 of recording) (emphasis added).

Opening Brief at 10-11; Respondents' Opening Brief at 11. Neither contends that there was a ballot title to evaluate, much less dispute, at that point.

Nova has already addressed the statute requiring "particularity" and specific challenges in a ballot title challenge. Petitioner's Opening Brief at 22-23; *see* C.R.S. § 1-40-107(1)(b). Coincidentally, that requirement was imposed as part of HB12-1313, the bill that introduced the "no further motion for rehearing" language into the statute.

Before the legislative committees that considered HB12-1313, Mr. Hobbs and Mr. Blake spoke extensively about the need for specificity in these challenges. They stated that the Board received motions for rehearing that said nothing more than "I hereby submit this motion for rehearing" or "I motion for a rehearing because this violates single subject" or "the title contains a catch phrase."[11] According to the Deputy Attorney General, this trial-by-ambush prejudiced the rights of initiative proponents as it "puts proponents of a title at a disadvantage because they have to wait for the appeal in order to hear the specifics of what the appeal is and then react on the spot."[12] Vague allegations of this sort give proponents "no idea how to focus on it or rebut it if you're a proponent."[13]

[11] *Id*. (statement of David Blake at 12:35 of recording).
[12] *Id*. (statement at 12:50 of recording).
[13] *Id*. (statement at 13:11 of recording).

As to the decision makers on initiatives, this change was designed to "help the Title Board members anticipate what the issues are going to be."[14] It "enables proponents to prepare and empowers the board members to prepare and be able to hear those (arguments) in a full and thorough manner."[15]

Here, the Board and the Proponents argue that the policy behind the statute's advance notice of specificity concerning title objections is limited to written motions for rehearing and does not apply to a person who just "appears" at the Title Board hearing. Any objection would preserve that individual's right to appeal, although given that it is made without any advance notice about ballot title language, it also restricts the issues he or she may raise here. Having argued for specificity in such challenges and obtained a change to the statute to require such clarity, it is anomalous that the Board backtracks now. This requirement for particularity in ballot title objections was the provision that "most significantly" affected Title Board practice[16] and was "the most important change in the procedures" addressed by the bill.[17]

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[14] *Id*. (statement at 12:58 of recording).

[15] *Hearings Before House State, Veterans, and Military Affairs Committee on H.B.12-1313 (Mar. 14, 2012), supra* at n. 2 (statement of Bill Hobbs at 12:33 of recording).

[16] *Hearings before Senate State, Veterans, and Military Affairs Committee on H.B.12-1313* (April 9, 2012), *supra* at n. 10 (statement of David Blake at 12:35 of recording).

[17] *Hearings Before House State, Veterans, and Military Affairs Committee on H.B.12-1313 (Mar. 14, 2012), supra* at n. 2 (statement of David Blake at 12:33 of recording).

In a departure from this Court's holdings, the Deputy Secretary of State assured the House State Affairs Committee that an objector could appeal issues that were not raised before the Title Board. The statute does address who can appeal a decision of the Title Board, he said, but the initiative statute "doesn't go on to say that the Court will only hear issues that were heard upon rehearing before the Title Board. So I think, right now, someone could raise an additional issue before the Supreme Court."[18]

This statement was inaccurate. *See In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1130 n.3 (Colo. 1996) (Court would not consider alleged title deficiency where "petitioners failed to raise this contention in their motion for rehearing"); *In the Matter of the Proposed Initiative on Limited Gaming in Burlington*, 830 P.2d 1023, 1027 (Colo. 1992) (appeal to this Court can only be based on objections "properly raised in the motion for rehearing"). But the House Committee was left believing that the process allowed for supplemental objections to ballot title challenges, not a strict lid on what could be appealed to this Court.

Thus, even the witnesses who were most knowledgeable about the bill did not portray HB12-1313 as a stringent restriction on post-rehearing challenges to a ballot title. The door was left open to seeking correction to Board decisions as long as the process used was not expressly prohibited by statute.

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[18] *Id*. (statement of Bill Hobbs at 18:16 of recording).

E. A court will rely on a statute's legislative intent rather than accept an absurd result due to a literal interpretation of a statute.

As noted in Petitioner's Opening Brief, the "no further motion for rehearing" provision, if applied literally, would not permit a motion for rehearing to address a Title Board error when it attempts to fix a title after having been ordered to do so by this Court. Petitioner's Opening Brief at 17-24.

The Title Board does not dispute that the position it takes in this appeal would lead to such a result. "[A]fter conducting a rehearing on an initiative, the Board cannot consider any new rehearing motions." Title Board's Opening Brief at 9. The Proponents are also locked into that extreme position. "[A]fter the Title Board decides 'any' motion for rehearing, it cannot hear further motions for rehearing." Respondents' Opening Brief at 4.

"[W]here a literal interpretation of the statute . . . leads to an absurd result, the intent of the legislature will prevail instead." *Crandall v. City and County of Denver*, 238 P.3d 659, 662 (Colo. 2010) (citations and internal quotation marks omitted). This Court generally considers "the potential consequences of a particular construction," C.R.S. § 2-4-203(1)(e), and will certainly do so where a statute affecting the exercise of the right of initiative is at issue. *Buckley, supra*, 968 P.2d at 117. Leaving errors in ballot titles that could mislead petition signers and voters is egregious. This Court strives to ensure that voters are not deceived in this manner, whether the title contains an error due to the Board's misunderstanding of the

measure or the title contains a political catch phrase that plays to voters' passions rather than voting "yes" or "no" based on the initiative's merits. *See In re Proposed Initiative for 1999-2000 # 258(A)*, 4 P.3d 1094, 1098, 1099-1100 (Colo. 2000).

Mr. Hobbs' concerns, expressed before the House State Affairs Committee, about "folks that believe they could do another motion after the first rehearing" or by Mr. Blake about objectors who "re-bring, and then re-re-bring, and then re-re-re-bring appeals" are addressed by using Nova's interpretation of the statute. Nova's position does not lead to the absurd result that springs from the Board's interpretation of the statute.

Rep. Court's observation about persons who "file numerous rehearing requests – for, you know, this word, this word, this word, and then single subject" is also resolved by Nova's interpretation. Yet, this construction would not trigger results that undermine the purpose of the titling process – fairly informing voters, whether or not they are knowledgeable about a proposed measure. *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24 at ¶ 11, 369 P.3d 565, 568. Thus, the interpretation urged on the Court by the Board and the Proponents does not withstand scrutiny made necessary because of its inevitable – but absurd – result.

F. The position taken by the Title Board and the Proponents about the meaning of "further" is contrary to the rule of a phrase's consistent usage within the same statute.

Legislative intent is not just apparent from the hearings held on the bill in question. It may also be evident from the "consistent usage" rule which provides that terms or phrases within the same statute are to be given the same effect.

> It is a well settled rule where, as here, the legislature employs the same words or phrases in different parts of a statute, then, absent any manifest indication to the contrary, the meaning attributed to the words or phrases in one part of the statute should be ascribed to the same words or phrases found elsewhere in the statute.

Colo. Common Cause v. Meyer, 758 P.2d 153, 161 (Colo, 1988) (citations omitted).

Here, the ballot initiative statute also uses "no further" in C.R.S. § 1-40-118(1). That statute addresses the process for protesting the Secretary of State's decision over the sufficiency or insufficiency of an initiative petition's signatures. Once the Secretary reviews petitions, determines that the signatures either are or are not sufficient, and a protest is thereafter filed, "**no further** agency action shall be necessary for the district court to have jurisdiction to consider the protest." *Id.* (emphasis added). In other words, a person objecting to the Secretary's sufficiency decision need not pursue any other petition-related administrative remedy even though it is provided by statute.

Before C.R.S. § 1-40-118(1) was amended in 2009,[19] this Court had already clarified this jurisdictional question – thirteen years before the statutory amendment in question. In *Fabec v. Beck*, 922 P.2d 330, 336-37 (Colo. 1996), the proponents of an initiative objected to a challenge to the Secretary of State's sufficiency decision on petition signatures, arguing that the objector had failed to exhaust administrative remedies. The Court held the objector was not required to pursue the administrative remedy found in C.R.S. § 1-40-119, which provides an administrative process for challenging circulator practices that violate the statute. Much like the situation presented here, the Court's ruling was codified many years later by the General Assembly. That statutory amendment provided notice to electors involved in the initiative process that they were not required to engage in any "further" proceeding before the Secretary in order to have a court accept jurisdiction over a complaint.

Given the rule of construction concerning consistent usage, "no further" as used in C.R.S. § 1-40-107 must reflect a legislative intent to address the act of a person who has already filed a motion for rehearing. As such, it prohibits any "further" motion for rehearing on his or her part. Because this phrase must have a consistent meaning in the initiative statute, the Court should reject the interpretation

[19] HB09-1326 amended several provisions in the initiative statute, including this one, and was sponsored by Rep. Court, among other legislators. 2009 Colo. Session Laws 1167, 1177.

advanced by the Board and the Proponents, as it is at odds with this clear meaning in other places in this statute.

III. The Title Board and the Proponents incorrectly seek to limit Nova's participation in the correction of the ballot title to the rehearing triggered by Proponents' own motion.

The Board and the Proponents argue that Nova was required to appear in the proceeding initiated "in support of or in opposition to" Proponents' motion for rehearing. Title Board's Opening Brief at 4, 10; Respondents' Opening Brief at 7, 11-12.

This statute allows a motion for rehearing "after the (single subject) decision is made ***or*** the titles and submission clause are set." C.R.S. § 1-40-107(1)(a)(I) (emphasis added). Thus, a motion for rehearing is ripe but only after either of two actions are taken by the Board: either it decides only the single subject issue (which would be a decision adverse to the initiative's proponents) or it finds a single subject and then, as it is required by law to do, sets the titles and submission clause.

Based on the language in the statute, the Board and the Proponents are incorrect that Nova was required to intervene in Proponents' rehearing. The use of the disjunctive in C.R.S. § 1-40-107(1)(a)(I) means that a motion for rehearing is appropriate after either of these acts. "[T]he disjunctive 'or' reflects a choice of equally acceptable alternatives." *Willhite v. Rodriguez-Cera*, 2012 CO 29 at ¶18, 274 P.3d 1233, citing *Webster's Third New International Dictionary* 1585 (2002)

("defining 'or' as indicating 'a choice between alternative things, states, or courses'"). The *Wilhite* decision cited this Court's decision in *Denver Horse Importing Co. v. Schafer*, 147 P. 367, 370 (Colo. 1915), which relied on the dictionary definition of "or" as "[a] co-ordinating particle that marks an alternative – as you may read or may write, that is, you may do one of the things at your pleasure, but not both – [and that] often connects a series of words or positions, presenting a choice of either."

The statute does not provide that a motion for rehearing can only be made after the single subject decision is made. It provides for motions based on two alternative events: a motion for rehearing is timely if made within seven days after the titles are set as well as if it is made within seven days after the Board makes its single subject decision. Nova based his motion on an actual title and, in order to comply with the wording of the statute, acted upon the former rather than the latter.

The statute also does not require that a motion for rehearing be filed only after "the earlier of" the Board's single subject decision or its setting of titles. This Court would have to import wording that does not exist in the statute in order to read this provision in the way that the Title Board and the Proponents urge it to do. Where it has intended such a condition to apply, the legislature has used such limiting language in other statutes dealing with ballot issues. *See* C.R.S. § 1-45-108(7)(a) (a matter is considered a ballot issue for campaign finance reporting purposes "at the

earliest" of the title setting, the circulation of petitions, or the submission of signed petitions to the designated election official). Because the legislature did not use such language, the Court cannot superimpose it here.

Thus, the statute allows for a timely objection to the setting of titles – namely, after the title is actually set. The Title Board and the Proponents are wrong that Nova was forced to speak "in support of or in opposition to" the Proponents' motion which did not even address the clear title requirement that Nova most objects to. *See* C.R.S. § 1-40-107(2). He had a statutory right to consider the most appropriate challenges within the seven-day time period provided by statute rather than merely uttering empty phrases – say, "I motion for a rehearing because this violates single subject" or "the title contains a catch phrase" – to preserve the right to appeal the Board's decision. It was just such "objections" that this initiative statute was amended to prohibit.

C.R.S. § 1-40-107(1)(a)(I) also answers Proponents' argument that there would be an endless series of motions for rehearing if Nova's position is embraced here. Respondents' Opening Brief at 10 ("Nothing would prevent an initiative's political opponents from lining up different objectors to file multiple motions for rehearing."). The statute allows for a motion for rehearing "after the decision is made or the titles and submission clause are set." *Id*. Once the titles are "set," there are only seven days for objectors to seek a rehearing. After that point, all parties

would be on notice of the Board decisions that might warrant further legal consideration. After the seventh day following the actual title setting, any add-on motions would be untimely.

Thus, Nova's motion was timely, as the statute sets the single subject decision "or" the setting of a ballot title as the official acts that began Nova's seven days to file a motion for rehearing. Additionally, Proponents' worst-case scenario of unending motions for rehearing is precluded by the statute, given that no motions for rehearing can be filed after the seventh day following title setting.

CONCLUSION

The Title Board's decision below is not supported by the applicable statutory wording, the amendment's legislative history, this Court's rules of construction, or this Court's previous decisions which were said to reflect the statutory change amendment at issue here. That amendment, by using "or," created the appeal route chosen by Nova – to wait until "after" there was a ballot title to review and, if it was believed to be flawed, to put the matter back before the Title Board so it could correct its errors.

The Board misread its own statute, just as it misreads the statute's legislative history. The Board's jurisdictional decision should be reversed, and the questions of ballot title adequacy and fairness should be returned to the Board for decision.

Respectfully submitted this 3rd day of June, 2019.

/s Mark Grueskin

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF** was sent this day, June 3, 2019, via Colorado Courts Electronic Filing to Counsel for the Title Board and to Counsel for the Proponents at:

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