

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021-2022) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #11 (“Petitions”)</p>	
<p>Petitioners: John Ebel and Donald Creager</p>	
<p>v.</p>	
<p>Title Board: Theresa Conley, David Powell, and Jason Gelender.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>PHILIP J. WEISER, Attorney General MICHAEL KOTLARCZYK, 43250 Assistant Attorney General* PETER G. BAUMANN, 51620 Campaign Finance Enforcement Fellow* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6187 FAX: (720) 508-6041 E-Mail: mike.kotlarczyk@coag.gov peter.baumann@coag.gov *Counsel of Record <i>Attorneys for the Title Board</i></p>	<p>Case No. 2021SA65</p>
<p>THE TITLE BOARD’S OPENING BRIEF</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, 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 2,388 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/ Peter G. Baumann

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ISSUE ON REVIEW

Whether the title set by the Title Board adequately and briefly informs voters of the central features of Proposed Initiative 2021-2022 #11.

STATEMENT OF THE CASE

I. Procedural history

Proponents John Ebel and Donald Creager seek to circulate #11 to obtain the requisite number of signatures to place an initiative on the ballot. The proposed initiative would amend the Colorado Revised Statutes by changing the petitioning process for initiatives and referenda. *See* Petition for Review #11, at 7, filed Feb. 24, 2021.¹

At its February 3, 2021 meeting, the Board concluded that the measure contained a single subject and proceeded to set a title. *Id.* at 8. Petitioner Donald Creager filed a timely motion for rehearing, arguing

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.

that the Board should “shorten and correct” #11’s title. *Id.* at 9. The Board considered the Motion for Rehearing at its February 17, 2021 hearing, granting the motion to the extent that it revised the original draft based on suggestions from Petitioners. *Id.* at 10. Petitioners now challenge whether the title fairly and briefly advises voters of the measure’s central features.

II. The features of #11

Initiative #11 proposes a series of statutory revisions to Colorado’s petition process. In general, the measure would liberalize that process. *See* Pet. for Review at 7. It would, among other things:

- Grant any adult petition rights at the state level as well as rights to petition any local and home rule governments and authorities. *Id.* (at Section 1(1));
- Require ballot titles to be no more than 60 words. *Id.*;
- Require challenges to titles to be immediately filed in the Colorado Supreme Court, and require the Supreme Court to rule on those challenges within six days. *Id.*;
- Require signatures of 5% of registered electors to place a measure on the ballot, or 120,000 signatures, whichever is less. For constitutional amendments, the figure could increase by 9,000 signatures every four years, ultimately requiring 50% more signatures than statutory entries. *Id.* (at Section 1(2));

- Give petition-circulators 180 days for local ballot measures and 365 days for statewide measures to collect the required signatures. *Id.* (at Section 1(3));
- Require election officers to count and report the signature entries within ten days of them being delivered to the officers, and require protests to that count to be filed within two days of the report and in the Supreme Court. The Supreme Court would then be required to rule on the protest within ten days. *Id.*
- Offer proponents 15 days to cure a petition declared invalid. If a cured petition is submitted, election officers would have two days to count and report the signature entries, which could be challenged in the Supreme Court two days later. *Id.*
- Create a presumption that signatures on a petition are from registered electors in the relevant district. *Id.*
- Require ballots to list one website in favor of the ballot measure and one website opposed. *Id.* (at Section 1(4));
- Limit the number of bills the General Assembly may declare exempt from referendum. *Id.* (at Section 2);
- Delay the effective date of any bill passed by the General Assembly subject to a referendum-repeal filed within 90 days of the end of the General Assembly's session. *Id.*;
- Require a \$3,000 fine for stopping, detaining, ejecting, citing, or arresting petition circulators or signers; *Id.* (at Section 4);
- Permit hearings on petitions to take place over the telephone, and permit "court filings" to occur over email. *Id.*;

- Prohibit a law passed by an initiative from being repealed or amended except by another initiative. *Id.*; and
- Repeal all conflicting statutes. *Id.*

Taken together, the operative sections of the measure contain 491 words, and would alter: (1) the process for setting and challenging title; (2) the process for gathering signatures; (3) the process and deadlines for legal challenges related to title or petition gathering; and (4) the way in which referenda interact with bills of the General Assembly.

III. Past and future measures similar to #11

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: 2019-2020 #245 and #299. Number 11 is similar to these measures, the primary difference being that 2021-2022 #11 proposes a statutory revision while last year's proposals proposed constitutional amendments. As a result, the title set by the Board here is comparable to those set on #245 and #299 last year. *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 Title Board’s actions on those measures are presently before this Court. 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	Pending (2021SA62)
9	Single subject violation – No Title set	Pending (2021SA63)
10	Title set	Pending (2021SA64) ²
11	Title set	Pending (2021SA65)
12	Single subject violation – No Title set	Pending (2021SA66)

SUMMARY OF ARGUMENT

For good reason, the Title Board is vested with considerable discretion in crafting titles for initiatives. This discretion reflects the

² Number 11 and #10 are nearly identical. The only difference between the two initiatives is that #11 omits the final sentence in Section 4 of #10, which states that “[a]nyone has standing to sue for any issue in this statute.” Given the similarities between Initiatives #10 and #11 and the similar manner in which the titles set on those Initiatives have been challenged by Petitioners, the Board’s opening brief in 2021SA64 is virtually identical to this submission.

dichotomous nature of the Board’s mandate. On one hand the Board is required to draft “brief” titles. But while those titles need not describe every detail of a proposed measure, they must sufficiently describe the central features of an initiative such that a voter reading the title will properly comprehend the measure’s components and effects.

Here, the Board acted well within its discretion in crafting a title for initiative #11. The initiative, like others advanced by these Petitioners, proposes numerous changes to the state’s initiative and referendum procedure. All with a general goal of liberalizing that process. The title crafted by the Board concisely summarizes those changes while informing voters of the central features of the initiative.

ARGUMENT

I. The title set by the Board informs voters of the measure’s central features.

A. Standard of review and preservation.

“The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶ 8 (quotations omitted). The Court “employ[s] all legitimate presumptions

in favor of the propriety of the Title Board’s actions,” and will “only reverse the Title Board’s decision if the titles are insufficient, unfair, or misleading.” *Id.* (quotations omitted). It thus follows that the Court does not “consider whether the Title Board set the best possible title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. Rather, the Court only “ensure[s] that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words that the Title Board employed.” *Id.*

Review in this Court is only appropriate where the Board has granted rehearing on a proposed initiative. *See* § 1-40-107(2). Here, the proponents submitted a spartan motion for rehearing that arguably did not comply with the statutory requirements. *See* Pet. for Review at 9 (“#10 was too long a title, and we should shorten and correct it. #11 has the same objections as #10.”); § 1-40-107(1)(b) (“A motion for rehearing must . . . set forth with particularity the grounds for rehearing. . . . If the motion claims that the title and submission clause set by the board are unfair or that they do not fairly express the true meaning and

intent of the proposed state law . . . , then the motion must identify the specific wording that is challenged.”).

However, after admonishing the proponents about the sparseness of their motion for rehearing, the Board granted the motion, thereby preserving Petitioners’ challenge to whether the title clearly sets forth the central features of the measure. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #11* (Feb. 17, 2021), <https://tinyurl.com/hv3jwhjw> (statement at 1:01:20–1:02:25) (advising proponents that “the Board will hear this today,” but future motions for rehearing would need to include more detail).

B. The title set by the Board adequately describes the central features of the measure.

“The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board “is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause.” *Id.*

“It is well-established that the titles and summary need not spell out every detail of a proposed initiative in order to convey its meaning accurately and fairly.” *In re Title, Ballot Title, & Submission Clause for 1997-1998 # 74*, 962 P.2d 927, 930 (Colo. 1998). To the contrary, ballot titles must “be brief.” § 1-40-106(3)(b); *see also In re Title, Ballot Title, & Submission Claus Pertaining to Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1357 (Colo. 1991) (same). In fact, the benefit of title is that it parses the central features of a proposed initiative to offer voters more clarity than they might receive from the text of the initiative itself. *See, e.g., In re Title, Ballot Title & Submission Clause for 2013–2014 #45*, 234 P.3d 642, 648 (Colo. 2010) (“the purpose of reviewing an initiative title for clarity parallels that of the single subject requirement: voter protection through reasonably ascertainable expression of the initiative’s purpose.”).

The Board must simultaneously be mindful, however, that its titles may be rejected if they “fail[] to reflect the central features of the proposed measure.” *In re Title, Ballot Title & Submission Clause, & Summary Adopted Nov. 1, 1995 By Title Bd. Pertaining to a Proposed*

Initiative on “Trespass-Streams with Flowing Water”, 910 P.2d 21, 24 (Colo. 1996) (citations omitted).

Here, despite the sparseness of Petitioners’ request for rehearing, the Board did vote to grant rehearing on initiative #11. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #11* (Feb. 17, 2021), <https://tinyurl.com/hv3jwhjw> (statements at 1:01:20–1:02:27).

Petitioners argued that the title was needlessly wordy and redundant. *Id.*(statements at 30:40–32:10 (describing #10)); *see also id.* (statements at 1:03:05–1:03:20 that Petitioners’ objections to #11 were identical to their objections to #10). In particular, Petitioners objected to subheadings that were included in the original title. *Id.* (statements at 30:40–32:10). In response, the Board removed those subheadings. *Compare* Pet. for Review at 8 *with id.* at 10.

The title here was well within the “discretion” offered to the Board to resolve “interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause.” *In re Title*, 2014 CO 63, ¶ 24. Initiative #11 has wide-ranging consequences across several aspects of the petition-gathering process. It would affect title,

signature-gathering, and enforcement. It would accelerate some timelines while lengthening others, and would impose new requirements on the Title Board, election officials, the General Assembly, and the Supreme Court.

These changes are contained in a 502-word petition that the Board effectively summarized in a 115-word title and submission clause. *Compare* Pet. for Review at 7 *with id.* at 10. This ratio stands in stark contrast to cases where this Court has overridden the Board’s discretion and rejected title on brevity grounds. *See, e.g., Cook v. Baker*, 214 P.2d 787, 790 (Colo. 1950) (rejecting 369-word submission clause for proposed initiative containing 505 words). The title set by the Board fulfills its mandate of summarizing “the central features” of this proposed initiative, and does so briefly. *In re Title*, 2014 CO 63, ¶ 24.

II. Petitioners’ arguments in favor of a shorter title are insufficient to overcome the Board’s discretion.

On March 19, 2021, Petitioners filed an opening brief in this action. Opening Br. by Pet’rs (March 19, 2021). In it, they suggest that

the title set by the Board is excessively long and ask this Court to impose a new title proposed by Petitioners. *Id.* at 7.

First, even if Petitioners, or this Court, think that another title may be better, that alone is insufficient to overcome the discretion afforded the Title Board. *See, e.g., In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. But even leaving that discretion aside, Petitioners' proposal on Page 7 of their Opening Brief omits central features of Initiative #11. For example, because a statutory change cannot repeal constitutional provisions, #11 would create an alternative process to the existing constitutional process. Petitioners' proposal omits any reference to this fact. It also omits altogether any reference to the changes being made to the signature-gathering-phase of the petition process.

Petitioners also reference a title proposed by the Board last year, *id.* at 7, but that was not the final version adopted by the Board. After the Board set title on #245 on February 19, 2020, an objector challenged that title, alleging that the title did not sufficiently describe the central features of #245. *See* 2020SA92. At rehearing on March 4, 2020, the

Board revised the title, which the objector still challenged as insufficiently detailed in this Court. *See id.* This Court upheld the Title set by the Board. *Id.*

Due to its dual mandates, the Board must always be conscious of briefly and clearly summarizing a proposed measure while still sufficiently describing its central features. As this Court affirmed, the title set on #245 last year properly balanced these objectives, and so does the title set here.

CONCLUSION

The Court should affirm the title set by the Title Board on 2021-2022 #11.

Respectfully submitted on this 24th day of March, 2021.

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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 electronically via CCEF, at Denver, Colorado and via Fed Ex overnight delivery, this 24th day of March, 2021, addressed as follows:

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