DATE FILED: May 26, 2022 2:07 PM

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' Answer 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 **1,337** 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

TABLE OF CONTENTS

Page

ARGUMENTS 1

I. Substantive technical corrections have been permitted in other legal contexts and by the Title Board. 1

II. The Proponents substantially complied with the requirements of the statutory initiative process. 4

CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Armstrong v. O'Toole (In re Title, Ballot Title & Submission Clause, & Summary for the Proposed Initiated Constitutional Amendment "1996-3"), 917 P.2d 1274 (Colo. 1996) 4, 6

Bollenbach v. United States, 326 U.S. 607 (1946) 2

Bruno v. United States, 308 U.S. 287 (1939) 1

Cordero v. Doe (In re Title, Ballot Title, & Submission Clause for 2013-2014 #103), 328 P.3d 127 (Colo. 2014) 5

Hayes v. Ottke (In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69), 293 P.3d 551 (Colo. 2013) 5

In re Title, Ballot Title and Submission Clause Pertaining to Casino Gambling Initiative, 649 P.2d 303 (Colo. 1982) 3, 5

Kotteakos v. United States, 328 U.S. 750 (1946) 1

Montero v. Meyer, 795 P.2d 242 (Colo. 1990) 6

Sarkar v. McCallin, 636 F.3d 572 (10th Cir. 2011) 2

United States v. Cash, 2021 U.S. App. LEXIS 32581 (10th Cir. Nov. 2, 2021) 2

Statutes

§ 1-40-101(1), C.R.S. (1973) 3

§ 1-40-105, C.R.S. (2022) 4

28 U.S.C. § 391 1

Other Authorities

Respondent's Opening Brief on Proposed Initiative 2021-2022 #89 .....1, 3

Petitioners Michael Fields and Suzanne Taheri hereby respectfully submit this Answer Brief opposing the actions of the Title Board for Proposed Initiative 2021-2022 #89 ("Proposed Initiative").

ARGUMENTS

I. Substantive technical corrections have been permitted in other legal contexts and by the Title Board.

Courts have made or permitted substantive "technical corrections" and corrections of "technical errors" in legal proceedings that are analogous to substantive technical corrections that are, and should be, permitted by the Title Board to protect the fundamental right to initiative.

The U.S. Supreme Court referred to a "technical error" within the meaning of 28 U.S.C. § 391, which set forth the duty of courts to "disregard 'technical errors, defects, or exceptions which do not affect the substantial rights of the parties.'" *Bruno v. United States*, 308 U.S. 287, 293 (1939), *cited by* Respondents Op. Br. Page 17. The judicial code provision was "intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." *Bruno*, 308 U.S. at 294. In later cases involving the same federal statute, courts found more directly that errors are "technical" when they do not affect or prejudice a party's rights. *See Kotteakos v. United States*, 328 U.S. 750, 765 (1946) ("…sustaining the verdict … turns on

whether the error is "technical" or is such that 'its natural effect is to prejudice a litigant's substantial rights.'"); and *Bollenbach v. United States,* 326 U.S. 607, 614, (1946) ("technical errors" are those "which 'do not affect the substantial rights of the parties' and must therefore be disregarded.")

The Title Board's "technical correction" to the Proposed Initiative likewise prevents this matter concerned with the formalities and minutiae of procedures from touching on the merits, and affirming the technical correction would not affect or prejudice any party's rights.

The terms "technical error" and "technical correction" are used in other legal contexts where technical corrections are permitted to make substantive changes. For example, the 10th Circuit Court of Appeals allowed a district court's "technical correction" when it amended a final judgment to change the sentence of the convicted person after considering recent case law. *United States v. Cash*, 2021 U.S. App. LEXIS 32581, at *6 (10th Cir. Nov. 2, 2021). In another case, the 10th Circuit determined that, "a district court clearly intended to enter a final judgment as to all claims and all parties but failed to do so because of 'a clerical mistake or a mistake arising from oversight or omission,' and declined to remand the case based on this substantive 'technical correction.'" *Sarkar v. McCallin*, 636 F.3d 572, 574 (10th Cir. 2011).

Respondent acknowledges that substantive technical changes have been permitted by the Title Board and this Court. Respondent's Op. Br. Page 19, citing *In re Title, Ballot Title and Submission Clause Pertaining to Casino Gambling Initiative,* 649 P.2d 303, 306 (Colo. 1982). The technical correction made an important change that prevented the "unwanted submission of the casino gaming amendment to the voters every two years." *Id*. at 311. This certainly altered the substance of the proposal; legalizing gaming is a controversial topic, and initiative language requiring repeated review and approval of casinos could be a significant consideration for voters. Also, although this case was decided under a "different predecessor statute," the predecessor statute is essentially the same as the current statute[1] and does not diminish this precedent allowing substantive technical changes by the Title Board.

---

[1] The original drafts of all initiative petitions . . . ., before they are signed by the electors or any of them, shall be submitted by the proponents of the petition to the directors of the legislative council and the legislative drafting office for review and comment . . . . No later than two weeks after the date of submission of the original draft, ... the directors of the legislative council and the legislative drafting office shall render their comments to the proponents of the petition concerning the format or contents of the petition at a meeting open to the public . . . . After the public meeting but before submission to the secretary of state for title setting, the proponents may amend the petition in response to some or all of the comments of the directors of the legislative council and the legislative drafting office. C.R.S. § 1-40-101(1) (1973).

(1) The original typewritten draft of every initiative petition …before it is signed by any elector, shall be submitted by the proponents of the petition to the directors of the legislative council and the office of legislative legal services for review and comment. … No later than two weeks after the date of submission of the original draft, … the directors of the legislative council and the office of legislative legal services, or their designees, shall render their comments to the proponents of the petition concerning the format or contents of the petition at a review and comment meeting that is open to the public. …

There is no need to contrast the definitions of "technical" and "substantive" because the terms are not mutually exclusive. It is evident that a technical correction may be both *involved in a detail* and have an *important* effect. Substantive "technical corrections" and corrections to substantive "technical errors" are upheld when statutory procedure noncompliance does not prejudice the right of any party.

II. The Proponents substantially complied with the requirements of the statutory initiative process.

To achieve substantive compliance, one requirement is that the purpose of the statutory provision is substantially achieved despite the non-compliance. *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).

Accordingly, this Court did not allow deviation from the statutory requirements for allowing substitution of a designated representative. *Cordero v. Doe (In re Title, Ballot Title, & Submission Clause for 2013-2014 #103)*, 328 P.3d

(2) After the review and comment meeting but before submission to the secretary of state for title setting, the proponents may amend the petition in response to some or all of the comments of the directors of the legislative council and the office of legislative legal services, or their designees. C.R.S. § 1-40-105 (2022).

127, 134 (Colo. 2014). The non-compliance was not related to "procedures for becoming a designated representative," rather the issue was the "duties required of an individual once he or she becomes a designated representative." *Cordero*, 328 P.3d at 134. The Court found that "[a]llowing for the substitution of alternates while proceedings are ongoing would disrupt the continuity that the statutes call for, thereby impairing the Title Board's functions and frustrating the aims of the General Assembly." *Id*. at 130. The designated representatives did not substantially achieve the purpose of the statutory provision regarding attendance. Consequently, this statutory requirement was deemed "inflexible." *Hayes v. Ottke (In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69),* 293 P.3d 551, 556 (Colo. 2013).

In contrast, the purpose of the procedural statutory provisions regarding submission and review of initiative drafts is substantially achieved in the case at hand despite the non-compliance of the technical correction. The Proponents did not fail to perform any statutory duty. There was no disruption of the continuity of the process. There is no frustration of the aims of the statute. *See In re Casino Gaming Initiative,* 649 P.2d at 310-11 (allowing a substantive change as a technical correction does not frustrate the purpose of the statute). The substantial compliance standard applies, and this constitutional right reserved to the people

should not be "hampered by either technical statutory provisions or technical construction thereof.'" *Armstrong,* 917 P.2d at 1276, quoting *Montero v. Meyer,* 795 P.2d 242, 245 (Colo. 1990).

CONCLUSION

For these reasons and the reasons presented in Petitioner's Opening Brief, 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 26, 2022

Respectfully submitted,

s/Suzanne Taheri
Suzanne Taheri (#23411)
MAVEN LAW GROUP
6501 E Belleview Ave., Suite 375
Englewood, Colorado 80111
Phone: 303.218.7150
Email: staheri@mavenlawgroup.com

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2022, I electronically filed a true and correct copy of this **Petitioners' Answer Brief** with the Clerk of Court via the Colorado Courts E-Filing System which will send notification of such filing upon counsel of record:

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

MICHAEL KOTLARCZYK, Assistant Attorney General
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
Registration Number: 43250

s/Suzanne Taheri
Suzanne Taheri