

<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: March 31, 2020 5:04 PM</p> <p>▲ COURT USE ONLY ▲</p>
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<p>PETITIONER’S OPENING 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 2,950 words.

It does not exceed 30 pages.

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

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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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STATEMENT OF THE ISSUES

Whether 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.

STATEMENT OF THE CASE

A. Statement of Facts.

Natalie Menten and Chip Creager (the “Proponents”) proposed Initiative 2019-2020 #245 (“Initiative #245” or “#245”). This measure would substantially amend Colorado law. It would add a new article to the Colorado Constitution and would repeal (either expressly or through its provision that would repeal all conflicting laws) or amend provisions of four other articles (Articles V, X, XIX and XX) and one title of Colorado statute (Title 24)—24 sections of law in all. Proponents claims that all provisions of the measure fall under the single subject “petitions”.

B. Nature of the Case, Course of Proceedings, and Disposition Below.

A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter, Proponents submitted final versions of the Proposed Initiative to the Secretary of

State for submission to the Title Board, of which the Secretary or her designee is a member.

A Title Board hearing was held on February 19, 2020, at which time titles were set for 2019-2020 #245. On February 26, 2020, Petitioner Kelly Brough filed a Motion for Rehearing, alleging *inter alia*, that the titles set were legally flawed because they failed to inform voters of certain central elements of the measure and would mislead voters. Rehearing was held on March 4, 2020, at which time the Title Board granted the Motion in part, to the extent that the Title Board made changes to the title.

The title set by the Board at rehearing follows:

Shall there be an amendment to the Colorado constitution concerning initiative and referendum petitions, and, in connection therewith, allowing petitioning of all Colorado governments; changing requirements, procedures, and deadlines for: 1) 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, 2) protesting petitions, including changing the venue and accelerating the protest process, and 3) informing voters of petition contents, including referring voters to pro and con websites and eliminating arguments against a petition from the ballot information booklet; requiring petition titles of no more than 60 words; limiting the number of bills that the general assembly may exempt from referendum; repealing the requirement that an initiative to add language to the Colorado constitution be approved by 55% of the voters; allowing laws enacted by initiative to be changed only by another initiative; exempting petitions from municipal home-rule provisions; and repealing all conflicting laws.

SUMMARY OF ARGUMENT

The titles set by the Title Board violate the legal requirements for ballot titles because they fail to inform voters of six central elements of the measure. The omitted elements include:

1. The measure would eliminate the opportunity for rehearing before the Title Board, and instead make this Court the venue for an immediate appeal from the Title Board's initial decision.
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).
3. The measure reverses decades of case law by undermining 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.
4. The measure would eliminate name and signature protests to district court and instead require all protests to begin in this Court.
5. The measure would allow any measure, not just TABOR measures, to be placed on odd-year ballots.

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.

LEGAL ARGUMENT

A. Standards of Review and Preservation of Issue Below.

1. Standard of review.

The Title Board must set titles that “correctly and fairly express the true intent and meaning” of the proposed initiative and “unambiguously state the principle of the provision sought to be added, amended, or repealed.” C.R.S. § 1-40-106(3)(b). This Court’s duty is to ensure that the titles “fairly reflect” the proposed initiative so petition signers and voters will not be misled into supporting or opposing a measure due to the words employed by the Title Board. *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Burlington*, 830 P. 2d 1023, 1026 (Colo. 1992).

If the title clearly and concisely summarizes the measure’s “central features,” the Title Board will be deemed to have done its job, and the title will be upheld. *In re Title, Ballot Title and Submission Clause for 2007-2008 Initiative #61*, 184 P.3d 747, 752 (Colo. 2008). Where, however, the Board has omitted

reference to, or mischaracterized, a central element of the measure, the title is legally deficient because voters will be misled, and the title must be sent back to the Board to be corrected. *See Matter of Proposed Election Reform Amendment*, 852 P.2d 28, 34-35 (Colo. 1993).

The titles, standing alone, should be capable of being read and understood, capable of informing the voter of the major import of the proposal, but need not include every detail. They must allow the voter to understand the effect of a yes or no vote on the measure. When they do not, both the title board and this court fail in their respective functions. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 217 (Colo. 2002).

2. Preservation of issues below.

The issues raised in this brief were presented to the Title Board in Petitioner's Motion for Rehearing, were considered at rehearing, and are preserved for review. *See Motion for Rehearing on Initiative 2019-2020 #245* at 2-3.

B. The Measure Contains Six Central Elements that were Improperly Omitted from the Titles.

The measure would make sweeping changes to initiative and referendum procedures in Colorado. While the titles inform voters that the measure would make changes, it does not advise voters what those changes are, at least with regard to the six substantial changes below.

1. The measure would eliminate the ability of the Title Board to correct its single subject decision or bring a ballot title into compliance with applicable law through rehearing. Instead, this Court would be required to hear all challenges of the initial Title Board decisions within two days after the Board acted.¹ *See* #245, sec. 1(1). Under current law, if the proponents of a measure, or any other registered elector, is dissatisfied with the titles set by the Title Board, the dissatisfied party may file a motion for rehearing with the Board. C.R.S. § 1-40-107(1)(a)(I). This gives proponents and others the opportunity to make their objections to the Board, with or without the expense of legal counsel, and allows the Board to correct errors and bring ballot titles into legal compliance before appeals are made to this Court.

¹ The measure would not expressly repeal the right of rehearing, but would do so operationally. Under the measure, “[a]ll protests of ballot titles...shall be filed in the supreme court *only*, and *only* two days after setting, and decided six days later.” #245, sec. 1(1), emphasis in original. The measure also “repeals all conflicting laws.” #245, sec. 5.

Eliminating this opportunity will increase the burden on petition proponents and others who, under the measure, would be left with only an appeal to this Court to address issues that are now often resolved by the Board on rehearing. This change will also change the role of this Court, converting it to an appellate body where ballot title challenges are made for the first time.

The titles make no mention of this provision, except to note that the measure would change “requirements, procedures, and deadlines for...protesting petitions, including changing the venue and accelerating the protest process.” While the titles tell voters that the measure will make unnamed, unspecified changes, it gives voters absolutely no idea what those “changes” are or that they will dramatically restrict the role of the Title Board and increase the burden on an initiative’s two designated representatives.

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/signatureRequirements.html>).

The titles make no mention of this change except to note that the measure would change “requirements, procedures, and deadlines for...circulating petitions and qualifying petitions for the ballot.” The titles do not notify voters of what those changes would be or that the measure would substantially lower the bar for placing an initiated measure before voters. This omission is particularly troubling because less than four years ago, voters approved Amendment 71 (known as the “Raise the Bar” initiative), an initiated measure intended to make it substantially more difficult to amend the constitution. *See* 2016 State Ballot Information Booklet (the “Blue Book”), Ballot Title for Amendment 71 at p. 31 (<https://www.sos.state.co.us/pubs/elections/Results/2016/2016bluebook.pdf>) (Ballot title summarized the measure’s single subject as “[s]hall there be an amendment to the Colorado constitution making it more difficult to amend the Colorado constitution...”). Voters should not be asked to reverse course without explicit notification in the titles that the measure would do so.

3. The measure reverses decades of case law² by undermining 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). Specifically, the measure provides that “[a]ffidavit errors shall not invalidate entries.” *Id.* The term “entries,” as used in the measure, is an undefined term, but it appears to mean a voter’s information and signature on an initiative or referendum petition.

The titles make no mention of this change except to note that the measure would change “requirements, procedures, and deadlines for...circulating petitions and qualifying petitions for the ballot.” The titles do not notify voters of what those changes would be or that petition signatures on a petition part with a defective circulator affidavit will not be invalidated.

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

² *See Am. Constitutional Law Found., Inc. v. Meyer*, 120 F.3d 1092 (10th Cir. 1997), *aff’d on other grounds*, 525 U.S. 182 (1999)(affirming constitutionality of affidavit requirement of C.R.S. §1-40-111); *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994)(same).

relating to petitions. *See* #245, sec. 1(3). Aside from the fact that this Court is not suited to act as a trial court and particularly where the substance of the challenge is not stipulated by the parties and requires a focus on details of individual signature lines and petition affidavits, adding the requirement that it serve this role for petition protests will require the Court to review and pass upon hundreds or thousands of pieces of petition, signer, and circulator information, not to mention impact the Court's ability to address its already busy docket in a timely manner.

The titles make no reference to this provision, except to note that the measure would change "requirements, procedures, and deadlines for...protesting petitions, including changing the venue and accelerating the protest process." While the titles tell voters that the measure will make changes, it does not explain that those "changes" will be. There is no signal whatsoever that the trustworthiness of petitions, assured through an elaborate administrative and judicial process, would be thrust into this Court's overworked hands.

5. The measure would allow any measure, not just TABOR measures, to be placed on odd-year ballots. *See* #245, sec. 1(4) and *Colo. Const.* art. V, sec.

1(2). Currently, only measures brought under TABOR may be considered by voters in odd years. *Id.* The measure would eliminate this long-standing constitutional provision and open the substantive law (whether it is the constitution, statutes, charters, ordinances, or resolutions) to annual amendment and open the substantive law (whether it is the constitution, statutes, charters, ordinances, or resolutions) to annual amendment. The titles make no mention of this substantial constitutional change.

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). “Topic” is an undefined term, leaving open the possibility that this provision will be broadly interpreted to substantially restrict the authority of the General Assembly. The titles make no reference to this provision of the measure.

This Court long ago established that a ballot title must “contain sufficient information to enable voters to determine intelligently whether to support or oppose a proposal.” *In re Title, Ballot Title, Submission Clause, & Summary by the Title Bd.*, 877 P.2d 848, 850-51 (Colo. 1994). In a recent application of this standard, the Court held that a measure concerning the recall of elective officials

was deficient because, while it advised voters that the measure specified recall and successor election procedures, it did not “advise voters what those procedures are.” *Hayes v. Spaulding (In re Title, Ballot Title and Submission Clause for 2015-2016 #73)*, 369 P.3d 565, 569 (Colo. 2016). The titles for #245 suffer from this same defect. While the titles tell the voters that the measure would change “requirements, procedures, and deadlines” for initiatives and referenda, they do not tell voters what those changes are with regard to the six enumerated substantial changes to existing law.

The *Hayes* Court identified numerous deficiencies in the ballot title in that case (“#73”) that are repeated in the #245 titles. Specifically, #73 would have substantially reduced the number of signatures required to trigger a recall election. *Id.* The measure would have also reduced the number of signatures required for successor candidates to get on the state-wide ballot. *Id.* These provisions of the measure were omitted from the titles. Similar to #73, #245 would substantially reduce the number of signatures required to place an initiated measure on the state-wide ballot, but the titles would not tell voters of this change. That deficiency alone was sufficient to find that the Title Board failed to accurately summarize the measure’s central features, and the Court reversed the Board’s decision.

The *Hayes* Court identified another deficiency in the #73 titles that is repeated in the #245 titles. The #73 titles failed to notify voters that the measure would have limited “the petition review that election officials perform to ensure that the recall election should go forward.” *Id.* at 570. Like #73, #245 would substantially change the process for petition review by prohibiting the invalidation of petition signatures due to “affidavit errors.” *See* #245, sec. 1(2).

The effect of the omission from the title of any one, but certainly all six, of the central features identified above is to render the titles, like the titles for #73, “so general” that they do not “contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative.” *Hayes, supra*, at 570, *also citing Garcia v. Montero (In re Ballot titles 2001-2002 #21 & #22)*, 44 P.3d 213, 222 (Colo. 2002)(“[t]he titles, standing alone...should be capable of...informing the voter of the major import of the proposal”).

Proponents argued at rehearing that the titles for #245 are already lengthy and should not be expanded further. While concise titles are required, the scope of #245 and its revision to the lawmaking process that governs our government at all levels is undeniably enormous. It would add a new article to the Colorado Constitution and would repeal (either expressly or through its provision that would repeal all conflicting laws) or amend provisions of four other articles (Articles V,

X, XIX and XX) and one title of Colorado statute (Title 1)—24 sections of law in all. *See* #245, sec. 5.

Brevity is an asset of a well worded title, and Colorado statute requires the Board to seek out the least wordy way of summarizing a measure’s central features. C.R.S. § 1-40-106(3)(b). The goal of brevity does not also authorize the Board to skip over key legal changes that voters need to learn via the ballot title. If it did, the statutory mandates that ballot titles “correctly and fairly express the true meaning and intent” of an initiative, “unambiguously state the principle of the provision sought to be added, amended, or repealed,” and avoid “public confusion that might be cause by misleading titles” would be meaningless. *Id.*

Accordingly, the ballot title for #245 must notify the voters of the numerous central elements of the measure, all of which would work substantial changes to Colorado law and stand to change the legislative process at the state level, as well as in all cities, counties, and districts. Voters must be informed of these changes in #245’s ballot title so that they do only sign petitions to put them on the ballot or vote to adopt them with sufficient and fair notice.

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 31st day of March, 2020.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #245 ("PETITIONS")** was sent electronically via CCEF this day, March 31, 2020, to the following:

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/s Erin Holweger _____