

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

DATE FILED: May 29, 2020 3:12 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 #301

Petitioner: TIMOTHY STEVEN HOWARD

v.

Respondents: GREG BROPHY AND SAM
BRADLEY

and

Title Board: THERESA CONLEY; DAVID
POWELL; and JASON GELENDER

▲ COURT USE ONLY ▲

Attorneys for Respondents/Proponents

Eric P. Waeckerlin, No. 44780

Jason C. Moore, No. 49493

Brownstein Hyatt Farber Schreck LLP

410 17th Street, Suite 2200

Denver, CO 80202

Phone: (303) 223-1100

E-mail: ewaeckerlin@bhfs.com; jmoore@bhfs.com

Case No.: 2020SA156

RESPONDENTS' 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 those rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits in C.A.R. 28(g).

It contains **1,758** words (answer briefs must not exceed 5,700 words).

The brief complies with the standard of review requirements in C.A.R. 28(a)(7)(A) and/or 28(b).

In response to each issue raised, Respondents' Opening Brief provided, under a separate heading before the discussion of the issue, a statement of the applicable standard of review with citation to authority and statements whether the issue was preserved.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: /s/ Eric P. Waeckerlin

TABLE OF CONTENTS

	Page
I. THE TITLES FOR INITIATIVE #301 ARE CLEAR AND NOT MISLEADING.....	1
A. Petitioner has not demonstrated that the Titles omit key features	1
B. Petitioner has provided no credible evidence that the Titles are not capable of being understood by voters	5
C. Petitioner does not allege the Initiative contains any confusing “catch phrases.”	7
CONCLUSION.....	8

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Title, Ballot Title & Submission Clause, & Summary Approved on April 6, 1994, for Proposed Initiated Constitutional Amendment Concerning “Fair Fishing”, 877 P.2d 1355, 1362 (Colo. 1994)</i>	5
<i>In re Title, Ballot Title & Submission Clause & Summary for 1999–2000 # 44, 977 P.2d 856 (Colo.1999)</i>	7
<i>In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 255, 4 P.3d 485 (Colo. 2000)</i>	3
<i>In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 258(A), 4 P.3d 1094 (Colo. 2000)</i>	3
<i>In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative Designated “Governmental Business”, 875 P.2d 871 (Colo. 1994)</i>	7
<i>In re Title, Ballot Title & Submission Clause for 2015-2016 # 73, 369 P.3d 565 (Colo. 2016)</i>	1, 2, 3, 6
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #89, 328 P.3d 172 (Colo. 2014)</i>	4
<i>In re Title, Ballot Title, Submission Clause, & Summary Adopted August 26, 1991, Pertaining to Proposed Initiative on Educ. Tax Refund, 823 P.2d 1353 (Colo. 1991)</i>	2
Statutes	
C.R.S. § 1-40-106(3)(b).....	3
C.R.S. § 24-4-103(2.5).....	6
Administrative Procedure Act.....	6

Greg Brophy and Sam Bradley (jointly, “Proponents” or “Respondents”), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Answer Brief in support of the title, ballot title and submission clause (jointly, the “Titles”) that the Title Board set for Proposed Initiative 2019-2020 #301 (the “Initiative” or “Measure”).

ARGUMENT

I. The Titles for Initiative #301 are Clear and not Misleading.

A. Petitioner has not demonstrated that the Titles omit key features.

Petitioner’s argument can be fairly summarized as this: the Titles for Initiative #301 are misleading because they do not include every single feature of the Initiative verbatim. Pet. Opening Brief at 4-5. This Court has been clear, however, that such verbatim recitation of an initiative is not required nor even preferred. *See In re Title, Ballot Title & Submission Clause for 2015-2016 # 73*, 369 P.3d 565, 569 (Colo. 2016) (“The Board's duty is to summarize the central features of a proposed initiative.”) (emphasis added). In fact, such a standard would defeat the very purpose of a concise title. Accordingly, the Titles accomplish what this Court requires—a fair and clear description of the material features of the Initiative, and Petitioner has not demonstrated otherwise.

The Titles in this case describe the procedures the COGCC must follow in conducting its regulatory impact findings and are markedly different from those in the cases relied on by Petitioner in his Opening Brief. *See id.* at 570 (concluding that “generally stating in a title that the initiative specifies recall and successor election procedures without in any way describing those procedures” violates the clear title requirements) (emphasis added). In this case, the Titles do describe each material feature of the Initiative.

First, the Titles inform voters that the regulatory impact findings must include a proposed rule’s impact on “employment.” Although the Initiative uses the phrase “direct or indirect impact to employment,” the Title Board is not required to include “every nuance or feature of the proposed measure.” *In re Title, Ballot Title, Submission Clause, & Summary Adopted August 26, 1991, Pertaining to Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991).

Second, although the Titles do not contain the precise phrase “cumulative impacts” as used in the Initiative, the Titles inform voters that the COGCC’s regulatory impact findings must consider the “impacts of the rule on: the oil and gas industry, including compliance costs.” This summary derives from the Initiative’s definition of cumulative impacts, which includes the term “cost of compliance.” The Title Board’s decision to refer more generally to “cost of

compliance” is entirely appropriate in this case given the need to keep titles concise. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 255*, 4 P.3d 485, 497 (Colo. 2000) (“In order to satisfy the requirement of brevity, the Board condensed the definition of ‘gun show vendor’ in the titles. The definition they retained is not clearly misleading and thus was within their discretion in setting the titles.”)

Third, the Titles adequately inform voters that the regulatory impact findings must include analysis of whether the proposed rule “can be implemented.” This language derives from the Initiative’s requirement that the regulatory impact findings must identify “[t]hat the propose rule is capable of implementation by oil and gas operators” and that “[i]f the proposed rule requires the acquisition or use of any product, technology or equipment, that such product, technology or equipment is commercially available.” The Title Board’s decision to paraphrase these procedural requirements comports with its duty to keep titles brief while also including a fair and reasonable summary of the central features of the Initiative. C.R.S. § 1-40-106(3)(b). Further, this Court has repeatedly recognized that the Title Board may summarize or paraphrase aspects of a proposed initiative without being misleading. *In re Title, Ballot Title & Submission Clause for 2015-2016 # 73*, 369 P.3d at 569; *In re Title, Ballot Title & Submission Clause, & Summary for*

1999-2000 # 258(A), 4 P.3d 1094, 1099 (Colo. 2000) (holding a ballot title and summary was misleading where it did not “state, paraphrase, or summarize” one of the initiatives material provisions).

Fourth, the Titles adequately inform voters of the Initiative’s material procedural requirements: (1) that COGCC must allow for public comment, and (2) that COGCC must publish the regulatory impact findings “before adopting a rule.” Even voters unfamiliar with agency rulemaking procedures will understand that requiring public comment prior to publishing regulatory impact findings necessarily involves the COGCC’s public release of a preliminary regulatory impact finding. Otherwise, there would be nothing upon which the public could comment. Further, the Titles appropriately inform voters that the final regulatory impact findings must be published prior to adopting a final rule.¹

In sum, the Titles set by the Title Board are a fair and complete summary of the central features of the Initiative, and we agree with the Title Board that the additions requested by Petitioner “would transform the title from a summary of the

¹ The number of days the regulatory impact finding must be published prior to adopting the formal rule is immaterial, and the exclusion of this information does not make the Titles misleading. *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014) (“Titles need not contain every feature of the proposed measure.”).

proposed initiative into a voluminous recitation of each element of the measure” in contravention of well-established precedent. Title Bd. Opening Brief at 5.

B. Petitioner has provided no credible evidence that the Titles are not capable of being understood by voters.

While the gravamen of Petitioner’s arguments is the purported failure to recite the Initiative verbatim, Petitioner advances several other unrelated arguments, which are equally unpersuasive. Although he concedes the Titles are consistent with the Initiative, Pet. Opening Brief at 8, Petitioner argues that the Titles are so general that voters will be incapable of understanding them. *Id.* at 8-9. This argument borders on the absurd in the face of the short, plain, and easily understandable language in the Titles. *See* Section I, *supra*. The general concept of conducting a regulatory impact finding prior to rule adoption is understandable regardless of a voter’s knowledge of COGCC’s current rulemaking procedures and adequately informs a voter of the effect of a “yes” or “no” vote.

Next, Petitioner argues that a voter would not be able to ascertain how the Initiative significantly alters current law, citing *In re Title, Ballot Title & Submission Clause for 2015-2016 # 73*, 369 P.3d 565 (Colo. 2016). Absent unusual circumstances, however, titles are not required to recite every impact on current law; rather, the question here is whether the titles are fair, clear and accurate on their face. *See In re Title, Ballot Title & Submission Clause, &*

Summary Approved on April 6, 1994, for Proposed Initiated Constitutional Amendment Concerning “Fair Fishing”, 877 P.2d 1355, 1362 (Colo. 1994)

(“Although detailed information regarding the state of the law and the effect of the proposed amendment on current law is not set forth in the summary, the Board is not required to state the effect that the measure will have on other constitutional or statutory provisions.”). Moreover, unlike the initiative in the case Petitioner cites,² Initiative #301 does not “significantly” alter current law.³ And in contrast to the titles at issue in that case, the Titles here include all material provisions of the Initiative, including the requirements for a regulatory impact finding.

² In *In re Title, Ballot Title & Submission Clause for 2015-2016 # 73*, the Court concluded that material omissions in the titles did not alert voters that many of the proposed changes would significantly alter the procedures for recall elections, the focus of the initiative. *Id.* at 569. For example, the Court noted that the titles did not alert voters that the number of signatures required to trigger a recall election would drop from 25% of the vote cast at the last preceding election to only 5% of active registered electors in the recall area, not to exceed 100,000. *Id.* Nor did it inform voters that the initiative would “prohibit[] officials who resign from office during a recall process from holding any elective office for six years.” *Id.* at 570. By contrast, the Titles at issue here properly summarize all of the material requirements for a regulatory impact finding without reproducing the entirety of the Initiative’s language verbatim.

³ For example, the Administrative Procedure Act (the “APA”) allows for any person to request that the Department of Regulatory Agencies (“DORA”) require the agency submitting the proposed rule to prepare a cost-benefit analysis. *See* C.R.S. § 24-4-103(2.5). Although the COGCC frequently finds itself preparing such a cost-benefit analysis, the Initiative requires more specificity and affords more public process regardless of whether a DORA request is made. In this respect, the Initiative alters current COGCC practice but not in a “significant” way.

In sum, the Titles contain sufficient information on the material provisions of the Initiative to allow a voter to understand the effect of a yes/for or no/against vote for the Initiative. A vote for the Initiative would require COGCC to prepare a regulatory impact finding prior to adopting rules. A vote against the Initiative would not impose such a requirement. Petitioner has not demonstrated how this could possibly be confusing.

C. Petitioner does not allege that the Initiative contains any confusing “catch phrases.”

Lastly, Petitioners argue, without explanation, that the source of the Titles’ language does not rule out the possibility that the Titles could cause voter confusion. While it is true that a title that closely tracks the language of the initiative can nevertheless be misleading, this only occurs where the language of the initiative itself is not clear or contains impermissible “catch phrases.” *See In re Title, Ballot Title & Submission Clause & Summary for 1999–2000 # 44*, 977 P.2d 856, 858 (Colo.1999) (“Here, perhaps because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear.”); *In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative Designated “Governmental Business”*, 875 P.2d 871, 875-76 (Colo. 1994) (disallowing the inclusion of the catch phrase or slogans “open government” and “consumer protection” in the title and submission clause in spite of the fact that

those identical phrases were contained in the Initiative itself). The Titles at issue here contain no such “catch phrases,” and Petitioner has not alleged otherwise. The Court should reject this throw-away argument.

CONCLUSION

This Court should affirm the decisions of the Title Board.

Respectfully submitted this 29th day of May 2020.

BROWNSTEIN HYATT FARBER SCHRECK LLP

By : /s/ Eric P. Waeckerlin

Eric P. Waeckerlin, No. 44780

Jason C. Moore, No. 49493

410 17th Street, Suite 2200

Denver, Colorado 80202

Phone Number: (303) 232-1100

E-mail: ewaeckrelin@bhfs.com

E-mail: jmoore@bhfs.com

Attorneys for Proponents/Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of May, 2020, I electronically filed a true and correct copy of the foregoing **Respondent's Answer Brief** with the Clerk via the Colorado Courts E-Filing System which will send notification of such filing and service to the following:

Michael Kotlarczyk, Esq.
Assistant Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
Michael.kotlarczyk@coag.gov

Attorneys for Title Board

Martha M. Tierney
225 E 16th Ave., Suite 350
Denver, Colorado 80203
Phone Number: (720) 242-7577
E-mail: mtierney@tierneylawrence.com

Attorneys for Petitioners

/s/ Paulette M. Chesson
Paulette M. Chesson, Paralegal