

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #245 (“Petitions”)</p> <p>Petitioner: Kelly Brough</p> <p>v.</p> <p>Respondents: Natalie Menten and Chip Creager</p> <p>and</p> <p>Title Board: Theresa Conley, David Powell, and Julie Pelegrin</p>	<p>DATE FILED: April 20, 2020 2:14 PM</p> <p>▲ COURT USE ONLY ▲</p>
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<p align="center">PETITIONER’S ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #245 (“PETITIONS”)</p>	

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, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

It contains 1,244 words.

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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.

s/ Thomas M. Rogers III

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SUMMARY

The Title Board erred in setting titles which fail to inform voters of central elements of the measure that, under prevailing case law, were required to be disclosed to voters by means of the ballot title.

LEGAL ARGUMENT

I. The omission of six central features of #245 from the titles requires remand to the Title Board.

Initiative #245 would dramatically change Colorado law. The measure would add a new article to the Colorado Constitution, repeal parts of four existing articles, and amend or repeal numerous sections of Title 1 of C.R.S. *See* #245, sec. 5. Not only are the changes the measure would make numerous, they are broad in scope. The measure would change every step of state and local initiative and referendum procedures, from review and comment, to title setting, to the role of this Court in title setting, to signature collection, to signature review, to judicial review of statements of sufficiency and insufficiency. *See* #245. The measure would change which measures could appear on an odd-year ballot. *Id.* at sec. 1(4). It would reduce the power of the General Assembly in several ways. *Id.* at sec. 1(2). In the interest of brevity, this is only a partial list. The Title Board argues that it has

struck the right balance between informing voters and brevity. *The Title Board's Opening Brief*, p. 5. It has not. The titles omit at least six central features of #245 that must be included before this measure is circulated for signatures. Each omitted central feature is addressed briefly below.

1. The measure would eliminate the opportunity for rehearing before the Title Board and instead require title appeals to be filed in this Court within two days after title is set. *See* #245, sec. 1(1). The Title Board notes that the titles reference changes to petition procedures, changes in the venue of protests and the acceleration of the process. *The Title Board's Opening Brief*, p. 6-7. The inadequacy of these mentions is that they communicate nothing to the voter about what changes #245 would actually make, the same inadequacy the Court identified in the titles at issue in *Hayes v. Spaulding (In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565, 569 (rejecting titles that advised the voter that the measure specified recall procedures, but failed to “advise the voters what those procedures are”). The voter reading the titles would have no idea that the measure would eliminate rehearing before the Title Board, a substantial change from current law.

2. The measure would reduce the number of signatures necessary to place a ballot measure on the ballot by more than 10% (from the current 124,632 requirement to only 110,000), a discrepancy that will only grow as the number of voters in the state increases. *See* #245, sec. 1(1) and the Secretary of State's website (<https://www.sos.state.co.us/pubs/elections/Initiatives/signatureRequirement.s.html>). The Title Board notes that the titles notify the voter that the measure would change requirements for circulating petitions, "including the requirement that signatures for constitutional amendments be gathered from all parts of the state." *The Title Board's Opening Brief*, p. 6-7 citing the titles for #245. The Title Board argues that the use of the word "including" in the description of the changes to petition requirements is sufficient notice to the voter. On the contrary, these titles provide the voter with no notice at all that the measure would reduce the number of signatures required to get a measure on the state-wide ballot by more than 10%. The same defect lead the Court to reject the titles for #73 in *Hayes*. *Hayes, supra*, 369 P.3d at 569 (rejecting titles that failed to inform voters the measure would substantially reduce the number of signatures required to trigger a recall election and the

number required for successor candidates to access the ballot). The same result is required here.

3. The measure would undermine the requirement that petition circulators properly complete an affidavit verifying compliance with applicable law and prohibiting the invalidation of petition names and signatures as a consequence for completing the affidavit incorrectly. *See* #245, sec. 1(2). The Title Board's position is, essentially, that this change is not significant enough to warrant inclusion in the titles. *The Title Board's Opening Brief*, p. 8-9. On the contrary, this change would remove from law an important protection against fraud and error and it must be included in the titles. A similar exclusion from the titles for #73 in *Hayes* resulted in the rejection of those titles. *Hayes, supra*, 369 P.3d at 570 (rejecting titles that failed to inform voters that a measure would limit the petition review that election officials perform). Like the fatal omission from #73 in *Hayes*, the changes to the petition circulator affidavit requirements in #245 threaten the integrity of the initiative process and warrant inclusion in the titles.
4. 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. *See* #245, sec. 1(3). The Title Board argues that Petitioner's challenge is based on the effect of the measure. *The Title Board's Opening Brief*, p. 9-10. Not so. The measure would, in fact, make this Court a court of first impression for all petition protests, a role now filled by our district courts. *See* C.R.S. 1-40-118(1) (requiring protests to statements of sufficiency and insufficiency to be filed in district court). This is a substantial change to current law and must be included in the titles.

5. The measure would change current law to allow any measure, not just TABOR measures, to be placed on odd-year ballots. *See* #245, sec. 1(4); *Colo. Const.* art. V, sec. 1(2) and art. X, sec. 20(3)(a); C.R.S. § 1-41-101, *et seq.* The Title Board's position is, essentially, that this change is not significant enough to warrant inclusion in the titles. *The Title Board's Opening Brief*, p. 10-11. On the contrary, the question of when measures may be placed before voters is the subject of two provisions of the Colorado Constitution, statutory enactments, and at least one matter resolved by this Court. *Colo. Const.* art. V, sec. 1(2) and art. X, sec. 20(3)(a); C.R.S. § 1-41-101, *et seq.*; *Zaner v. City of Brighton*, 917 P.2d 280 (Colo. 1996). It is an important issue and must be included in the titles.

6. 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. *See* #245, sec. 1(2). In its Opening Brief, the Title Board appears to have confused this provision of #245, found in sec. 1(2) of the measure, with a separate provision in sec. 4 (“[c]hanging voter-approved petitions requires voter approval of petitions”). *The Title Board’s Opening Brief*, p. 11. At rehearing, the Title Board did add a reference to this second provision to the titles. However, the titles make no reference to the provision that prohibits the General Assembly from legislating on the same topic as a successful referendum. This is an important provision of #245 and must be included in the titles.

CONCLUSION

The title for Initiative #245 omits six central features of the measure. The Court should reverse the decision of the Title Board, declare the title deficient, and remand with directions to the Title Board to revise the title for #245 accordingly.

Respectfully submitted this 20th day of April, 2020.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER’S ANSWER BRIEF ON PROPOSED INITIATIVE 2019-2020 #245 (“PETITIONS”)** was sent electronically via CCEF this day, April 20, 2020, to the following:

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