| | |
|---|---|
| SUPREME COURT OF COLORADO<br>2 East 14th Ave.<br>Denver, CO 80203 | DATE FILED: March 1, 2016 5:03 PM |
| Original Proceeding<br>Pursuant to Colo. Rev. Stat. § 1-40-107(2)<br>Appeal from the Ballot Title Board | |
| In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #73 ("Public Accountability of Officials")<br><br>**Petitioner: Phillip Hayes**<br>**v.**<br>**Respondents: Mike Spalding and David Ottke**<br><br>**and**<br><br>**Title Board: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER** | ▲ COURT USE ONLY ▲ |
| Attorney for Petitioner:<br><br>Mark G. Grueskin, #14621<br>RECHT KORNFELD, P.C.<br>1600 Stout Street, Suite 1000<br>Denver, CO 80202<br>Phone: 303-573-1900<br>Facsimile: 303-446-9400<br>Email: mark@rklawpc.com | **Case No. 2016SA48** |
| **PETITIONER'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, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

**X** It contains 7,559 words.

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

**X** For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

*s/ Mark G. Grueskin*
Mark G. Grueskin
*Attorney for Petitioner*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Other Authorities**



**Constitutional Provisions**

## STATEMENT OF ISSUES PRESENTED

Whether the Title Setting Board ("Title Board" or "Board") erred in setting a ballot title for an initiative that contains at least five separate subjects, including: (i) methods of triggering and conducting recall elections; (ii) eliminating the single subject requirement for recall petitions by allowing four officials to be recalled via a single petition; (iii) allowing four different types of officials to be recalled by means of the same petition; (iv) changing qualifications for all elected offices in Colorado by prohibiting recalled officials from running for six years; and (v) changing the constitutional authority of Denver and Broomfield to set their own candidate qualifications.

Whether the Board erred by setting a misleading title that does not inform voters about: (i) the significant change to the process for establishing the minimum number of signatures required to recall a governmental official; (ii) the fact that recall petitions may now be the vehicles for removing four officials from the petition area; (iii) the significant change in the formula for establishing the minimum number of signatures for successor candidate petitions; (iv) the lack of an effective recall petition review process; (v) the fact that resignation from office can trigger the 6-year ban on that official holding any elected office in the state; and (vi) the unnecessary recitation of existing law concerning campaign finance requirements applying to incumbent officials.

## STATEMENT OF THE CASE

### A. Statement of Facts.

Initiative #73 would amend Article XXI of the Colorado constitution to vastly change the procedures leading up to, as well as the conduct of, a recall election for state or local elected officials. The measure does not simply amend procedures relating to recall elections.

This proposal also authorizes, for the first time, the use of a single recall petition in order to force the recall election for as many as four (4) different officials elected from the same petition area. Moreover, #73 changes the qualifications for all elected offices in the State of Colorado. Specifically, any official who has been recalled from any office is, by that fact alone, disqualified from holding any elected office for six (6) years, regardless of the reason for recall, the office from which the official was recalled, the level of government at which that office was held, or the office and level of government to which the official might otherwise be elected.

### B. Nature of the Case, Course of Proceedings, and Disposition Below.

Mike Spalding and David Ottke (hereafter "Proponents") proposed Initiative 2015-2016 #73 (the "Proposed Initiative"). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter the Proponents submitted a final version of the

Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or his designee is a member. A Title Board hearing was held on January 20, 2016 to establish the Proposed Initiative's single subject and set a title.

On January 27, 2016, Petitioner filed a Motion for Rehearing, alleging that the Board did not have jurisdiction to set a title, the title was misleading, did not fairly and correctly express the true meaning of the Proposed Initiative, and will lead to voter confusion. The rehearing was held on February 3, 2016, at which time the Title Board granted in part the Motion for Rehearing to cure certain deficiencies in the title it had set. The Board set the following title:

> Shall there be an amendment to the Colorado constitution concerning recall of elective officials, and, in connection therewith, specifying recall and successor election procedures for state and local elective officials; stating that recalled officials shall not be any official for six years; restricting recall from the same office for an official who has already defeated a recall effort; requiring opposition donations and spending to continue to be public records; and prohibiting identification, reporting, or limitation of donations to recall campaigns and payments to recall petition circulators?

The Board did not, however, cure certain remaining deficiencies that were raised at the rehearing, and Petitioner timely filed a petition for review before this Court pursuant to C.R.S. § 1-40-107(2).

## SUMMARY

Initiative #73 is the next iteration of a measure the Court rejected in 2014 for violations of the single subject requirement. In considering #73, however, the Board did not consider certain issues that this Court expressly left open as possible single subject violations in the 2014 decision or issues broached by this latest iteration of a "recall" initiative. As a result, the Board failed to acknowledge that #73 addresses, in addition to the manner of conducting and triggering a recall election, the following subjects: (1) nullification of the historic single subject aspect of recall petitions; (2) the expansion of a petition to facilitate four different office holders from the same jurisdiction; (3) changing the qualifications to hold any public office in the state for an official who has, within the last six years, been recalled; and (4) changing the constitutional authority of Denver and Broomfield to set the qualifications of their officers without regard to this six-year ban.

Moreover, the Title Board erred in setting this title, as it omitted central features of this measure including: (1) the expansion of a petition to apply to four officials; (2) the triggering of the six-year ban when an official resigns from office after a recall has begun; (3) the massive change in the number of signatures required to trigger a recall; (4) the massive change in the number of signatures required to qualify as a successor candidate to the recalled official; (5) the removal of key safeguards to the integrity of the petitioning process; and (6) the inclusion

of certain campaign finance requirements that apply to recall opponents but already exist in current law and therefore are hardly a central feature of #73.

The Title Board thus erred, and its decision to set a title or, alternatively, its description of this measure, should be reversed by the Court.

## LEGAL ARGUMENT

### A. The Title Board lacked jurisdiction to set a ballot title because Initiative #73 violates the single subject requirement.

#### 1. Standard of review; preservation of issue below.

Without interpreting the merits of proposed initiatives or analyzing how it will be applied, the Court must engage in a limited analysis of the meaning of each initiative to identify its subject or subjects. This limited inquiry is essential to determine whether the single subject requirement found in Colo. Const., art. V, § 1(5.5), has been violated. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172, No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999).

In order to be determined a single subject, the Court must find that an initiative's topics are "necessarily and properly" related to the general single subject assigned to the measure by the Title Board, rather than "disconnected or incongruous" with that subject. *In the Matter of the Title, Ballot Title and*

*Submission Clause, and Summary Adopted April 17, 1996 (1996-17)*, 920 .2d 798, 802 (Colo. 1996).

The single subject issues raised in this appeal were presented to the Board at the rehearing and thus preserved for review. *See* Motion for Rehearing on Initiative 2015-2016 #73 at 1-2.

**2. Initiative #73 contains five subjects.**

a. The first subject of #73: triggering and conducting a recall election.

In *Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2013–172 #76*, 333 P.3d 76 (Colo. 2014), this Court addressed a measure proposed by the one of the same proponents (Mike Spaulding) to achieve most of the same goals. The Court identified a number of the procedural aspects of the recall process that were affected by that measure, including the provisions that:

- changed the number of proponents to five (5) to initiate a recall effort;
- prohibited government intervention in peaceful petitioning;
- set petitioning time at 180 days for statewide petitions and 90 days for local petitions, with an extension of 31 days after a petition was held invalid;
- established the required number of signatures for a recall petition at the lesser of 5% of active registered electors in a recall area or 100,000 entries;

- set deadlines for election official review of recall petitions and for petitions for review by the Supreme Court regarding disputed entries;
- required ballots to list candidates to fill the term of the recalled official, but such official was ineligible for election to the office, and further required that the candidate petitions contain the lesser of 1% of active registered electors in the recall area or 10,000 entries and that such petitions be filed according to timeliness specified in the measure;
- authorized immediate installation of successful candidate after recall election, but where there was no successor, the vacancy was to be filled at the following November election held at least 90 days after the recall election and allowing for certain vacancies to be filled by appointment;
- prohibited disclosure of recall donors and petition circulator payments or the naming of such circulators;
- prohibited any governmental aid to defeat a recall or pay any recall campaign costs;
- defined "elective" as applying to officials for which an election was held as well as officials who were appointed;
- provided judicial enforcement mechanism;
- superseded all conflicting state and local constitutional, statutory, charter, and other laws and legal provisions.

*Id.* at 81.

These revisions reflected "new recall petition, election, and vacancy provisions." *Id.* at 79. "Collectively, these **changes to the manner in which recall elections are triggered and conducted** constitute a single subject." *Id.* at 83 (emphasis added); *see also id.* at 84 (summarizing this subject as "preemptive changes to the manner in which state and local recall elections are triggered and conducted").

The Court also found the measure contained another subject, expanding recall to non-elected state and local officers. *Id.* As such, it violated the single subject requirement.

However, the Court specifically noted, "Initiative #76 contains **at least** two subjects." *Id.* (emphasis added). The Court expressly reserved judgment on the other single subject claims advanced by objectors in that matter and noted, "We need not and do not decide this issue because Initiative #76 contains at least two separate and distinct subjects in violation of the article V, section 1(5.5) of the Colorado Constitution." *Id.*, n.2. Besides the manner of triggering and conducting a recall election, the topics alleged to be contained in #76 and in #73 include "elimination of the single subject requirement of recall petitions, and allowance of five different types of officials to be recalled by the same petition." *Id.*

Initiative #73 does not limit itself to procedural aspects of the right of recall. It changes the substance of the right of recall in ways that are neither necessary nor proper as part of the subject of triggering and conducting recall elections. Moreover, it does so in ways that are hidden from voters. For example and as explained below, voters would not intuit that recall petitions will become political shotguns, used to recall multiple officials from unrelated offices. Neither would they intuit that a person's recall from one office bars him or her from holding any elected office for six (6) years, whether or not the two offices had anything to do with one another or were even at the same governmental level (state vs. county vs. city vs. district).

b. The second subject of #73: eliminating the "single subject" requirement of recall petitions.

Tucked in the middle of the initiative text is the following sentence: "Up to four officials in the same petition area may be listed on one recall petition, but they shall be voted on separately." Proposed Art. XXI, sec. 2(2). In one sentence, the Proponents have obliterated the single subject requirement that has always been part and parcel of recall petitions.

The Constitution does not use the phrase "single subject" in connection with recall elections as it does with initiatives. *See* Colo. Const., art. V, § 1(5.5). But the single subject requirement for recall petitions is apparent from a plain reading

of the existing recall provisions. In all references to the recall of a public official, the Constitution only uses definite articles. *Id.*, art. XXI, § 1 ("procedure hereunder to recall an elective public officer; "a successor of the incumbent sought to be recalled"; "the officer named in said petition"; "the person sought to be recalled"; "a successor to the incumbent"). As a practical matter, the right of recall through petitions is specific to a single elected official.

A set of changes to initiative procedures in addition to an elimination of the single subject requirement for initiatives violates that single subject requirement.

> Although the elimination of the single-subject requirement and procedural measures governing the process by which initiatives are placed on the ballot both relate to the initiative and referendum process, the former serves a separate and discrete purpose from the latter. The procedural measures govern **how** a proponent exercises his right to petition. The single-subject requirement, in contrast, controls **what** an initiative placed on the ballot may contain. The elimination of this requirement, therefore, fundamentally alters the permissible scope of measures placed before the voters for their approval or rejection.

*Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001–02 # 43*, 46 P.3d 438, 446 (Colo. 2002) (emphasis in original). As the Court correctly observed, "A voter of average intelligence would be quite surprised to find out that an initiative purporting to deal with procedural aspects of the right to petition drastically altered the substance of measures on the ballot." *Id.*

In the very same sense, the Proponents here seek to change how the recall process works, but they are also changing the substance of the exercise of recall –

the expanse of officials who are placed on a recall ballot by means of a single petition. In that regard, this measure echoes Initiative 2001-2002 #43, a measure the Court held violated the single subject requirement. *Id.* Amidst a set of procedural changes, Initiative #73 allows for the recall of unrelated officers elected by the same jurisdiction or, alternatively, whole county commissions or city council majorities. The prospect of including one lightning rod official to attract petition signers who inadvertently agree to the recall of other, less controversial officials is real.

The same is true for holding out a recall petition that attracts certain voters to sign it to recall one named official, whereas the same petition is held out to other voters to recall a different named official. Thus, neither official is the reason for 100% of the petition signatures, a fact that makes the per-official signature much lower than the changed number of signatures in this measure. This provision reflects the ability of recall petition organizers to "log roll" – the act of garnering support for their petition from "various factions which may have different or even conflicting interests." *Id.* at 441. Approving "log rolling or Christmas tree tactics," *id.*, in the recall process is a second subject of the initiative.

Certainly in the initiative context, this question is settled law. "The elimination of the single subject requirement constitutes an additional subject unrelated to the procedural requirements which must be satisfied to entitle a

proponent to place his measure on the ballot." *Id.* at 446. This precept applies with equal force to the right of recall. The Title Board erred in setting a title for a measure that is so clearly at odds with the single subject requirement for initiatives.

c. The third subject of #73: allowing four different types of officials to be recalled by the same petition.

The sentence quoted above that allows "[u]p to four officials in the same petition area [to be] listed on one recall petition" contains another surreptitious element.

There is no dispute among the parties that "the same petition area" relates to the common jurisdiction in which a recall petition would have effect. This provision permits, for example, Denver's mayor, an at-large city council person, the city auditor, and the city clerk to be recalled using a single recall petition. *See* Denver Municipal Code § 15-32 ("candidate" includes persons running for mayor, auditor, city clerk and recorder, and city council). There is no obvious or even apparent connection among these officials who could, under #73, be subjected to recall with a single petition. *See* Denver Charter, §§ 2.2.2 (mayor is the chief executive whose duty it is to enforce all laws and ordinances); 3.2.1 (at-large council members are part of the City and County's legislative branch); 5.2.1(A), (D) (auditor conducts financial and performance audits of city agencies and approves city contracts); and 8.1.2(B), (E) (clerk maintains city records and

oversees city elections). Thus, a change that allows these elected officials with unrelated job duties – and thus unrelated reasons for recall – is a major and distinct element of this initiative.

The same underlying flaw applies to another "petition area" – the state as a whole. A person could petition for the joint recall of state executive branch officers who fulfill very different roles: the governor, the lieutenant governor, the state treasurer, the secretary of state, and the attorney general. The statewide recall petition could also include an at-large member of the University of Colorado Board of Regents. C.R.S. § 23-20-102(a), (b) (specifying at-large as well as congressional district representatives).

As a practical policy matter, these officials have no necessary connection with one another and, in fact, may be quite at odds with one another. The governor ensures that state laws are "faithfully executed," acts as commander-in-chief of state's military forces, appoints certain state officers, grants pardons and reprieves, and may convene or adjourn the legislature and veto its enactments. Colo. Const., art. IV, §§ 2, 5-7, 9-12. The state treasurer superintends all state funds. C.R.S. §§ 24-36-101 et seq. The secretary of state maintains state records and oversees elections, including campaign finance regulation. C.R.S. §§ 1-1-107; 24-36-101(1); Colo. Const., art. XXVIII, § (9). The attorney general acts as legal advisor to non-legislative entities within state government, prosecutes all civil and criminal

actions in which the state has an interest, drafts contracts and other writings for the use of the state, defends state employees against certain claims, and exercises powers as appropriate regarding all trusts established for charitable, educational, religious, and benevolent purposes. C.R.S. § 24-31-101 (1)(a), (c), (4.5), (4.7). The at-large Regent is involved in supervising the operations of and directing expenditure of the funds belonging to the University of Colorado system. C.R.S. § 23-20-111.

At any level of government, a single official might be have been critiqued in local newspapers for a public statement or a policy position; the others on the petition might not be associated with this or any controversy. About these latter officials, voters might be supportive, neutral, or even unaware. Signing the petition, though, helps put all four officials up for recall.

There can be little dispute that the affected state officials, who could be placed on the same recall petition, do not always see eye-to-eye. For instance, the attorney general and the secretary of state have vehemently disagreed whether a legislatively adopted plan for redistricting could be implemented. *People el rel. Salazar v.Davidson*, 79 P.3d 1221 (Colo. 2003). The governor and the attorney general have opposed one another over the proper interpretation of the "TABOR" amendment to the constitution. *Mesa County Bd. of Com'rs v. State of Colorado,* 203 P.3d 519, 530-31 (Colo. 2009). The point is, the group that places both

officials on the same petition may do so, despite the fact there is no reason for treating them jointly.

The wisdom for drafting Article XXI to apply to only one incumbent to be recalled is apparent. Each incumbent must stand on his or her own merits, and the act of removing a person from public office is specific to the individual at issue. "Obfuscating the repeal of such a fundamental requirement within the folds of a complex initiative purporting to deal only with the procedural right to petition violates this (single subject) provision." *# 43, supra*, 46 P.3d at 447. There is no reasonable argument that authorizing the recall of various officials who simply happen to be elected from the same electoral area is just another recall "procedure." It is a hidden subject that could only comprise its own initiative.

The Title Board is required to protect against maze-like measures, and where it fails to do so, this Court should correct the Board's failure.

d. The fourth subject of #73: changing qualifications to hold office for state and county officials.

The measure changes qualifications for all state and county officials, no matter what the office. Specifically, #73 imposes a restriction on every elected office in the state. "Recalled officials and those who resign during a recall process shall not be any official for six years." Proposed Art. XXI, § 2(9).

Colorado law already specifies the qualifications to hold office at the state and county levels. *See, e.g.,* Colo. Const., art. IV, § 4 (qualifications of executive branch officers at the state level address age, citizenship, and for the attorney general, status as a licensed attorney in good standing); art. V, § 4 (qualifications of state legislators address age, citizenship, and residency within a district); art. XIV, § 10 (qualifications of county officers address status as a qualified elector and a resident in the county for at least one year). Attempts to change these qualifications are outside of existing legislative authority. For example, the legislature cannot simply add to the constitutional qualifications to hold a county office such as county assessor. *Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1208 (Colo. 1994) (legislature could not mandate that county assessors obtain an appraiser's license as a condition to holding office).

Of course, the Constitution could be amended to include such additional qualifications, but that amendment is not consistent with and thus is distinct from existing law. As such, it would be its own subject. Thus, this aspect of #73 is not a mere detail of a proposal that seeks to change recall petitioning and election procedures.

Adding changes to the qualifications of a governmental official to hold office is its own subject. *In re Title for 1999-2000 #104*, 987 P.2d 249, 257 (Colo. 1999) (qualifications of appointed judges is a subject separate from qualification of

executive branch officials who perform a function related to the judiciary, the judicial performance commission). Here, changing the conditions that must be met by county officers (or state officers) to hold office does not run clearly and necessarily from a measure about the procedures by which the recall elections themselves are triggered and conducted.

This additional qualification for office would apply to an official who, after a successful recall election, is elected or appointed to fill a vacancy, *see* Proposed Art. XXI, §2(9), even if that office is wholly unrelated to the one in which the recall election occurred and exists at a different level of government. The measure addresses whether such a person may "hold" office rather than whether he or she can run for that office. Changes to the prerequisites to hold office are unrelated to triggering and conducting recall elections, and thus fall outside of single subject identified by this Court. *#76, supra*, 333 P.3d at 83.

e. The fifth subject of #73: changing constitutional authority of Denver and Broomfield to determine the qualifications of their officers.

In combination with the specific office qualifications that have been changed as set forth above, the measure also eliminates the ability of the city and county of Denver and the city and country of Broomfield to be the sole arbiters of officials' qualifications through their charters and ordinances. Colo. Const, art. XX, § 2 (qualifications of Denver officers to be established by the city and county of

Denver); art. XX, § 11 (qualifications of Broomfield officers to be established by the city and country of Broomfield); *see also* art. XX, § 6 (qualifications of home rule officers generally). These changes fall outside of the subject of "recall elections" and therefore violated the single subject requirement. *See In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 263-64 (Colo. 1999) (indirect repeal of Denver's "independent control over the selection" of judges was a separate subject).

Currently, Denver and Broomfield are permitted to specify the qualifications for their elected officials. They could, but do not, dictate that a successful recall election affects the inherent capacity of recalled officials to run for other, unrelated offices. In both jurisdictions, the voters are trusted to assess whether a previous recall is relevant to, and a disqualifier from, holding another office.

The Proponents seek to displace the right in these jurisdictions of voters or local officials to determine whether a previous recall has any bearing on a person's capacity to hold local office. Because an official may be recalled for any reason – or no reason – rather than only the commission of an act of malfeasance, *Bernzen v. City of Boulder*, 525 P.2d 416, 418-19 (Colo. 1974) (right of recall "is purely political in nature" and need not be related to "official misconduct"), the fact that voters turn an official out before his or her term is over may have nothing at all to

do with that person's job performance. As such, it may have nothing to do with that person's suitability to perform a different governmental job.

Yet, #73 sets up a standard of "strict liability" for a recalled official; for six years, that person is as unqualified to run for office – any office. And it does so as to every elected office in the state. As just one example, person who is recalled from service as a legislator could not serve as a special district board member or a library district board member for six years.

Notwithstanding existing constitutional authority to the contrary, the voters of Denver and Broomfield, as well as every other home rule jurisdiction, could do nothing to restore the ability of such persons to run for office – any office. The Proponents are not at liberty to change qualifications for every elected office, including in those jurisdictions in which such decision is reserved to the voters and representatives of Broomfield and Denver.

The additional qualification to run for all elected offices in these jurisdictions has no necessary or proper connection to the broad topic of "triggering and conducting recall elections." This limit neither triggers nor has anything to do with the conduct of a recall election. In fact, it governs every election for office ***except*** a recall election. It is therefore a separate subject.

## B. The Title Board failed to set an accurate title, one that communicates the central features of this initiative.

### 1. Standard of review; preservation of issue below.

The Title Board must set titles that "correctly and fairly express the true intent and meaning" of the proposed initiative and "unambiguously state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1–40–106(3)(b). This Court's duty is to ensure that the titles "fairly reflect" the proposed initiative so petition signers and voters will not be misled into supporting or opposing a measure due to the words employed by the Board. *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Burlington*, 830 P.2d 1023, 1026 (Colo.1992).

If the title clearly and concisely summarizes the measure's "central features," the Title Board will be deemed to have done its job, and the title will be upheld. *In re Title, Ballot Title, Submission Clause for 2007-2008 Initiative #61*, 184 P.3d 747, 752 (Colo. 2008). Where, however, the Board has omitted reference to, or mischaracterized, a central element of the measure, the title is legally deficient because voters will be misled, and the title must be sent back to the Board to be corrected. *See Matter of Proposed Election Reform Amendment,* 852 P.2d 28, 34-35 (Colo. 1993).

> The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal, but need not include every detail. They must allow the voter to understand the effect of a yes or no vote on the measure. When they do not, both the title board and this court fail in our respective functions.

*In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22 ("English Language Education")*, 44 P.3d 213, 217 (Colo. 2002).

This issue was presented to the Board at the rehearing and preserved for review. *See* Motion for Rehearing on Initiative 2013-2014 #73 at 3-4.

**2. The title fails to alert voters to central elements in the initiative.**

a. The number of signatures required to trigger recall elections.

The measure would radically change the calculation of required signatures to qualify a recall petition to the ballot. Currently, the signatures required must be 25% of the vote for that office in the last election. Colo. Const., art. XXI, § 1. Under #73, proponents need to gather only "5% of active registered electors in the recall area and shall not exceed 100,000." Proposed Art. XXI, § 2(5).

How great a change does this reflect? In 2014, there were 2,041,605 votes cast in the gubernatorial election. *See* 2014 Abstract of Votes Cast of the Colorado

Secretary of State at 107.[1] Thus, under current law, the proponents would have to collect 25% of that number or 503,651 valid signatures to recall the governor.

Under #73, recall proponents for a statewide office would have to collect signatures of just 5% of active registered electors but in no event more than 100,000 electors. Currently, there are 2,886,853 active registered electors. *See* Total Registered Voters by Status As of Tue. Feb. 2, 2016 of the Colorado Secretary of State at 2.[2] Five percent of that number is 144,343 voters, so the lesser of the two options – just 100,000 – is the number of required signatures. Thus, the signature requirement for a statewide recall would be dramatically reduced – from just over half a million to 100,000 – without informing voters of that fact.

Given that four statewide officials could be placed on one recall petition under #73, any one official would only need to attract 25,000 valid signers (100,000 ÷ 4 = 25,000) in order to place all four on a recall ballot. Thus, the real change in the number of required signatures is a reduction from 503,651 to 25,000.

Yet, the Title Board chose to describe this change simply as "specifying recall and successor election procedures for state and local elective officials." Two

---

[1] http://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2014AbstractBook.pdf (last viewed on February 28, 2016).

[2] http://www.sos.state.co.us/pubs/elections/VoterRegNumbers/2016/January/VoterCountsByStatus.pdf (last viewed February 28, 2016).

years ago, the Board at least included the phrase "altering the number of signatures required to initiate a recall." *#76, supra*, 333 P.3d at 88. This phrase was insufficient to describe the magnitude of the change under that measure, but it barely alerted voters to the fact of the change involved. The ballot title set for #73 did not even do that.

The manner of calculating the required signatures is hardly a detail of implementation. The existing signature requirement of 25% of the number of voters participating in the previous election serves the purpose of "assur[ing] that a recall election will not be held in response to the wishes of a small and unrepresentative minority." *Bernzen, supra*, 525 P.2d at 86. Given the expense and the disruption arising from these elections, voters should at least have been informed that #73 dramatically undermines that check on the acts of "a small and unrepresentative minority." The Title Board failed in its duty to apprise voters of this key element of the measure.

b. The number of officials subject to recall due to just one petition.

As discussed at length above, #73 allows recall proponents to subject four officials from the same petition area to a recall election.

If the Court finds them not to be separate subjects, the expansion of the capacity of a recall petition – from one elected official to four – should have been set forth in the titles. The single subject analysis and the assessment of an

initiative's central elements are, after all, "interrelated." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249, 253 (Colo. 1999). Accordingly, voters should know that the measure:

- eliminates the "single subject" requirement of recall petitions by allowing up to four (4) officials to be recalled by means of the same petition; and
- allows four (4) different types of officials to be recalled by the same petition as long as they are elected from the same petition area.

If the Court finds this change in the most fundamental element of the recall process – the petitioning by concerned voters – not to be a separate subject, this change must nonetheless be disclosed to voters.

c. The calculation for signatures on successor candidate petitions.

Successor candidates would still be required to submit petitions in order to qualify for the ballot. However, "[t]he required number of valid successor petition entries shall be 0.25% of active registered electors in the petition area and shall not exceed 5,000." Proposed Article XXI, section 2(8). In contrast, persons seeking to be candidates to replace a recalled official must collect the number of signatures required to petition onto the regular ballot for that election. C.R.S. §1-12-117(1).

Under existing law, again assuming that the petition for recall applies to the governor, the number of required petition signatures is a total of 10,500 valid

signatures. Current statute requires 10,500 eligible electors from all existing congressional districts (7 x 1,500 = 10,500). C.R.S. § 1-4-801(2)(c)(II). Under #73's formula, the required number of signatures would only be 7,217 signers (.25% x 2,886,853 active registered electors = 7,217). That number would be a 31% reduction from current law.

However, because #73 sets an absolute cap for candidate petitions of 5,000 signatures, the actual signature requirement in this measure is less than half of what current law requires (5,000 ÷ 10,500 = 47.6%). Thus, the task of becoming a successor candidate in a statewide recall has been eased, opening the door to more candidates running for this seat. Because there can be no run-off elections under #73, *see* Proposed Art. XXI, §2(9), the recall election can be determined by something far short of a majority of voters. As such, Proponents' system for electing governmental officials after a recall can be controlled by "a small and unrepresentative minority." *Bernzen, supra*, 525 P.2d at 86. This is a notable change and one that the voters should be informed of in the ballot title.

The importance of this issue is highlighted by another of #73's departures from current law. Initiative #73 does not require geographic dispersion of petition signatures by congressional district. This change changes the contours of even this lesser signature gathering effort, meaning that more replacement candidates could petition onto the ballot as competitors to succeed the recalled incumbent. While

existing law is not to be described by ballot titles, the actual change proposed by an initiative, if it is a central feature, must be addressed. The candidate petition changes would not be generally known to voters, and that failure was error by the Title Board.

d. Restrictions on petition review to ensure the recall should take place.

Initiative #73 provides, "Entries shall be reviewed individually" and, in that regard, prohibits a random sample or statistical model to establish that a recall petition contains the required number of signatures. Proposed Art. XXI, §2(5). Yet, the actual review process authorized is exceedingly limited. "Varied entries with a signature, readable first and last name, street address, and attached affidavit with or without errors shall be presumed valid until a foe disproves validity by clear and convincing evidence in a court review." *Id.*

In other words, the election official cannot strike a signature that has a readable name, an address, and is on a petition form accompanied by an affidavit, regardless of the errors on signature line or the affidavit. That matter is reserved for "a court review." The election official's review is virtually meaningless except to count the number of fully completed lines. Only a court, if a "foe" of the petition seeks judicial review, can correct a faulty sufficiency decision by the handcuffed election official.

Additionally, the affidavit's accuracy has always been deemed a guarantor of legal compliance in the petition circulation process. "The central feature of an affidavit is its assurance, pursuant to oath, that the contents of a subscribed document are, to the subscriber's personal knowledge or belief, true." *Committee for Better Health Care v. Meyer*, 830 P.2d 884, 898 (Colo.1992). That assurance goes by the wayside regardless of the errors committed by the petition circulator. Where the petition is not signed before a notary, the petition may be found invalid, absent evidence that explains the discrepancy. *Fabec v. Beck*, 922 P.2d 330, 342 (Colo. 1996). But such discrepancies will no longer invalidate petition sections and, as such, guarantee circulator truthfulness as reflected in his or her affidavit.

Protections such as these "prevent fraud, mistake, or other abuses in the initiative process" and are "firmly rooted in constitutional soil." *Committee for Better Health Care, supra*, 830 P.2d at 893. Because Proponents seek to uproot such protections, voters should be told that #73 would do so.

Under the terms of #73, there is no remedy where petition circulators conceal their identities by using an untraceable name or an alias on the petition. There is no remedy where a notary public uses a false name to "notarize" the petition section. The General Assembly found these practices to be common in initiative petition circulation in 2008.

> The initiative process relies upon the truthfulness of circulators who obtain the petition signatures to qualify a ballot issue for the statewide

> ballot and that during the 2008 general election, the honesty of many petition circulators was at issue because of practices that included: Using third parties to circulate petition sections, even though the third parties did not sign the circulator's affidavit, were not of legal age to act as circulators, and were paid in cash to conceal their identities; providing false names or residential addresses in the circulator's affidavits, a practice that permits circulators to evade detection by persons challenging the secretary of state's sufficiency determination; and obtaining the signatures of persons who purported to notarize circulator affidavits, even though such persons were not legally authorized to act as notaries or administer the required oath.

C.R.S. § 1-40-101(2)(a)(I).

A reference to the review still permitted by #73 would at least inform voters that the check-and-balance historically built into the petitioning process is absent under the terms of #73. However, because the ballot title is silent on the fact that election official sufficiency reviews will be non-existent and petition circulators may neglect the requirements associated with executing an affidavit, it conceals this central feature of the initiative. That silence was error by the Title Board.

e. Officials who have resigned from office are prohibited from holding any elective office for six (6) years.

The 6-year ban on holding office applies to officials "who resign during a recall process." Proposed Art. XXI, § 2(9).

This portion of the measure is particularly important for voters. Public officials have resigned during a recall petition process.[3] But those officials have

[3] http://www.denverpost.com/breakingnews/ci_24611818/colorado-state-sen-evie-hudak-resign

not actually been recalled, a determination that is made by voters only when the question has been decided by voters at an election.

Nevertheless, under #73, the roles of such officials in the public sector would be ended for six years. As noted above, this precondition to holding any elective office has nothing to do with "triggering and conducting recall elections," the subject of this initiative based on this Court's holding two years ago. *#76, supra,* 333 P.3d at 84. It certainly is unrelated where there is no recall election at all because the official resigned at some point during the recall process. Still, voters should know about this far-reaching effect of #73, and the Board should be directed to correct the title with this provision in mind. Such a change to the title would correct an inaccuracy in the title set.

Currently, the title includes the phrase, "stating that recalled officials shall not be any official for six years." However, one does not need to be "recalled" in order to be banned from office for six years. The Board errs where it misstates the extent of an initiative, *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 215*, 3 P.3d 11, 16 (Colo. 2000) (Court ordered that title be corrected to reflect actual initiative text regarding reach of mining measure to specific, permitted mining operations), and it should be ordered to correct its mistake as to the title set for Initiative #73.

f. Recapping existing campaign finance law concerning reporting by committees opposing the recall of an elected official.

At the rehearing, the Board included the following language in the title: "requiring opposition donations and spending to continue to be public records; and prohibiting identification, reporting, or limitation of donations to recall campaigns and payments to recall petition circulators." The first phrase summarizes current law as encapsulated in Initiative #73. Proposed Art. XXI, § 2(10) ("Opposition donations and spending... shall be public records.")

Committees opposing a recall must already disclose their contributions and expenditures.

> Any issue committee whose purpose is the recall of any elected official shall register with the appropriate officer within ten calendar days of accepting or making contributions or expenditures in excess of two hundred dollars to support or oppose the recall. **Reports of contributions and expenditures shall be filed with the appropriate officer** within fifteen days of the filing of the committee registration and **every thirty days** thereafter until the date of the recall election has been established **and then fourteen days and seven days before the recall election and thirty days following the recall election.**

C.R.S. § 1-45-108(6) (emphasis added). These reports "are public records and shall be open to inspection by the public during regular business hours." C.R.S. § 1-45-109(4)(a).

The Board recognized it was merely stating that the law was unchanged. Its title language specifically stated that these financial disclosures "continue to be"

public records. The Board did so because it sought to highlight that the measure also, as described in the title, exempts the recall proponents from this disclosure requirement. Proposed Art. XXI, § 2(10). But this Court often recognizes that addressing current law in the ballot title is not part of the Board's mission. An effect of the proposed measure, particularly one that reflects a statement of existing law, is not necessary in order for the Board to fulfill its statutory mission in setting ballot titles. *In re Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 246(e)*, 8 P.3d 1194, 1197 (Colo. 2000).

While the Board is not prohibited by statute from describing current law, to do so when it omitted so many key aspects of an initiative was error. Therefore, to comply with the statutory directive to draft a "brief" ballot title, C.R.S. § 1-40-106(3)(b), the Board erred by summarizing current law rather than the major changes that have been addressed herein. The title should be returned to the Board for correction on this count as well.

## CONCLUSION

The Title Board failed to consider the import of this Court's 2014 decision in *#76* that appropriately acknowledged differences between procedures, associated with triggering and conducting a recall election, and substantive elements of the constitution. At least two of those substantive provisions deal with the "single subject" of recall petitions and the qualifications applicable to all

governmental officers. The Board should not have set a title for #73, given these substantive changes without allowing voters to choose among the constitutional revisions they wish to adopt.

Similarly, the title was inadequate in informing voters of key provisions of #73. The Board should have informed voters of the ways in which this measure gives over control of recall petitioning and recall elections to a dissatisfied minority of voters. The percentages of signatures required, as well as the dissipated nature of petition review by election officials, will transform the recall process from a safety valve to something much more chaotic. If that is the popular will, so be it. But voters should know what they are approving, and the Title Board failed to provide that type of notice to them.

The initiative should be returned to the Proponents, or in the alternative, the title should be returned to the Board.

Respectfully submitted this 1st day of March, 2016.

*/s Mark Grueskin*
Mark G. Grueskin, #14621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
Email: mark@rklawpc.com
**ATTORNEY FOR PETITIONER**

## CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF** was transmitted this day, March 1, 2016, via the ICCES electronic filing system to counsel for the Title Board:

LeeAnn Morrill
Matthew Grove
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

And via FedEx overnight to the proponents at:

Mike Spalding
18 Buckthorn Drive
Littleton, CO 80127

David Ottke
3308 S Hannibal St
Aurora, CO 80013

Erin Holweger