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COLORADO SUPREME COURT 2 East 14th Avenue, Denver, Colorado 80203	
Original Proceeding Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of Proposed Initiative 2021-2022 #89 **Petitioners**: Michael Fields and Suzanne Taheri v. **Ballot Title Setting Board:** Eric Olson, Jeremiah Barry, and Theresa Conley and **Respondent**: Leanne Wheeler	▲ **COURT USE ONLY** ▲
Attorney for Petitioner: Suzanne Taheri (#23411) MAVEN LAW GROUP 6501 E Belleview Ave., Suite 375 Englewood, Colorado 80111 Phone: 303.218.7150 Email: staheri@mavenlawgroup.com	Case No.: 2022SA117

Petitioners' Opening Brief

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in Colorado Appellate Rule 28(g).

It contains **3,629** words (opening brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A).

For each issue raised by Petitioner, 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 Colorado Appellate Rules 28 and 32.

s/ Suzanne Taheri
Suzanne Taheri

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Title Board err in finding that it had jurisdiction to consider a motion for rehearing on the grounds that the Proponent's correction was not permitted?
2. Alternatively, did the Title Board err in denying its jurisdiction to set a title for the Proposed Initiative?

STATEMENT OF THE CASE

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. Proposed Initiative #89 ("Proposed Initiative") concerns eligibility for parole and would limit eligibility for parole for certain statutory violent crimes, requiring the person sentenced to serve eighty-five percent of the sentence before the person is eligible for parole. Persons sentenced for those same crimes who have twice previously been convicted of a crime of violence must serve the full sentence imposed.

The Proponents submitted a draft of the Proposed Initiative to the directors of Legislative Council and the Office of Legislative Legal Services on March 11, 2022, and participated in the public meeting where questions and comments were discussed ("Review and Comment Hearing"), pursuant to § 1-45-105(1), C.R.S.

After the Review and Comment Hearing, Proponents amended the language in subsections (1.5) and (2.5) of Section 1 to read "shall begin parole" instead of the original phrase "shall be eligible for parole." The edit in subsection (2.5) was made in direct response to the comments presented at the Review and Comment Hearing as permitted by section 1-45-105(2).[1] The exact same edit to the same language in subsection (1.5) was made in error.

The error was unintended and did not conform to the original intent of the Proposed Initiative. The original language in subsection (1.5) was intended to ensure that certain convicted persons would serve a substantial portion of their sentence before they could be eligible for parole. The mistaken edit would have changed the section to require early parole for those persons.

The Proposed Initiative with edits was filed with the Secretary of State on March 25, 2022. The Title Board conducted its initial public hearing, on April 6, 2022. Members of the Title Board recognized the error and the Title Board allowed Proponents to make a technical correction to the text of the Proposed Initiative to

[1] Review and Comment Mem. for 2021-2022 #89, Substantive Comments and Questions, ¶ 3.

restore the language in subsection (1.5) to "shall be eligible for parole."[2] Thereafter the Title Board set a title for the Proposed Initiative.

Petitioners filed the amended version of the Proposed Initiative reflecting the technical correction on April 7, 2022. The Objector filed a motion for rehearing on April 13, 2022, alleging that the Title Board lacked jurisdiction to consider the Proposed Initiative and the Board exceeded its authority by allowing the technical correction. The Title Board considered and granted the motion for rehearing on April 20, 2022, and denied title setting because the Title Board lacked jurisdiction to set title on the grounds that substantial changes were made to the final draft after review and comment, violating C.R.S.1-40-105(2).

Petitioner seeks review of the Title Board's jurisdiction to grant the rehearing and its action to deny title setting.

SUMMARY OF THE ARGUMENT

Petitioners assert that the Title Board did not have jurisdiction to consider the motion for rehearing because the motion did not state proper grounds for a rehearing and that allowing consideration of a motion for rehearing on non-

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[2] Apr. 6, 2022, Title Board Hr'g on 2021-2022 #89 at 5:51-5:52.

statutory grounds impedes the fundamental right to initiative. In the alternative, if the Title Board has jurisdiction to consider a motion for rehearing on non-statutory grounds, the Title Board erred in finding that it did not have jurisdiction to set a title because the Proponent's correction of an error in the Proposed Initiative was a technical correction.

ARGUMENT

I. Standard of Review

People have reserved to themselves right of initiative in § 1 of art. V, Colo. Const. *In re Second Initiated Constitutional Amendment Respecting the Rights of the Public to Uninterrupted Service by Public Employees of 1980,* 613 P.2d 867, 869 (Colo. 1980). The initiative power reserved to the people is a fundamental right, "and must be liberally construed in favor of the right of the people." *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981). Decisions should "allow the greatest possible exercise of this valuable right." *City of Glendale v. Buchanan,* 195 Colo. 267, 578 P.2d 221 (1978).

"[S]ubstantial compliance is the appropriate standard to apply in the context of the right to initiative and referendum. *Armstrong v. O'Toole (In re Title, Ballot Title & Submission Clause, & Summary for the Proposed Initiated Constitutional*

Amendment "1996-3"), 917 P.2d 1274, 1276 (Colo. 1996), citing *Loonan v. Woodley*, 882 P.2d 1380 (Colo. 1994) (citations and footnote omitted).

II. The Title Board did not have jurisdiction to consider Respondent's motion for rehearing.

A. Respondent's complaint did not comply with statutory grounds for a rehearing.

The grounds for filing a motion for rehearing are enumerated in statute. Objection to a technical change approved by the Title Board is not among the permissible reasons for requesting a rehearing.

Any registered elector or the designated representatives may file a motion for rehearing that the Title Board is required to hear at its next meeting. C.R.S. § 1-40-107(1)(c). A motion for rehearing is permitted regarding dissatisfaction: 1) with the single subject ruling, 2) with the titles and submission clause, 3) with the fiscal summary, or 4) with the determination regarding a whether a constitutional amendment pursuant repeals in whole or in part a provision of the state constitution. C.R.S. § 1-40-107(1)(a). Any registered elector who is dissatisfied with the title board's decision on the grounds stated in statute may move for a rehearing. *Montero v. Meyer*, 790 F. Supp. 1531, 1534 (D. Colo. 1992).

This statutory list is qualifying grounds for rehearing is limited and exclusive, and not merely descriptive. *See Roberts v. Bd. of Assessment Appeals*, 883 P.2d 588, 590 (Colo. App. 1994); *cf. Fleury v. IntraWest Winter Park Operations Corp*., 372 P.3d 349, 350 (Colo. 2016) (where statute uses the non-exclusive term "including" before listing examples, the list is not exclusive).

Accordingly, this Court has determined that the Title Board does not have jurisdiction to hear a motion for rehearing if the motion is not permitted by section 1-40-107, Colo. Rev. Stat. *Aisenberg v. Campbell (In re Title, Ballot Title & Submission Clause),* 999 P.2d 819, 821 (Colo. 2000) (prohibiting an objector from bringing a second motion for rehearing after determining that the statute only permits one motion for rehearing to challenge titles set by the Title Board), a*pplied in Sanderson v. Henderson (In re Title, Ballot Title & Submission Clause),* 3 P.3d 447, 449 (Colo. 2000).

The Objector's motion for rehearing failed to state proper statutory grounds for a rehearing and should have been denied by the Title Board for lack of jurisdiction.

B. Denying the Title Board jurisdiction to consider a rehearing based upon non-statutory grounds is a liberal construction of the right of initiative and allows the greatest possible exercise of this

valuable right.

1. The practical effect of construing the Title Board's jurisdiction to allow a rehearing on non-statutory grounds precludes Proponents from exercising their right to initiative.

The practical effect of the Title Board's decision to grant the rehearing and deny jurisdiction to make the technical correction to the Proposed Initiative is that the Proponents were unable to resubmit the initiative and are now precluded from seeking voter approval of their initiative in 2022.

A proposed initiative must be submitted to the legislative research and drafting offices of the general assembly for review and comment, and a public meeting shall be held prior to fixing the title. Colo. Const. art. V, § 1(5) and C.R.S. 1-40-105. The Proponents completed the review and comment process for initiatives. Questions were raised at the Review and Comment Hearing regarding the original language in subsection (2.5) of Section 1, and whether it should be changed from "shall be eligible for parole" to "shall begin parole,"[3] and the subsection was amended accordingly. The same phrase existed in the original

[3] Review and Comment Mem. for 2021-2022 #89, Substantive Comments and Questions section at ¶ 3 and Mar. 22, 2022, Review and Comment Hr'g on 2021-2022 #89 at 10:07:47 to 10:08:44.).

language of subsection (1.5), and, while there is no issue with the use of the language in that section and none was raised at the Review and Comment Hearing, Proponents accidentally amended subsection (1.5) from "shall be eligible for parole" to "shall begin parole."

The edit made to subsection (1.5) was not made in response to the comments of the directors because the edit was a genuine mistake. Proponents were not required to resubmit the Proposed Initiative for review and comment because the edit was not a substantial amendment, but a simple drafting error.[4]

After the Title Board reversed its decision regarding technical changes, the Proponents would have had to begin the initiative process over by resubmitting the Proposed Initiative for review and comment, however, the deadline for submitting initiatives for review and comment in time for the 2022 election was March 25,

[4] Even if the change had been intended to be a substantive change, but not in direct response to comments, the Proponents would have had time to resubmit the proposal had they not relied on the Title Board's technical correction. Absent additional comments on exactly the same measure they would not have had a second Review and Comment Hearing. *See In re Second Proposed Initiative Concerning Uninterrupted Serv. by Pers. Employees*, 613 P.2d 867 (Colo. 1980). Therefore, Proponents could have submitted to the Title Board before the deadline of April 8, 2022, the last day to file for measures that will appear on the November 2022 General Election ballot. *See* C.R.S. §§ 1-40-105(4) and 1-40-106(1).

2022. *See* Colo. Const. art. V, § 1(5) and C.R.S. § 1-40-106(1). The practical effect of the Title Board's decision on rehearing prevented the Proponents from meeting submission deadlines to get the Proposed Initiative on the November 2022 ballot, which inhibited their right to initiative. *See In re Title, Ballot Title & Submission Clause, and Summary Pertaining to the Casino Gaming Initiative Adopted on April 21, 1982,* 649 P.2d 303, 311 (Colo. 1982) (affirming the Title Board's denial of petitioner's motion for rehearing on the basis of the Board's technical correction when the practical effect of such an order would prevent the proponents from obtaining the necessary signatures and filing the petition with the Secretary of State due to missed deadlines.)

Disallowing Title Board jurisdiction to consider a motion for rehearing on non-statutory grounds is a liberal construction of the right of initiative that serves to preserve Proponents' ability to exercise that right.

2. The public hearings served their purposes; a strict interpretation of procedural requirements would not provide additional information to the public, but would only impede the fundamental right to initiative.

The Review and Comment Hearing "permits proponents of initiatives to benefit from the experience of independent experts in the important process of drafting language that may become part of this state's constitutional or statutory

jurisprudence…[and] also permits the public to understand the implication of a proposed [initiative] at an early stage of the initiative process. *In re Title, Ballot Title & Submission Clause, and Summary Approved February 12, 1992, Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d 963, 966-67 (Colo. 1992), citing *In re Title, Ballot Title and Submission Clause, and Summary Adopted May 16, 1990*, 797 P.2d 1283, 1287 (Colo. 1990). The comments presented at the public meeting "help assure that all relevant questions and issues surrounding the proposals are raised at the proper time--before the circulation of the petition for signatures." *In re Title, Ballot Title, Submission Clause, & Summary Clause Adopted March 16, 1994, by the Initiative Title Setting Review Bd.,* 875 P.2d 861, 868 (Colo. 1994), *citing In re May 16, 1990,* 797 P.2d at 1288 (quoting Legislative Council of the Colorado General Assembly, *An Analysis of 1980 Ballot Proposals,* Research Publication No. 248 (1980) at 4).

The Title Board recognized that the Proponent's edit to subsection (1.5) was an unintended error, as seen in the statements made at the Title Board hearing:

> Mr. Berry: …my plain reading [of the edit to subsection (1.5)] would be…that the parole board no longer has the authority to make them stay in prison.
> Proponents' representative: That is not our intent…

> Ms. Conley: …The edit was made in two places instead of one, and I don't think the rest of the measure speaks to giving the parole – or taking away the authority of the parole board…
> Mr. Berry: I agree, I think that was the intent of the proponents, but I don't think the final text that we received was accurate in that respect.[5]

The Title Board then allowed Proponents to correct the unintentional error that conflicted with the intent and meaning of the original initiative. This action does not change the public's understanding of the implication of the Proposed Initiative as express in the Review and Comment Hearing. Furthermore, the title setting process fulfilled its purpose of "ensur[ing] that both [the] persons reviewing an initiated petition and the voters are fairly and succinctly advised of the import of the proposed law." *In re March 16, 1994,* 875 P.2d at 864 (citations omitted).

Allowing consideration of motion for rehearing on a technical change allowed by the Title Board would not assist proponents in drafting the measure or raise any new questions or issues for the public, and therefore would not further the purposes of the title setting hearings or process. However, strict interpretation of procedural requirements that prohibit proponents from fixing errors recognized as

[5] Apr. 6, 2022, Title Board Hr'g on 2021-2022 #89 at 5:50.

such by the Title Board would unnecessarily hinder the fundamental right to initiative.

III. Alternatively, even if the non-statutory technical correction objection is grounds for a motion for rehearing, the Title Board should have denied the motion for rehearing because the change was within the Title Board's authority and the Proponent's actions were substantially compliant with the statutory title setting process.

A. The Title Board erred in denying its jurisdiction to set a title because the correction was a proper and necessary technical correction to rectify an unintentional error that conflicted with the intent and meaning of the original proposal.

Allowing a technical correction of an initiative at the Title Board hearing that conforms with the intent of the Proponents supports the fundamental right to initiative. The Proponents edit in subsection (1.5) from "shall be eligible for parole" to "shall begin parole" is a technical correction because 1) the phrase was included in error and 2) the change conforms with the original proposal's intent.

The Title Board's technical correction of an initiative has been upheld where the Proponents deleted an entire paragraph of language that would have required the submission of the proposed constitutional amendment to the people for a vote every two years. *In re Casino Gaming Initiative,* 649 P.2d at 310-11. In that case, the proponents had not realized the error and only intended a single vote on the constitutional amendment. *Id*. at 311. Eliminating a paragraph that required

recurring voter approval of a constitutional amendment was clearly a substantive change, and the Title Board allowed the proponents to delete the paragraph as a "technical error." *Id*.

The Court found that allowing this substantive change as a technical correction would "conform with the intent of the Proponents [and] does not frustrate the purpose of the statute," and, furthermore:

> To invalidate this initiative on the basis of the Board's technical correction of a previously unrecognized error, when the correction is made at the beginning of a hearing on the titles, submission clause, and summary, rather than before the petition was submitted to the Secretary of State for title-setting, would be contrary to the spirit of our constitutional right of initiative.

Id. citing In re Second Initiated Constitutional Amendment, 613 P.2d 867 (Colo. 1980).

In other circumstances, the Court prohibited the Title Board from allowing a change to the text of an initiative when the change "substantially alter[ed] the intent and meaning of central features of the initial proposal" such that "the revised document in effect constitutes an entirely different proposal from the one previously reviewed by the legislative offices." *In re Limited Gaming in Idaho Springs.,* 830 P.2d at 968. The correction was not permitted because "substantial alteration of the intent and meaning of a central feature of the initial proposal in

effect creates a new proposal that must be submitted to the legislative offices for comment at a public meeting." *Id.* (where the intent of the original initiative draft was to limit gaming in the city of Idaho Springs, and the proponents sought a correction limited gaming in places other than Idaho Springs, which was deemed to constitute an entirely different proposal from the one submitted for review and comment).

The concern illustrated by these cases is not simply whether the amended text itself makes a substantive change. Prior decisions make clear that substantive corrections are permissible and technical in nature when the change rectifies an unintentional error and conforms with the original intent of the proponents. A change to remedy an error in the text of an initiative before the Title Board is permissible as a technical correction unless it creates an entirely different proposal that is substantively altered from the intent and meaning of the initiative that was examined in review and comment.

The Title Board routinely makes technical corrections to initiatives during initial hearings. Just in the current 2021-2022 cycle the Title Board permitted several technical corrections and set a title. Some of these were substantive, for example, the technical correction to proposed initiative 2021-2022 #41 altered the

number of the section in the Colorado Revised Statutes that was being amended. Also, there were two changes in each of the proposed initiatives 2021-2022 #84-88, the first altering the date for an applicable tax by an entire year and the second changing the phrase "community eligible provision" to the defined term "community eligibility provision." It is fair to say the problems were due to unintentional "scrivener's error,"[6] but the corrections made at the Title Board hearings were substantive in terms of the effect of the proposed initiative, and all were allowed by the Title Board as technical corrections.

The Proponent's correction to the Proposed Initiative addressed an unintentional editing error that occurred after the Review and Comment Hearing. After the correction, the revised subsection was restored to the very same one that the legislative offices reviewed; the correction did not change the intent and meaning of the original proposal. Therefore, the Title Board was authorized to allow the correction to the Proposed Initiative. The Title Board erred when it granted the motion for rehearing and denied the Proponents the opportunity to

[6] So described by Proponents counsel in initiatives #84-88, Apr. 6, 2022, Title Board Hr'g on 2021-2022 #84 at 8:27.

correct an unintentional error that conflicted with the intent and meaning of the original proposal.

B. The Proponent's error was not intended to mislead voters, and their actions were in substantial compliance with the statutory title setting process.

A substantial compliance standard applies so that "the constitutional right reserved to the people 'may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.'" *Armstrong,* 917 P.2d at 1276, *quoting Montero v. Meyer,* 795 P.2d 242, 245 (Colo. 1990).

In applying the substantial compliance standard to the Proponent's actions in making and correcting the error, a nonexclusive list of factors applies: "(1) the extent of the proponents' non-compliance, that is, whether the proponents systematically disregarded the statutory requirements or whether their divergence was an isolated instance; (2) the purpose of the statutory provision and whether that purpose is substantially achieved despite the non-compliance; and (3) whether it can reasonably be inferred that the proponents made a good faith effort to comply or whether the non-compliance is more properly viewed as an attempt to

mislead the electorate." *Armstrong*, 917 P.2d at 1276, *quoting Montero,* 795 P.2d at 245.

The error made in editing the text of the Proposed Initiative, changing the phrase "shall be eligible for parole" to "shall begin parole" in two places instead of one, was an isolated instance in this measure and by these Proponents. The purpose of the statutory title setting process, which ensures that both the Proponents and the voters are fairly and succinctly advised of the import of the proposed law is fulfilled notwithstanding the editing error and the correction approved by the Title Board. Finally, the Proponent's actions were in good faith and "were not of the kind from which it could be inferred that the proponents intended to mislead anyone." *See Armstrong*, 917 P.2d at 1276.

The Proponents' actions throughout the title setting process were substantially compliant with the requirements of C.R.S. § 1-40-107, and they should not be hampered by either technical statutory provisions or technical construction thereof. The unintentional editing error and correction of that error should not prevent Proponents from proceeding in their pursuit of obtaining voter approval of the Proposed Initiative in 2022.

CONCLUSION

The Title Board did not have jurisdiction to consider a motion for rehearing on the grounds stated. Alternatively, the Title Board erred in granting Petitioners' motion for rehearing and denying jurisdiction to set a title for the Proposed Initiative. Accordingly, Petitioners respectfully request that the Court reverse the actions of the Title Board and order the Proposed Initiative to be returned to the Title Board to allow the technical correction and set a title.

Dated: May 12, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2022, I electronically filed a true and correct copy of this **Petitioners' Opening Brief** with the Clerk of Court via the Colorado Courts E-Filing System which will send notification of such filing upon counsel of record:

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