

COLORADO SUPREME COURT

2 East 14th Ave.
Denver, Colorado 80203

Original Proceeding Pursuant to § 1-40-107(2),
C.R.S. (2019-2020)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2019-
2020 #295 (“Voter Approval Requirement for
creation of Certain Fee-Based Enterprises”)

Petitioner: William Hunter Railey,

v.

Respondents: Michael Fields and Lindsey Singer,

and

Title Board: Theresa Conley, David Powell, and
Jason Gelender.

^ COURT USE ONLY ^

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Case No.: 2020SA328

THE TITLE BOARD’S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I 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:

- A. The brief complies with the word limits set forth in C.A.R. 28(g) because it contains 2,286 words.
- B. The brief complies with C.A.R. 28(b) and C.A.R. 28(7)(a) because for each issue it contains, under a separate heading, a statement of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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.

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The Colorado Title Board (“Board”), by and through undersigned counsel, hereby submits its Opening Brief.

STATEMENT OF THE ISSUES

1. Whether the Title Board correctly determined that Proposed Initiative 2019-2020 #295 (“#295”) contains a single subject.

2. Whether the Title Board lacked jurisdiction to set a title for #295 because the initiative is incomprehensible.

2. Whether the ballot title is misleading in violation of Section 1-40-106(3)(b), C.R.S. (2019).

STATEMENT OF THE CASE AND FACTS

Proponents Michael Fields and Lindsey Singer seek to circulate #295 to obtain the requisite number of signatures to place a measure on the ballot to enact a new article, § 24-77-108, in Colorado’s revised statutes. The proposed initiative seeks to require voter approval for new enterprises that exceed a certain revenue cap. Record for Initiative #295, p. 2, filed April 22, 2020 (“Record”).

The initiative consists of just two paragraphs. *Id.*, p. 2. The first requires any new state enterprise “with projected or actual revenue” in excess of one hundred million over the first five years to be approved in a statewide general election. *Id.* The second provides that, if multiple enterprises “serv[e] primarily the same purpose,” their revenue shall be aggregated in calculating the cap. *Id.*

The Board conducted an initial public hearing on April 1, 2020 and set a title for #295. Record, p. 3. Petitioner filed a timely motion for rehearing on April 8, 2020, *id.*, pp. 4-8, and the Board denied that motion after holding a rehearing on April 15, 2020, *id.*, p. 10. Petitioner then filed a timely petition of review with this Court on April 22, 2020.

SUMMARY OF THE ARGUMENT

Petitioner argues that the Board lacks jurisdiction to set title for #295 for two reasons. First, he argues the initiative encompasses more than a single subject. Second, he argues the initiative is incomprehensible. Both of these arguments turn on speculative analysis of how the initiative, if approved by Colorado voters, might apply to

certain fact patterns. Such speculation is outside the scope of the Board's role in title setting and the Court's review here.

Petitioner's final argument is that the title is misleading because the title does not notify voters of three elements of the measure. The title set by the Board accurately summarizes the substance of the initiative and is not misleading. The Board's action in setting the title for #295 should be affirmed.

ARGUMENT

I. The Board has jurisdiction to set title because #295 is limited to a single subject.

A. Standard of Review and Preservation

This Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title, & Submission Clause for 2009–2010 #45*, 234 P.3d 642, 648 (Colo. 2010). This Court “will only overturn the Title Board's finding that an initiative contains a single subject in a clear case.” *In re Title, Ballot Title, Submission Clause for 2011-2012 #45*, 274 P.3d 576, 579 (Colo. 2012).

“The Board need not consider and resolve potential or theoretical disputes or determine the meaning or application of the proposed amendment.” *In re Title, Ballot Title & Submission Clause for a Petition on Sch. Fin.*, 875 P.2d 207, 210 (Colo. 1994). The Board “may not speculate on the potential effects of the initiative if enacted.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014). This Court does not “review the initiative’s ‘efficacy, construction, or future application,’ as those issues do not come up unless and until the voters approve the amendment.” *Id.* at 176, quoting *In re Title, Ballot Title, Submission Clause, & Summary for 1999–2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000).

Petitioner preserved this argument by raising it in his motion for rehearing, Record, p. 5, and at the rehearing itself.¹

¹ *Hearing Before Title Board on Proposed Initiatives 2019-2020 #294, #295 & #296* (April 15, 2020), available at <https://tinyurl.com/y9pc2k5n> (statement at timestamp 1:59:22-1:59:49) incorporating statements from *Hearing Before Title Board on Proposed Initiatives 2019-2020 #273, #274 & #275* (March 25, 2020),

B. The initiative contains a single subject.

Petitioner objects to the title set by the board because he believes the initiative necessarily includes multiple subjects. He maintains that, in addition to the requirement for voter approval of enterprises with revenue that exceeds a certain cap, there is a second subject, which is unstated in the initiative, but necessarily implied. But the alleged second subject is really a question about the initiative's potential impact on the state budget under a specific factual scenario. Petitioner's alleged second subject is a theoretical legal dispute that is not before the Board or this Court at this juncture. This Court should affirm the title set by the Board.

Under TABOR, a state enterprise that meets certain criteria may fund its own operations through fees collected for services provided, without impacting the state's budget. COLO. CONST., art. X, § 20(2)(d). Initiative #295 requires that any state enterprise “with projected or

available at <https://tinyurl.com/yaevyjm> (statements at timestamps 8:03 to 10:55).

actual revenue” in excess of one hundred million in its first five years be submitted to the voters in a statewide general election. Record, p. 2.

Petitioner’s single subject challenge assumes that future enterprises will (1) exceed this threshold; (2) not be submitted for a vote until after the threshold is exceeded; and (3) continue to operate without enterprise status until after that vote. In the event that all three of those circumstances occur, Petitioner argues “the Initiative will require the state to dedicate a portion of the state’s current revenues to replace lost enterprise revenue that must be refunded under TABOR, and as a result the state must lower the amount it spends on state programs.”

Id., p. 5.

Petitioner argues that this impact on the state budget is a second, hidden subject in the initiative. Petitioner’s argument fails. “[T]he effects this measure could have on Colorado law if adopted by voters are irrelevant to [a] review of whether the proposed initiative and its Titles contain a single subject.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 160 (Colo. 2014) (quotations omitted).

Petitioner’s single subject challenge asks the Board, and this Court, to do just that, to speculate on a potential impact the initiative may have, under one of many fact scenarios. A challenge to title is not the forum to litigate this issue. The ballot title should be affirmed.

II. The initiative is not incomprehensible.

A. Standard of Review and Preservation

A ballot initiative title must be fair, clear, accurate, and complete. *In re Title, Ballot Title & Submission Clause, & Summary for 2007-2008 No. 62*, 184 P.3d 52, 60 (Colo. 2008). The Board’s task is to set a fair and accurate title, not to ascertain the measure’s efficacy, construction, or future application. *In re #45*, 234 P.3d at 645, 649. In order to set title, the Board must have a sufficient comprehension of the proposed initiative to enable it to express the measure’s single subject. *Hayes v. Ottke*, 293 P.3d 551, 555 (Colo. 2013).

“The Board need not consider and resolve potential or theoretical disputes or determine the meaning or application of the proposed amendment.” *In re Petition on Sch. Fin.*, 875 P.2d at 210. The Board

“may not speculate on the potential effects of the initiative if enacted.” *In re #89*, 328 P.3d at 179. The Court will reverse the Board’s decision only if the title is “clearly inaccurate or misleading.” *In re Title, Ballot Title & Submission Clause for 2015–2016 #63*, 370 P.3d 628, 635 (Colo. 2016). This Court does not “review the initiative’s ‘efficacy, construction, or future application,’ as those issues do not come up unless and until the voters approve the amendment.” *In re #89*, 328 P.3d at 176, quoting *In re Title, Ballot Title, Submission Clause, & Summary for 1999–2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000).

The constitutional right to the initiative process must be liberally construed. *In re Title, Ballot Title & Submission Clause, & Summary For 1999-2000 No. 255*, 4 P.3d 485, 492 (Colo. 2000). The title setting process should not be used to hamper the people’s constitutional right. *Id.*

Petitioner preserved this argument by raising it in his motion for rehearing, Record, p. 6, and at the rehearing itself.²

B. Speculation regarding the legal impact of the measure does not render it incomprehensible.

Petitioner’s argument, as expressed in his Motion for Rehearing, is that the Board lacks jurisdiction to set title because the initiative is incomprehensible. In support of this position, Petitioner points to discussion during title setting on a prior set of nearly identical measures, initiatives #273, #274 and #275, regarding the meaning and operation of the term “qualified” in the initiative. Record, p. 6. Specifically, at title setting for proposed initiatives numbers 273 through 275, members of the Board raised questions about the impact of the proposed initiative on a state owned entity that goes in and out of

² *Hearing Before Title Board on Proposed Initiatives 2019-2020 #294, #295 & #296* (April 15, 2020), available at <https://tinyurl.com/y9pc2k5n> (statement at timestamp 1:59:22-1:59:49) incorporating statements from *Hearing Before Title Board on Proposed Initiatives 2019-2020 #273, #274 & #275* (March 25, 2020), available at <https://tinyurl.com/yaevyjm> (statements at timestamps 10:56-12:41).

enterprise status because of the requirement in TABOR that an enterprise not receive more than 10% of funding from state and local government. *See* COLO. CONST., art. X, § 20(2)(d).³

Like the first issue presented, Petitioner argues that speculative questions regarding the potential legal effects of the measure under specific fact patterns deprive the Board of jurisdiction to set title. Both the first and second issues presented are resolved by a single subject analysis. “[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*, 293 P.3d at 555. Here, as discussed above, the Board was able to express the measure as a single subject.

Questions from the Board about the meaning of specific terms of the initiative, and how the initiative, if passed, might work under

³ *Hearing Before Title Board on Proposed Initiatives 2019-2020 #273, #274 & #275* (March 4, 2020), available at <https://tinyurl.com/t9yrobp> (statements at timestamps 3:58:35-4:02:20).

certain circumstances, do not deprive the Board of jurisdiction to set title. To hold otherwise would go beyond the Board's role in title setting, and risk depriving the people of their constitutional rights to the initiative process. *In re #255*, 4 P.3d at 492. The Board does not lack jurisdiction to set title simply because Petitioner has identified potential questions about the legal impact of the measure. *In re 2013-2014 #90*, 328 P.3d at 160. The Board's action in setting title for #295 should be affirmed.

III. The ballot title is not misleading.

A. Standard of Review and Preservation

A ballot initiative title must be fair, clear, accurate, and complete. *In re #62*, 184 P.3d at 60. The Board's task is to set a fair and accurate title, not to ascertain the measure's efficacy, construction, or future application. *In re #45*, 234 P.3d at 645, 649. This Court does not demand that the Board draft the best possible title. *Id.* at 648. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.*

The Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for 2001-02 #21 and #22*, 44 P.3d 213, 222 (Colo. 2002). Title-setting is about distilling the proposed initiative down to a “reasonably ascertainable expression of the initiative’s purpose.” *In re #45*, 234 P.3d at 648, *citing In re Title, Ballot Title, and Submission Clause for 2009-10 #24*, 218 P.3d 350, 356 (Colo. 2009).

Petitioner preserved this argument by raising it in his motion for rehearing, Record, pp. 6-7, and at the rehearing itself.⁴

B. The ballot title accurately and plainly summarizes the initiative.

Petitioner identifies three elements that he maintains should be included in the ballot title: (1) the specific ballot language required by

⁴ *Hearing Before Title Board on Proposed Initiatives 2019-2020 #294, #295 & #296* (April 15, 2020), available at <https://tinyurl.com/y9pc2k5n> (statement at timestamp 1:59:22-1:59:49) incorporating statements from *Hearing Before Title Board on Proposed Initiatives 2019-2020 #273, #274 & #275* (March 25, 2020), available at <https://tinyurl.com/yaevyjmv> (statements at timestamps 12:42-13:43).

the initiative for future enterprise elections; (2) an explanation of the term “qualified” as used in the initiative; and (3) a reference to the provision aggregating multiple enterprises for purposes of calculating the revenue cap.

The Board is not required to set out every detail of the measure in the title. *In re #21 and #22*, 44 P.3d at 222. Including the first and third items identified by Petitioner in the title would not assist voters and could lead to confusion. The Board is not required to include these details in the title.

The second item identified by Petitioner relates to the term “qualified,” the same term at issue in Petitioner’s second issue presented. In setting titles, the Board may not ascertain the measure’s efficacy, construction, or future application. *In re #45*, 234 P.3d at 645. Instead, the Board’s task is to “reasonably ascertainable expression of the initiative’s purpose.” *Id.*, at 648. Here, Petitioner is asking the Board to explain what the term qualified “means” in the context of the initiative, but that is not the role of the Board, or of a ballot title. The

title set by the Board plainly and briefly expresses the initiative's core purpose. The ballot title should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's actions in setting the title for Initiative #295.

Respectfully submitted this 6th day of May, 2020.

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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 Arvada, Colorado, this 6th day of May, 2020 addressed as follows:

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