

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2021-2022)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2021-2022 #23 (“Petitions”)

Petitioners: John Ebel and Donald
Creager

v.

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

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Case No. 2021SA139

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 1,546 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/ Emily Buckley

EMILY BUCKLEY, #43002

Assistant Attorney General

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ISSUE ON REVIEW

Whether Proposed Initiative 2021-2022 #23 requires the addition of language to the Colorado Constitution such that it is an amendment and a 55% vote is required for the initiative to pass.

STATEMENT OF THE CASE

I. Procedural history

Proponents John Ebel and Donald Creager seek to circulate #23 to obtain the requisite number of signatures to place an initiative on the ballot. The proposed initiative would make statutory and constitutional changes to the petitioning process for initiatives and referenda. *See* Petition for Review #23, at 12, filed April 28, 2021.¹

At its April 7, 2021 meeting, the Board concluded that the measure contained a single subject and proceeded to set a title, as follows:

¹ The record for this appeal is attached to the petition. Because the record was not filed as a separate document, this brief will cite to the pages of the PDF of the petition.

An amendment to the Colorado Constitution and a change to the Colorado Revised Statutes concerning initiative and referendum petitions, and, in connection therewith, replacing certain constitutional provisions that govern petitions, including the requirement that signatures for constitutional amendments be gathered from all parts of the state and any amendment that adds language to the Colorado Constitution be approved by 55%, rather than 50% of the voters, with a statute that allows petitioning of all Colorado governments; changes requirements, procedures, and deadlines for: circulating petitions and qualifying petitions for the ballot, protesting petitions, including changing the venue and accelerating the protest process, and informing voters of petition contents, including referring voters to pro and con websites; limits petition titles to 60 words; limits the number of bills that the general assembly may exempt from possible voter review; allows laws enacted by initiative to be changed only by another initiative; repeals all conflicting statutes; and grants anyone standing to sue for any issue in the statute.

Id. at 14.

After hearing from Petitioners, the Board determined, by unanimous vote, that because Proposed Initiative 2021-2022 #23 requires the *addition* of language to the Colorado Constitution, a 55% vote is required for the initiative to pass under Colo. Const. art. V, § 1(b). *Id.* at 12; *see also Hearing Before Title Board on Proposed*

Initiative 2021-2022 #23 (April 7, 2021), <https://tinyurl.com/5ubax99c>
(discussion and vote found at 6:00:30-6:12:25).

Petitioners timely filed for rehearing, arguing as relevant here, that because #23 was a simple repeal—not an amendment—to the constitution, 55% voter approval was not required. *Id.* at 15. The Board considered and denied the Motion for Rehearing at its April 21, 2021 hearing. *Id.* at 17. Petitioners now challenge whether #23 proposes an amendment to the constitution.

II. The relevant features of #23

Number 23 proposes statutory and constitutional changes to Colorado’s petition process. *See* Pet. for Review at 12. The only provision of #23 relevant to this appeal is as follows:

IN ARTICLE X SECTION 20, AMEND SECTION 20 AS
FOLLOWS: Applying the last sentence of Article X section
20(3)(b)(v) to petitions is repealed.

Id.

III. Past and future measures similar to #23

This effort to revise the petition process is not unique. Last year, the Title Board set title on two measures proposing changes to the

petition process through constitutional amendment: 2019-2020 #245 and #299. *See* 2020SA92, 2020SA135. A third-party challenged those titles in this Court alleging that they did not contain sufficient detail, but the Court affirmed the titles set by the Board. *See id.*

The Petitioners also submitted several measures to the Title Board for the 2021-2022 cycle. The following table summarizes those measures and the actions of the Title Board:

Initiative	Title Board action	Supreme Court action
6	Single subject violation – No Title set	Affirmed (2021SA10)
8	Single subject violation – No Title set	Affirmed (2021SA62)
9	Single subject violation – No Title set	Affirmed (2021SA63)
10	Title set	Affirmed (2021SA64)
11	Title set	Affirmed (2021SA65)
12	Single subject violation – No Title set	Affirmed (2021SA66)

SUMMARY OF ARGUMENT

Because the only way to implement #23's changes to article X, § 20 of the Colorado Constitution is by adding language, #23 is an amendment to the Constitution and subject to a 55% voter approval requirement under Colo. Const. art. V, § 1(b).

ARGUMENT

I. The Board correctly determined #23 seeks to amend the Constitution.

A. Standard of review and preservation.

The Title Board has considerable discretion in setting the title, ballot title and submission clause, and summary for a ballot initiative. *In re Proposed Initiative on Parental Choice in Educ.*, 917 P.2d 292, 294 (Colo. 1996). Thus, in reviewing the actions of the Board, this Court generally defers to its broad discretion in the exercise of its drafting authority, *id.*, and “employ[s] all legitimate presumptions in favor of the propriety of the Board's actions,” *In re Title, Ballot Title Submission Clause for 2009–2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010). However, questions of legal interpretation—such as the issue before the Court here—are reviewed de novo. *Hayes v. Ottke*, 293 P.3d 551, 554 (Colo.

2013). Petitioners preserved the issue raised here by filing a motion for rehearing. *Petition* at p 15.

B. Proposed Initiative #23 seeks to amend the Colorado Constitution.

At issue here is whether the final provision of #23 is an amendment or a repeal to the Constitution. Despite Petitioners' insistence #23 is a pure repeal, because the initiative's proposed changes to article X, § 20 of the Constitution would require the addition of *some* words to effect the initiative, #23 is an amendment and subject to 55% voter approval under Colo. Const. art. V, § 1(b).²

The text of #23 itself uses both the words “amend” and “repeal” to describe the initiative's proposed changes to article X, § 20: “IN ARTICLE X SECTION 20, **AMEND** SECTION 20 AS FOLLOWS:

² “In order to make it more difficult to amend this constitution, an initiated constitutional amendment shall not become part of this constitution unless the amendment is approved by at least fifty-five percent of the votes cast thereon; except that this paragraph (b) shall not apply to an initiated constitutional amendment that is limited to repealing, in whole or in part, any provision of this constitution.” Colo. Const. art. V, § 1(b).

Applying the last sentence of Article X section 20(3)(b)(v) to petitions is *repealed.*” *Petition* at p 12 (emphasis added). Petitioners did not submit redlined changes to show how #23 would alter the Constitution. Instead, they rely solely on the ambiguous language of #23. Accordingly, to determine the nature of the changes—i.e., whether amendment or repeal—the Title Board had to closely consider how #23 would change the Constitution’s text.

Petitioners insist that #23 simply repeals the last sentence of article X, § 20(3)(b)(v) of the Colorado Constitution as it applies to petitions. That constitutional provision currently states:

(3) Election provisions.

(b) At least 30 days before a ballot issue election, districts shall mail at the least cost, and as a package where districts with ballot issues overlap, a titled notice or set of notices addressed to “All Registered Voters” at each address of one or more active registered electors. The districts may coordinate the mailing required by this paragraph (b) with the distribution of the ballot information booklet required by section 1(7.5) of article V of this constitution in order to save mailing costs. Titles shall have this order of preference: “NOTICE OF ELECTION TO INCREASE TAXES/TO INCREASE DEBT/ON A CITIZEN PETITION/ON A

REFERRED MEASURE.” Except for district voter-approved additions, notices shall include only:

(v) Two summaries, up to 500 words each, one for and one against the proposal, of written comments filed with the election officer by 45 days before the election. No summary shall mention names of persons or private groups, nor any endorsements of or resolutions against the proposal. Petition representatives following these rules shall write this summary for their petition. The election officer shall maintain and accurately summarize all other relevant written comments. **The provisions of this subparagraph (v) do not apply to a statewide ballot issue, which is subject to the provisions of section 1(7.5) of article V of this constitution.**

(emphasis in last sentence added).

After reviewing the last sentence of article X, § 20(3)(b)(v), it is clear that its application to petitions cannot be easily repealed by deleting words—for example, by striking the word “petition” (which does not appear)—from the sentence. And because statewide ballot initiatives include both referred initiatives *and* petitions, #23 cannot be implemented by striking the entire last sentence. The only feasible way to implement #23’s directive that “[a]pplying the last sentence of Article X section 20(3)(b)(v) to petitions is repealed” would be to add words

expressly carving out petitions from the bluebook requirement in this subsection. And because *adding* words to the Constitution is clearly an amendment #23 must be classified as an amendment to the Constitution. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #23* (April 7, 2021) (discussion and vote found at 6:00:30-6:12:25).

CONCLUSION

The Court should affirm the decision of the Title Board on 2021-2022 #23.

Respectfully submitted on this 13th day of May, 2021.

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CERTIFICATE OF SERVICE

This is to certify that I have duly caused the foregoing **THE TITLE BOARD'S OPENING BRIEF** to be served upon the following parties electronically via CCEF, at Denver, Colorado and via Fed Ex overnight delivery, this 13th day of May, 2021, addressed as follows:

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