DATE FILED: May 26, 2022 2:56 PM

SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
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 #89 ("Concerning Eligibility for Parole") **Petitioners:** Michael Fields and Suzanne Taheri **v.** **Respondents:** Leanne Wheeler **and** **Title Board:** Eric Olson, Jeremiah Barry, and Theresa Conley	**▲COURT USE ONLY▲**
Attorney for Respondent: 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: 2022SA117

RESPONDENT'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #89 ("CONCERNING ELIGIBILITY FOR PAROLE")

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).

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X It contains 5,694 words.

☐ It does not exceed 30 pages.

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☐ 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.

X 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 Respondent

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I. The Board had, and the Court has, jurisdiction over this denial of title.

A. The Petitioners failed to raise below the issue of the lack of Board jurisdiction to consider the motion for rehearing and thus cannot raise it here.

The Petitioners did not include this issue in their Petition for Review to this Court. *See* Pet. for Rev. at 3-4. Standing alone, that is not a reason why the Court cannot consider the issue as long as the issue was properly preserved below. *See Giampapa v. American Family Mut. Ins. Co*., 919 P.2d 838, 840 (Colo. App. 1995), *rev'd in part and vacated in part on other grounds*, 12 P.3d 839 (Colo. App. 2000).

In appeals to this Court from decisions by the Title Board, an issue must be preserved at rehearing if there is to be appellate review of that issue. This includes challenges to the Board's jurisdiction.

> In this original proceeding, the petitioners contend that the Board lacked jurisdiction to set title, ballot title and submission clause, and a summary because it held hearings on the Initiative outside the time frame mandated by section 1-40-106(1). However, the petitioners failed to raise this contention in their motion for rehearing, and, accordingly, we refuse to address the issue here.

In re Proposed Ballot Initiative on Parental Rights, 913 P.2d 1127, 1130 n.3 (Colo. 1996).

Petitioners' "Standard of Review" section does not address preservation of the issues and neither does any other section of the brief. Pet. Op.Br. at 4. An appellant

must include, "under a separate heading placed before the discussion of each issue, statements of the applicable standard of review with citation to authority, whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled." C.A.R. 28(7)(A).

Having failed to raise below the issue of the Board's jurisdiction to consider the motion for rehearing, and because they have not identified any portion of the Record in which this question was preserved, Petitioners cannot seek reversal of the Board's decision on this basis.

B. Alternatively, Petitioners ignore the constitutional underpinnings of this appeal which justify a motion for rehearing when petition proponents make substantial changes to their proposal without a review and comment hearing.

Petitioners contend the Title Board could only consider the statutory grounds specified in C.R.S. § 1-40-107 as the substance of a motion for rehearing. Pet. Op.Br. at 5-6.

In so arguing, Petitioners ignore the constitutional grounds for reevaluating the Board's acts. Proponents of an initiative can only submit their measure to the Board if they have not made substantial changes after their hearing before legislative staff. Titles cannot be set if "the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment

[on the revised measure] is in the public interest." Colo. Const., art. V, § 1(5.5); *see* Resp. Op.Br. at 10-11.

If the initiative's designated representatives have not resubmitted their draft to the legislative offices after they make such a change, there is no basis for the Title Board to act. This restriction has been settled law for more than three decades. Where initiative proponents initially filed a comprehensive measure but pared it down and submitted directly to the Title Board, the Court found they acted improperly. "Since the proponents did not comply with the constitutionally-required procedure for comments and review, the Board was without jurisdiction to set the title, ballot title and submission clause, and summary for the [second] initiative." *In re Title, Ballot Title & Submission Clause, and Summary Pertaining to the Proposed Initiative Under the Designation "Tax Reform*," 797 P.2d 1283, 1288 (Colo. 1990).

Petitioners effectively argue that, because the statute does not specify constitutional compliance as a ground for rehearing, constitutional noncompliance is permitted by default. That argument fails as a matter of logic and the fundamental, seemingly unquestionable need for adherence to constitutional standards for the initiative process. *Cf. Buckley v. Chilcutt*, 968 P.2d 112, 117 (Colo. 1998) (despite statute that required initiatives be automatically placed on ballot if petition sufficiency was not resolved within 30 days of filing, Secretary of State could not

place such a measure on the ballot unless the constitutionally required number of signatures was certified).

It also fails because the title rehearing process is the recognized avenue for addressing this precise question. As this Court has said, a rehearing is exactly where compliance with the review and comment mandate is addressed.

> [T]he Title Board's meeting on a motion for rehearing may be the only stage in the title setting process at which a detailed discussion occurs regarding whether the measure contains a single-subject, **whether proponents made substantive changes after the review and comment hearing beyond those in direct response to questions or comments by the legislative council**, and whether the title as initially adopted is clear and best reflects the true import of the measure.

In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69, 2013 CO 1, ¶25, 293 P.3d 551, 557 (emphasis added) ("*2011-2012 Nos. 67, 68, & 69, supra*").

If this issue could not be raised in the context of a motion for rehearing, the Board would set a title even though it lacks jurisdiction to do so. But where the required hearing before the legislative offices is not held, "the Board has **no authority to fix a title** to a proposed amendment." *In re Title, Ballot Title & Submission Clause, and Summary With Regard to Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d

963, 966-967 (Colo. 1992) (emphasis added) *("In re Title for Limited Gaming in Idaho Springs")*.

Petitioners' argument would mean that this Court could consider this constitutional question, stemming from proponent's errors, ***only*** if that issue was raised by the Board during title setting. There is no such limitation in law, and the Court's role is more weighty than that. The Court is charged with "determin[ing] whether the Title Board's action complies with the constitutional and statutory provisions governing the setting of a title and ballot title and submission clause." *In re Title, Ballot Title & Submission Clause, and Summary for Initiative 2005-2006 #75*," 138 P.3d 267, 271 (Colo. 2006) (assuring compliance with constitutional single subject requirement). This role of ensuring constitutional compliance has never been restricted to Board-originated claims, and Petitioners advance no argument as to why it is justified now.

Constitutional compliance here isn't a matter of form over substance; taking an initiative through the hearing process before the legislative offices not only assists proponents, it provides critical public notice and education.

> An open public meeting would 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. At present, very little information is available to persons signing petitions other than that provided by sponsors and circulators of the petitions. **Public disclosure**

from the beginning would enhance the likelihood of an informed electorate which is essential to a constructive initiative process.

Legislative Council of the Colorado General Assembly, *An Analysis of 1980 Ballot Proposals* (Res. Pub. No. 248) at 4 (argument in favor of Amendment No. 1, amending the constitutional provisions relating to the right of initiative) (emphasis added); *see In re Title for Limited Gaming in Idaho Springs, supra*, 830 P.2d at 968 ("public's right to understand the contents of an initiative in advance of its circulation would be completely eradicated" if proponents change central features after review and comment hearing). Thus, the need for a hearing after substantial changes are made to an initiative is a matter of great importance to the initiative process itself.

Therefore, the Board properly heard and decided Respondent's motion for rehearing, and its decision should stand.

C. Applying the clear constitutional requirement for resubmission of proposed initiatives after its proponents make substantial changes does not unduly burden the right of initiative.

Petitioners have a fundamental right to engage in the initiative process. That issue is not in dispute. But while they cloak their concerns in an alleged denial of this fundamental right, that is not actually the relief Petitioners seek. What they really complain about here is whether they will present their question at the upcoming election.

Petitioners do not have a fundamental right to be on the 2022 ballot. This Court has been clear on this point. *See 2011-2012 Nos. 67, 68, & 69, supra*, 2013 CO 1, ¶ 29 (Court would not consider the fact that Board was "unable to set titles for those initiatives in time for the 2012 election" due to proponents' acts). In fact, the question of what ballot a particular initiative might qualify for is beyond the ability of the Board to decide or even consider. "The Board does not have any power to set an election date or to place any measure on the ballot." *In re Title, Ballot Title & Submission Clause Pertaining to the Workers Comp Initiative Adopted on Jan. 6, 1993,* 850 P.2d 144, 145 (Colo. 1993).

Moreover, Petitioners have always been in control of the timing aspect of this measure. They decided when to draft it. They decided when to file it with the legislative offices. They decided when to revise it. They decided when to file it with the Title Board. Petitioners, who are experienced practitioners in the initiative realm, now seek extraordinary relief in the name of the fundamental right of initiative, having waited until the end of the initiative process and put themselves in a spot where timing could be an issue. The fundamental right of initiative does not rescue a petition's proponents from their own decisions about how they would exercise that right. *Cf. Loonan v. Woodley*, 882 P.2d 1380, 1386 (Colo. 1994) (petition proponents' use of wrong affidavit form invalidated all signatures collected and

prevented initiative from being placed on the ballot, notwithstanding proponents' fundamental right of initiative).

Finally, Petitioners have no right—fundamental or otherwise—to ask the Board to set a title based on a "final" draft that actually isn't final—one that Petitioners have not filed for title setting. The statute is clear; a title is set on documents that are submitted for review by the Board and by the public. C.R.S. § 1-40-105(4) (for Board to act, proponents must first file their original draft, an amended draft that shows changes made to the first draft, and "original final draft that gives the final language for printing"); *see* C.R.S. § 1-40-102(4) ("draft" means "text of the initiative which, if passed, becomes the actual language of the constitution or statute"). The Board could not act without having before it the "final" "actual language of the… statute" that Petitioners hoped voters will enact.

The final version here was not filed until the day ***after*** title setting. Petitioners are not entitled to a title on a yet-to-be-finalized measure. For good reason, the General Assembly used "final" to modify "draft that gives the final language for printing." Failing to file such a version is not even substantial compliance with this requirement. *See In re Title, Ballot Title & Submission Clause, and Summary for Initiative 1997-1998 #109,* 962 P.2d 252 (Colo. 1998) (proponents who filed supplemental drafts of final initiative did not substantially comply with statute).

What if Petitioners filed no corrected version at all? Or the "corrected" version was different than what the Board understood the revised text would reflect? Or Petitioners decided another "technical correction" would improve their measure or better reflect their actual intent and included that change as well in the version submitted after titles were set? There is no statutory remedy for stopping the Petitioners from moving forward under any of these circumstances. In addition, voter confusion would be considerable for a measure whose title did not match up substantively with the final text.

The process is designed to prevent such variables from being introduced into the initiative process. The public should not be forced to wonder if petition proponents' "final" draft really is the version that the Board will consider.[1]

If Petitioners seek a public vote on some version of Initiative #89, they may have it. That it would not be on the 2022 ballot is the consequence of the timing choices only they made. They may refile their measure and petition it onto the 2024 ballot. This might not match up with their 2022 political agenda,[2] but that is not why

[1] All three versions of the initiative proponents submit for title setting are publicly posted to provide notice about measures to be considered at the next Board meeting. *See* https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/index.html.

[2] *See* Fields, M., *AG Sabotages Effort to Make State Safer*, Colorado Politics (Apr. 26, 2022) https://tinyurl.com/2p8eve2b (last viewed May 25, 2022). Factual errors

the initiative process exists or what the Court needs to consider in evaluating the Board's actions here.

The Board did not compromise Petitioners' fundamental right of initiative, and the Court is not required to find that this right allows for the constitutional noncompliance urged here.

II. Petitioners' test for determining whether a change to a measure is a "technical" correction has no support in the law and would undermine the proper functioning of the title setting process.

Petitioners also contend that the Title Board erred in disallowing their change to the measure because their requested correction was only a "technical" correction. Their argument rests on a redefinition of the word "technical" into a subjective test about Petitioners' intent. Not only does their test lack any legal support, it would interject substantial uncertainty to the ballot title setting process. The Court should reject it.

A. Petitioners' argument redefines what the word "technical" means.

Petitioners propose a two-part test for determining whether a change to the final draft of a ballot measure is a technical correction. A change to a measure is a technical correction if it (1) "rectifies an unintentional error" and (2) "conforms with

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and conjecture are not addressed here as they would not assist the Court in resolving issues raised on appeal.

the original intent of the proponents." Pet. Op.Br. at 14; *see also id.* at 12. This test bears no relation to the meaning of the word "technical."

As Respondent explained, the word technical means "[i]nvolved in a detail rather than a principle." Ballantine's Law Dictionary. A "technical error" is a matter that addresses "mere etiquette" of proceedings or "the formalities and minutiae of procedure." *Bruno v. United States*, 308 U.S. 287, 295 (1939). *See* Resp.'s Op.Br. at 17. Technical, in other words, refers to something that does not involve ***substance***.

Petitioners' test focuses on "why" the change is necessary. In other words, it is a function of the ***subjective intent*** of a measure's proponents. What were they thinking? What was their intent? What is their explanation of wording changes made?

A more accurate test focuses on "what" is associated with the change. Is it a change of substance? Does it alter the meaning of what was submitted as the proponents' final draft? To apply this test, the Court need not explore Petitioners' state of mind to determine what they meant to do, what their intent was while editing their measure, and which version of the language is consistent with that intent.

Similarly, if it focuses on the "what," the Title Board will have an easily understood and applicable test. And most importantly, that test reflects the constitutional language regarding the necessary process after "substantial" changes

are made to a measure. In contrast, there is no legal support for the Petitioners' interpretation that a "substantial" change is one that, no matter what it says or how it affects policy, is a function of proponents' level of deliberation.

B. Neither the statute nor the Title Board's rules offer support for Petitioners' proposed subjective inquiry.

In describing their test, Petitioners do not cite Article 40 of Title 1, C.R.S., a single time. *See* Pet. Op.Br. at 12-16. This is because their version of a technical correction finds no support in the statute. After completing the review and comment process before legislative staff, the statute requires proponents to submit the "final draft" of their measure as it would be printed. C.R.S. § 1-40-105(4). This means the "not to be altered" version of their measure that would become the "actual language of the . . . statute." Resp. Op.Br. at 12 and discussion, *supra*, (quoting definition of "final" and statutory definition of "draft").

Nowhere does the statute authorize proponents to alter the "***final***" language of the measure that has been submitted to the Board. Nor does the statute permit the Board to engage in a subjective review of proponents' state of mind to determine if the "final" language of a measure in fact is consistent with their "intent." To the contrary, the statute provides that proponents submit the "final draft" of the measure and the Board may set a title based on that "draft." *See* C.R.S. §§ 1-40-105 (requiring "final draft"), -106 (permitting Board to set titles based on the submitted draft).

Petitioners' approach reads the word "final" out of the statute, an outcome this Court does not permit. *See In re 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*, 2020 CO 5, ¶ 19, 455 P.3d 759 (rejecting construction of statute that rendered statutory language "effectively meaningless").

Neither the Constitution nor the statute authorize changes to a final draft submitted to the Board. The Board's rules counsel to the contrary and allow limited "non-substantive" changes only:

> **No changes to a draft initiative may be made after the deadline for submission to the Secretary of State** and prior to the Title Board meeting to consider the proposed initiative. During the Title Board hearing, the proponents may make ***non-substantive*** technical or grammatical revisions to their submission, provided the Title Board agrees that the revisions are ***non-substantive***. If any such ***non-substantive*** changes are made, the proponents must submit an updated amended and final text to the Secretary of State no later than 48 hours after the end of the Title Board meeting.

Title Bd., Policies and Procedures (Dec. 15, 2021), ¶ 10 (emphasis added).[3]

Consistent with the definition of "technical," *see supra*, the Board's rules focus on whether a requested change to the "final draft" of a measure is substantive

[3] The Title Board's policies and procedures are available at https://www.sos.state.co.us/pubs/elections/Initiatives/files/2021-2020TitleBoardPoliciesAndProcedures.pdf.

or not. The Board's rules do not consider the subjective intent of proponents in deciding whether a change is allowable.

In addition, the Board's rules ensure that the draft used for title setting is actually the language that is understood to be the final measure when proponents file for a title. Except for grammatical and like technical changes to be reflected in a corrected draft filed within 48 hours, the Board's rule does not allow for title setting based on a draft that no one on the Board has seen.

Petitioners raise a few examples where they argue the Board allowed "substantive" changes to other measures. None of these examples involved a substantive change as occurred with their measure.[4] In Initiative #41, proponents identified the wrong statutory section in the introductory clause:

- Original: "SECTION 1. In Colorado Revised Statutes, 39-26-***106*** amend"
- Corrected: "SECTION 1. In Colorado Revised Statutes, 39-26-***105*** amend"

Correcting this reference was not a change to the substance of their statutory amendments. Further, the measure identified the correct section in the actual substantive amendments: "39-26-***105***. Vendor liable for tax - definitions - repeal. (1)(a)(I)(A)". (Initiative 2021-2022 #41, sec. 1.) This was plainly a typo.

[4] The original final draft and the corrected final draft of the measures are available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html.

And in Initiatives #84 to 88, Petitioners state that the Board allowed those measure's proponents to change the year of the tax and to swap in a defined term. Pet. Op.Br. at 15. The changes were not so dramatic. With respect to the year, the original final draft of the measure had a strikeout indicating an error: "January 1, 2022~~2~~3." (Initiative 2021-2022 #84, original final draft, sec. 6, proposed C.R.S. § 39-22-104(3)(p).) The Board allowed a correction so the date read: "January 1, 2022." (Initiative 2021-2022 #84, corrected final draft, sec. 6, proposed C.R.S. § 39-22-104(3)(p).) Not only did the strikethrough clearly indicate a typographical error, the date only made sense if it was January 1, 2022, as reflected in the corrected text: "For income tax years commencing on or after January 1, 2022, BUT BEFORE JANUARY 1, 2023 . . ." (*Id.*) For the measure to read on or after January 1, 2023, but before January 1, 2023, would have been nonsensical. Although Petitioners did not like the version of Initiative #89 they submitted for title setting, the measure as they submitted it was by no means nonsensical.

As to the change to a "defined term" in #84, Petitioners in a paragraph discussing "community eligibility provision" in one instance mistakenly typed "community eligible provision":

> (3) IF THE UNITED STATES DEPARTMENT OF AGRICULTURE CREATES THE OPTION FOR THE STATE, AS A WHOLE, TO PARTICIPATE IN THE ***COMMUNITY ELIGIBLE PROVISION***,

> THE DEPARTMENT SHALL PARTICIPATE IN THE OPTION AND SHALL WORK WITH SCHOOL FOOD AUTHORITIES AND THE NECESSARY STATE AND LOCAL DEPARTMENTS TO COLLECT DATA AND IMPLEMENT THE ***COMMUNITY ELIGIBILITY PROVISION*** STATEWIDE. UNTIL SUCH TIME AS COLORADO PARTICIPATES IN THE ***COMMUNITY ELIGIBILITY PROVISION*** AS A STATE, EACH PARTICIPATING SCHOOL FOOD AUTHORITY, AS A CONDITION OF PARTICIPATING IN THE PROGRAM, MUST MAXIMIZE THE AMOUNT OF FEDERAL REIMBURSEMENT BY PARTICIPATING IN THE ***COMMUNITY ELIGIBILITY PROVISION*** FOR ALL SCHOOLS THAT QUALIFY FOR THE ***COMMUNITY ELIGIBILITY PROVISION*** AND THAT THE PARTICIPATING SCHOOL FOOD AUTHORITY SERVES.

(Initiative 2021-2022 #84, original final draft, sec. 6, proposed C.R.S. § 39-22-104(3)(p).) A mistake in typing "eligible" instead of "eligibility" is a textbook example of a non-substantive error. This is especially apparent in this provision given the ***repeated*** use of the phrase ***in the paragraph***.

Assuming the Board can allow technical corrections under the statute, *see supra*, there is no inconsistency in the Board permitting these truly technical corrections while deciding that Petitioners' requested change here, which changed the meaning and effect of the measure, was improper.

C. This Court's precedent does not support Petitioners' argument.

As they find no help in the definition of "technical" or in the statute or the Board's rules, Petitioners look for support in this Court's case law. However, the cases they cite do not lend the help they seek.

They principally rely on a case considering a ballot measure addressing casino gambling. Pet. Op.Br. at 12-13. The proponents there had "bas[ed] their initiative on the form for concurrent [General Assembly] resolutions [which] would produce an unwanted submission of the casino gaming amendment to the voters every two years." *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to the Casino Gaming Initiative Adopted on April 21, 1982*, 649 P.2d 303, 311 (Colo. 1982). The Board allowed the proponents to delete the General Assembly form language from the measure as a "technical error subject to correction," which decision this Court affirmed. *Id.*

This case does not apply here for two reasons. *First*, the change in *Casino Gambling* did not concern the ***substance*** of the measure but rather, as the Court expressly recognized, its "***form***." That is, the proponents used a General Assembly form for referred measures that produced repetitive elections rather than the single election proponents sought. *See also Bruno, supra*, 308 U.S. at 295 ("technical error" includes "formalities…. of procedure"). Correcting the form of the gambling

question did not alter the proposed legal change in the actual gambling laws that proponents sought.

Here by contrast, Petitioners defend a change to their measure that altered the substantive meaning of the measure.[5] They changed one of their purposes, as stated in the Review and Comment memo.[6] If changing a purpose of an initiative isn't substantial, it is hard to identify matters that would qualify as substantial.

Second, the state's law on ballot measures has changed since *Casino Gambling* was decided in 1982. The General Assembly has made the procedures governing ballot measures more stringent. In particular, the statute now requires

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[5] Notably, Petitioners did not initially request that this change be made. A Title Board member had to call it to Petitioners' attention in order for them to ask that the change be made and then to defend it as a "technical correction."

[6] Legislative staff summarized one of the original draft's purposes as:

> 1. To require a person sentenced for second degree murder; first degree assault; first degree kidnapping, unless the first degree kidnapping is a class 1 felony; sexual assault under part 4 of article 3 of title 18, Colorado Revised Statutes; first degree arson; first degree burglary; or aggravated robbery, committed on or after January 1, 2023, to serve eighty-five percent of the person's sentence before the person **is eligible for parole**.

Legislative Council Staff and Office of Legislative Legal Services, Memorandum re: Proposed initiative measure 2021-2022 #89, concerning eligibility for parole at 1-2 (Mar. 22, 2022) (emphasis added). http://leg.colorado.gov/sites/default/files/initiatives/2021-2022%2520%252389.002.pdf (last viewed May 25, 2022).

submission of the "***final***" draft of a measure that gives its "***final***" language, which clearly indicates an intent by the General Assembly to foreclose changes to measures once they reach title setting. *Compare* C.R.S. § 1-40-101(2) (1980) (submission of "the original or amended drafts, as the case may be") *with* C.R.S. § 1-40-105(4) (current) (submission of "an original ***final*** draft that gives the ***final*** language for printing").

Nor did the Court in *Casino Gambling* have the benefit of rules like the Board now has, which expressly limit changes to "non-substantive" corrections. *See supra*. As this Court has recognized, prior judicial interpretations of the statute give way when the General Assembly has changed statutory language and the new language is inconsistent with prior case law. *See 2011-2012 Nos. 67, 68, & 69, supra*, 2013 CO 1, ¶¶ 27-28 (recognizing that prior case law concerning ability of Board to act where designated representatives failed to comply with statutory requirements no longer applied because of General Assembly changed the statutory responsibilities of designated representatives).

More relevant here is the second case cited by Petitioners, which considered a measure to allow limited gaming in Idaho Springs. *In re Title for Limited Gaming in Idaho Springs, supra*. In that case, after the review and comment process with legislative staff, proponents changed their initiative from allowing "regulatory

provisions for limited gaming only in the city of Idaho Springs to a proposal intended to establish such regulatory provisions for limited gaming in places other than that city." 830 P.2d at 968. The Court found this change to be "substantial," and, as such, it required resubmission of the measure for review and comment before the Board could assume jurisdiction. *Id.*

Similar are the circumstances here. Petitioners changed subsection (1.5) from discretionary parole to parole-as-of-right after the review and comment hearing. As Petitioners concede, the change "made to subsection (1.5) was ***not*** made in response to the comments of the directors." Pet. Op.Br. at 8 (emphasis added). This change altered a material provision of the measure, changing the potential prison time for convicted defendants who qualified under its terms. This wasn't a missing comma or a verb tense out of sync with the subject of the sentence. As such, it required resubmission to legislative staff before the Board could assume jurisdiction. *See* C.R.S. § 1-40-105(2).

As the Court stated in *Idaho Springs*, "This 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." 830 P.2d at 968. Without complying with that constitutional process, the Board literally cannot set titles for the measure. It has "no authority" to do so. *Id*.

D. Practical considerations counsel against Petitioners' test.

Not only is Petitioners' test inconsistent with the law, it is contrary to the sound administration of the ballot title setting process. It opens a Pandora's Box for the Board. It is an unwieldy test that requires the Board to delve into the subjective intent of proponents seeking a correction.

Further, allowing proponents to seek substantive changes during a title setting may create significant uncertainty. Petitioners here did not have a corrected version of their measure at the hearing. The result is that the Board set titles without having the actual, final text of the measure before it. As noted above, the Board could not legally set a title without a final draft.

Allowing substantive changes to ballot measures during title hearings would undermine the Board and create numerous difficult problems that frustrate the expeditious process established in statute—to say nothing of the possibility for gamesmanship. *See In re 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*, 2020 CO 5, ¶¶ 11 and 18, 455 P.3d 759 (stringent timelines and procedures "ensure that initiative proponents have sufficient time to collect signatures and the public has time to consider the proposed initiative" and noting procedures prevent "gamesmanship"). It is a slippery slope the Court cannot foster.

E. Petitioners' change is not permissible under the doctrine of substantial compliance.

If the Court does not accept Petitioners' test for a technical correction, then they argue that the change here was permissible under the doctrine of substantial compliance. Pet. Op.Br. at 16-17. Although the Court has applied the doctrine of substantial compliance to ballot measures, it has never used substantial compliance to approve a substantive deviation from the statute's requirements.

For instance, the Court applied the doctrine in a case where proponents "failed to highlight or otherwise indicate all of the changes made to the amended original draft of the Initiative." *In re Title, Ballot Title & Submission Clause, & Summary for the Proposed Initiated Constitutional Amendment "1996-3,"* 917 P.2d 1274, 1275 (Colo. 1996). The Board concluded it had jurisdiction because "the changes that were not highlighted were technical or grammatical, but ***not substantive***." *Id.* (emphasis added). The Court agreed because "any differences between the two versions that were not highlighted by the proponents in their submission to the secretary of state were technical and grammatical." *Id.* at 1276. Petitioners' change to Initiative #89 is not "technical or grammatical" but instead concerns the very purpose of the measure and allowing the change alters the entire meaning of the measure.

The Court also applied the doctrine where the office of state planning and budgeting submitted its fiscal impact statement late. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 255*, 4 P.3d 485, 490 (Colo. 2000). The office submitted its report five minutes late and then submitted a corrected version approximately three hours later. *Id.* at 491. The Court found any noncompliance "minimal," as the report was received in advance of the hearing such that there was sufficient time to review it. *Id.* at 493. Moreover, the Court was troubled by a strict application of the statute because the error was the fault of a government agency. Strictly applying that statute would improperly empower "the staff of a government agency . . . to delay progress on an initiative simply by retaining the requested fiscal information until a few minutes after noon." *Id.* at 492. The Court contrasted the situation with the deadline for submitting an initiative, "which is entirely within the power of the proponents themselves to meet." *Id.* Here, the Constitution commits to Petitioners the sole authority over the language of their initiative, *see* Colo. Const. art. V sec. 1(5), and it was entirely within Petitioners' power to submit the version of their initiative they chose to use.

There are three substantial compliance factors. Were the errors frequent? Were they committed in bad faith? And did they frustrate the purpose of the statutory or constitutional provision at issue? *Loonan, supra*, 882 P.2d at 1384.

There was one error (albeit a major one) and no evidence of Petitioners' bad faith in committing it. But good faith alone does not neutralize the important goals of dealing with an initiative's substantial changes as directed by the Constitution and having titles set on an actual final draft of the measure. The most significant factor, then, is whether the purpose of the applicable legal requirements was achieved, notwithstanding noncompliance.

The "final" draft is the primary source of information for Title Board members, legislative staff who provide the Board with an initial draft title, and interested parties prepare for hearing with accuracy. Board members can learn what the measure actually says and also research related laws. This is particularly important where proponents overwhelm the Board with variations on a theme, such as the 25 alcohol-related measures the Board titled in 2022. Knowing the fine points of each and how they differ from comparable initiatives is key to title setting that captures a measure's central features and accurately portrays them.

Likewise, legislative staff can prepare a substantively correct draft title only if they have the correct final draft. Their draft titles enable the Board to be efficient and legally precise in its work.

And members of the public can know whether and what to challenge at title setting, rather than shoot from the hip at title setting. While such advocates definitely

have their own points of view, a substantively accurate discussion before the Board oftentimes leads to better titles and sometimes to fewer cases being filed at this Court to get issues addressed.

Regardless, where initiative proponents are still working on their proposals after the time of filing, this Court has not found them to have substantially complied with title setting laws. *See In re Title for Initiative 1997-1998 #109, supra,* 962 P.2d at 252 (changing the substantive content between Title Board filing and Title Board hearing was not found to be substantial compliance). Therefore, substantial compliance is not a safe harbor where these proponents can dock.

CONCLUSION

The Board properly found it lacked jurisdiction to set titles, and that decision should be affirmed.

Respectfully submitted this 26th day of May, 2022.

s/ Mark G. Grueskin
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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **RESPONDENT'S ANSWER BRIEF ON PROPOSED INITIATIVE 2021-2022 #89 ("CONCERNING ELIGIBILITY FOR PAROLE")** was sent electronically via CCEF this day, May 26, 2022 to the following:

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