DATE FILED: May 10, 2022 7:16 PM

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 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 #93 ("Percentage of Utility Rates Paid by Investor-Owned Utilities") **Petitioner:** Raymond Gifford **v.** **Respondents:** Jon Caldara and Jake Fogleman **and** **Title Board:** Theresa Conley, Ed DeCecco and Kurt Morrison	▲ COURT USE ONLY ▲
Attorneys for Respondents: John S. Zakhem, #30089 Victoria E. Edwards, #39838 Jackson Kelly PLLC 1099 18th Street, Suite 2150 Denver, Colorado 80202 Telephone: 303.390.0003 Facsimile: 303.390.0177 jszakhem@jacksonkelly.com victoria.edwards@jacksonkelly.com	Case No. 2022SA000126

RESPONDENTS' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 6,240 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 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).

☒For each issue raised by the appellant, 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.

☐In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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 or 28.1, and C.A.R. 32.

/s/ John S. Zakhem
John S. Zakhem

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Proponents, Jon Caldera and Jake Fogleman (jointly, "Proponents"), respectfully submit this opening brief in support of the title, ballot title, and submission clauses (the "Titles") that the Title Board set for Proposed Initiative 2021-2022 #93 ("Initiative #93").

STATEMENT OF ISSUES

1. Did the Title Board err in setting the Titles because Initiative #93 was so incomplete and thus incomprehensible, thus preventing title from being set under C.R.S. § 1-40-106?

2. Do the Titles violate the "clear ballot title" requirement because they fail to inform voters of central elements of the measure, and clearly and fairly express the true intent and meaning of Initiative #93, in violation of C.R.S. § 1-40-106?

STATEMENT OF THE CASE AND FACTS

Proponents seek to place a measure on the ballot for Initiative #93, titled "Percentage of Utility Rates Paid by Investor-Owned Utilities." This measure would amend the Colorado Revised Statutes to require investor-owned utilities providing electric or gas service (or both) to residential, commercial, or industrial users in Colorado to pay a percentage (at least 5%) of all rates - their "fair share," from the investor-owned utilities' profits.

To accomplish this purpose, Initiative #93 requires the Colorado Public

Utilities Commission ("PUC") to adopt rules, under "Public Utilities Law" as defined in article 1 of title 40, that create and implement the fair share standard. The PUC has twelve months from the initiative's effective date to adopt such rules implementing the fair share standard.

Legislative Legal Services provided Proponents with its Review and Comment Memoranda for Initiative #93 on March 25, 2022, and conducted the associated Review and Comment Hearing on Initiative #93 on March 31, 2022. On April 7, 2022, the Proponents revised Initiative #93 in response to the staff's comments, and filed an amended and final version of Initiative #93 with the directors of the Legislative Council and the Office of Legislative Legal Services.

At hearing on April 21, 2022, the Title Board found that Initiative #93 contained a single subject, as required by Colo. Const., art. V, sec. 1(5.5) and C.R.S. § 1-40-106.5. The Title Board then set the Titles for Initiative #93.

On April 27, 2022, petitioner, Raymond Gifford ("Gifford"), filed a Motion for Rehearing to challenge the Title Board's jurisdiction to set the Titles on the grounds that Initiative #93 is incomplete and thus incomprehensible, preventing title from being set under C.R.S. § 1-40-106. Gifford also contended that the Titles violated the "clear ballot title" requirement because they fail to inform voters of

central elements of the measure; and thus, fail to clearly and fairly express the true intent and meaning of Initiative #93, in violation of C.R.S. § 1-40-106.

On April 28, 2022, the Title Board reaffirmed that Initiative #93 contains only a single subject, and revised the Titles to their current form.

The title as designated and fixed by the Title Board is as follows:

> A change to the Colorado Revised Statutes requiring investor-owned utilities to pay at least 5% of all future electric and gas service rates from their profits as determined by the public utilities commission.

The ballot title and submission clause as designated and fixed by the Title Board is as follows:

> Shall there be a change to the Colorado Revised Statutes requiring investor-owned utilities to pay at least 5% of all future electric and gas service rates from their profits as determined by the public utilities commission?

On May 5, 2022, Gifford filed this appeal, pursuant to C.R.S. § 1-40-107(2).

SUMMARY OF THE ARGUMENT

The single subject of Initiative #93 is to require that investor-owned utilities for electric and or gas service to ratepayers—commercial residential or industrials—pay their fair share of the rate base[1] adopted by the PUC, at least 5%.

[1] The legal definition of "rate base", according to the Merriam Webster dictionary, is "the total fair value of public utility property that is used in rendering services and that comprises the investment on which a fair rate of return is based in

The initiative's delegation of authority to the PUC to adopt rules to implement the fair share standard and the proposed timing for implementation in the measure do not make the measure incomprehensible. The intentional omission of certain implementing details from the language of the initiative is proper as it reflects the Proponents' intent and is supported by this Court's precedent, as further set forth below. The text of Initiative #93 and the Titles clearly explain its single purpose and intent, and the means by which to accomplish them. There are no surreptitious subjects or risk of voter surprise.

The Titles set by the Title Board also meet the "clear ballot title" requirement because they fairly and accurately set forth the major feature of Initiative #93, i.e., requiring investor-owned utilities to pay their fair share of rates from their profits. The method by which that will be accomplished is naturally left to the rulemaking authority of the PUC, which already sets rates for regulated utilities and facilities. Accordingly, there is no basis for setting aside the Titles.

(cont'd.).. setting utility rates." *See* https://www.merriam-webster.com/legal/rate%20base. (Last visited May 10, 2022).

ARGUMENT

I. The Title Board Did Not Err in Setting Titles.

A. Standard of review and preservation.

This Court is vested with the authority to review the rulings of the Title Board. C.R.S. § 1-40-107(2). The Court's "review of actions taken by the Title Board is of a limited scope," *In re Title, Ballot Title, & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008), and the Court defers to the Title Board's discretion in setting the title, ballot title, and submission clause, *see In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016).

"The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause." *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 413 P.3d 151, 153 (Colo. 2016). Thus, when reviewing a title for clarity and accuracy, the Court will only reverse the Title Board's decision if the title is "insufficient, unfair, or misleading." *In re Initiative for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). The Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions." *In re 2015-2016 #156*, 413 P.3d at 153 (quoting *In the Matter of the Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014) and *In the Matter of the Title, Ballot Title and Submission Clause for 2009-2010 #*45, 234 P.3d 642, 645 (Colo. 2010)).

The Title Board must set titles that "correctly and fairly express the true intent and meaning" of the proposed initiative, and ballot titles "shall unambiguously state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1–40–106(3)(b).

The Title Board may use public meetings "to engage both proponents and opponents of an initiative in discussion regarding the intent and purpose of the proposed measure as the Board carries out its title setting duties." *Hayes v. Ottke*, ¶15, 293 P.3d 551, 555 (Colo. 2013). These meetings "are a critical part of the title setting process because 'if the Board cannot comprehend a proposed initiative sufficiently to state its single-subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters.'" *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #25*, 974 P.2d 458, 465 (Colo. 1999).

In reviewing the Title Board's decision to set a title, the Court may not address the merits of a proposed initiative or interpret its language or predict its application. *See In re Petition on Campaign & Political Fin.*, 877 P.2d 311, 313 (Colo. 1994).

Gifford preserved this issue for review in his Motion for Rehearing before the Title Board. *See* Record filed May 5, 2022 ("Record"), at 5-6.

B. The Title Board properly set Titles for Initiative #93 because it is complete, and the Title Board was able to sufficiently comprehend the proposed initiative in order to state its single subject clearly in the title.

Gifford contends the Title Board should not have set the titles for Initiative #93 and that the measure cannot be forwarded to the voters under C.R.S. § 1-40-106 and "applicable precedent" because "[t]he measure is so incomplete that it is impossible to comprehend or understand," and if "the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters". Pet. for Review #93, at 3-4. Specifically, Gifford contends the "Proposed Initiative requires investor-owned utilities to 'pay a percentage of all rates from their profits' but fails to specify to whom those payments would be made or who [sic] they would benefit," and that this omission "renders the measure impossible to comprehend or understand." The result, Gifford incorrectly claims, is that Initiative #93 cannot be forwarded to voters. Pet. for Review #93, at 4. Gifford provides an example of how he claims the language is confusing, arguing that the measure could be read to require investor-own utilities to pay themselves a percentage of all rates from their own profits. *See* Record, at 6.

Gifford's arguments fail because they are based on a flawed factual premise—that the Title Board could not and did not comprehend Initiative #93 in a manner sufficient to clearly state its single subject in the title.

To the contrary, the Title Board's comments at the Review and Comment Hearing establish that the Title Board clearly understood the measure to require investor-owned utility companies to pay a percentage of all rates from their profits to consumers, not to keep profits they have already earned. Review and Comment Hearing #93 [March 31, 2022] 10:07:51-10:08:28, https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220507/72/13100. (Last visited May 8, 2022.)

The only question from the Title Board on this issue was the form the payment was to take; whether the payments were to go "directly to consumers", or to be made "through a discount applied to consumers' utility bills." *Id.* at 10:08:02-10:08:14. In response to this question, the Proponents confirmed that the PUC would be charged with making this determination, but that the intent was that the fair share standard would result in a reduction or discount to ratepayers. *Id. at* 10:08:13-10:08:29. Throughout the hearing, the Proponents expressed their intent to delegate the details of Initiative #93 to the future rulemaking authority of the PUC, as that agency is best prepared to develop the details of a future program. The PUC was

created in 1953 for this very purpose - to deal with the issue of rate setting. Under C.R.S. §§ 40-1-103 and 40-2-108, investor-owned utility companies are "subject to the jurisdiction, control, and regulation of the [PUC]," and the PUC is obligated to "promulgate such rules as are necessary for the proper administration and enforcement of" Title 40.

The Title Board is not required to rely solely on the language of the measure to understand it; but rather, it may properly rely on the Proponents' testimony regarding the meaning and application of the fair share standard when setting the Titles. *See In re Matter of the Title, Ballot Title, and Submission Clause for 2013-2014 #90*, 328 P.3d 155, 163 (Colo. 2014) (citing *In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Water Rights*, 877 P.2d 321, 327 (Colo. 1994) ("It is appropriate for the Board, when setting a title, to consider the testimony of Proponents concerning the intent and meaning of a proposal.")). The record makes clear that the Title Board did, in fact, comprehend Initiative #93 sufficiently to clearly state its single subject in the Titles, allowing the measure to be forwarded to the voters.

Moreover, the Proponents' testimony at hearing confirms that this information was intentionally omitted from the measure, so that the PUC could properly create and implement the fair share standard in conformity with existing law governing

utility regulation. The fact that the Titles omit payee language is not problematic, as they alert the voter to the material elements and purpose of the measure. This Court has affirmed the Title Board's setting of title in similar fact patterns, where the implementing details of a measure were omitted, allowing future rulemaking to address them. *See, e.g., In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998).[2]

Gifford's identification of an alternative reading of the measure is inapposite because this Court, when reviewing the Title Board's actions, "can only consider whether the title, submission clause, and summary reflect the intent of the Initiative, not whether they reflect all possible problems that may arise in the future in applying the proposed language." *In the Matter of the Title, Ballot Title, and Submission Clause Approved February 2, 1994, Re: Limited Gaming IV, as Determined on Motion for Rehearing*, 873 P.2d 733, 740-741 (Colo. 1994). Gifford attempts to

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[2] In this case, the Court found in a single subject challenge that "[a]n initiative with a single, distinct purpose does not violate the single-subject requirement simply because it spells out details relating to its implementation. As long as the procedures specified have a necessary and proper relationship to the substance of the initiative, they are not a separate subject." 962 P.2d at 929. Acknowledging that school district initiatives and referenda are contemplated under existing law, the Court had "little trouble concluding" the language of the proposed measure "simply provide[d] a mechanism to administer the details of the impact fee proposal," and "merely clarifie[ed] that current law governing the use of initiatives and referenda would apply to policy decisions on school impact fees." *Id.*

create confusion in the measure by mere conjecture, concocting different theories of how the measure could be implemented to have the opposite effect from the stated purpose of the measure. However, this Court does not consider mere speculation about the potential effects of an initiative, when reviewing the decisions of the Title Board. *In re Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 59.

Initiative #93's construction, and future application cannot be reviewed by this Court unless and until the voters approve the initiative. *Id.* (citing *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097-98 (Colo. 2000)); *see In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 720 (Colo. 1994) (rejecting a challenge to a ballot title because "petitioners' argument is based on their interpretation of the proposed initiative, not on its express language").

Indeed, Gifford's ultimate interpretation of the measure contradicts the logical understanding of utilities regulation, as well as the stated purpose of the measure, to wit, ensuring that investor-owned utilities pay their "fair share" of the rates they are charging rate-payers. *See In re Breene*, 24 P. 3, 4 (Colo. 1890) (connection between

matter covered by legislation and proposed title should be within the comprehension of the ordinary intellect, as well as the trained legal mind).

The grand bargain of regulated utilities in Colorado is that they get a protected territory and assurances of a reasonable rate of return, in exchange for consumers getting reasonable rates. However, the recent expansion of environmental laws in Colorado has required these utility companies to build new structures such as transmission lines, to ensure that Colorado meets new green benchmarks. CPR News, *Is Xcel Energy making too much money? Colorado voters could get the chance to decide*. https://www.cpr.org/2022/04/21/colorado-xcel-energy-profits-utilities/. (Last visited May 10, 2022.) This expansion of utility infrastructure has resulted in record profits for investor-owned utility companies because these companies make money when they build new infrastructure. *Id.* The regulated utility model in Colorado allows these investor-owned utility companies to recover operating expenses and capital expenses from ratepayers; and in the case of capital expenses, it also allows utility companies to collect an extra percentage (profits) determined by PUC regulators. *Id.* These profits later become earnings for the utility companies' shareholders, regardless of the price that these utility companies pay to produce electricity (which prices continue to drop from rapid improvements in wind and solar energy technology). *Id.*

This model, in combination with Colorado's recent focus on green initiatives, has allowed Public Service Company of Colorado, Xcel Energy's Colorado subsidiary, to more than double its net income from approximately $297 million in 2007 to $660 million in 2021, according to public financial filings. *Id.* (citing Xcel Energy 10-K reports filed to the Securities Exchange Commission.)

Meanwhile, Colorado regulators have approved a recent Xcel Energy proposal to raise electric rates, and the PUC is now considering a natural gas rate hike and additional charges to cover the costs of last year's natural gas price spikes. *Id.* If all three of these proposals are ultimately approved, it would increase monthly utility bills for ratepayers by almost $17.00. *Id.*

As a result, Initiative #93 seeks to require Xcel Energy and other investor-owned utility companies to pay their "fair share" of operational and capital costs, rather than simply increasing costs for ratepayers, which is what the current system allows. This will be accomplished by requiring the PUC to enact rules to ensure ratepayers do not continue to bear the full brunt of these ever-rising capital costs in the midst of Colorado's new environmental mission, without consequence to the utility companies. Allowing the PUC to address these concerns through rulemaking, pursuant to Initiative #93's policy guidance, rather than the limited structure

currently in place for rate cases, ensures the fair share paid by investor-owned utility companies are distributed in concert with current statutory and regulatory authority.

Gifford also contends the measure "offers no definition of 'fair share,'" and "no hint as to what the clause means, or any guidance on what standard the PUC should apply in determining what a 'fair share' is." *See* Record, at 6. However, the fact that "fair share" is not defined reflects the true intent and meaning of the Initiative, and cannot be said to make the measure incomprehensible, as Gifford suggests. *In the Matter of the Title, Ballot Title, and Submission Clause Approved February 2, 1994, Re: the Proposed Initiated Constitutional Amendment Concerning Limited Gaming In the City of Antonito (Limited Gaming IV), as Determined on Motion for Rehearing*, 873 P.2d 733, 741-42 (Colo. 1994) (superseded by statute on other grounds, as stated in *Ottke*, 293 P.3d at 557). The Title Board is generally not required to define a term that is undefined in the proposed measure, and "must give deference to the intent of the proposal as expressed by its proponent...." *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #25*, 974 P.2d 458, 465; *In re Title, Ballot Title & Submission Clause & Summary For 1999-2000 #255*, 4 P3d 485, 498 (Colo. 2000).

"Although the Initiative may raise questions in the future concerning the [creation and application of the fair share standard], the silence of the title and

submission clause in this regard is consistent with the proponents' stated intent...." *Id.* at 741. "'[P]erfection is not the goal' of the Title Board's title-setting efforts". *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008) (citing *In re Proposed Initiative for 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999)).

Moreover, the core purpose of the Title Board in setting title is not to require that every single feature of an initiative is described in the title and submission clause, but to prevent voter confusion or fraud by the insertion of surreptitious subjects into initiatives. C.R.S. § 1-40-106.5(1)(e)(II). That core purpose is not violated here. Initiative #93 and its Titles describe each major component—the requirement that investor-owned utilities pay their fair share and that the PUC create rules to establish and apply the fair share standard. There are no surreptitious or hidden subjects, and voters will not be confused about the interrelationship between the features of Initiative #93. Thus, these details need not be included in the measure to make it clear and comprehensible, for title-setting purposes.

Gifford does not dispute the rulemaking authority granted to the PUC, but argues that it is "incomprehensible that the measure would require the PUC, having already set just and reasonable utility rates, to determine a 'fair share' payment

which, if paid to a third party, would necessarily leave regulated utilities with less than the PUC determined to be just and reasonable" under the law. Record, at 6.

This is, however, mere speculation as to how the measure could be applied, and likely an unwarranted concern because the PUC is well-versed in rate setting. As conceded by Gifford, reasonable rate setting is the *raison d'etre* of the PUC. Record, at 6.

Similar to the breadth of the rulemaking authority provided to the PUC in Initiative #93, the PUC is given broad authority under Title 40 to achieve the just and reasonable standard. In fact, the just and reasonable requirements of the statute expressly state that "[n]othing in this subsection (1) shall limit or restrict the commission's authority to regulate rates and charges, correct abuses, or prevent unjust discrimination." This broad rulemaking authority enables the PUC to establish and implement the fair share standard, while ensuring "[a]ll charges ... received by any public utility for any rate, fare, product, or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable." C.R.S. § 40-3-101. This is supported by precedent: "Because of the legislative character of rate-making, the commission is not bound by its prior decisions or by any doctrine similar to Stare decisis." *Colorado Ute Elec. Ass'n, Inc. v. Pub. Utilities Comm'n of the State of Colo.*, 602 P.2d 861, 865 (Colo. 1979) (citing

B & M Service, Inc. v. Pub. Utils. Comm'n, 429 P.2d 293, 295 (Colo. 1967)); *See City of Loveland v. Pub. Utilities Comm'n*, 580 P.2d 381, 383 (Colo. 1978), *superseded by statute on other grounds* ("On its own motion the PUC may suspend a proposed tariff, hold a hearing on the proposal and, if necessary, cancel an unreasonable proposed rate Section", citing to C.R.S. § 40-6-111, C.R.S.). This means the PUC has inherent authority to change its mind or to fix rate-making issues as needed, thus alleviating Gifford's perceived concerns.

In fact, the legislature has given the PUC such broad-stroke authority, without specifics, throughout Title 40, regardless of the topic. For example, C.R.S. § 40-3-104.3 grants the PUC the ability, upon application, to authorize any public utility "to provide utility services to a specific customer or potential customer by contract without reference to its tariffs on file with the" PUC, if certain requirements are met per the statute. Thus providing the PUC with similar broad authority to implement the measure is in line with the legislature's intent and stated purpose for the PUC.[3]

[3] The broad rulemaking authority granted to the PUC is very intentional. Colo. Const., art. XXV has vests "all power" in the PUC to "regulate the facilities, service and rates and charges therefor...." Even the courts have limited jurisdiction in reviewing PUC decisions. *See Bennett Bear Creek Farm Water & Sanitation Dist. v. City & Cnty. of Denver By & Through Bd. of Water Comm'rs*, 928 P.2d 1254, 1262 (Colo. 1996) ("The Districts here press a theory of common law public utilities regulation which we conclude would substitute the courts for the PUC, a choice

Gifford's concerns about the PUC's ability to implement the fair share standard without adversely affecting the current rights of utility companies is without merit.

Regardless, the "Title Board is neither obligated nor authorized to construe the future legal effects of an initiative as part of the ballot title," as this "is an issue for post-election litigation, not the basis for a ballot title challenge." *In re Title, Ballot Title, & Submission Clause for 2007-2008 #62*, 184 at 60 (citing *In re Proposed Initiatives 2001-2002 #21 & #22*, 44 P.3d 213, 215-16 (Colo. 2002) & *Percy v. Fielder (In re Title, Ballot Title & Submission Clause, & Summ. for 1999-00 #256)*, 12 P.3d 246, 256 (Colo. 2000)). Moreover, as stated above, this Court does not consider mere speculation about the potential effects of an initiative, when reviewing the decisions of the Title Board. *In re Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d at 59.

An initiative that requires investor-owned utilities to pay their fair share of rates from their profits is not incomprehensible simply because it fails to include details concerning the means by which this fair share standard will be established and implemented by rulemaking. Gifford fails to cite any "applicable precedent"[4]

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which the General Assembly has precluded".). It is also notable the PUC recently underwent sunrise sunset review, and no narrowing of authority was recommended.

[4] The case that Gifford relies on for his vagueness argument is distinguishable. The *Lamm* case concerned a single-subject challenge to a proposed initiative that

to support this bald assertion. To the Proponents' knowledge, this Court has never held that title could not be set because it did not include all implementing details in the measure. To do so would constitute a vast, slippery-slope considering the abundance of citizen-initiated legislation that relies upon subsequent rulemaking to designate payees and payment systems. Since the measure is comprehensible and does not "contain a material and significant omission, misstatement, or misrepresentation", *see In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d at 58, the Court should affirm the Title Board's decision to set the Titles for Initiative #93.

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clearly had "at least two subjects." *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 279 (Colo. 2006), as modified on denial of reh'g (June 26, 2006). Here, Gifford makes no such challenge, and does not dispute the stated purpose of the measure.

Specifically, the *Lamm c*ourt was tasked with "examin[ing] sufficiently [the] initiative's central theme, as expressed, to determine whether it contain[ed] incongruous or hidden purposes or bundles incongruous measures under a broad theme." *Id.* The *Lamm* court concluded that the "two purposes—terminating services benefiting the welfare of individuals not lawfully present in Colorado and denying access to unrelated administrative services that facilitate organization and regulation—are incongruous" and that "[t]he theme of restricting non-emergency government services is too broad and general to make these purposes part of the same subject." *Id., at* 281–82. This "facial vagueness" complicated the Court's attempt to understand the initiative's subjects. The concerns of the *Lamm* case have no import here.

II. Gifford's Challenges to the Language of the Title Lack Merit.

A. Standard of review and preservation.

The Court affords the Title Board "considerable discretion in setting the titles for a ballot initiative." *Kemper v. Hamilton (In re Title, Ballot Title, & Submission Clause for 2011-2012 #3)*, 274 P.3d 562, 565 (Colo. 2012). The Court will resolve all "legitimate presumptions" in the Title Board's favor, invalidate a title only in a clear case, and not interfere with the Title Board's choice of language unless it is "clearly misleading." *In re Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991); *In the Matter of the Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 648 ("When reviewing a title for clarity and accuracy, the Court will only reverse the Title Board's decision if the title is "insufficient, unfair, or misleading.*"*). Nor will the Court "re-write the titles and summary to achieve the best possible statement of the proposed measure's intent." *See Percy*, 12 P.3d at 255.

In examining an initiative's wording to determine whether its title comports with the clear-title requirement, the Court "employ[s] the general rules of statutory construction and give[s] words and phrases their plain and ordinary meanings." *In re Title, Ballot Title, & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 567 (Colo. 2016). The Court construes the "constitutional and statutory provisions

governing the initiative process in a manner that facilitates the right of initiative...." *Id*., (quoting *Armstrong v. Davidson*, 10 P.3d 1278, 1282 (Colo. 2000)).

Gifford preserved this issue for review in his Motion for Rehearing before the Title Board. *See* Record, at 7-8.

B. "Clear ballot title" requirement.

The Title Board is "vested with considerable discretion in setting the title and the ballot title and submission clause." *See In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 442 P.3d 867, 869 (Colo. 2019) (quoting *In re Title, Ballot Title, & Submission Clause for 2013-2014 #90*, 328 P.3d at 159).

The Title Board is required to set titles that "consist of a brief statement accurately reflecting the central features of the proposed measure." *Feazel v. Martinez (In re Proposed Initiative on "Trespass-Streams with Flowing Water")*, 910 P.2d 21, 24 (Colo. 1996). Titles are not required to "spell out every detail" or "describe every nuance and feature" of a proposed initiative. *Percy*, 12 P.3d at 256; *In re Proposed Initiative on Educ. Tax Refund*, 823 P.2d at 1355. Rather, "the point of titles is to identify the proposal succinctly." *Howes v. Hayes (In re Title, Ballot Title & Submission Clause, & Summ. for 1997-1998 #74)*, 962 P.2d 927, 930 (Colo. 1998). The Title Board lacks the authority "to provide a title that includes more

information than is contained in the initiative." *In re Proposed Initiative on Educ. Tax Refund*, 823 P.2d at 1357.

C. Initiative #93's central features are found in the Titles, as the Titles adequately describe the fair share requirement for investor-owned utilities.

Gifford asserts that "the titles set by the Board violate the 'clear ballot title' requirement by misstating or omitting critical elements of the measure and will mislead voters". Pet. for Review #93, at 3. Specifically, Gifford states that the Titles fail to inform the voters of two central elements of the measure: who is to receive fair share "payments" from the investor-owned utilities; and how long such payments may take. These elements of the measure, however, are not key features of the initiative and, therefore, were properly omitted from the Titles.

1. The Title Board reasonably omitted reference in the Titles to measures that the PUC will implement in establishing and implementing the fair share standard.

Gifford contends that the Titles must specify to whom the payments required by Initiative #93 would be made. Pet. for Review #93, at 3. However, Gifford misunderstands both Initiative #93 and the requirements for title-setting. The clear language of the initiative confirms that the details of the fair share standard are to be established by the PUC under its rulemaking authority and; as a result, are not included in the measure.

The relevant language of Initiative #93 provides:

40-3-111. Rates determined after hearing.

(3) INVESTOR-OWNED UTILITIES THAT SUPPLY ELECTRIC OR GAS SERVICE OR BOTH IN COLORADO SHALL PAY A PERCENTAGE OF ALL RATES FROM THEIR PROFITS AS DETERMINED BY THE PUBLIC UTILITIES COMMISSION; SUCH PERCENTAGE SHALL BE AT LEAST FIVE PERCENT OF THE TOTAL RATES APPROVED OR MODIFIED ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (3). THE PUBLIC UTILITIES COMMISSION SHALL ADOPT RULES IMPLEMENTING THIS STANDARD WITHIN TWELVE MONTHS OF THE EFFECTIVE DATE OF THIS SUBSECTION (3) PURSUANT TO THE "PUBLIC UTILITIES LAW" AS DEFINED IN ARTICLE 1 OF THIS TITLE.

Based on the rulemaking authority granted to the PUC, the Title Board reasonably omitted information relating to the method of payment under the fair share standard because the measure instructs the PUC to adopt rules implementing the fair share standard pursuant to the "public utilities law." Such details are, therefore, not a central feature of Initiative #93. Titles are required to be brief, and thus are not required to "spell out every detail" or "describe every nuance and feature" of a proposed initiative. *Percy*, 12 P.3d at 256, *see Feazel*, 910 P.2d at 24; *In re Proposed Initiative on Educ. Tax Refund*, 823 P.2d at 1355. Again, it was the intent of the Title Board and the Proponents to omit details concerning the fair share standard and how it would be established and implemented, and this Court must uphold the intent of the measure.

Moreover, to require that a title describe every feature of an initiative would "transform what the General Assembly intended — a relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters — into an item-by-item paraphrase of the proposed constitutional amendment...." *Outcelt v. Schuck (In re Title, Ballot Title & Submission Clause, & Summ. for 1997-98 #62)*, 961 P.2d 1077, 1083 (Colo. 1998).

Gifford contends that a voter's decision about how to vote on the measure might very well turn on the perceived effect of that measure on the voter - "who would receive the proposed payments and who would benefit from them." Record, at 7. Gifford, however, places too much emphasis on this detail because it is not a central feature of the measure. Rather, the central features of Initiative #93 are the imposition of a new fair share requirement on investor-owned utility companies, and the delegation of authority to the PUC to create and implement this new fair share requirement. According to the clear Titles, the focus for voters is on the fact that such companies will be required to pay their fair share, and Gifford has offered no evidence to suggest that voters will be influenced by where the fair share payments go. *See In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #315*, 500 P.3d 363, 370 (Colo. 2020) (where measure would impose new tax, "voters are interested in the fact that the measure would impose a new tax, and

petitioner has offered no evidence to suggest that voters will be influenced by where the tax is created").

"The fact that the Titles neither include every detail of the initiative nor use the phrase [] [ratepayers] to describe the public's right to [a fair share of the utility companies' profits] is not problematic, as the Titles alert the voter to the material elements and purpose of the initiative". *In re Title, Ballot Title and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179-180 (Colo. 2014). The alleged omitted details do not obscure the intent of the measure. *See In re Matter of the Title, Ballot Title and Submission Clause for 2015-2016 #63*, 370 P.3d 628, 635 (Colo. 2016). Indeed, court action here may create an unworkable slippery-slope, considering the abundance of initiatives that implicate future rulemaking for more definitive action. *See Id.*

Details regarding implementation of the fair share standard are not central features and need not be described in the Titles. The Court should defer to the Title Board's discretion and uphold the Title Board's decision to keep the Titles as concise as is reasonable and omit these administrative details. *See Kemper*, 274 P.3d at 565.

2. The Title Board reasonably omitted from the Titles reference to timing of the implementation of the measure.

Gifford contends that the Titles "are legally flawed because they fail to inform the voters that there may be a substantial delay in implementation of the measure."

Pet. for Review #93, at 3. As explained above, however, the Title Board must keep titles brief and is not required to describe every detail of a proposed initiative. *See In re Title, Ballot Title & Submission Clause & Summary for Proposed Initiative Concerning Auto. Ins. Coverage*, 877 P.2d 853, 857 (Colo. 1994) (Board must "navigate the straits between brevity and unambiguously stating the central features of the provision sought to be added, amended, or repealed"). The provision of Initiative #93 concerning the effective date of the measure concerns the implementation of the fair share standard, and is not a central feature of Initiative #93.

Gifford also contends the "title should be amended to inform voters that the payments required by the measure may not commence for up to a year after its effective date and that payments will only be made on rates approved or modified after the effective date of the measure." Record, at 8. However, if the Titles were to include this language, this would add length to the Titles to describe relatively minor implementation details, without enhancing voter understanding of Initiative #93, contrary to the Title Board's statutory duty to draft a brief title that states only the central features of the measures. *See* C.R.S. § 1-40-106(3)(b) (2013).

Deferring to the Title Board's discretion, the Court should uphold the Title Board's reasonable decision to omit from the Titles information regarding the implementation of the measure. *See Kemper*, 274 P.3d at 565.

CONCLUSION

The Title Board fully discharged its constitutional and statutory responsibilities when it set the Titles for Initiative #93. The Title Board correctly determined that it had jurisdiction to set the Titles, and that those Titles set forth, in plain language and concisely, the central features of Initiative #93. The measure addresses all major elements of Initiative #93 and correctly and fairly expresses the initiative's true intent and meaning.

Therefore, the Court should reject Gifford's challenges to both the Title Board's ability to set title, and the language of the Titles. Both objections concern alleged omissions from the Titles and the measure, but neither omission is central to Initiative #93.

For the reasons stated above, Proponents respectfully request that the Court affirm actions of the Title Board.

Respectfully submitted this 10th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF** was sent this 10th day of May, 2022, by Colorado Courts E-Filing System to the following:

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