DATE FILED: May 12, 2022 4:24 PM

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

Title Board: Eric Olson, Jeremiah Barry, and Theresa Conley.

▲COURT USE ONLY▲

Case No. 2022SA117

PHILIP J. WEISER, Attorney General
MICHAEL KOTLARCZYK, Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: (720) 508-6187
FAX: (720) 508-6041
E-Mail: mike.kotlarczyk@coag.gov
Registration Number: 43250
*Counsel of Record
Attorneys for the Title Board

THE TITLE BOARD'S OPENING 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 2,573 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

The brief contains, under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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

s/ Michael Kotlarczyk

MICHAEL KOTLARCZYK, #43250
Assistant Attorney General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

STATUTES

OTHER AUTHORITIES

ISSUE ON REVIEW

Whether the Title Board correctly determined that it lacked jurisdiction to set a title on Proposed Initiative 2021-2022 #89 because Proponents' requested change was substantive and not a technical correction.

STATEMENT OF THE CASE

Proponents Michael Fields and Suzanne Taheri seek to circulate Proposed Initiative 2021-2022 #89. The proposed initiative seeks to amend the Colorado Revised Statutes by changing certain offenders' eligibility for parole. *See* Record, p 2, filed Apr. 27, 2022.

At the April 6, 2022 hearing on #89, the Title Board noted that Proponents had made an amendment to the measure that was not in direct response to comments from the directors of the Legislative Council and the Office of Legislative Legal Services. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #89* (Apr. 6, 2022), https://tinyurl.com/3e4zd5su ("Hearing") (discussion from 5:47:30 to 5:52:15). Specifically, Proponents had changed § 17-22.5-303.3(1.5) from

providing a period when an offender would be "eligible for parole" to a period when parole would automatically "begin." *See* Colo. Sec'y of State, 2021-2022 Initiative Filings, #89 Redline, https://tinyurl.com/4s2pcybk ("Redline"). Proponents stated that their intent had been to "comply with what had been suggested at review and comment," but agreed that they could change it back. *See Hearing* at 5:49:00. The Title Board agreed they could make that change as a technical correction and proceeded to set a title.

Leanne Wheeler filed a timely motion for rehearing, arguing that the Board erred in allowing the amendment as a technical correction. *See* Record at 5. The Title Board heard that motion on April 20. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #89* (Apr. 20, 2022), https://tinyurl.com/39sy37y7 ("Rehearing") (discussion from 3:30: to 14:30). In a 2-1 vote, the Board granted the motion for rehearing, agreeing that the amendment was more than a technical correction and that the Board lacked jurisdiction to set title.

SUMMARY OF ARGUMENT

The Title Board properly declined to set a title for #89 because Proponents wanted to make a substantive, rather than technical, change to their measure after submitting it to the Secretary of State. The Title Board has no statutory authority to allow changes to proposed initiatives after proponents submit them to the Secretary of State. The Board has allowed narrow, technical corrections to fix typos and similar errata, but has not allowed Proponents to change the substance of what they are proposing. The change requested by Proponents here—to change when a person would begin parole to when a person would be eligible for parole—is a substantive change. Because Colorado law does not permit the Board to make such substantive changes to a measure, the Board correctly determined it lacked jurisdiction to set a title.

Finally, Proponents have also argued that the effect of the Board's decision is to deprive them of the opportunity to bring the measure to the ballot. But this is a consequence of the Proponents' own choices. Proponents could have brought their measure earlier in the year, or could have submitted a new measure to Legislative Council after the

additional hearing noted the unusual change to the initiative's text that was being proposed. Proponents should not have substantively different rights merely because they brought their initiative at the end of the two-year cycle for new initiatives.

ARGUMENT

I. The Title Board correctly determined that it lacked jurisdiction to consider #89.

A. Standard of review and preservation.

This Court employs "all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title and Submission Clause for 2009-2010 #91,* 235 P.3d 1071, 1076 (Colo. 2010). The "Board's actions are presumptively valid and this presumption precludes this court from second-guessing every decision the Board makes in setting titles." *In re Title, Ballot Title & Submission Clause for 1999-00 #245(b), (c), (d), & (e)*, 1 P.3d 720, 723 (Colo. 2000).

Proponents argued about whether the requested change was a technical correction at both the hearing and the rehearing and so preserved that argument. *See* Hearing at 5:47:30; Rehearing at 3:30.

B. The process for changing proposed initiatives.

Before a proposed initiative comes before the Title Board, it must go before "the directors of the legislative council and the office of legislative legal services for review and comment." § 1-40-105(1), C.R.S. (2021); *see also* Colo. Const. art. V, § 1(5). This requirement "permits the proponents to benefit from the experience of experts in constitutional and legislative drafting, and allows the public to understand the implications of a proposed initiative at an early stage in the process." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #256*, 12 P.3d 246, 251 (Colo. 2000).

Proponents may, but do not have to, amend their petition in response to comments received during this review and comment meeting. § 1-40-105(2). But if the proponents make a "substantial amendment . . . to the petition" that is not "in direct response to the comments" made at the review and comment meeting, they must resubmit their amended petition for another review and comment meeting. *Id.*; *see also In re Title, Ballot Title, & Submission Clause Approved Feb. 12, 1992*, 830 P.2d 963, 968 (Colo. 1992) ("The public's

right to understand the contents of an initiative in advance of its circulation would be completely eradicated if the . . . central features of a proposal submitted to the Board . . . is substantially different from the . . . central features of an earlier version thereof that was submitted to the legislative offices.").

Following the review and comment meeting, Proponents may then submit their measure to the Secretary of State for the Title Board to consider setting titles. Proponents must provide three copies of their proposed initiative: the original that was submitted for review and comment; a redline showing any changes made to the original in direct response to review and comment; and "an original final draft that gives the final language for printing." § 1-40-105(4).

Proponents do not have any statutory right to amend their petition after it is submitted to the Title Board. But the Board has historically allowed proponents to fix typos and make other technical corrections to their submissions. This practice is memorialized in the Board's written policies and procedures, which were adopted under § 24-3.7-102(1), C.R.S. (2021). *See* Title Board, Policies & Procedures

(Dec. 15, 2021), https://tinyurl.com/2ztam7v5. The Board's Policies and Procedures confirm that proponents cannot change a draft initiative "after the deadline for submission to the Secretary of State and prior to the Title Board meeting to consider the proposed initiative." *Id.* at 4. But the Policies and Procedures also allow proponents to "make non-substantive technical or grammatical revisions to their submission, provided the Title Board agrees that the revisions are non-substantive." *Id.*

C. The Title Board properly concluded that it could not make the requested change as a technical correction.

Following the review and comment hearing, Proponents were only authorized to make substantive changes to their measure that were in response to comments received at the hearing. The change made by Proponents—from "shall be eligible" to "shall begin"—was substantive and was not in direct response to any comments. *See* Redline. Proponents have not argued otherwise. *See* Pet'n for Review (Apr. 27, 2022). Nor did Proponents ask the Board to set a title on the measure with the "shall be eligible" language.

Instead, Proponents argue that they should have been permitted to change the language in their final draft back to "shall be eligible" after they submitted the final draft of the measure to the Secretary of State. Proponents argue that the Board is not only permitted, but is required, to allow them to change their final draft by making this substantive change. Nothing in statute permits the Board to do so. Instead, statute requires proponents to submit "an original final draft that gives the final language for printing." § 1-40-105(4). Because the Board is not statutorily authorized to make substantive changes to final drafts, the Board could not make the change requested by Proponents and it lacked jurisdiction to set the title.

1. The exception permitting technical corrections has been, and should be, construed narrowly.

The Board has allowed a number of technical corrections at Title Board meetings in this two-year cycle, but none affected the substance of the measure:

- The Board allowed these same proponents to submit a technical correction where a typo misnamed a newly created

fund (mislabeling it as an "account" rather than a "fund"). *See Hearing Before Title Board on Proposed Initiative 2021-2022 #19* (Apr. 7, 2021), https://tinyurl.com/2s3nbpe9 (at 5:26:25).

- The Board allowed proponents to add a header to a new statutory section that had been inadvertently omitted. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #50* (Dec. 15, 2021), https://tinyurl.com/yn8apacx (at 1:40:05).
- The Board allowed proponents to change the word "eligible" to "eligibility," and add additional enacting language to change "amend . . . " to "amend . . . and add . . ." *See Hearing Before Title Board on Proposed Initiative 2021-2022 #84* (Apr. 6, 2022), https://tinyurl.com/3e4zd5su (at 8:28:00).
- The Board allowed proponents to change the word "on" to the word "of." *See Hearing Before Title Board on Proposed Initiative 2021-2022 #108* (Apr. 21, 2022), https://tinyurl.com/2p93b9j3 (at 1:38:25).

- The Board allowed proponents to change the phrase "age twenty-one years of age or older" to "twenty-one years of age or older" by deleting the first use of the word "age." *See Hearing Before Title Board on Proposed Initiative 2021-2022 #128* (Apr. 29, 2022), https://tinyurl.com/ynjr464y (at 4:13:30).

As these instances make clear, the exception for technical corrections is a narrow one. Because the Board does not have explicit statutory authorization to make even grammatical or technical corrections, it should exercise this implicit authority to allow technical corrections to measures narrowly. *Cf. Tarco, Inc. v. Conifer Metro. Dist.*, 2013 COA 60, ¶ 35 ("[I]mplied powers must be necessary to effectuating the express powers, and thus their validity must be interpreted narrowly."). A contrary rule would result in the Title Board consistently having to consider whether to permit substantive changes to final drafts. Such a rule would not only render the word "final" meaningless, it would also undermine the purpose of the review and comment process

to allow for public involvement before a measure comes to the Board for title setting. *See In re 1999-2000 #256*, 12 P.3d at 251.

2. The *Casino Gaming Initiative* case does not require a different result.

At the rehearing on #89, the dissenting Title Board member pointed to a case where the Supreme Court affirmed the Title Board's decision to allow a technical correction following submission of the final draft to the Secretary. *See In re Title, Ballot Title, & Submission Clause Pertaining to Casino Gaming Initiative*, 649 P.2d 303 (Colo. 1982). But that case is distinguishable for three reasons.

First, the *Casino Gaming Initiative* case did not involve a change that altered the substance of the proposal. That case involved language that was lifted from concurrent resolutions pending in the General Assembly requiring the submission of the measure to the voters at the next general election, language which would have had the bizarre effect in an initiative of requiring the resubmission of the initiative to voters every two years. *See id.* at 311. Unlike here, where the actual substance of the proposal would change, the correction allowed in *Casino Gaming*

Initiative concerned only a change to correct an obviously mistaken procedure.

Second, *Casino Gaming Initiative* also involved procedural unfairness that is not present here. The review and comment process in that case "failed to point out this problem to the Proponents." *Id.* As a matter of fairness, then, the Court held that a technical correction to remove the mistaken language was appropriate given the failure of the review and comment process to afford the proponents the chance to correct the error. Such is not the case here, as the Proponents added the additional language not in response to review and comment at all, but of their own volition.

Third, the Supreme Court int that case reviewed the Board's decision to allow a technical correction, and so the Board benefited from the deferential standard of review requiring that "[a]ll legitimate presumptions must be indulged in favor of the propriety of the Board's action." *Id.* at 306. Here, the Court must presume the propriety of the Board's decision to deny the edit as a technical correction and overturn that decision only if it is a clear case. This case does not present a clear

case for reversal. Accordingly, *Casino Gaming Initiative* case does not support reversing the Board's decision here to disallow the proposed amendment to the final text.

D. The timing of the hearing and rehearing on #89 is irrelevant to the Board's decision.

Proponents also assert that the Board "did not have authority to reverse its order" at the April 20 rehearing because the rehearing occurred after the deadline for filing new initiatives for the 2022 ballot had passed.

For the 2022 general election, proponents of ballot measures could begin bringing their measures before the Title Board on December 2, 2020. *See* § 1-40-106(1). The final date for the Board to hear new measures for the 2022 election was April 20, 2022. *See id.* Proponents could have brought #89 before the Title Board at any point in those sixteen months. They were fully entitled to wait until April 6, 2022 to bring their measure before Title Board, which they did. However, that choice carried with it certain consequences, one of which being that a motion for rehearing could be granted after the final review and

comment period had passed. They also could have, following the April 6 hearing at which this issue was identified and discussed by the Board, presented a new draft to Legislative Council just in case a rehearing on that ground was granted. Again, they chose not to. These were permissible choices by Proponents, but they carried with them certain consequences. Their fundamental right to initiative has not been hampered merely because they now wish they had made different choices.

Additionally, Proponents' argument proves too much. Any adverse jurisdictional determination at the final two rehearings in April of an election year could deprive proponents of the ability to go start a new review and comment process. But this Court has never held that the Title Board cannot grant a motion for rehearing on single subject grounds—another jurisdictional basis for refusing to set a title—at the final Title Board hearings just because the proponents could no longer go back to review and comment. Nor should the Court apply a more lenient standard to initiatives at the end of an initiative cycle than at its beginning. Such a rule would further incentivize proponents to wait

until the last meetings of the cycle to present their initiatives so that the Board would be limited in enforcing its jurisdictional criteria.[1]

CONCLUSION

The Court should affirm the decision of the Title Board that it lacked jurisdiction to set a title on 2021-2022 #89.

Respectfully submitted on this 12th day of May, 2022.

PHILIP J. WEISER
Attorney General

/s/ Michael Kotlarczyk
MICHAEL KOTLARCZYK, 43250*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

[1] This year, The Board heard 60 initiatives at the final Title Board meeting for new initiatives, which extended two full days (and well into the evening on both days). *See* Colo. Sec'y of State, Title Board- Apr. 20, 2022, https://tinyurl.com/mvhbzjs7. The 60 initiatives represent more than 39% of all proposed initiatives filed with Legislative Council staff for the 2021-2022 cycle. *See* Colo. Gen. Assembly, Initiatives filed, https://tinyurl.com/yahmd2y7.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 12th day of May, 2022, addressed as follows:

Suzanne M. Taheri
Maven Law Group
1600 Broadway, Suite 1600
Denver, CO 80202
staheri@mavenlawgroup.com
Attorney for Petitioners

s/ Xan Serocki
Xan Serocki