SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 12, 2022 4:10 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 #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 OPENING 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).

Choose one:

X It contains 5,201 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
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INTRODUCTION

Proponents submitted their final draft initiative to get a ballot title. Then, a Title Board member pointed out that one of their changes, altering a felon's parole status, was made to a provision that had not been identified as warranting change at their Review and Comment hearing. Proponents agreed and said that they wished to withdraw the change they had made to their final initiative. The Title Board initially allowed them to do so, even though the change the Proponents sought to make was substantive rather than technical in nature.

After a motion for rehearing was filed, the Board reversed its earlier decision, concluding—correctly—that the change Proponents sought to make was substantive and beyond the power of the Title Board to authorize. The Board got it right the second time. Nothing in the governing statutes or this Court's case law allows a measure's designated representatives to change the substantive terms of their measure in the midst of title setting, days after they submit their "final" draft.

Assuming the Title Board can allow "technical" or "grammatical" corrections to a "final draft" of a measure, Proponents' change here did not meet that standard. It literally altered the eligibility for parole for some offenders, converting it from ***automatic*** parole to ***discretionary*** parole. For prisoners, victims of crime, and society generally, the way in which a statute addresses qualification

for parole is anything but a technical correction—it is the heart of a measure about reforming parole eligibility.

It was Proponents' choice to start the initiative process at the very end of the filing calendar. The Title Board correctly decided that it was not its job to rescue the Proponents from a substantive decision that they rethought after they finalized their measure. This Court should affirm that well-considered judgment.

ISSUES PRESENTED

1. Whether the Title Board properly determined it lacked statutory authority to allow a substantive change to the "final" draft of a proposed initiative when the initiative was already in final form and presented to the Board for title setting.

2. Whether Proponents can now complain they cannot make the 2022 ballot because of delays for which they were solely responsible in timing their filing of an initiative draft with legislative staff and a final version with the Title Board.

STATEMENT OF THE CASE

A. Statement of Facts.

Michael Fields and Suzanne Taheri proposed Initiative 2021-2022 #89 ("Concerning Eligibility for Parole") ("Initiative #89" or the "Initiative"). As described below, Proponents made a substantive change to the text of their

measure—after their Review and Comment hearing before legislative staff, after Proponents submitted the amended and final versions of their measure to the Board, during the title hearing. At first, the Board allowed them to do so, but after receiving Objector's motion for rehearing that set forth pertinent legal authorities was filed, the Board changed its decision.

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

A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. During the hearing, legislative staff questioned whether proposed subsection (2.5), which applies to repeat offenders who must complete all of their sentence before parole, contained an error or ambiguity by stating that an offender "shall be eligible for parole" after completing their entire sentence. Legislative staff explained the use of "eligible" in subsection (2.5) was ambiguous because an offender who has completed their entire sentence then begins parole. Proponents agreed with staff and stated they would change proposed subsection (2.5) to "shall begin parole." (Mar. 25, 2022, Review and Comment Hr'g on 2021-2022 #89 at 10:07:47 and 10:08:44.[1]) No such question or issue arose during the hearing concerning proposed subsection (1.5), which

[1] The recording of the review and comment hearing is available at https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220322/-1/13053.

applies to first- or second-time offenders who, under the measure, must serve 85% of their sentence before parole.

Thereafter, Proponents submitted the final draft of the proposed Initiative to the Secretary of State for submission to the Title Board. As relevant here, Proponents made two substantive changes to the Initiative. First, they amended proposed subsection (2.5) as suggested during the review and comment hearing. Second, they also amended proposed subsection (1.5) so that, when a covered offender completed 85% of his or her sentence, they would "begin parole." The amended version of the Initiative that Proponents submitted to the Title Board shows these two changes:

> **(1.5)** ANY PERSON CONVICTED AND SENTENCED FOR SECOND DEGREE MURDER; FIRST DEGREE ASSAULT; FIRST DEGREE KIDNAPPING, UNLESS THE FIRST DEGREE KIDNAPPING IS A CLASS 1 FELONY; SEX ASSAULT UNDER PART 4, ARTICLE 3 OF TITLE 18; FIRST DEGREE ARSON; FIRST DEGREE BURGLARY; OR AGGRAVATED ROBBERY, COMMITTED ON OR AFTER JANUARY 1, 2023, SHALL ~~BE ELIGIBLE FOR~~ BEGIN PAROLE AFTER SUCH PERSON HAS SERVED EIGHTY-FIVE PERCENT OF THE SENTENCE IMPOSED UPON SUCH PERSON. THEREAFTER, THE PROVISIONS OF SECTION 17-22.5-303 (6) AND (7) SHALL APPLY.
>
> **(2)** Any person sentenced BEFORE JANUARY 1, 2023, for any crime enumerated in subsection (1) of this section, who has twice previously been convicted for a crime of violence, shall be eligible for parole after he has served the sentence imposed less any time authorized for earned time pursuant to section 17-22.5-302. Thereafter, the provisions of section 17-22.5-303 (6) and (7) shall apply.
>
> **(2.5)** NOTWITHSTANDING ANY OTHER PROVISIONS OF THIS TITLE 17, ANY PERSON SENTENCED ON OR AFTER JANUARY 1, 2023, FOR ANY CRIME ENUMERATED IN SUBSECTION (1.5) OF THIS SECTION, WHO HAS TWICE PREVIOUSLY BEEN CONVICTED FOR A CRIME OF VIOLENCE, SHALL ~~BE ELIGIBLE FOR~~ BEGIN PAROLE AFTER HE HAS SERVED THE FULL SENTENCE IMPOSED. THEREAFTER, THE PROVISIONS OF SECTION 17-22.5-303 (6) AND (7) SHALL APPLY.

(Initiative #89, amended text, available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2021-

2022/89Amended.pdf (last visited May 10, 2022.) The final draft of the Initiative submitted by Proponents contained the change to proposed subsection (1.5), so that it provided that a covered offender "shall ***begin*** parole after such person has served eighty-five percent of the sentence imposed upon such person." (Initiative #89 [Final text], sec. 1, proposed C.R.S. § 17-22.5-303.3(1.5) (emphasis added), available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2021-2022/89Final.pdf.) At no time prior to the Title Board hearing did Proponents ask to amend the final draft of their Initiative.

The Title Board hearing on Initiative #89 was held on April 6, 2022. At the beginning of the hearing, a member of the Board asked Proponents to explain why they changed both proposed subsections (1.5) and (2.5). Proponents stated the amended language to proposed subsection (1.5) did not express their intent, and that they would be fine "taking it back to where it was before." The Board granted Proponents leave to submit a "corrected" version of the Initiative after the hearing. The Board reasoned that the change was only "grammatical," or what it referred to in its summary of the outcome of the hearing as a "technical correction." (Apr. 6,

2022 Title Bd. Hr'g at 5:47:40 to 5:52:17[2]; Certified Record at 3-4 ("The Board made a technical correction to the text of the initiative.").)

On April 13, 2022, Petitioner Leanne Wheeler ("Objector") filed a Motion for Rehearing, alleging that the Title Board erred by allowing Proponents to substantively amend the Initiative. Objector contended that, since it was a substantial change to the measure, Proponents should have resubmitted it for review and comment by legislative staff. Objector further argued that, even if review and comment was not required, the Board could not allow a substantive change to the final draft of a measure during a hearing. A rehearing was held on April 20, 2022. The Board granted Objector's Motion with one member dissenting. The Board reasoned that it was improper for it to allow a substantive change to a measure:

> I would sustain the motion because the substance is significant to go from no discretion to requiring discretion.

(Apr. 20, 2022, Title Bd. Hr'g, Comments of E. Olson, 13:03 to 13:12).

> I have to agree with that. That is such a substantive change and I worry that the precedent for the Board of making and authorizing such a substantive change to a measure that I think it is beyond the authority of this Board.

[2] The recordings of the Title Board's April 6 and April 20 hearings are available at https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html.

(*Id.*, Comments of J. Barry, 13:20 to 13:43.) The dissenting Board member did not disagree with the reasoning of the majority, but instead she agreed it was a substantive change:

> It is certainly a substantive change. The person would go right into parole. They would be eligible for parole at 85% of their time.
>
> . . .
>
> But I do think, it does change the meaning of it. If this was not April, I think the Proponents stated it pretty well, we'd have them resubmit with the correction and have the hearing.

(*Id.*, Comments of T. Conley, 10:25 to 10:36, 11:06 to 11:19.) The dissenting member would have created an exception to the statutory requirement that Proponents submit a "final draft" of the measure for title setting because it was the last hearing for title setting for the 2022 election.

Accordingly, the Board granted the Motion for Rehearing, which action Proponents have appealed.

SUMMARY OF ARGUMENT

Proposed subsection (1.5) of Initiative #89 applies to first- or second-time offenders, requiring that they complete 85% of their sentence before seeking parole. Proposed subsection (2.5) applies to offenders convicted of committing covered crimes who have committed crimes of violence twice or more previously. When

originally filed, subsection (2.5) stated that such an offender is not eligible to receive parole until completing their entire sentence.

As originally drafted, both provisions stated that a person would be "eligible for parole" when the conditions in the preceding paragraph were met. At Review and Comment, staff pointed out that a person who has served their entire sentence should be granted parole rather than just be eligible for parole. Proponents took this suggestion to heart and changed proposed subsection (2.5).

Using the discretion that is reserved by the Colorado Constitution to an initiative's proponents, their final version submitted to the Board also stated that a first- or second-time offender, having served 85% of a sentence, was also "granted" parole. During the initial title setting, though, Proponents were asked about this change by the Title Board. Only at that point did they decide that they didn't really want to make that change and chalked it up to an editing error.

At the initial title setting hearing, the Board went along with this request. At rehearing, though, the Board decided, correctly, that Proponents could not make a substantive change such as this during title setting and ruled that it had lacked jurisdiction to set the titles at its previous meeting.

What Proponents now contend was a drafting error was not an authorized basis for a change to the initiative text at this late, pre-petition stage. The Board's

decision not to allow experienced initiative proponents to make 11th hour changes to their measure was correct and must be upheld by this Court.

LEGAL ARGUMENT

I. The Board properly determined that it could not allow Proponents to substantively amend their Initiative during a title setting hearing.

A. Standard of review; preservation of issue below.

Whether the Board exceeded its authority concerns a matter of statutory construction, which the Court reviews *de novo*. *In re Title, Ballot Title, and Submission Clause for 2013-2014 #103 ("2013-2014 #103")*, 2014 CO 61, ¶ 11, 328 P.3d 127, 129.

Preservation is not at issue.

B. Proponents exercised their constitutional discretion to draft the final version of the measure, discretion which the Constitution commits to proponents alone.

The Colorado Constitution gives discretion to initiative proponents to draft a change to state law in the way that they see fit. The rights of proponents are set forth in this manner.

> The original draft of the text of proposed initiated constitutional amendments and initiated laws shall be submitted to the legislative research and drafting offices of the general assembly for review and comment…. ***Neither the general assembly nor its committees or agencies shall have any power to require the amendment, modification, or other alteration of the text of any such proposed***

> ***measure*** or to establish deadlines for the submission of the original draft of the text of any proposed measure.

Colo. Const., art. V, § 1(5) (emphasis added). Therefore, only the Proponents could decide which of the changes that were indicated in the Review and Comment hearing they would incorporate. That authority is constitutionally committed to Proponents, and the Constitution prohibits any official or agency from assuming the ability to determine the content of a citizen-proposed ballot measure. The right to pursue an initiative thus comes with the weighty responsibility to determine the content of the measure before it is filed with the Board for title setting.

The Constitution does, of course, set a procedure to facilitate the ballot measure process, including by requiring review and comment by legislative staff. Generally, proponents can proceed to the title setting process without undergoing a second review and comment proceeding "unless the revisions involve more than the elimination of provisions to achieve a single subject, or ***unless 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***." *Id*., § 1(5.5) (emphasis added). Here, the Board did evaluate those changes and found that they altered Initiative #89 in ways that were not contemplated at hearing. As such, Proponents' amendment at the Title Board rehearing was so

substantial as to deprive the Board of authority to set the titles based on the text filed in advance of its April 6 meeting.

C. The Title Board's decision was consistent with the statute's requirements for title setting.

The above-enumerated constitutional authority is reflected in statute. Proponents may amend their initiative after the review and comment hearing in "direct response" to comments received from legislative staff. C.R.S. § 1-40-105(2). If their amendments go beyond the comments from legislative staff, proponents must then resubmit the initiative to the Offices for further review. *Id.* The statute ***prohibits*** proponents from submitting a measure for title setting if there have been substantial amendments that have not been reviewed by legislative staff:

> If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition ***must be resubmitted*** to the directors for comment in accordance with subsection (1) of this section ***prior to submittal*** to the secretary of state as provided in subsection (4) of this section.

C.R.S. § 1-40-105(2) (emphasis added).

The statute does not provide ***any*** other opportunity for proponents to amend their initiative after the review and comment process. It states that proponents are to file the measure's final language—in other words, the language that will appear on the ballot—for title setting with the Title Board:

> After the review and comment meeting provided in subsections (1) and (2) of this section, a copy of the original typewritten draft submitted to the directors of the legislative council and the office of legislative legal services; a copy of the amended draft with changes highlighted or otherwise indicated, if any amendments were made following the last review and comment meeting conducted pursuant to subsections (1) and (2) of this section; and ***an original final draft that gives the final language for printing*** shall be submitted to the secretary of state without any title, submission clause, or ballot title providing the designation by which the voters shall express their choice for or against the proposed law or constitutional amendment.

C.R.S. 1-40-105(4) (emphasis added). "'Final' means 'not to be altered or undone; conclusive, decisive.'" *Collins v. Colo. Mt. College*, 56 P.3d 1132, 1135 (Colo. App. 2002) (quoting *Webster's Third New International Dictionary* 851 (1981)). And "draft" is a statutorily defined term that means "the typewritten proposed text of the initiative which, if passed, ***becomes the actual language of the constitution or statute***." C.R.S. § 1-40-102(4). A final draft, then, is the "not to be altered" "text of the initiative" that, if passed, "becomes the actual language of the statute." If this language were not clear enough, the statute goes further to say the final draft contains the "final language for ***printing***," in other words, the language that would appear on a petition or ballot.

Nothing in statute allows the Board to permit substantive amendments during a title setting hearing. Rather the statute confines the Board's authority to setting a title based on the "draft" (i.e. the text that would appear in statute if passed) that was

submitted to it. *See* C.R.S. § 1-40-106(1) ("To be considered at such meeting, a draft shall be submitted to the secretary of state no later than 3 p.m. on the twelfth day before the meeting at which the draft is to be considered by the title board . . ."). The Title Board is thus limited to considering the filed "draft" of a measure. Further, the timing for such filing is restricted: a draft must be submitted "no later than 3 p.m. on the twelfth day before the meeting at which the draft is to be considered." *Id.*

Proponents filed their final draft, and then, contrary to the statutory procedure above, changed it. They made a decision that parole should be granted to persons who had served 85% of their sentences, and then at the Board hearing, they changed it to make such persons only "eligible" for parole. At hearing, they decided to undo the change they had made to the substantive standard for parole. It was untimely and not even in "direct response" to legislative staff at Review and Comment. Such staff had commented only on the standard in subsection (2.5). Once the Title Board found this change to be substantial, the Board did not have authority to set titles based on the language submitted. *Cf.* C.R.S. § 1-40-105(2) (requiring resubmission of measures for additional review and comment).

Even if resubmission for review and comment was not required (which was the Board's conclusion), Proponents nonetheless submitted to the Board a draft of the Initiative that was not final; it was ***not*** the version of their measure that would

appear on the ballot. And once they requested that the Board make a substantive change to their measure—a process this statute does not authorize—the Board was then setting titles on a version of the measure that it had not received within the deadline mandated by statute (i.e., 12 days before the hearing).

The process the Board undertook at its first hearing on this matter shows just how dangerous title setting under these circumstances can be. After a Board member raised this issue and Proponents decided to change the substance of their measure on April 6, the Board still did not have the final language for Initiative #89. There was discussion with Proponents about what the revised text would say, but Proponents did not bring a corrected draft to that hearing. Nor did they ask for a recess of the April 6 hearing so they could provide the Board with a corrected draft before titles were set. Instead, the Board set titles based on what it thought the revised draft would say. And Proponents only submitted their "corrected" version on April 7, the day ***after*** the Board hearing.[3] The dangers of setting a ballot title based on a yet-to-be-filed text are obvious and inconsistent with the Board's statutory obligations.

[3] *See* Record at 2 ("CDOS Received: April 7, 2022 7:59 A.M.") https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2021-2022/89FinalCorrected.pdf (final filed with Secretary of State at 7:59 a.m. on April 7, 2022).

This Court has not countenanced these types of deviations from the statutory procedures established by the General Assembly. For instance, the Court reversed the actions of the Title Board when the Board had allowed a substitution of a designated representative. *2013-2014 #103*, *supra*, 2014 CO 61, 328 P.3d 127. As the Court explained, the General Assembly nowhere authorized this action by the Board, and to permit a departure from the statutory procedures "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.*, ¶ 16, at 130. Similarly, the Court disapproved the Board acting on a motion for rehearing where both designated representatives were not present. *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, and 69*, 2013 CO 1, 293 P.3d 551, 552. The Court found the dictates of the statute to be "clear and unambiguous," and the requirements established by the legislature to be "both unambiguous and inflexible." *Id.* at ¶¶ 19 and 22, at 556. And the Court has rejected the argument that the statute permits a second motion for rehearing, reasoning that the statute's language is "clear" and permitting such a change from its clear language would be contrary to "the tight timelines and strict deadlines that pervade that process." *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, ¶¶ 7 and 23, 455 P.3d 759, 761 and 764.

The lesson of this Court's precedent is that the statute governing the ballot title process "means what it says." *Id.* at ¶ 1, at 760. Here, there was no statutory authority for the Board to permit Proponents to make a substantive change to their measure during the title setting hearing; in fact, the statute says the opposite, as only a "final draft" of an initiative may be submitted to the Board for title setting. As such, the Board did not err in declining to set titles based on these changes to the Initiative. *See In re Title Ballot Title & Submission Clause and Summary for 1997-98 #109*, 962 P.2d 252, 253 (Colo. 1998) (proponents' failure to adhere to statutory filing requirements by submitting multiple, changed versions of their initiative prevented Board from accepting jurisdiction for title setting).

D. Even if the Board can allow technical or grammatical changes to an initiative, the change Proponents requested was material and substantive.

Proponents do not appear to meaningfully contest that the statute requires submission of the "final draft" of a measure for title setting. (*See* Petition for Review of Final Action of the Ballot Title Setting Board Concerning Proposed Initiative 2021-2022 #89 ("Concerning Eligibility for Parole"). Instead, they argue that the Board can allow a "technical correction" to a measure, (*id.* at 4.), or what the Board

referred to during its initial consideration of Initiative #89 as a "grammatical" change, (Apr. 6, 2022 Title Bd. Hr'g at 5:47:40 to 5:52:17). The change here was no such thing, and allowing proponents to pursue changes such as this would upend the title setting process.

As relevant here, "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).

Similarly, "grammatical" is something relating to grammar, which is a "normative or prescriptive set of rules setting forth a standard of usage." American Heritage College Dictionary 602 (2002). In plain language, "Grammar is the way that words can be put together in order to make sentences." Collins Dictionary, available at www.collinsdictionary.com/us/dictionary/english/grammar-pattern (last viewed May 10, 2022). A "grammatical" change or correction then is one addressing the structuring of clauses and sentences, such as matching a sentence's subject(s) and verb(s) or determining whether and how words or groups of words modify one another within a sentence, and a "technical correction" is a change that has no impact beyond "the formalities and minutiae of procedure."

In contrast, "substantial" is "defined as something being of substance, important or essential." *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306, 313 n.11 (Colo. 1995) (citing Webster's Third New International Dictionary 2280 (1986)). The difference between whether a person is simply "eligible for" parole or whether parole "begins" automatically is not one of "sentence structure" but instead unquestionably a matter of substance; it is important—even essential—to the incarcerated person, the parole board, and to society, and hence to voters.

Assuming that a "technical" correction to a measure before the Board is permissible, there is a practical, common-sense limit that the Board observes. For example, the Court considered an appeal in which the Board allowed, at the request of the proponents, a "technical correction . . . in text of measure to change the last subsection of section 12-26.1-101 ***from '(d)' to '(4)'***." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 255*, 4 P.3d 485, 490 (Colo. 2000) (per curiam) (emphasis added). This type of change was so minor as not to be raised by objectors who found several other technical problems with the Board's procedures, issues this Court found to be inconsequential. In addition, the Board in

2022 allowed technical corrections for similar matters that had no effect on the substantive legal change brought about by initiatives[4]:

- Remove underlining of a subsection number [i.e. changing (1) to (1)] from the final draft of an initiative, where the underlining carried over from the amended version of the initiative to the final version submitted to the Board. (Initiative 2021-2022 #139, discussion during Apr. 20, 2022, Title Bd. Hr'g at 10:06:37 to 10:08:12.)
- Remove the word "age" which was accidentally repeated in an alcohol measure [i.e. changing "age twenty-one years of age or older" to "twenty-one years of age or older"] after proponents amended the phrasing of the age restriction in response to comments from legislative staff. (Initiative 2021-2022 #128, discussion during Apr. 29, 2022, Title Bd. Hr'g at 4:13:08 to 4:16:26.)

These types of changes represent actual "technical" or "grammatical" changes. *Cf. In re Title, Ballot Title and Submission Clause Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982) (a "technical correction" was acceptable, under the different predecessor statute, where proponents used wording from

[4] The recordings of the hearing referenced below are available at https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html.

legislative concurrent resolutions that they did not realize would result in repetitive elections on the same question). A true technical change deals with process and does not expand the substantive rights or remedies that the measure addresses.

The same cannot be said of the change the happened here. Proponents' amendment of subsection (1.5) changes entirely the meaning of the measure: for those offenders covered by subsection (1.5), it went from ***automatic*** parole to ***discretionary*** parole. This is a difference of significant public importance that would affect whether or not voters would sign the petition or vote for or against the measure in the election. And the change will certainly matter in the administration of the penal system—to the parole board, to offenders subject to the provision, to the public generally in terms of the cost and resources for the state's prisons.

The Court need not decide in this appeal whether and to what extend the Board may allow a technical or grammatical correction to the final text of a measure, because this case isn't a close call. Proponents asked for a change during the title hearing that effectively created an entirely different measure. The Board correctly determined it could not do that.

II. Proponents are responsible for complying with the statutory procedures for proposing ballot initiatives.

A. Standard of review; preservation of issue below.

Whether the Board exceeded its authority concerns a matter of statutory construction, which the Court reviews *de novo*. *2013-2014 #103*, *supra*, 2014 CO 61, ¶ 11, 328 P.3d at 129.

Preservation is not at issue in this appeal.

B. It was Proponents' legal responsibility to ensure that they submitted the correct final draft of their measure.

Proponents' final contention is that they should not be responsible for their mistake, because the Board, in effect, induced them into the error by initially accepting their revision to the measure. This is unfair, they say, because when the Board later determined it had erred, Proponents could not resubmit their initiative because the title setting session for this election had ended. (*See* Petition for Review of Final Action of the Ballot Title Setting Board Concerning Proposed Initiative 2021-2022 #89 ("Concerning Eligibility for Parole"), at 4.).

Proponents are attempting to divert responsibility for what happened. As discussed above, the Constitution gives all discretion about changes in an initial draft to an initiative's proponents. Colo. Const., art. V, § 1(5) (no legislative entity "shall have any power to require the amendment, modification, or other alternative of the

text" of a proposed initiative). Consistent with their control over the content of their measure, Proponents substantively revised proposed subsection (1.5) after the review and comment hearing. Neither legislative staff nor any Board member told them to make that change. They had sole authority to file a final measure for title setting, petitioning, and an election; it was their job to ensure that the measure was substantively what they wanted it to be. As the United States Supreme Court has noted in a different context, "[I]n this world, with great power there must also come—great responsibility." *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 465 (2015) (citing S. Lee & S. Ditko, *Amazing Fantasy No. 15: Spider-Man!*, p. 13 (1962)).

Although the Board initially concluded that Proponents could make the change as a "technical" or "grammatical" correction, that was not, as Proponents know, the end of the matter. Every measure is subject to a motion for rehearing, which can lead the Board to reach a substantively different conclusion on jurisdictional or title drafting questions. *See* C.R.S. § 1-40-107. In fact, as this Court has recognized, it is often not until a hearing on a motion for rehearing that the Board considers the real substance of potential issues with a measure:

> Indeed, through objections raised by opponents, the 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

2011-2012 Nos. 67, 68, & 69, *supra*, 2013 CO 1, ¶ 25.

It was Proponents' responsibility to follow the statute's requirements—i.e. to submit a ***final*** draft of the initiative—and the Board's initial good faith attempt to help Proponents (misguided as it was) did not relieve Proponents of that responsibility. It was not the Board's job—or in its authority—to set a title on a final text it had not even seen as of the April 6 hearing.

As to Proponents' concern that the Board's understanding of its responsibilities will keep them off the 2022 ballot because they could not resubmit on April 6, that is upon the Proponents. The Constitution makes this clear: "The revision and resubmission of a measure . . . shall not operate to alter or extend any filing deadline applicable to the measure." Colo. Const., art. V, § 1(5.5). And this Court has been no less direct in holding initiative proponents accountable for the decisions they make in light of the well-known timeline for initiative filing and title setting. "[T]hat the time constraints of the election cycle meant that the Board was unable to set titles for those initiatives in time for the 2012 election did not justify its decision to set titles when the statute deprived it of authority to do so." *2011-2012 Nos. 67, 68, & 69*, *supra*, 2013 CO 1, ¶ 29.

CONCLUSION

The Proponents, not the Title Board, were in charge of the wording of this measure. Where there was a substantial change to the text that literally changed the terms of parole for certain offenders, and where this change was made informally before the Title Board while it was attempting to fulfill its limited duty of setting titles, the Board was correct to reevaluate whether it made the right decision in going forward on Initiative #89 at its initial hearing. Having found that it erred on April 6, the Board was correct in its decision on April 20, and the Court should affirm.

Respectfully submitted this 12th 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 OPENING BRIEF ON PROPOSED INITIATIVE 2021-2022 #89 ("CONCERNING ELIGIBILITY FOR PAROLE")** was sent electronically via CCEF this day, May 12, 2022, to the following:

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