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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 #75 ("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.: 2019SA89
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' ANSWER 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 2,035 words.

In response to each issue raised, Proponents provide, under a separate heading before the discussion of the issue, a statement indicating whether Proponents agree with the Title Board'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.

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

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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 #75 ("Initiative #75"), through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit this Answer Brief in support of the title, ballot title, and submission clause (the "Title(s)") set by the Title Board for Initiative #75.

SUMMARY OF ARGUMENT

Over 20 pages of briefing, Objector Kenneth Nova ("Objector") weaves together various complaints about the General Assembly's policy decision to forbid multiple rounds of motions for rehearing before the Title Board. Conspicuously absent from his Opening Brief, however, is any analysis of the plain language of the provision in question and how its clear prohibition against multiple motions for rehearing can be squared against the statutory interpretation Objector advances. Indeed, Objector never clearly articulates the rule he believes should be gleaned from the amendment to the rehearing statute because such an analysis would reveal itself to be an *ad hoc* rewrite of the statute. Objector also ignores the legislative history that clearly indicates that the General Assembly meant what it said in amending the statute.

Objector's primary complaint against applying the statute as written is that

doing so prevented him from contesting the clarity of the Titles. Objector is wrong because he had an opportunity to contest the clarity of the Titles at the publicly noticed rehearing meeting. Had he done so, he would have had another opportunity to contest the Titles through an appeal to this Court. Instead, Objector, who was present through counsel at the rehearing meeting for Proponents' related measure, Initiative #74, elected to then leave the meeting prior to the Title Board addressing Initiative #75. Objector now seeks a right to delay the initiative process even further by requiring the Title Board to hold yet another hearing, after which Objector could then file another appeal with this Court. Having sat on his rights, Objector should not be heard to complain and delay the initiative process further.

ARGUMENT

I. Standard of Review/Preservation.

Proponents agree that issues of statutory construction are reviewed *de novo*. With respect to Objector's recitation of the rules of statutory construction, Objector ignores the role of legislative history despite his contention that the statute is ambiguous. As set forth in Proponents' and the Title Board's Opening Briefs, the Court need not address the legislative history because the statute unambiguously precludes multiple rounds of motions for rehearing. However, Objector should not be permitted, on the one hand, to argue the statute says something it does not, while

on the other hand, to ignore the legislative history indicating that the General Assembly intended exactly what the statute says.

Proponents agree that the jurisdictional argument was preserved.

II. Objector's Inaccurate Policy Argument Cannot Trump the Plain Language of the Statute.

Fundamentally, Objector's argument is that applying the statute as written would be unfair to him because he did not have an opportunity to contest the Titles for Initiative #75. Objector tees up his position by first arguing at length about the importance of clarity in setting ballot titles. Objector's Op. Br. at 6-8. However, the General Assembly—not Objector—is charged with making policy decisions as to how to appropriately balance clarity and an expeditious process in setting titles. The General Assembly struck that balance with its amendment to the rehearing statute that prevents the Title Board from hearing further motions for rehearing. 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.)

The bigger issue with Objector's attempt to inject a policy debate into a statutory construction analysis is that his policy position is based on the false premise that he did not have an opportunity to object to the Titles. Objector's Op. Br. at 3, ("[T]he Board denied Nova the ability to raise key issues about the ballot title.")

The Title Board held two hearings on Initiative #75, the initial hearing on April 17, 2019, and the hearing on Proponents' Motion for Rehearing on April 26, 2019. *See* R., p. 27. Both were held after public notice, and any registered elector, including Objector, could attend and participate in either or both hearings. At the April 26 rehearing, upon determining that Initiative #68 contained only one subject, the Title Board proceeded to draft and set titles.

Objector could have appeared in opposition to Proponents' Motion for Rehearing and could have participated in the Title Board's discussion when it set the Titles for Initiative #75. In fact, Objector's counsel was in attendance at the rehearing on the sister measure, Initiative #74, but then left the meeting and elected not to participate in the title setting for Initiative #75. Yet, Objector would have the Court believe that he did not object to the Titles as they were set on rehearing because doing so would have been a "legal improv exercise[]." Objector's Op. Br. at 22. As a practical matter, it is not an "improv" exercise because the Title Board is deliberate and thorough in its discussions concerning Titles, and anyone present has an opportunity to participate and object during those discussions. Moreover, here, the Title Board had already set titles for two of Initiative #75's sister measures (2019-2020 #70 and #71), and Objector had moved for rehearing on the clarity of

those titles as of the April 26 rehearing.[1] The titles set after rehearing on Initiatives #70 and #71 were used as the baseline for setting the Titles on Initiative #75 because the measures are very similar.

Had Objector simply voiced the same title objections he had already filed in his motions for rehearing on the other measures, he would have had another opportunity to raise title issues with this Court on appeal. § 1-40-107(2), C.R.S. (permitting any registered elector "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). Nevertheless, Objector misapplies the rehearing statute to argue that it was impossible for him to object to the Titles set on rehearing.

Objector cites section 1-40-107(1)(a)(I), C.R.S. and incorrectly states that "the statute limits any objection to the wording of a ballot title until 'after' the titles and submission clause are set." Objector's Op. Br. at 4; *see also id.* at 9-10 (elaborating on this incorrect position). The cited statute provides that an elector dissatisfied with the titles set "may" file a motion for rehearing (which is subject to the one-motion limitation in subsection (1)(b)), but the statute in no way prohibits an elector from

[1] *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).

making objections during a public rehearing where the Title Board sets the titles. (Emphasis added). In fact, the statute expressly contemplates that electors can appear in opposition to motions for rehearing because that is one of the triggers for standing to appeal. § 1-40-107(2), C.R.S. Accordingly, Objector has only himself to blame for any perceived lack of opportunity to object to the Titles as a result of his strategic decision not to appear in opposition at the rehearing.

In sum, applying the plain language of the statute does not contradict other statutory provisions as Objector suggests, nor does it preclude an elector from objecting to titles set by the Title Board. Rather, the statute precludes electors from objecting to titles in the manner Objector sought to do here, i.e., by further delaying the title setting process with multiple motions for rehearing. This is a fair result, not an "absurd" one; but, regardless, that is a policy decision for the General Assembly to make. The Court should not undermine the General Assembly's authority by rewriting the statute to suit Objector's needs.[2]

[2] Objector speculates that the prohibition against second motions for rehearing could be applied to bar a motion for rehearing if the Title Board is re-vested with jurisdiction after the Supreme Court remands a measure to reset titles. Objector's Op. Br. at 18-21. Objector then calls that result "absurd" and further speculates that even the Supreme Court could not consider any error made by the Title Board in resetting titles. *See id.* The Court need not consider Objector's speculation because the issue is not before the Court. In fact, the statute is silent about the process on remand. Regardless, it would not be an "absurd" result if a motion for rehearing could not be filed after the Title Board resets titles on remand, given that any

III. Objector Ignores the Legislative History, While Illogically Assuming the General Assembly Was Merely Memorializing Existing Case Law.

Objector cannot contend that the plain language of the statute stands for his proposed amorphous rule of precluding "serial motions for rehearing." Objector's Op. Br. at 16. Consequently, Objector must necessarily contend that the statute is ambiguous and should be interpreted in a manner consistent with his proposed rule. At the same time, Objector painstakingly avoids using the term "ambiguous" in his Opening Brief because that would then require a review of the legislative history. Here, as pointed out in both Proponents' and the Title Board's Opening Briefs, the legislative history confirms that the intent of the amendment was to allow only one round of motions for rehearing, after which the only further recourse is an appeal to this Court. Proponents' Op. Br. at 8-9; Title Board's Op. Br. at 8-9.

Instead of addressing the legislative history that contradicts his position, Objector argues—without any historical support—that the General Assembly was merely intending to codify existing Supreme Court precedent. Objector's Op. Br. at 16. To make this argument, Objector misconstrues case law that directly undercuts his position. Objector's Op. Br. at 16 (citing *Weinstein v. Colborne Foodbotics,*

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registered elector can participate in the initial rehearing, that the statute intends an expedited process, and that Objector would have the opportunity to attend and participate in any Title Board hearing on remand.

LLC, 2013 CO 33, ¶ 17 and *Indus. Comm'n v. Milka*, 410 P.2d 181, 184 (Colo. 1966)). The rule from these cases is that if the General Assembly reenacts or amends a statute without changing the language of the provision in question, the then-existing judicial construction of the statute applies. *See Milka*, 410 P.2d at 120-21 (noting that significant changes to phraseology shows an intent to "establish a rule different from that announced by the Court") (emphasis added); *see also Weinstein*, 2013 CO 33, ¶ 17 (noting that the rule of construction advanced by Objector applies "only when the legislature amends or reenacts the same statute interpreted by a previous judicial decision") (emphasis added).

Here, pursuant to these cases, the General Assembly is presumed to have been aware of the Supreme Court's then-existing rule on multiple motions for rehearing. Instead of amending the statute without change or by adding language tracking the Supreme Court's rule, the General Assembly adopted a rule that is, on its face, significantly different than the then-existing rule. *See* Proponents' Op. Br. at 7-8. Consequently, the takeaway from the cases cited by Objector is that the General Assembly intended to go further than the Supreme Court's prior rule, which only precluded the same objector from filing a second motion for rehearing on an issue he could have raised in his first motion. *In re Title, Ballot Title, & Submission Clause for 1999-2000 No. 219*, 999 P.2d 819, 820 (Colo. 2000). In contrast, the

plain language of the amendment provides that "the decision of the title board on any motion for rehearing shall be final . . . , and no further motion for rehearing may be filed or considered by the title board." § 1-40-107(1)(c), C.R.S. (emphasis added). Accordingly, the Title Board properly determined that it did not have jurisdiction to consider a second round of motions for rehearing.

CONCLUSION

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

Respectfully submitted this 3rd day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June, 2019, a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF** was filed and served via CCEF, and served upon the following:

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