

COLORADO SUPREME COURT  
2 East 14th Avenue  
Denver, CO 80203

Original Proceeding Pursuant to  
§ 1-40-107(2), C.R.S. (2021)  
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.

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Case No. 2022SA126

**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) or C.A.R. 28.1(g).

It contains 1,680 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/ Emily Buckley*

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## TABLE OF CONTENTS

|  |   |
|--|---|
| STATEMENT OF THE ISSUES PRESENTED FOR REVIEW .....         | 1 |
| STATEMENT OF THE CASE .....                                | 1 |
| SUMMARY OF ARGUMENT .....                                  | 1 |
| ARGUMENT .....   | 2 |
| I. Standards governing titles set by the Board.....        | 2 |
| II. The proposed initiative contains a single subject..... | 4 |
| A. Standard of review and preservation. ....               | 4 |
| B. The single subject requirement is met. ....             | 4 |
| III. The title set by the Board is not misleading.....     | 7 |
| A. Standard of review and preservation. ....               | 7 |
| B. The title accurately describes the measure.....         | 7 |
| CONCLUSION.....  | 9 |

## TABLE OF AUTHORITIES

### CASES

|  |      |
|--|------|
| <i>In re Proposed Initiative on Trespass-Streams with Flowing Water,</i><br>910 P.2d 21 (Colo. 1996).....                                      | 2, 8 |
| <i>In re Title, Ballot Title &amp; Submission Clause, &amp; Summary for</i><br><i>1999-2000 No. 25,</i><br>974 P.2d 458, 465 (Colo. 1999)..... | 5, 6 |
| <i>In re Title, Ballot Title &amp; Submission Clause for 2019-2020 #3,</i><br>2019 CO 107 .....  | 7    |
| <i>In re Title, Ballot Title &amp; Submission Clause for 2009-10 #45</i><br><i>(“In re #45”),</i><br>234 P.3d 642, 645 (Colo. 2010).....       | 2, 8 |
| <i>In re Title, Ballot Title &amp; Submission Clause for 2009-10 #91,</i><br>235 P.3d 1071 (Colo. 2010).....                                   | 2    |
| <i>In re Title, Ballot Title &amp; Submission Clause Pertaining to Casino</i><br><i>Gambling Initiative,</i><br>649 P.2d 303 (Colo. 1982)..... | 2, 3 |
| <i>In re Title, Ballot Title, &amp; Submission Clause for 2011-2012 #45,</i><br>2012 CO 26 .....   | 4    |
| <i>In re Title, Ballot Title, &amp; Submission Clause for 2007-08 #62,</i><br>184 P.3d 52 (Colo. 2008).....                                    | 3    |

### STATUTES

|                                       |   |
|---------------------------------------|---|
| § 1-40-106(3)(b), C.R.S. (2021) ..... | 3 |
|---------------------------------------|---|

### OTHER AUTHORITIES

|  |      |
|--|------|
| <i>Hearing Before Title Board on Proposed Initiative 2021-2022 #93</i><br>(Apr. 28, 2022), <a href="https://tinyurl.com/6naapu53">https://tinyurl.com/6naapu53</a> ..... | 6, 9 |
|--|------|

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

(1) Whether the Title Board correctly found that #93 is not impossible to comprehend, and as such, found it could set a title;

(2) Whether the title set by the Title Board properly advises the voters of the central purpose of the measure.

## **STATEMENT OF THE CASE**

Proponents Jon Caldara and Jake Fogleman seek to circulate #93 to obtain the requisite number of signatures to place a measure on the ballot to revise the Colorado Revised Statutes to require 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.

Record filed May 5, 2022 (“Record”) at 2.

The Board concluded that the measure contains a single subject at its April 21, 2022 meeting, and proceeded to set title. *Id.* at 3. Petitioner filed a timely motion for rehearing. *Id.* On rehearing on April 28, 2022, the Board made edits to the title, but otherwise denied the motion. *Id.*

## **SUMMARY OF ARGUMENT**

The Board’s actions in setting #93 should be affirmed. First, the Board properly determined that #93 contains a single subject—correctly

finding that the measure is *not* so incomplete that it is incomprehensible. Second, the Board's title appropriately conveys the initiative's central purpose.

## ARGUMENT

### I. Standards governing titles set by the Board.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title & Submission Clause for 2009-10 #45* (“*In re #45*”), 234 P.3d 642, 645, 648 (Colo. 2010). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board's decision only if the title is insufficient, unfair, or misleading. *In re #45*, 234 P.3d at 648.

The Court will “employ all legitimate presumptions in favor of the propriety of the Board's actions.” *In re Title, Ballot Title & Submission Clause for 2009-10 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re*

*Title, Ballot Title & Submission Clause Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Section 1-40-106(3)(b), C.R.S., establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title, & Submission Clause for 2007-08 #62*, 184 P.3d 52, 58 (Colo. 2008). The statute provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a “yes/for” or “no/against” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed...within two weeks after the first meeting of the title board. ...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered “yes/for” (to vote in favor of the proposed law or constitutional amendment) or “no/against” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S.

## **II. The proposed initiative contains a single subject.**

### **A. Standard of review and preservation.**

When this Court reviews the Board's single subject decision, "[it] employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions. [It] will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re Title, Ballot Title, & Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶ 8 (quotation omitted). The Title Board agrees Petitioners preserved the single subject issue by raising it in a motion for rehearing.

### **B. The single subject requirement is met.**

The Board correctly determined the measure contains a single subject, namely to revise the Colorado Revised Statutes to require 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. Record at 2. On appeal to this Court, Petitioner argues that the Board erred in setting a title because "[t]he measure is so incomplete that it is impossible to comprehend or understand." Petition at 3-4. This Court has held in the past that "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 No. 25*, 974 P.2d 458, 465 (Colo. 1999). But here, the Board *did* comprehend #93 and properly set a title.

Petitioner argues that #93 is incomprehensible because it does not explain *to whom* investor-owned utilities would pay at least 5% of all future electric and gas service rates from their profits. Petition at 4 (arguing #93 “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.’). As reflected in the measure and title, the Public Utilities Commission has discretion through rulemaking to decide how the required payments are made. The fact that the initiative does not specify exactly how the payments will be made—and leaves that detail to the Public Utilities Commission—does not make the measure incomprehensible.

As the Board correctly reasoned, 93’s failure to identify a specific payee does not make the measure so incomprehensible or incomplete such that the Board cannot identify a single subject. Instead, as the

Board reasoned, the fact that the measure specifies that investor-owned utilities would pay at least 5% of all future electric and gas service rates from their profits “provides sufficient information for the voters to know what the purpose of this measure is.” *Hearing Before Title Board on Proposed Initiative 2021-2022 #93* (Apr. 28, 2022), <https://tinyurl.com/6naapu53> (statement of E. DeCecco at 1:28:50 - 1:30:20); *see also id.* (“Currently the customers would be paying 100 percent of it, and [voters] could read [the title] and [understand that] ‘someone else is paying a portion of what the customer . . . would otherwise be paying.’”). And as another board member explained, voters can easily understand the initiative’s single purpose: “in the average voter’s mind, there’s a transaction between the rate payer and the utility, and if utility is made to pay more, then it’s implied in their minds that the rate payer will be the recipient.” *Hearing Before Title Board on Proposed Initiative 2021-2022 #93* (Apr. 28, 2022), <https://tinyurl.com/6naapu53> (statement of K. Morrison at 1:32:00-1:32:42).

Because #93 is not so incomprehensible or incomplete such that the Board could not identify a single subject, the Board correctly found a single subject and set title.

**III. The title set by the Board is not misleading.**

**A. Standard of review and preservation.**

When considering a challenge to a title, the Court does not “consider whether the Title Board set the best possible title.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. Rather, the Court only “ensure[s] that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words that the Title Board employed.” *Id.* The Board agrees that Petitioners preserved a challenge to the clear title of #93.

**B. The title accurately describes the measure.**

The Board’s title for #93 is not misleading. The ballot title and submission clause set by the 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?

Record at 2.

Petitioners argue that the title is misleading because (1) it fails to specify to whom payments required by the measure are made; and (2) it fails to inform voters that “there may be a substantial delay in implementation of the measure.” Petition at 3.

Petitioner’s arguments are unavailing. The title as set by the Board accurately and properly reflects the intent of the initiative, and Petitioner does not demonstrate how the title could be considered insufficient, unfair, or misleading. *See In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d at 26; *In re #45*, 234 P.3d at 648. With respect to Petitioner’s first argument, the initiative lets the Public Utilities Commission decide, through rulemaking, to whom any payments are made. Consistent with that feature, the title explains that the payments will be made “as determined by the public utilities commission.” Record at 2. Thus, the title accurately reflects the measure.

With respect to Petitioner’s second argument, i.e., that the title does not explain the payments would not be immediate, the title in fact

*does* make clear that customers would not be entitled to an immediate discount on their current utility bills. On rehearing, the Board specifically addressed this very argument and added the word “future” to the title to clarify that the five percent payment does not apply to *current* rates, and only applies to *future* rates. Record at 2; *Hearing Before Title Board on Proposed Initiative 2021-2022 #93* (Apr. 28, 2022), <https://tinyurl.com/6naapu53> (statement of E. DeCecco at 1:48:40 – 1:50:25). As the Board reasoned, the word “future” makes clear to voters that the five percent payment is not going to be “automatic” but could occur weeks or years in the future, whenever the Public Utilities Commission next changes the relevant rates. *Id.*

The Board properly set title for #93.

## CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 10th day of May, 2022.

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*/s/Emily Buckley*

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon all counsel of record electronically via CCEF and/or email, at Denver, Colorado, this 10<sup>th</sup> day of May, 2022.

*/s/ Carmen Van Pelt*

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Carmen Van Pelt