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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2019) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #299 (“Petitions”) **Petitioner**: Kelly Brough **v.** **Respondents**: Mike Spalding and Chip Creager, **and** **Title Board**: Theresa Conley, David Powell, and Jason Gelender.	**▲ COURT USE ONLY ▲**
PHILIP J. WEISER, Attorney General MICHAEL KOTLARCZYK, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6187 FAX: (720) 508-6041 E-Mail: mike.kotlarczyk@coag.gov Registration Number: 43250 *Counsel of Record *Attorneys for the Title Board*	Case No. 2020SA135

THE TITLE BOARD’S OPENING 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 2,765 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

TABLE OF CONTENTS

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The titles set by the Board inform voters of the measure's central features. 4

A. Standard of review and preservation. 4

B. Petitioner's challenge to the titles of #299 is identical to her challenge to #245, and should similarly be denied. 5

C. The titles set by the Board adequately describe the central features of the measure. 5

1. Rehearing before the Title Board. 7

2. Reduction of signature requirements. 8

3. Change to petition circulator affidavit requirements. 10

4. Elimination of district court review for name and signature protests. 11

5. Allowance of odd-year ballot measures. 12

6. Requiring voter approval for statutory changes on the same topic as a successful petition. 12

II. The measure is not so unclear that the Board is unable to set a title 13

A. Standard of review and preservation. 13

B. The measure's treatment of the single-subject requirement is not so unclear that the Board was unable to set a title. 14

CONCLUSION 16

TABLE OF AUTHORITIES

CASES **PAGES**

Hayes v. Ottke, 2013 CO 1 .... 13, 14

In re Title, Ballot Title & Submission Clause for 2019-2020 #245, 2020SA92 .... 2, 5

In re Title, Ballot Title & Submission Clause for 2019-2020 #3, 2019 CO 107 4

In re Title, Ballot Title & Submission Clause, & Summary For 1999-2000 No. 255, 4 P.3d 485 (Colo. 2000) 14

In re Title, Ballot Title, & Submission Claus Pertaining to Proposed Initiative on Educ. Tax Refund, 823 P.2d 1353 (Colo. 1991) 6

In re Title, Ballot Title, & Submission Clause for 1997-1998 # 74, 962 P.2d 927 (Colo. 1998) 6, 13

In re Title, Ballot Title, & Submission Clause for 1997-1998 #62,
961 P.2d 1077 (Colo. 1998) 6

In re Title, Ballot Title, & Submission Clause for 1999-2000 #245(f), (g), 1 P.3d 739 (Colo. 2000) 10

In re Title, Ballot Title, & Submission Clause for 2013-2014 #89,
2014 CO 66 .... 8, 15

In re Title, Ballot Title, & Submission Clause for 2013-2014 #90,
2014 CO 63 .... 5, 7, 9, 11

STATUTES

§ 1-40-106(3)(b), C.R.S. (2019) 6

OTHER AUTHORITIES

Hearing Before Title Board on Proposed Initiative 2019-2020 #245 (Mar. 4, 2020), *available at* https://tinyurl.com/t9yrobp 7, 13

Hearing Before Title Board on Proposed Initiative 2019-2020 #299 (Apr. 15, 2020 a.m. session), *available at* https://tinyurl.com/y9pc2k5n 5

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether the titles set by the Title Board for Proposed Initiative 2019-2020 #299, which are nearly identical to the ones approved by this Court for Proposed Initiative 2019-2020 #245, fail to adequately inform voters of the central features of the measure.
2) Whether #299's provision concerning the single-subject requirement is so unclear that the Board could not set titles.

STATEMENT OF THE CASE

Proponents Mike Spalding and Chip Creager seek to circulate #299 to obtain the requisite number of signatures to place a measure on the ballot to amend the state constitution. The proposed initiative would change the petitioning process for initiatives and referenda. Record for Initiative #299, p 2, filed April 22, 2020 ("Record").

The Board concluded that the measure contained a single subject and proceeded to set a title at its April 1, 2020 meeting. *Id.* at 4. Petitioner Kelly Brough filed a timely motion for rehearing, arguing

that the titles failed to advise voters of central features of the measure, and that the Board should not have set a title because the measure's treatment of the single-subject requirement was "vague, unclear and incomprehensible." *Id.* at 5-7.

On April 15, 2020, the Board denied the motion for rehearing in its entirety. *Id.* at 10.

SUMMARY OF ARGUMENT

Number 299 is nearly identical to #245, which Petitioner also challenged. The challenges to the titles of #299 are the same challenges Petitioner made to #245. This Court just affirmed the titles for #245. *See* 2020SA92. For the same reasons, the Court should affirm the titles here.

Titles crafted by the Title Board need to describe the central features of the initiative, not every detail. The Board is also required to draft "brief" titles. The Board has broad discretion to effectuate this dual mandate.

Here, the Board acted well within its discretion in crafting a title. The initiative proposes changes to numerous details of the initiative

and referendum process, with a general purpose of liberalizing that process. The titles concisely summarize those changes, without delving into every specific provision of the measure. The specific details Petitioner argues should be included in the titles are not central features of the measure and are sufficiently described by the titles drafted by the Board.

Finally, the measure is not incomprehensible to the point that the Board could not set titles. The Court has found that the Board cannot set titles when the measure is so incomprehensible that even the single-subject cannot be determined. Here, the Board accurately stated the measure's single subject. Petitioner contends that a particular aspect of the proposed initiative would have uncertain applications. Even if Petitioner was correct—and she is not—this uncertainty about a specific feature of the measure is not enough for this Court to deprive proponents, and ultimately the voters, of their constitutional right to seek changes to Colorado's laws through initiative.

ARGUMENT

I. The titles set by the Board inform voters of the measure's central features.

A. Standard of review and preservation.

"The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause." *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶ 8 (quotations omitted). The Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions," and will "only reverse the Title Board's decision if the titles are insufficient, unfair, or misleading." *Id.* (quotations omitted). It thus follows that the Court does not "consider whether the Title Board set the best possible title." *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. Rather, the Court only "ensure[s] that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words that the Title Board employed." *Id.*

The Board agrees that Petitioner preserved her challenge to whether the titles clearly set forth the central features of the measure.

B. Petitioner's challenge to the titles of #299 is identical to her challenge to #245, and should similarly be denied.

By Petitioner's own admission, #299 is "almost identical" to #245.[1] At the rehearing, Petitioner's counsel stated that he was raising those issues "to preserve them for appeal pending the outcome of" this Court's determination of #245.[2] Because the Court has now affirmed the titles for #245, *see* 2020SA92, the Court should also affirm the titles of #299.

The remainder of this Part I repeats the arguments the Board made in its Opening Brief for #245.

C. The titles set by the Board adequately describe the central features of the measure.

"The Title Board's duty in setting a title is to summarize the central features of a proposed initiative." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board "is given discretion in resolving interrelated problems of length,

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[1] *Hearing Before Title Board on Proposed Initiative 2019-2020 #299* (Apr. 15, 2020 a.m. session), *available at* https://tinyurl.com/y9pc2k5n (statement at 16:45).

[2] *Id.* at 17:50.

complexity, and clarity in setting a title and ballot title and submission clause." *Id.*

"It is well-established that the titles and summary need not spell out every detail of a proposed initiative in order to convey its meaning accurately and fairly." *In re Title, Ballot Title, & Submission Clause for 1997-1998 # 74*, 962 P.2d 927, 930 (Colo. 1998). To the contrary, ballot titles must "be brief." § 1-40-106(3)(b), C.R.S. (2019); *see also In re Title, Ballot Title, & Submission Claus Pertaining to Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1357 (Colo. 1991) (same). "The Board need not and often cannot describe every feature of a proposed initiative in a title or ballot title and submission clause and simultaneously heed the mandate that such documents be concise." *In re Title, Ballot Title, & Submission Clause for 1997-1998 #62*, 961 P.2d 1077, 1083 (Colo. 1998) (quotations omitted).

Petitioner objects that the titles do not detail certain components of the initiative. But they do not need to. The titles fairly inform voters of the central features of the measure and are in no way misleading to the voters. In light of the number of specific changes to the petitioning

process contained in #299, the titles reflect an appropriate balance between the statutory mandate of being brief and describing the central features. How to strike this balance lies well within the Board's discretion, *In re 2013-2014 #90*, 2014 CO 63, ¶ 24, and the Board consciously and reasonably exercised that discretion here.[3]

The petition for review identifies six parts of #299 that Petitioner contends should have been addressed in greater detail. The omission of these specific details do not render the titles misleading, but instead reflect a reasonable balance between the "interrelated problems of length, complexity, and clarity." *In re 2013-2014 #90*, 2014 CO 63, ¶ 24.

1. Rehearing before the Title Board.

Petitioner first objects that the titles do not state that the measure eliminates the opportunity for rehearing before the Title Board. She claims this would increase the burden on petition

[3] *See Hearing Before Title Board on Proposed Initiative 2019-2020 #245* (Mar. 4, 2020), *available at* https://tinyurl.com/t9yrobp (statement at 3:28:00) ("I think this is the best we can do, is to put the voter on notice, without making this 200 words.").

proponents to advocate for a ballot title at the initial Title Board hearing before being appealed directly to the Supreme Court.

The titles currently state that the measure "chang[es] requirements, procedures and deadlines for . . . protesting petitions, including changing the venue and accelerating the protest process." Record, p 9. How much detail to provide about *how* the rehearing process is altered was within the discretion of the Board. The title fairly advises the voter that the protest process is altered by "accelerating" that process and changing the "venue." Petitioner seems mostly to object to the effect of the measure, which she believes would result in proponents without counsel being placed at a disadvantage by having to go straight to the Supreme Court. But "the Title Board may not speculate on the potential effects of the initiative if enacted." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 24. Accordingly, the titles adequately describe this provision.

2. Reduction of signature requirements.

The proposed measure would decrease the amount of signatures required to place a measure on the ballot, setting the required number

at "5% of district active registered electors, up to 111,000 entries." Record, p 2. Petitioner objects that the titles should specifically mention this. Instead, the titles provide that the measure will "chang[e] requirements, procedures, and deadlines for . . . circulating petitions and qualifying petitions for the ballot, including elimination of the requirement that signatures for constitutional amendments be gathered from all parts of the state." *Id.* at 9. By using the word "including," the titles indicate that there are additional "requirements, procedures and deadlines" that will be changed by the measure. The level of detail requested by Petitioner is not required, and the Board acted within its reasonable discretion in determining which details of the measure to specifically identify and which to describe more generally. *See In re 2013-2014 #90*, 2014 CO 63, ¶ 24 (the Board has discretion to "resolv[e] interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause").

3. Change to petition circulator affidavit requirements.

Petitioner next argues that the titles should inform voters that the measure would eliminate the current law that invalidates signatures gathered by a petition circulator who fails to accurately complete their affidavit. But this change is not a central feature of the measure. The average voter is probably not even aware of the statutory provision invalidating petitions sections based on deficient affidavits. Requiring the titles to specify this level of detail would answer a question that few would even think to ask. The "Board is not required to include every aspect of a proposal in the title and submission clause, to discuss every possible effect, or provide specific explanations of the measure." *In re Title, Ballot Title, & Submission Clause for 1999-2000 #245(f), (g)*, 1 P.3d 739, 745 (Colo. 2000). The titles make clear the measure changes the process for "circulating petitions and qualifying petitions for the ballot," which sufficiently advises voters of the central features of the initiative. Record, p 9.

4. Elimination of district court review for name and signature protests.

Petitioner contends that the titles fail "to inform voters that the measure would eliminate name and signature protests to district court and instead require all protests to begin in the Supreme Court, thus converting this Court into a court of first impression on all factual matters relating to petitions." Pet. at 5. The titles expressly state that the measure changes the requirements for "protesting petitions, including changing the venue and accelerating the protest process." Pet. at 9. This is more than adequate notice of changing the district court venue to the Supreme Court. Petitioner's complaint that the effect of this would be to make this Court the court of first impression for signature challenges is an effort to include the effects of the measure in the title, which is not required. *See In re 2013-2014 #90*, 2014 CO 63, ¶ 24 (the Board "is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme").

5. Allowance of odd-year ballot measures.

Next, Petitioner argues that the titles should expressly state that the measure would allow any initiative to be voted on in any off-year election. Again, this level of detail is not required. The titles alert voters to changes in the "requirements, procedures and deadlines" for "circulating petitions and qualifying petitions for the ballot." Record, p 9. Consistent with the Board's broad authority to determine what level of detail is appropriate while keeping the titles brief, the Board acted appropriately in declining to provide this level of specificity in its titles.

6. Requiring voter approval for statutory changes on the same topic as a successful petition.

Finally, Petitioner objects that the titles should "inform voters that the measure would fundamentally restrict the otherwise plenary power of the General Assembly to legislate by requiring voter approval for statutory changes on the same 'topic' as any successful referendum." Pet. at 6. The titles state that the measure would "allow[] laws enacted by initiative to be changed only by another initiative." Record, p 9. This

is the precise language Petitioner suggested the Title Board use at the rehearing on #245, and the Board adopted it.[4]

Not only was this the language Petitioner requested, it also conveys the primary feature of this part of the measure—when voters speak, the General Assembly cannot legislate in that area. Whatever additional detail Petitioner now seeks to add is simply not required. *See In re 1997-1998 # 74*, 962 P.2d at 930 ("the titles and summary need not spell out every detail of a proposed initiative in order to convey its meaning accurately and fairly").

II. The measure is not so unclear that the Board is unable to set a title.

A. Standard of review and preservation.

"[I]f the Board cannot comprehend a proposed initiative sufficiently to state its single-subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *Hayes v. Ottke*, 2013 CO 1, ¶ 15. At the same time, the "constitutional and

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[4] *Hearing Before Title Board on Proposed Initiative 2019-2020 #245* (Mar. 4, 2020), *available at* https://tinyurl.com/t9yrobp (statement at 2:20:30).

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 . . . further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." *In re Title, Ballot Title & Submission Clause, & Summary For 1999-2000 No. 255*, 4 P.3d 485, 492 (Colo. 2000) (quotations omitted).

The Board agrees that Petitioner preserved her challenge to whether the title is so unclear that the Board should not have set a title.

B. The measure's treatment of the single-subject requirement is not so unclear that the Board was unable to set a title.

The Board cannot set a title on a measure that is so unclear that the Board cannot even clearly state the single subject of the measure in the title. *See Hayes*, 2013 CO 1, ¶ 15. But here, the Board set the single-subject as an amendment to the state constitution "concerning initiative and referendum petitions." Record, p 9. This accurately and succinctly

states the subject of #299. Petitioner's argument that the Board could not set a title because the measure was incomprehensible is thus wrong.

Petitioner argues that the treatment #299 gives to the single-subject requirement renders it incomprehensible. This is incorrect, for two reasons. First, the caselaw cited by Petitioner does not support invalidating a proposed initiative on the basis of an unclear component with the initiative. Instead, the Board can decline to set a title only when the measure is so incomprehensible that even the measure's subject cannot be determined. Petitioner's claim that certain particulars of the measure would have an uncertain application if the measure is enacted thus are not sufficient to deny proponents, and potentially the voters, of their right to seek to enact the measure. Neither the Board nor the Court can "review the initiative's efficacy, construction or future application." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 10. Accordingly, so long as the subject of the measure can be fairly identified, neither the Board nor the Court should keep a proposed initiative from the ballot based on some uncertainty about potential future applications.

Second, even if such an inquiry was appropriate, #299 is not unclear. The measure states that "the state single subject rule . . . remains in effect." Record, p 2. That the measure also would repeal large portions of Article V, Section 1 of the state constitution is immaterial as it concerns the single-subject rule, as the measure's plain language states that the single subject rule remains in effect. Therefore, even if the Court were inclined to review the specific provisions of a proposal for clarity in its future applications, #299 is not so unclear that the voters should be denied the opportunity to decide whether to enact the measure.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 6th day of May, 2020.

PHILIP J. WEISER
Attorney General

/s/Michael Kotlarczyk

MICHAEL KOTLARCZYK, 43250*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado and/or via U.S. Mail, this 6th day of May, 2020, addressed as follows:

Thomas M. Rogers III
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Attorney for Petitioner

Mike Spalding
18 Buckthorn Drive
Littleton, CO 80127
Respondent

Chip Creager
3056 Newton Street
Denver, CO 80211
Respondent

s/ Xan Serocki
Xan Serocki