COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 3, 2019 5:37 PM
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2018) 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**: Ben Schler, LeeAnn Morrill, and Jason Gelender.	▲ **COURT USE ONLY** ▲ Case No. 2019SA89
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THE TITLE BOARD'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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,963 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).

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.

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/ Michael Kotlarczyk

MICHAEL KOTLARCZYK, #43250
Assistant Attorney General

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SUMMARY OF ARGUMENT

Petitioner Kenneth Nova does not dispute that the plain language of § 1-40-107(1)(c), C.R.S. (2018) compels the very conclusion that the Board reached: the Board lacked jurisdiction to consider his motion for rehearing on Proposed Initiative 2019-2020 #75 because it was a "further motion for rehearing." Instead, Petitioner urges the Court to disregard the plain meaning of the statute and apply his preferred reading. Petitioner's arguments do not merit ignoring the plain language of section (1)(c).

First, Petitioner incorrectly argues that the plain meaning of section (1)(c) fails to give effect to section (1)(a)(I), which specifies when a motion for rehearing may be filed. In fact, these provisions are entirely consistent. Read as a whole, the statute bars "further motion[s] for rehearing," but allows permitted motions (i.e. motions that are not "further motion[s]") to be filed within seven days of the Board's decision. Petitioner's atextual reading of the statute would render section (1)(c) meaningless by allowing "further motion[s] for rehearing" every time

the Board makes a decision affecting the titles.

Second, Petitioner argues that the 2012 amendment to section (1)(c) was intended solely to codify case law from 12 years earlier, which only addressed successive motions from the same objector. This argument is contradicted both by the plain language of section (1)(c) and the actual legislative history of the 2012 amendment.

Finally, Petitioner argues the Court should disregard the plain language of section (1)(c) because it produces an absurd result. It does not. The statute provides a means for any elector to raise his concerns about a title with the Board and, if necessary, this Court. That an objector may, in some cases, have to appear at the Board and make contemporaneous objections is not an absurd result. Rather, it reflects a deliberate policy choice to expedite the ballot title review process.

ARGUMENT

I. Standard of review and preservation

The parties agree that the Board's jurisdiction to consider Petitioner's subsequent motion for rehearing is a matter of statutory

interpretation reviewed de novo. The parties also agree that Petitioner preserved that issue for review by the Court.

II. The Board lacked jurisdiction to consider Petitioner's successive motion for rehearing based on the plain language of the statute.

The Court's analysis should start and end with the plain language of the statute. *See, e.g.*, *In re Marriage of Chalat*, 112 P.3d 47, 54 (Colo. 2005) ("If the statute is clear and unambiguous on its face, then we will apply the statute as written . . . ."). Section (1)(c) of the statute provides: "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." § 1-40-107(1)(c) (emphasis added). The Board heard Respondents Sebold's and Colbert's motion for rehearing on April 26, and its decision on their motion—that the measure contained a single subject, and setting a title—was final. Petitioner's motion for rehearing, filed after April 26, was a "further motion for rehearing," which could not be filed or considered by the Board.

Petitioner concedes that the plain language of the statute bars the Board from considering his motion. *See* Pet.'s Opening Br. at 19 ("If the 'no further motion for rehearing' provision is applied literally . . . an additional motion for rehearing would be prohibited as to this new title language . . . ."). Petitioner nevertheless asks the Court to disregard the plain language, for three reasons, each of which fails.

A. The plain language of section (1)(c) is consistent with section (1)(a)(I).

First, Petitioner mistakenly argues that the plain language of section (1)(c) is incompatible with section (1)(a)(I). Section 1-40-107(1)(a)(I) provides:

> 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 . . . or who is not satisfied with the titles and submission clause provided by the title board . . . 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.

According to Petitioner, the Board had jurisdiction over his rehearing motion because he could not file his motion until the Board set the title.

Petitioner misreads section (1)(a)(I). That section describes when a rehearing motion may be filed, but does not give an objector the absolute right to file such a motion. Rather, section (1)(a)(I) must be read together with section (1)(c), which expressly limits the ability of an elector to file a rehearing motion in certain circumstances. *See Mosley v. People*, 2017 CO 20, ¶ 16 ("To reasonably effectuate the legislature's intent, a statute must be read and considered as a whole, and should be interpreted to give consistent, harmonious, and sensible effect to all its parts."). Reading those two sections together, an elector ***may*** file a motion for rehearing within seven days of the Board's action ((1)(a)(I)), but only if that motion for rehearing is not a further motion for rehearing after the Board already held a rehearing ((1)(c)).

Petitioner's reading of section (1)(a)(I) would render section (1)(c) a nullity in many instances. *See Indus. Claim Appeals Office v. Orth*, 965 P.2d 1246, 1254 (Colo. 1998) ("we should avoid a construction that renders any [statutory] provision superfluous or a nullity"). According to Petitioner's interpretation, any time the Board makes a "decision . . . with respect to whether a petition contains more than a single subject"

or sets a title, any elector would have seven days to file a motion for rehearing, regardless of whether the Board already held a rehearing. This would render section (1)(c)'s provisions—that the Board's decisions on rehearing are "final" and barring any "further motion[s] for rehearing"—meaningless: whenever the Board changed a title at a rehearing, another elector "who is not satisfied with the titles" could "file a motion for a rehearing." § 1-40-107(1)(a)(I).

Petitioner's interpretation runs counter to both the language and purpose of section (1)(c). That section bars further rehearing motions to further the legislative purpose of expediting the rehearing process. *See* Title Board's Opening Br. at 7-10. By introducing additional delay into the Board's title-setting, Petitioner's reading of the statute also violates the general principle that "statutory provisions governing the initiative process should be liberally construed so that the constitutional right reserved to the people 'may be facilitated and not hampered.'" *Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996) (quoting *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994)). Only a plain language construction of the statute gives full effect to both (1)(a)(I) and (1)(c).

B. Petitioner's theory about the purpose of the statute is contradicted by the statute's language and history.

Petitioner next contends that the language added to section (1)(c) in 2012 was intended to codify two decisions from 2000 which applied only to successive motions for rehearing brought by the same objector. *See In re Title, Ballot Title & Submission Clause for 1999-2000 #215*, 3 P.3d 447, 449 (Colo. 2000); *In re Title, Ballot Title & Submission Clause for 1999-2000 No. 219*, 999 P.2d 819, 821 (Colo. 2000). Petitioner is incorrect that the 2012 amendment was so limited.

First, the plain language of the statute is clear and obviates any need to resort to canons of construction or other interpretive aids. *See Welby Gardens Co. v. Adams Cty. Bd. of Equalization*, 71 P.3d 992, 995 (Colo. 2003) ("Since we have concluded that the plain language of the statute is clear, we need not consider other interpretive aids."). There is thus no need for the Court to examine the legislative history.

Second, Petitioner does not identify any legislative history indicating that the General Assembly only intended to codify existing case law. The legislative history cited by the Board and Respondents in

their opening briefs directly contradict Petitioner's theory and show that the General Assembly did not intend any such limitation. *See* Title Board's Opening Br. at 7-9; Resps.' Opening Br. at 8-9.

Finally, Petitioner misreads the case law when he claims that the "legislature is deemed to have adopted this same concern" reflected in the prior cases. Pet.'s Opening Br. at 16. The cases he cites provide that "the legislature 'is presumed to adopt the construction which prior judicial decisions have placed ***on particular language*** when such language is employed in subsequent legislation.'" *Weinstein v. Colborne Foodbotics, LLC*, 2013 CO 33, ¶ 15 (quoting *Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997)) (emphasis added). Here, the language in the 2012 amendment is not found in the prior case law, and so there is no basis for concluding that the 2012 amendment was a technical revision incorporating decade-old cases.

Petitioner actually has it exactly backwards: the narrower language used in the 2000 cases he cites shows that the General Assembly did ***not*** intend to merely codify those cases. "[W]hen an amendment follows closely on a judicial decision interpreting a statute,

and the plain meaning of the amendatory language manifests a modification of the statute as previously construed, we must assume that the General Assembly intended to change the law." *Barela v. Beye*, 916 P.2d 668, 676 (Colo. App. 1996). The cases on which Petitioner relies limit their holdings to successive motions for rehearing that "the objector could have raised in his first motion for rehearing." *In re #215*, 3 P.3d at 449; *see also In re No. 219*, 999 P.2d at 821 ("we construe section 1-40-107 to permit an objector to bring only one motion for rehearing"). The 2012 amendment eschews such limiting language, and instead provides that the Board's decision on "***any*** motion for rehearing" is final, and that "***no further motion***" may be filed or considered by the Board. § 1-40-107(1)(c) (emphasis added). The broad language found in section (1)(c) shows that the General Assembly intended to sweep more broadly than the 2000 cases and prohibit all further motions for rehearing.

C. The plain language interpretation of the statute does not produce an absurd result.

Finally, Petitioner urges the Court to disregard the plain language of the statute because he contends it would lead to an absurd result. It would not.

Courts are permitted to disregard a statute's plain language to avoid an absurd result only in narrow circumstances. "The rule that we will deviate from the plain language of a statute to avoid an absurd result must be reserved for those instances where a literal interpretation of a statute would produce a result contrary to the expressed intent of the legislature." *Smith v. Executive Custom Homes, Inc.*, 230 P.3d 1186, 1191 (Colo. 2010). This "rule does not permit this court to give a statute a meaning that the plain language does not support in order to avoid a result that we find inequitable or unwise." *Id.* Accordingly, a plain language reading that results in a "harsh or unfair result will not render a literal interpretation absurd." *Id.*

1. The General Assembly's decision to bar "further motion[s] for rehearing" reflects a deliberate policy choice to expedite the title setting process.

Petitioner contends that it would be absurd to bar him from filing a motion for rehearing because the titles were not set until the rehearing. This argument confuses the opportunity to object to the titles with the opportunity to file a motion for rehearing.

The statute ensures every registered elector has the opportunity to support or oppose the titles, both before the Title Board and the Supreme Court, by "appear[ing] before the title board in support of or in opposition to a motion for rehearing." § 1-40-107(2); *see also Matter of Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 17 (same). But electors do not have an unqualified right to file a written motion for rehearing. The statutory scheme imposes "stringent time restraints" on "the proponents and opponents of initiatives, as well as on the Title Board," so as to "provide proponents of initiatives with sufficient time for the collection of signatures and for public debate." *In re #219*, 999 P.2d at 821.

This process—allowing objectors to be heard but providing a definite cut-off for rehearing motions—is not absurd. Rather, it reflects "a legitimate policy decision" of the legislature to balance citizen involvement in the title-setting process with the need to expedite the Board's title review. *See Ceja v. Lemire*, 154 P.3d 1064, 1067 (Colo. 2007) (rejecting argument that result of plain language interpretation is absurd; rather it "was a legitimate policy decision" of the General Assembly). Thus, while the plain language of section (1)(c) does, in this circumstance, prevent Petitioner from filing a successive motion for rehearing, it does not bar him from having his concerns raised and addressed before the Title Board and, if necessary, the Court.

Petitioner argues that he could not have raised his objections to the title at the April 26 rehearing because the Respondents' motion for rehearing did not expressly request the setting of a title. But Respondents did request a rehearing on whether #75 contained a single subject. *See* Record for Initiative #75, p 18, filed May 3, 2019 ("Record"). If the Board granted the rehearing motion and concluded that #75 contained a single subject, it had to proceed with setting a

title. *See, e.g.*, § 1-40-106(1) ("The title board . . . shall proceed to designate and fix a proper fair title . . . ."). Accordingly, nothing prevented Petitioner from being heard on any aspect of the motion, including the title set during the rehearing, and then raising unresolved issues with this Court. *See Matter of #4*, 2017 CO 57, ¶ 17 ("Any person who remains dissatisfied after the rehearing, who . . . appeared before the Title Board" may petition this Court).[1]

Petitioner also argues in passing that an elector "must file a motion for rehearing that is overruled by the Board" before he may seek judicial review in this Court. Pet.'s Opening Br. at 11 (quoting *In re Ballot Title 1999-2000 #265*, 3 P.3d 1210, 1215-16 (Colo. 2000)). This is based on an outdated version of the statute, which was amended in 2000 to give "any ***other*** registered elector who appeared before the Title Board in support of or in opposition to a motion for rehearing" the

[1] Petitioner also argues that the "Board lacked jurisdiction to consider" Respondents' motion for rehearing because it was too vague. Pet.'s Opening Br. at 12. Petitioner tried to raise this issue with the Court by filing a "Supplement to Advisory List of Issues" on May 6, but the Court denied him leave to do so. *See* Order of Court (May 6, 2019). Accordingly, this issue is not before the Court.

ability to petition the Court. 2000 Colo. Session Laws Ch. 339 § 2 (emphasis added). The filing of a motion for rehearing before the Board is no longer a jurisdictional prerequisite to seeking review in this Court. *Accord Matter of #4*, 2017 CO 57, ¶ 17.

2. Requiring parties to make contemporaneous objections at Board hearings is not an absurd outcome.

Petitioner objects to this policy choice—limiting rehearing motions while preserving an objector's right to be heard—as "convert[ing] Title Board rehearings into legal improv exercises," and argues such an outcome is absurd. Pet.'s Opening Br. at 22. This is wrong.

First, requiring objections to be made orally, in narrow circumstances, falls far short of the standard for absurdity that would permit this Court to disregard the plain language of the statute. Even if this result is "harsh or unfair"—and it is neither—the Court would still be compelled to apply the statute's plain language. *Smith*, 230 P.3d at 1191. The General Assembly has made the reasoned policy choice to permit only one rehearing while still preserving the rights of

all to be heard; any difficulties this process creates for some objectors are not serious enough to render the statute absurd.

Second, Petitioner overstates the degree to which a potential objector might be caught off guard by a rehearing. The Board's meetings are public, *see* § 1-40-106(1), and detailed information about every initiative, and rehearing, can be found on the Secretary of State's website.[2] Here, it was publicly known that #75 was considered on April 17; that a rehearing petition was filed by the proponents; and that the rehearing was held on April 26. Petitioner still did not participate.

Finally, the facts of this particular rehearing show that requiring an objector to orally state his opposition is not absurd. Petitioner filed two rehearing motions on two closely related initiatives—#70 and #71—which were also heard at the April 26 hearing. *See* Pets. for Review, 19SA84 & 19SA85 (filed May 3, 2019 by K. Nova). The titles set for #70 and #71 were substantially similar to the title set for #75, so Petitioner could have raised any unresolved objections he had made to the titles

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[2] *See* 2019-2020 Initiative Filings, Agendas & Results, *available at* https://tinyurl.com/y7crwep2.

for those initiatives. *Compare* Record, p 19, *with* Records for Initiatives #70 and #71, p 21, filed May 3, 2019.

As Petitioner recognizes, the "rehearing is . . . an important part of the statutory scheme designed to implement the constitutional single-subject and clear-title requirements." *Hayes v. Ottke*, 2013 CO 1, ¶ 25. Petitioner's argument that he could only raise his arguments in a written motion for rehearing after the titles were set thus rings hollow. Petitioner knew the importance of this rehearing and had notice and the opportunity to be heard, but failed to exercise his right to object in the manner provided by the General Assembly.

CONCLUSION

The Court should affirm the Board's conclusion that it lacked jurisdiction to consider Petitioner's motion for rehearing.

Respectfully submitted on this 3rd day of June, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado, this 3rd day of June, 2019 addressed as follows:

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