

<p>COLORADO SUPREME COURT 2 East 14th Ave. Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021- 2022 #102 (“Concerning Liquor Licenses”)</p> <p>PETITIONERS: STEVEN WARD and LEVI MENDYK,</p> <p>v.</p> <p>RESPONDENTS: ROBERT SCHRAEDER and JOEL ALLEN CATHEY,</p> <p>and</p> <p>TITLE BOARD: THERESA CONLEY, JULIE PELEGRIN, and DAVID POWELL.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p><b>THE TITLE BOARD’S OPENING BRIEF</b></p>	

## CERTIFICATE OF COMPLIANCE

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

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

It contains 1,648 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).

Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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/ Grant T. Sullivan*

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## **STATEMENT OF THE ISSUE**

Whether Objectors adequately preserved their argument that #102's title fails to describe the measure's central features when their motion for rehearing stated only, as relevant here, that the title does not describe "any operational changes that also apply to fermented malt beverage licenses."

## **STATEMENT OF THE CASE AND FACTS**

Robert Schraeder and Joel Allen Cathey ("Proponents") seek to circulate Proposed Initiative 2021-2022 #102 ("#102") to obtain the requisite number of signatures to place a measure on the ballot that amends certain statutory provisions in articles 3 and 4 of Title 44 of the Colorado Revised Statutes governing alcohol beverage licenses. The proposed initiative expands the alcohol beverage licenses available in Colorado by creating a new fermented malt beverage and wine retail license. *Attachments to Petition for Review* ("Record") at 2-8. This new category of license is in addition to the existing fermented malt beverage license already available under Colorado law.

The Title Board conducted an initial public hearing on April 20, 2022. After discussion with Board members, Proponents stated at the hearing that #102's single subject is the expansion of alcohol beverage licenses.<sup>1</sup> The Board agreed that #102 contained a single subject and therefore proceeded to set a title. Record at 11.

Objectors Steve Ward and Levi Mendyk ("Objectors") filed a motion for rehearing arguing, among other things, that the title as set violated the clear title requirement. Record at 12. The clear title portion of their motion stated in its entirety:

Opponents assert that the titles as set violate clear title as they do not describe the central features of the measure including:

- In parity to opponents' own measures, the board should not include effective dates in one measure while omitting them from other measures.<sup>2</sup>
- A description of any operational changes that also apply to fermented malt beverage licenses.

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<sup>1</sup> *Hearing Before Title Board on Proposed Initiative 2021-2022 #102* (Apr. 20, 2022), available at <https://tinyurl.com/2b8nx89r> (minute 7:44:50).

<sup>2</sup> Objectors do not raise this issue in their petition for review in this Court. See Pet. 3.

Record at 12. The motion did not specify what alleged “operational changes” were improperly omitted from #102’s title.

The Board conducted a rehearing on April 28, 2022.<sup>3</sup> At the rehearing, Objectors’ counsel stated “we’ll stand on our motion” and did not offer any additional oral argument on why the Board’s title for #102 violated the clear title rule. *See Rehearing, supra* n.3 (statement at minute 11:16:00). Although the Board incorporated into #102’s rehearing all prior verbal arguments from the rehearsings on other related measures (Nos. 96, 97, 100, and 101), *see Rehearing, supra* n.3 (statement at minute 11:15:45), incorporating one’s prior verbal comments into the record does not obviate the statutory requirement that the *written* motion for rehearing state “with particularity” the arguments supporting rehearing. § 1-40-107(1)(b), C.R.S. (2021).

The Board denied Objectors’ motion for rehearing without making any changes to the title. The title as fixed by the Board at the original hearing and unchanged at rehearing is:

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<sup>3</sup> *Rehearing Before Title Board on Proposed Initiative 2021-2022 #102* (Apr. 28, 2022), available at <https://tinyurl.com/2d8p6rx9> (beginning at minute 11:15:35).

A change to the Colorado Revised Statutes concerning the expansion of alcohol beverage retail licenses, and, in connection therewith, creating a new fermented malt beverage and wine retail license that authorizes the sale of fermented malt beverages, such as beer, and wine for consumption off the licensed premises; making the new license subject to the same requirements concerning location, delivery, and sales that apply to fermented malt beverage retail licensees; allowing a person to obtain up to 12 fermented malt beverage and wine retail licenses; and authorizing fermented malt beverage retailers and fermented malt beverage and wine retailers to offer tastings if authorized by the local licensing authority.

Record at 9.

Objectors filed a timely petition for review in this Court on May 5, 2022. Objectors’ petition for review raises a single issue—whether #102’s title fails to describe the measure’s central features because it “omits a description of the changes to the existing beer code.” Pet. 3.

### **SUMMARY OF THE ARGUMENT**

Objectors’ clear title arguments are not preserved for appeal because they were not stated with particularity in their motion for rehearing as required by § 1-40-107(1)(b), C.R.S. (2021). Objectors’ motion for rehearing stated merely that the Board’s title for #102 omitted a “description of any operational changes that also apply to



fermented malt beverage licenses.” The motion for rehearing did not specify what operational changes should have been included in the title but were not, precluding the Board from addressing in any meaningful way the arguments that Objectors intended to convey. Indeed, Objectors’ petition for review in this Court appears to raise a clear title argument that is entirely different from the argument that the Board took from Objectors’ motion for rehearing. Because Objectors’ clear title arguments were not stated with particularity in their motion for rehearing, this Court should affirm the Board’s title for #102.

## **ARGUMENT**

### **I. Objectors’ clear title arguments are not preserved for appeal.**

#### **A. Standard of Review and Preservation**

This case implicates the interpretation of statute, § 1-40-107(1)(b), which this Court reviews de novo. *In re Matter of Title, Ballot Title and Submission Clause for 2019-2020 #74*, 2020 CO 5, ¶8. That statute provides that a motion for rehearing before the Title Board must “be typewritten and set forth with particularity the grounds for rehearing.” § 1-40-107(1)(b). The statute elaborates: “If the motion claims that the

title and submission clause set by the title board are unfair or that they do not fairly express the true meaning and intent of the proposed state law or constitutional amendment, then the motion must identify the specific wording that is challenged.” *Id.*

This statutory mandate makes clear that a proponent’s or objector’s motion for rehearing must articulate with specificity his or her objection to the Board’s title. Arguments not raised before the Board—or not raised with adequate particularity—may not be advanced later before this Court. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 265*, 3 P.3d 1210, 1215-16 (Colo. 2000). This commonsense rule is consistent with Colorado case law outside of the Title Board context. *See, e.g., Sinclair Transp. Co. v. Sandberg*, 2014 COA 75M, ¶33 (issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived); *Holley v. Huang*, 284 P.3d 81, 87 (Colo. App. 2011) (same).

As explained below, Objectors' arguments are not preserved for appeal because they were not stated with particularity in the motion for rehearing.

**B. Objectors' motion for rehearing failed to state their clear title arguments with particularity.**

The clear title portion of Objectors' motion for rehearing consists of just one sentence. The relevant portion states: "Opponents assert that the titles as set violate clear title as they do not describe the central features of the measure including: . . . [a] description of any operational changes that also apply to fermented malt beverage licenses." Record at 12. The motion fails to mention what "operational changes" should have been included in the title but were not. Nor does the motion explain why the unspecified operational changes constitute central features of #102 that must be included in the title.

The Board interpreted Objectors' argument to refer to #102's statement that new fermented malt beverage and wine retailers, *and* existing fermented malt beverage retailers, are permitted to offer tastings when authorized by local licensing authorities. Record at 3

(proposed § 44-3-901(1)(i)(III)(A)). This provision authorizing tastings is one of the only provisions in #102 that impacts existing fermented malt beverage licensees. The Board ultimately rejected this argument, determining that its title adequately informed voters in the final clause that tastings are allowed by both types of licensees. *See Rehearing, supra* n.3 (minute 11:17:24).

Now, however, it appears that Objectors had a different argument in mind. Their petition for review in this Court lists a single issue for review, stating “[t]he ballot title as set by the board omits a description of the changes to the existing *beer code*.” Pet. 3 (emphasis added). The “Colorado Beer Code” is located in article 4 of Title 44. *See* § 44-4-101. But #102’s authorization for both types of licensees to offer tastings is located in article 3, which is the “Colorado Liquor Code.” *See* Record at 3 (proposed § 44-3-901(1)(i)(III)(A)); § 44-3-101. So, the Board apparently misunderstood the argument that Objectors intended to convey in their (short) motion for rehearing.

This disconnect between the argument that Objectors apparently intended to convey and the argument that the Board took from the

motion for rehearing illustrates why the particularity requirement is vital. If an objector does not state their challenge with specificity in the motion, it deprives the Board of any meaningful opportunity to address the issue and therefore obviate Supreme Court review. Or, as here, it results in the Board evaluating and adjudicating an argument that the objector did not intend to convey.

In this context, the particularity requirement is akin to CRE 103(a)(1)'s requirement that a litigant state "the specific ground of objection" when objecting to a trial court's evidentiary rulings. Without such specificity, the objection is not preserved for appeal. *See, e.g., American Family Mut. Ins. Co. v. DeWitt*, 218 P.3d 318, 326 (Colo. 2009) (holding objection not preserved where it "contained no phrases or arguments that could reasonably be expected to focus the [trial] court's attention" on the specific issue).

Because Objectors' written motion for rehearing did state with particularity what "operational changes" should have been included in the title but were not, Objectors' argument is not preserved for appeal. To the extent Objectors' opening brief identifies arguments that were

properly preserved, the Title Board reserves all available defenses and will respond to such arguments in its answer brief.

### CONCLUSION

This Court should affirm the Title Board's actions in setting the title for #102.

Respectfully submitted this 10th 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 OPENING BRIEF** upon the following parties or their counsel electronically via CCE at Denver, Colorado this 10th day of May, 2022, addressed as follows:

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