SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 3, 2022 4:29 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #75 ("Concerning Property Valuation") **Petitioner: Bernard Buescher** **v.** **Respondents: Alex Valdex and Colin Larson** **and** **Title Board: Theresa Conley, David Powell, and Ed DeCecco**	**▲COURT USE ONLY▲**
Attorney for Petitioner: Mark G. Grueskin, #14621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com	Case Number: 2022SA102

PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #75 ("CONCERNING PROPERTY VALUATION")

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:

X It contains 6,127 words.

☐ It does not exceed 30 pages.

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

X 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/ Mark G. Grueskin
Mark G. Grueskin
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTRODUCTION

The purpose of a ballot title is to inform voters about a measure so they can decide whether to support it. Sometimes, a measure's language makes it impossible for titles to fulfill that role. That happened here.

Initiative #75's purpose is to reduce residential property taxes by manipulating the property valuation process. However, under the Initiative, this new valuation process applies to residential property—and then the Initiative expressly states this new process ***does not apply to residential property***. No title could fairly and accurately explain what a property tax measure seeks to achieve when, in so many words, it both includes and exempts residential property. As such, the Board erred in setting titles rather than returning the Initiative to Proponents.

The Board further erred by describing the Initiative as applying generally to "property"—because the Initiative does ***not*** apply to all property. In addition to exempting residential property, the text of the Initiative does not apply to valuation of agricultural land, mines, and oil and gas producing lands or leaseholds. A voter reading the titles would have no idea the Initiative does not apply to these huge swaths of "property" in Colorado. It is a critical omission that renders the titles misleading.

Finally, Proponents appeal the Board's decision to include the mandatory tax change language from C.R.S. § 1-40-106(3)(f) in the titles. However, the Court need not consider the issue because Proponents' Petition for Review was untimely, which deprives the Court of jurisdiction over their appeal.

ISSUES PRESENTED

1. Whether the Board erred in setting any title at all, given that Initiative #75 both subjects and exempts residential land from its changed property tax valuation techniques, making the measure so inherently confusing that a title reflecting its true meaning cannot be set.

2. Whether the Board violated the statutory "clear ballot title" requirement by indicating that the measure changes property tax valuation techniques for real property without stating that agricultural land, mines, and oil and gas producing lands or leaseholds are expressly exempt from this Initiative's limits on valuation increases for property tax purposes.

3. Whether the Court has jurisdiction over Proponents' appeal because Proponents filed their petition for review beyond the mandatory statutory deadline, which deprives the Court of jurisdiction over their appeal.

STATEMENT OF THE CASE

A. Statement of Facts

Alex Valdez and Colin Larson ("Proponents") proposed Initiative 2021-2022 #75 ("Initiative #75" or the "Initiative"), which is one of among 20 versions of the initiative they filed with the Secretary of State for Title Board consideration. The Initiative limits increases in the value of real and personal property for the purpose of property tax assessments, which will reduce the amount of revenue local governmental entities can collect even if there are substantial increases in property values. The initiative accomplishes this by amending the Colorado Constitution and Colorado Revised Statutes to cap property value increases for assessment purposes annually at the rate of inflation, limited to three percent (3%).

Although purporting to apply to "real and personal property" generally, the Initiative contains a number of exemptions. One of these exemptions has the effect of rendering the Initiative inherently contradictory. Specifically, under the Initiative's terms, residential property—which is touted by Proponents as the focus of the Initiative—is both exempted from the new inflation valuation approach and made subject to it.

Proposed C.R.S. § 39-1-3(5)(a) exempts residential property from the new valuation method:

> . . . The actual value of such property, other than agricultural lands exclusive of building improvements thereon ***and other than residential real property*** and other than producing mines and lands or leaseholds producing oil or gas, shall NOT BE INCREASED ANNUALLY BY MORE THAN INFLATION, LIMITED TO 3%, AND SHALL be that value determined by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal. . . .

(Initiative #75, sec. 3, proposed C.R.S. § 39-1-103(5)(a) (emphasis added).)

The same subsection of the statute being amended then provides that the new valuation approach applies to residential property:

> The actual value of residential real property shall NOT BE INCREASED ANNUALLY BY MORE THAN INFLATION, LIMITED TO 3%, AND SHALL be determined solely by consideration of the market approach to appraisal.

(*Id.*) The proposed amendment to section 3 of article X of the Colorado Constitution also applies the new valuation approach to residential property. (*Id.*, sec. 1., proposed Colo. Const. art. X, sec. 3.)

In addition to the exemption for residential property, the Initiative exempts agricultural land and mines or oil and gas producing lands or leaseholds from its new valuation standard. (*Id.*, sec. 3, proposed C.R.S. § 39-1-103(5)(a).) The titles set by the Board do not reflect Initiative #75's inherent contradiction of exempting and including residential property. Nor do they apprise voters of the exemption for agricultural land and mines or oil and gas producing lands or leaseholds.

Finally, the measure includes various changes to the valuation process as part of its new approach; however, these process changes are not relevant to the issues presented in this appeal.

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

A review and comment hearing was held before the Offices of Legislative Council and Legislative Legal Services. Proponents then filed a final version of Initiative #75 with the Secretary of State for submission to the Title Board.

A Title Board hearing was held on March 16, 2022, at which time the Board set titles for the Initiative. On March 23, 2022, Petitioner Bernard Buescher ("Petitioner") filed a Motion for Rehearing, alleging that the Board lacked jurisdiction because Initiative #75 violated the single subject requirement. Petitioner also argued that the Board erred by setting titles that failed to inform voters of key element of the Initiative and that the titles would mislead voters.

Proponents filed a Motion for Rehearing arguing the Board erred by including C.R.S. § 1-40-106(3)(f)'s mandatory "tax change" language in Initiative #75's titles. This language informs voters that Initiative #75 will reduce property tax revenue for local districts, and it includes in the titles an estimate of the scope of the measure's effects.

A rehearing was held on April 6, 2022. The Board denied Petitioner's Motion for Rehearing. The Board denied Proponents' motion as to their argument that C.R.S. § 1-40-106(3)(f) does not apply, but it granted their motion to the extent that changes were made to the titles. The Board approved the following title:

> Shall funding available for counties, school districts, water districts, fire districts, and other districts funded, at least in part, by property taxes be impacted by a reduction of $1.3 billion in property tax revenue by an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning the actual value of real and personal property for purposes of property taxation, and, in connection therewith, limiting the annual increase of a property's value to inflation or to three percent, whichever is less; and allowing a property to be reappraised when a property suffers a decline in value or is in a county that has suffered a sustained economic downturn?

Petitioner filed his Petition for Review with the Court on April 13, 2022, which was seven days after the Board denied his Motion for Rehearing. Proponents filed their Petition for Review the next day, April 14, which was eight days after the Board denied in part their Motion for Rehearing.

SUMMARY OF ARGUMENT

The Board violated the clear title requirement in two ways by setting titles for Initiative #75. Their first error is fatal to the title setting. Initiative #75 contains an inherent contradiction by applying its inflation-valuation method to residential property and exempting residential property from that standard. This contradiction is not inconsequential, as manipulating residential property values to lower property

taxes is the overarching purpose of the Initiative. Confronted with this contradiction, as the Court has previously explained, the Board should have returned the Initiative to Proponents because it is not possible to set a title that would fairly and accurately explain to voters that an initiative targeted at residential property applies to that property and does not apply to that property.

Even if that error by the Board was not fatal, the titles set by the Board suffer another serious flaw. The titles state that new valuation process applies generally to "property"—but they do ***not***. The Initiative exempts agricultural lands and mines or oil and gas producing lands and leaseholds from its new standard. That is a significant carve out from the Initiative, yet, from the titles, a voter would not know of it. Rather, a voter reading the titles would believe that the Initiative's new valuation approach applies to ***all*** property in the state. This is a material omission from the titles that renders them fundamentally misleading.

Proponents have sought review of whether the Board erred by including mandatory "tax change" language in C.R.S. § 1-40-106(3)(f) in the titles. The Court cannot consider their appeal, however, because their Petition for Review was filed after the statutory deadline, which deprives the Court of jurisdiction over their appeal.

LEGAL ARGUMENT

I. The Board erred by setting titles for Initiative #75 as the Initiative contains an inherent and substantial contradiction that necessarily prevents the setting of clear titles.

A. Standard of review; preservation of issue below.

An initiative title must "fairly summarize the central points" of the proposed measure. *In re Title, Ballot Title & Submission Clause, & Summary for Petition on Campaign & Political Fin*., 877 P.2d 311, 315 (Colo. 1994). Titles must be "fair, clear, accurate, and complete" but are not required to "set out every detail of the initiative." *In re Title, Ballot Title & Submission Clause, & Summary for 2005-2006 # 73*, 135 P.3d 736, 740 (Colo. 2006).

This Court will review titles set by the Board "with great deference" but will reverse the Board where "the titles are insufficient, unfair, or misleading." *Id.* No such deference is required where the titles "contain a material and significant omission, misstatement, or misrepresentation." *In re Ballot Title 1997-1998 #62*, 961 P.2d 1077, 1082 (Colo. 1998). "Perfection (in writing a ballot title) is not the goal; however, the Title Board's chosen language must not mislead the voters." *In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999).

Petitioner raised this issue in his Motion for Rehearing, and during the hearing on his Motion, and, therefore, preserved the issue for review. (*See* Pet.'s Mot. for Reh'g on Initiative 2021-2022 #75 at 2 (¶ 2.H).)

B. Initiative #75 is inherently contradictory by both exempting residential property from its valuation standard and applying its valuation standard to residential property.

Initiative #75 imposes a cap on property tax valuation based on inflation, limited to a maximum of three percent (3%). Proposed Section 39-1-103(5)(a) provides, "The actual value of residential real property shall NOT BE INCREASED ANNUALLY BY MORE THAN INFLATION, LIMITED TO 3%, AND SHALL[1] be determined solely by consideration of the market approach to appraisal."

The very same proposed subsection says the opposite. It explicitly removes residential property from this ceiling on valuation for tax purposes.

> All real and personal property shall be appraised and the actual value thereof for property tax purposes determined by the assessor of the county wherein such property is located. The ***actual value of such property***, other than agricultural lands exclusive of building improvements thereon and ***other than residential real property*** and other than producing mines and lands or leaseholds producing oil or gas, shall NOT BE INCREASED ANNUALLY BY MORE THAN INFLATION, LIMITED TO 3%, AND SHALL be that value

[1] Capitalized wording in a proposed statutory or constitutional amendment is used to identify language being added to the provision in question and is replicated here for the Court's reference.

> determined by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal.

(Emphasis added.) As a result, residential property is both subject to and exempt from the 3% annual limit on growth of property values.[2]

"Other than" means "with the exception of: except for, besides." Merriam-Webster Online, last accessed April 18, 2022, available at https://www.merriam-webster.com/dictionary/other%20than; *see also, e.g.*, Oxford English Dictionary Online ("other than: besides, except, apart from"), last accessed April 18, 2022, available at https://www.oed.com. Using the plain and unambiguous meaning of this term, this language thus provides:

> The actual value of such property . . . [with the exception of] [except for] [besides] residential real property . . . shall not be increased annually by more than inflation, limited to 3%.

Stated more plainly, the Initiative's inflation-valuation approach applies to property "with the exception of" residential real property. *See In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 9, 328 P.3d 155, 159 (explaining that, in construing ballot initiatives and titles, the Court "give[s] words and phrases their plain and ordinary meaning").

[2] Comparable language is included in the amendment to subsection (1)(a) of Article X, section 3 in Initiative #75.

"Other than" is a construct that is regularly used in property tax law to carve out categories of property that are exempt from a statute. For instance:

- "Vacant land" means a lot, parcel, site, or tract of land where there are no buildings or fixtures "***other than*** minor structures," C.R.S. § 39-1-103(14)(c)(I);
- A "related improvement" in the context of residential property is a driveway, parking space, or improvement "***other than*** a building… designed for used predominately as a place of residency…," C.R.S. § 39-1-102(14.4)(a)(III)(B);
- Improvements are to be valued separately from water rights "except improvements ***other than*** buildings on land… used solely and exclusively for agricultural purposes," C.R.S. § 39-5-105(1); and
- Water rights, "***other than*** for agricultural purposes," shall not be appraised and valued separately." C.R.S. § 39-5-105(1.1)(a)(I).

Initiative #75 thus contains an inherent and substantial contradiction. Proposed C.R.S. § 39-1-103(5)(a) both subjects and exempts residential property from the new valuation standard. Further, the exemption in proposed C.R.S. § 39-1-103(5)(a) conflicts with the proposed amendment to the Colorado Constitution. This drafting not only renders the Initiative contradictory, it was fatal to the ability of the Title Board to set clear titles.

Notably, Proponents did not deny that this conflict exists. And when they submitted eleven (11) other measures to achieve similar goals (Initiatives #141-#151), they fixed their error. For instance, in Initiative #141, they specifically struck the phrase "and other than residential property" from Proposed Section 39-3-105(a) to make it clear that residential property would get the benefit of this valuation methodology change, thus removing the contradiction found in Initiative #66. https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2021-2022/141Final.pdf (last viewed May 2, 2022) (*see* Section 3).

This internal conflict would affect hundreds of thousands of voters who own homes. But its resolution is not apparent to the casual reader of this text, and it cannot be resolved by any amount of after-the-fact rationalization as to why the measure really meant to give effect to one sentence and not another. "[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." *In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #25 ("In re 1999-2000 #25")*, 974 P.2d 458, 465 (Colo. 1999).

C. Because of its inherent contradiction, titles for Initiative #75 cannot be written without confusing voters as to the true meaning and effect of the measure.

As the Court has explained, "[t]he Colorado Constitution . . . mandates that an initiative's single subject shall be clearly expressed in its title." *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 22, 369 P.3d 565, 568. The clear title standard requires that titles "allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal." *Id.* The Board must consider the confusion that may arise from a misleading title and set titles that "correctly and fairly express the true intent and meaning" of a measure. *Id.* (quoting C.R.S. § 1-40-106(3)(b)). The contradiction within Initiative #75 made it impossible for the Board to satisfy the clear title requirement.

As an initial matter, the Board had to address the Initiative's treatment of residential real property in the titles. Although Proponents described their Initiative in broad terms as addressing valuation of property generally, it does not in fact provide a general measure for valuation. Instead, Proponents exempted significant categories of property from the measure, not only residential property as described here but also, as discussed *infra*, agricultural lands and mines or oil or gas producing lands or leaseholds. (Initiative #75, sec. 3, proposed C.R.S. § 39-1-103(5)(a).)

A general reference to "property"—as the titles do here—is deceptive because not all property is included. To enhance this idea's political appeal, Proponents have been clear in their public statements that the Initiative is primarily aimed at residential property. *See* Alex Valdez and Colin Larson, "Protect Coloradans from this crushing ***housing*** inflation" (emphasis added), *The Denver Post*, Mar. 17, 2022, *available at* https://www.denverpost.com/2022/03/17/property-taxes-assessed-value-cap-colorado-housing-inflation/. If Proponents feel the measure targets residential property, it should do so without introducing a high level of doubt stemming from its own contradictory terms. The only way for voters to make an intelligent choice about whether to vote for or against this measure is for voters to understand which property is subject to the Initiative and which property is not.

Although the titles must describe how the Initiative treats residential property, there is no conceivable way to do so. The Board could not "correctly and fairly" express that Initiative #75 will both exempt residential real property from its new valuation approach and apply that valuation approach to residential real property.

A measure's single subject "***shall be clearly expressed*** in its title." Colo. Const., art. V, sec. 1(5.5) (emphasis added); *In re 1999-2000 #25*, 974 P.2d at 463. But the Board cannot meet its constitutional obligation here, a duty imposed by the provision that created the single subject requirement. This Court is "bound to assume

that the word 'clearly' was not incorporated into the constitutional provision under consideration by mistake." *Id*. at 464. The voters' expectation was that an initiative's subject was not to be addressed "'dubiously' or 'obscurely.'" *Id.* at 462.

This element of the single subject requirement is not at all peripheral. If voters cannot know what a measure seeks to accomplish, they cannot decide whether to sign petitions in support of it or how to vote. Fundamentally, if the measure's text prevents voters from knowing what it does and how it affects them, the Board cannot set any title for that measure. *Id.* at 465.

It would be accurate ***and*** confusing to state that the measure both subjects and exempts residential property values from the 3% annual increase. And the Board erred here by ignoring this measure's inherent contradiction as if it did not exist within the text of Initiative #75.

The Court considered this type of circumstance in *In re Title, Ballot Title and Submission Clause for 2015-2016 #156*. 2016 CO 56, 413 P.3d 151. The proposed initiative sought to regulate the sale of certain intoxicants at "food stores." *Id.* ¶¶ 3-4. The Court found that the titles set by the Board were "illogical and inherently confusing," which would prevent voters from being able "to determine intelligently whether to support or oppose the proposal." *Id.* ¶ 13. Voters were left to "speculate" as to how the initiative would actually operate, which would prevent voters from

understanding the initiative's intent and whether they should support it or not. *Id.* ¶ 14.

As is the case here, the source of the "illogical and inherently confusing" titles was the initiative itself. The Court recognized that the Board had used language that "substantially tracks language found in the initiative itself[.]" *Id.* ¶ 15. That did not, however, salvage the titles from the clear title rule because "the source of a title's language does not rule out the possibility that the title could cause voter confusion." *Id.* Put differently, a title can only be set if it meets the clear title requirement, and if that requirement cannot be satisfied, even if it results from the language of a measure itself, then the Board cannot set a title.

The Court has recognized this principle on other occasions. For instance, in considering titles for a proposal making various tax changes, the Court concluded that the Board failed to set clear titles. *In re Title, Ballot Title and Submission Clause & Summary for 1999-2000 #44*, 977 P.2d 856 (Colo. 1999) (per curiam). The Court noted that "perhaps because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear." *Id.* at 859. In such a situation, where the Board cannot understand an initiative such that it can fix clear titles, "the initiative[] cannot be forwarded to the voters and must, instead, be returned to the proponent." *Id.*

Similarly, in considering an initiative that changed various standards related to the judiciary, the Court held that language used in the titles regarding the measure's judicial term limits provision was unclear. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 299*, 972 P.2d 257 (Colo. 1999). The issue arose from the interplay of the initiative's effective date and the proposed new term limits for judges, which made it ambiguous whether the new term limits applied to judges retained in the election falling near the effective date. *Id.* at 267. The Board's attempt to describe this provision was unclear, which arose from either a "material ambiguity or concealed intent" in the proposed initiative. As the Court explained, "initiative proponents and the Title Board in turn have a duty to fairly state the meaning of their proposal through its plain language so that voters may answer 'yes' or 'no' to the proposition." *Id.* In the face of the proposal's inherent ambiguity, the Board violated the "constitutional and statutory prohibitions against misleading titles" in attempting to set titles. *Id.* at 268.

The Proponents of Initiative #75 placed the Board in the same predicament as these cases. Due to the inherent contradiction of Proponents' initiative, it is impossible to fix titles that clearly express the intent of the Initiative and allow voters to intelligently answer "yes" or "no" to the measure. Accordingly, the Board erred in setting titles.

II. The Board erred by setting titles that failed to inform voters about an essential component of Initiative #75.

A. Standard of review; preservation of issue below.

The standard of review described in Section I.A., *supra*, regarding the clear title requirement applies to this issue, and Petitioner incorporates it by reference.

Petitioner raised this issue in his Motion for Rehearing, and during the hearing on his Motion, and, therefore, preserved the issue for review. (*See* Mot. for Reh'g on Initiative 2021-2022 #75 at 2 (¶ 2.G).)

B. The titles fail to inform voters of the exemption for agricultural and mines and oil and gas property, which is an essential element of the Initiative.

As the Court has explained, "Titles that contain 'a material and significant omission, misstatement, or misrepresentation' cannot stand." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 258(A) (English Language Education In Public Schools) ("In re 1999-2000 # 258(A)")*, 4 P.3d 1094, 1099 (Colo. 2000) (quoting *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 # 62*, 961 P.2d 1077, 1078 (Colo. 1998)).

In addition to failing to inform voters about the treatment of residential property under the Initiative, the titles fixed by the Board include another "material and significant omission": Initiative #75's proposed changes in valuation standards

would not apply to agricultural land and mines or oil and gas producing lands or leaseholds. Proposed C.R.S. § 39-1-103(5)(a) provides:

> . . . The actual value of such property, ***other than agricultural lands*** exclusive of building improvements thereon and other than residential real property ***and other than producing mines and lands or leaseholds producing oil or gas***, shall NOT BE INCREASED ANNUALLY BY MORE THAN INFLATION, LIMITED TO 3%, AND SHALL be that value determined by appropriate consideration of the cost approach, the market approach, and the income approach to appraisal. . . .

(Initiative #75, sec. 3, proposed C.R.S. § 39-1-103(5)(a) (emphasis added).)

Despite these exemptions, the Proponents' counsel described the Initiative as involving a "property's value." (Mar. 16, 2022, Title Bd. Hr'g, at 4:29:54 to 4:30:00.[3]) The Board followed the Proponents' focus and described Initiative #75's single subject as applying generally to valuation of real and personal property: "concerning the actual value of real and personal property for purposes of property taxation." A plain reading of the titles would lead a voter to believe that the Initiative is making all property in Colorado subject to the same valuation standard for purposes of property taxes. As the clause in the title explaining the valuation standard states, "limiting the annual increase of ***a property's value*** to inflation or to three percent, whichever is less." (emphasis added)

[3] The hearing recording is available at https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html.

If this description were true, it would be a substantial change. As the Court has recognized, the Colorado Constitution "gives special tax consideration to agricultural lands by providing that 'the actual value of agricultural lands, as defined by law, shall be determined solely by consideration of the earning or productive capacity of such lands capitalized at a rate as prescribed by law.'" *Boulder Cnty. Bd. of Equalization v. M.D.C. Constr. Co.*, 830 P.2d 975, 978 (Colo. 1992) (quoting Colo. Const. art. X, sec. 3). Similarly, "lands or leaseholds producing oil or gas" receive special consideration under the Constitution for taxation purposes based upon their production. Colo. Const. art. X, sec. 3; *see also Wash Cnty. Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 150-51 (Colo. 2005) (describing amendment to Constitution creating this standard). Based on the titles, voters would believe that these longstanding principles for valuing agricultural lands and oil and gas lands and leaseholds would no longer apply. Rather, as types of "property," the titles would lead a voter to believe that Initiative #75's new standard applies.

This belief, however, would not be true. Although Proponents and the Board refer to "property" generally in describing the Initiative's scope, the Initiative leaves in place the current approach to valuing agricultural lands and mines or oil and gas producing lands and leaseholds. (*See* Initiative #75, secs. 1 and 3, proposed Colo. Const. art. X, sec. 3 and C.R.S. § 39-1-103(5)(a).) The titles nowhere inform voters

that these types of "property" are not, in fact, subject to the measure's valuation standard. Not only is this a material component of the Initiative—knowing which types of property to which the Initiative will apply—it has real-world practical implications given the significant agricultural, oil, gas, and mining presence in Colorado. *See, e.g.*, Colo. Parks & Wildlife, "Land & Water," last visited Apr. 21, 2022 (stating that "Colorado's 66 million acres of land include 11.5 million acres of cropland"), https://cpw.state.co.us/aboutus/Pages/LandWater.aspx; U.S Dep't of Ag., "Colorado is More than a Pretty Face," last visited Apr. 21, 2022 ("Of the total land area of 66.3 million acres, 31.8 million acres were used by the 38,893 farms and ranches throughout the state[.]"), July 29 2021, https://www.usda.gov/media/blog/2019/08/15/colorado-more-pretty-face.

Recently, this Court acknowledged just how many voters are affected by consideration of matters dealing with agricultural lands and oil or gas producing lands. In *In re Colorado Independent Congressional Redistricting Commission*, 2021 CO 73, ¶¶ 20-21, 497 P.3d 493, the Court noted the centrality of shared concerns in "farming and agricultural production," "the preservation and promotion of natural resources and mining industries," "agricultural policy interests," and "oil and gas development" in two of eight congressional districts in Colorado. In other words, a quarter of Colorado voters are so focused on these issues that they

warranted the congressional district lines drawn for Congressional Districts 3 and 4. Clearly, titles that incorrectly tell these voters their property values are subject to a 3% annual increase will affect their voting decision-making.

This Court has disapproved titles that suggest an initiative does something that it does not, in fact, do. For instance, in considering an initiative that placed certain limits on mining in the state, it was contended by objectors that, contrary to the text of the measure, "the titles are misleading because they imply that Initiative No. 215 prohibits mine owners from expanding the physical operations of existing mines, regardless of whether their present permits allow them to do so." *In re Title, Ballot Title & Submission Clause, and Summary for 1999-2000 #215*, 3 P.3d 11, 16 (Colo. 2000). The Court agreed, holding that "the initiative purports to prohibit only the modification of existing mining permits." *Id.* That misrepresentation of one provision of the measure was enough to invalidate the misleading titles.

Similarly, in considering an initiative on emissions, the Court held that the titles fixed by the Board were misleading because they did not specify that the geographic limitations of the program. *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 17, 1996*, 920 P.2d 798, 803 (Colo. 1996) (per curiam). The Court explained that "[b]ecause the titles and summary do not contain any indication that the geographic area to be affected is quite limited, there is a

significant risk that voters statewide will misperceive the scope of the proposed Initiative." *Id*. The same is true here: by failing to identify which property is subject to the Initiative, voters may "misperceive" the scope of its application. *See also In re Title, Ballot Title and Submission Clause, and Summary Adopted May 16, 1990*, 797 P.2d 1283, 1284 (Colo. 1990) (holding a ballot summary was misleading where it stated that "Food shall not be included in the tax base without approval of the registered electors" but the measure actually preserved some taxation of food); *In re In re 1999-2000 # 258(A)*, 4 P.3d at 1100 (title gave voters the false impression that, under the initiative which did not require public schools to have bilingual programs, "parents of non-English speaking students will have a meaningful choice between an English immersion program and a bilingual program").

As in these cases, the omission of the measure's exceptions will mislead voters about the reach of the measure and the meaning of their votes. This is a "fatal defect" because the "omission may cause confusion and mislead voters about what the initiative actually proposes." *In re 1999-2000 # 258(A)*, 4 P.3d at 1099. As such, the Court should vacate the titles fixed by the Board.

III. Proponents' Petition for Review was untimely, which deprives the Court of jurisdiction over their appeal.

A. Standard of review; preservation of issue below.

This issue concerns the construction and application of a statutory provision, which the Court reviews *de novo*. *See In re Title, Ballot Title and Submission Clause for 2019-2020 #74 and In re Title, Ballot Title and Submission Clause for 2019-2020 #75*, 2020 CO 5, ¶ 8, 455 P.3d 759, 761. In construing a statute, the Court is to "give effect to the legislative purpose underlying its enactment." *Id.* (internal quotation marks and citation omitted). Where a statute's language "is clear and unambiguous on its face, there is no need to apply rules of statutory construction because it may be presumed that the legislature meant what it clearly said." *Id.* (internal quotation marks and citation omitted).

This is a jurisdictional issue, which does not implicate preservation. Nonetheless, Objector Buescher did oppose Proponents' motion for rehearing before the Title Board.[4]

[4] Before the Title Board, Objector Buescher opposed Proponents' motion for rehearing, arguing that they misread C.R.S. § 1-40-106(3)(f) by arguing that the statute's use of the term "including" was a term of limitation rather than a term of expansion. In support, Objector cited *Lyman v. Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975) ("the word 'include' is ordinarily used as a word of extension or enlargement" and was used in such manner in statute at issue there; "[t]o hold otherwise here would transmogrify the word 'include' into the word 'mean'"). *See* Apr. 6, 2022, Title Bd. Hr'g, at 4:20:30-4:23:10 (addressing Initiative #74) and

B. Section 1-40-107(2), C.R.S., establishes a strict seven-day deadline after the Board denies a motion for rehearing to initiate review before this Court.

As the Court has explained, the General Assembly has established "stringent time restraints . . . on the proponents and opponents of initiatives, as well as on the Title Board." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 219*, 999 P.2d 819, 821 (Colo. 2000). These restrictions reflect the "great emphasis" the "general assembly has placed . . . on expediting the review process governing initiatives." *Id.* The Court should enforce the "strict deadline[]" for initiating review in this Court, and hold that Proponents' late filing of their Petition for Review deprives it of jurisdiction. *See In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #74 and In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #75 ("In re #74 and #75")*, 2020 CO 5, ¶ 23, 455 P.3d 759, 764 (describing strict deadlines and processes).

The statutory deadline to invoke this Court's review of the Board's action is seven days after the Board denies a motion for rehearing:

> If any person presenting or the ***designated representatives*** of the proponents of an initiative petition for which a motion for a rehearing is filed . . . ***is not satisfied with the ruling of the title board upon the***

5:19:20-55 (addressing Initiative #75 and incorporating remarks from prior hearing dealing with Proponents' previous measure). The recording of the April 6, 2022 rehearing before the Title Board can be found at https://csos.granicus.com/player/clip/301?view_id=1&redirect=true.

> ***motion***, then the secretary of state shall furnish such person, upon request, a certified copy of [the record]. ***If filed with the clerk of the supreme court within seven days thereafter***, the matter shall be disposed of promptly, consistent with the rights of the parties, either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the title board is in error.

C.R.S. § 1-40-107(2) (emphasis added). The Board denied in part Proponents' Motion for Rehearing on April 6. They filed their Petition for Review on April 14, which was ***eight*** days after the Board's decision.

The Court interpreted an earlier version of this statutory provision, which provided for a five-day deadline, and held that "an appeal from the Board's title and summary setting action ***must be filed*** within five days of the Board's denial of the rehearing motion, pursuant to section 1-40-107(2)." *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 # 62*, 961 P.2d 1077, 1079 (Colo. 1998) (emphasis added). Although the deadline has changed from five days to seven days, the operation of the statute has not. As the Court recently explained in reviewing the "strict" deadlines and procedural requirements attendant to ballot initiatives, "anyone who appeared at the rehearing and objects to the decision of the Title Board on rehearing, whether or not that person had himself filed a motion for rehearing, may file an appeal with this court ***within seven days***, and we are directed

to resolve the objection 'promptly.'" *In re #74 and #75*, 2020 CO 5, ¶ 11, 455 P.3d at 761-62 (emphasis added).

Accordingly, because Proponents did not file their Petition for Review within the seven-day statutory deadline, the Court lacks jurisdiction over it and should not address the issue(s) they raise. *See Widener v. District Court of Cnty of Jefferson*, 615 P.2d 33, 34 (Colo. 1980) ("Failure to file a notice of appeal within the prescribed time deprives the appellate court of jurisdiction and precludes a review of the merits.").

CONCLUSION

The clear title requirement in the Colorado Constitution ensures that voters have sufficient and accurate information upon which to make an informed choice to support or oppose a measure. The Board here failed to enforce the requirement by setting titles for an initiative that, due to its inherent contradiction over whether it applies to its main purpose (residential property) or not, prevents fixing of acceptable titles. The Board further erred by setting titles that tell voters that the measure applies generally to "property" when the measure does not due to its exemption for agricultural lands and mines or oil and gas producing lands and leaseholds. Accordingly, the Court should vacate the titles with instructions to the Board to

return the Initiative to Proponents or, at the least, order the Board to correct the titles to properly describe the measure.

Respectfully submitted this 3rd day of May, 2022.

s/ Mark G. Grueskin
Mark G. Grueskin, #14621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
Email: mark@rklawpc.com
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #75 ("CONCERNING PROPERTY VALUATION")** was sent electronically via CCEF this day, May 3, 2022, to the following:

Counsel for the Title Board:
Michael Kotlarczyk
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Counsel for Proponents:
Sarah Mercer
David Meschke
Brownstein Hyatt Farber & Shreck
410 17th Street, #2200
Denver, CO 80202
smercer@bhfs.com
dmeschke@bhfs.com

/s Erin Holweger