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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021-2022) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #89 **Petitioners**: Michael Fields and Suzanne Taheri **v.** **Respondent**: Leanne Wheeler **and** **Title Board**: Eric Olson, Jeremiah Barry, and Theresa Conley.	▲ COURT USE ONLY ▲ Case No. 2022SA117
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THE TITLE BOARD'S ANSWER BRIEF

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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g).

It contains 2,353 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Michael Kotlarczyk
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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Proponents' arguments boils down to this: the Title Board was required to afford them a remedy that is not contemplated by statute or the Colorado Constitution. They wanted to change the final text of their measure to substantively alter when individuals would begin parole. But neither statute nor the Constitution allows such amendments to the final text submitted to the Secretary of State.

To be sure, the Title Board allows proponents to make technical or grammatical changes to their measures even though statute does not expressly authorize them to do so. This Court has upheld the practice in prior cases. But because this is a power not expressly given to the Title Board, the Title Board exercises it narrowly and judiciously. The Board has allowed Proponents to correct typos, for instance, or to add a header that had been inadvertently omitted from the final draft. But Proponents here asked the Title Board to make a substantive change. Without statutory authorization to do so, the Title Board properly determined it could not.

Proponents advance three main arguments in their opening brief. *First*, they argue the Title Board could not consider the motion for rehearing because the statute does not specifically mention such a motion. But they did not preserve this argument, and even if they did, the Board is always authorized to consider its jurisdiction to set titles. *Second*, Proponents argue that the Board has hampered their fundamental right to initiative. But that is strictly a consequence of when Proponents decided to bring their measure—they easily could have rectified their error had they not waited until the last minute to file their petition. *Third*, Proponents argue that the Board should accept their altered final draft under the substantial compliance standard. But substantial compliance is not used to compel the Board to accept new filings, but to forgive technical errors of proponents. Even if substantial compliance applied here, Proponents did not meet it because their amendment would undermine the purpose of providing clear notice of an initiative's final text before the Title Board hearing.

Proponents have not overcome the presumption that the Board acted properly. The Board's actions should therefore be affirmed.

ARGUMENT

I. The Board properly considered the arguments in the motion for rehearing.

A. Proponents did not preserve this argument by raising it before the Title Board or in their petition.

In their opening brief, Proponents argue for the first time that the Title Board did not have jurisdiction to consider the motion for rehearing. Because they did not present this argument to the Title Board during the rehearing, or even in their petition for review in this Court, the Court should not address this argument. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 265*, 3 P.3d 1210, 1215-16 (Colo. 2000) ("Because [objectors] did not raise the issue before the Board they cannot now urge this contention as a grounds for reversing the Board."); *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1130 n.3 (Colo. 1996) ("[T]he petitioners failed to raise this contention in their motion for rehearing, and, accordingly, we refuse to address the issue here.").

B. If the argument is not waived, the Board properly addressed the objector's challenge to its jurisdiction to set a title.

The Board determined that it lacked jurisdiction to set a title because Proponents attempted to change the final text after they submitted it to the Secretary of State. The Board had to consider this argument because it challenges the Board's jurisdiction to set a title on the measure.

"Just as a court's lack of subject matter jurisdiction cannot be waived at any stage of the proceedings before it, neither the Secretary of State, the Title Board, nor the parties involved in a challenge to a proposed initiative may give the Board authority that the General Assembly withheld." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #103*, 2014 CO 61, ¶ 18 (citation omitted). In *2013-2014 #103*, for example, the Court held that the Board could not excuse the absence of one of the designated representatives because statute requires both representatives' attendance. Here, too, statute does not allow the Board to accept substantive changes to a final draft of a measure after it is submitted to the Secretary of State. *See* § 1-40-

105(4), C.R.S. (2021). Regardless of whether the issue was raised in a rehearing motion, the Board properly considered it.

Additionally, this Court has allowed challenges on grounds not specifically mentioned in § 1-40-107. According to Petitioners, a rehearing motion may only raise objections regarding (1) single subject, (2) the titles and submission clause, (3) the fiscal summary and (4) whether a constitutional amendment only repeals a constitutional provision. *See* Petr's Op. Br. 5. But this Court has never adopted such a limited construction. To the contrary, the Court has recognized that

> 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 proponents made substantive changes after the review and comment hearing beyond those in direct response to questions or comments by the legislative council.

Hayes v Ottke, 2013 CO 1, ¶ 25. This observation is particularly true where, as here, the measure is heard late in the session when the Board hears dozens of measures at a time. Affording the Board the opportunity to have a "detailed discussion" about the jurisdictional issues around a proposed measure is appropriate, and allowing

objectors to flag those concerns for Board discussion ensures a more robust review of the measures.

This Court has also considered similar challenges in the past. *See, e.g.*, *In re Title, Ballot Title & Submission Clause for 1999-2000 #256*, 12 P.3d 246, 250 (Colo. 2000) (considering "claim[] that the Board did not have jurisdiction to set titles . . . because of four amendments the proponents made to the Initiative before submitting it to the secretary of state"); *In re Title, Ballot Title & Submission Clause Approved Feb. 12, 1992*, 830 P.2d 963, 966 (Colo. 1992) (motion for rehearing "alleg[ed] that the proposed amendment in effect constituted a new proposal that must be submitted to the legislative offices for review and comment before the Board was authorized to fix the title"). Therefore, the Board properly considered whether it had jurisdiction to set a title on Proponents' proposed final text.

II. The Board's decision did not impair the fundamental right to initiative.

Proponents argue that the Title Board's ruling impairs their fundamental right to initiative. Based on this fundamental right,

"[s]tatutory provisions regarding the initiative process should receive a liberal construction to facilitate and not hamper this right." *Buckley v. Chilcutt*, 968 P.2d 112, 119 (Colo. 1998). But here, there is no statutory provision that could be construed as giving Proponents a right to change a final draft after submitting it to the Secretary of State. To the contrary, the statute requires proponents to submit "an original final draft that gives the final language for printing." § 1-40-105(4).

If Proponents were arguing that they should be permitted to use the final language they originally submitted to the Secretary of State, they could argue that the fundamental right to initiative requires a liberal construction of the statute requiring "substantial amendment[s] . . . to the petition" that are not "in direct response to the comments" made at the review and comment meeting. § 1-40-105(2). But that is not the relief Proponents sought before the Title Board or here. Instead, Proponents argue that they should be permitted to substantively change the final text they submitted. There is no statute that authorizes such a change, no matter how liberally it is construed. *See*

Buckley, 968 P.2d at 119 (fundamental right to initiative "does not . . . exist without bounds").

Further, Proponents' own choices, not the Board, are responsible for their inability to circulate their proposed measure. From December 2020 through April 2022, there were 34 possible Title Board meetings at which initiatives could be heard. If the Proponents had presented #89 at any of the first 32 Title Board meetings, they would have been able to resubmit their measure with their preferred final language and had it heard by the Board. Nothing in the statute authorizes the Board to apply a different standard when Proponents choose to wait until the end of the election cycle. Doing so would create bad incentives and further backload a process that has already become remarkably backloaded. The Board therefore didn't frustrate Proponents' right to initiative—Proponents' own choices did.

III. The substantial compliance standard cannot be used to compel the Title Board to accept a new final draft of an initiative.

Proponents argue that their amended final draft should be accepted under a substantial compliance standard. The Board does not

agree that substantial compliance applies here, but even if it does, it would not justify overturning the Title Board's decision.

A. Substantial compliance does not apply to compel the Board to accept a new filing.

The substantial compliance standard is used in determining "adherence to statutes regulating the right of initiative and referendum." *Loonan v. Woodley*, 882 P.2d 1380, 1384 (Colo. 1994). But the standard applies to the proponents' acts, not to compel the Board to take certain actions. For example, in *Loonan*, the Court applied substantial compliance to determine the sufficiency of circulators' affidavits submitted on an initiative petition. *See id.* Or in *In re Title, Ballot Title & Submission Clause for 1996-3*, the Court applied substantial compliance to determine whether initiative proponents substantially complied with statute when their amended draft did not highlight all the changes made to an initiative draft. 917 P.2d 1274, 1276 (Colo. 1996).

So if the Proponents were asking this Court to move forward on the final draft it originally submitted to the Secretary of State, the

Court would have to determine whether the changes made by Proponents following review and comment substantially complied with statute. *See* § 1-40-105(2). But that is not what Proponents are asking the Court to do. Proponents instead ask the Court to direct the Title Board to accept a new final draft. Proponents did not cite any cases where substantial compliance was used in the nature of a mandatory injunction—directing affirmative action by a governmental body—rather than to review action already undertaken by proponents. Accordingly, substantial compliance does not apply here.

B. If substantial compliance does apply, Petitioners have not satisfied that standard.

Even if substantial compliance applies, Proponents' requested relief fails that standard. When substantial compliance applies, courts consider three factors: (1) the extent of the noncompliance, (2) the purpose of the statute that was not complied with and whether the purpose was achieved despite the noncompliance, and (3) whether Proponents made a good faith effort to comply. *See Fabec v. Beck* 922 P.2d 330, 341 (Colo. 1996). Here, the first and third factors would favor

a substantial compliance finding, as Proponents acted in good faith and had just one instance of noncompliance.

But the second factor is determinative here. *See Loonan*, 882 P.2d at 1384 ("the second factor is determinative"). Proponents' noncompliance with the provision requiring submission of a final draft undermined the purpose of the statutory scheme. A final draft gives the Board, the public, and legislative staff clear notice of the substantive provisions of a measure before the Title Board meets. If the final text can substantively change, neither the Board, the public, nor legislative staff can rely on the final text. For example, a member of the public may review the final text of a measure and decide they do not need to be heard at the Title Board hearing, only to have the substance of the measure change at the initial Board hearing. This is not the notice contemplated by the statutes governing the initiative process.

In this sense, the Board's practice of permitting technical or grammatical, but not substantive, changes to a final draft is a good example of the substantial compliance standard. Although the statute

does not expressly permit even grammatical fixes to a final draft, they generally address minor mistakes, made in good faith, and do not subvert any of the reasons for requiring a final draft. Substantive changes, on the other hand, do undermine those purposes, specifically the purpose of affording all interested parties notice of the substantive content of an initiative. This Court has recognized that grammatical and technical mistakes may satisfy a substantial compliance standard. *See In re 1996-3*, 917 P.2d at 1276 (proponents substantially complied with statute requiring proponents to highlight changes in the final text of a proposal when their omissions were "technical and grammatical"). But Proponents have failed to cite any authority establishing that substantive changes to the final text of an initiative can satisfy a substantial compliance standard. Doing so would put the Board in the untenable position of having to adjudicate the three substantial compliance factors any time proponents seek to make a substantive change to their proposal.

IV. Deference to the Board is appropriate here.

In reviewing the Title Board's decisions, "[a]ll legitimate presumptions must be indulged in favor of the propriety of the Board's action." *In re Title, Ballot Title, & Submission Clause Pertaining to Casino Gaming Initiative*, 649 P.2d 303, 306 (Colo. 1982). Such deference is particularly appropriate here. At the rehearing on this measure, Board members expressed the view that this was a "unique" and "close" question. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #89* (Apr. 20, 2022), https://tinyurl.com/39sy37y7 ("Rehearing") (discussion from 10:10 to 13:15). The Board considered how its standards for allowing technical or grammatical changes applied to Proponents' request for a substantive change to their measure. The Board appropriately read their authority to make any corrections narrowly and concluded they lacked statutory or constitutional authority to authorize a substantive change to a final draft. Proponents have not overcome the presumption that this determination was proper.

CONCLUSION

The Board respectfully requests the Court affirm its conclusion that it lacked jurisdiction to set title on #89.

Respectfully submitted on this 26th day of May, 2022.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 26th day of May, 2022, addressed as follows:

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