

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to Colo. Rev. Stat.
§ 1-40-107(2)
Appeal from the Ballot Title Setting Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2013-
2014 #76 ("RECALL OF STATE AND LOCAL
OFFICIALS")

Petitioner:

Phillip Hayes,

v.

Respondents:

Mike Spalding and Natalie Menten,

and

Title Board:

Suzanne Staiert, Daniel Domenico, and Jason
Gelender.

JOHN W. SUTHERS, Attorney General
SUEANNA P. JOHNSON, Assistant Attorney
General, Atty. Reg. No. 34840*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: 720-508-6155
FAX: 720-508-6042
E-Mail: Sueanna.Johnson@state.co.us
*Counsel of Record

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Case No. 2014SA105

ANSWER BRIEF OF THE TITLE BOARD

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).

It contains 1,888 words.

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

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 (R. , p.), not to an entire document, where the issue was raised and ruled on.

/s/ Sueanna Johnson _____

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
I. Initiative #76 contains a single subject.	2
A. The standard of review and preservation of the issue on appeal.....	2
B. There are not distinct subjects in Initiative #103.	3
II. The title for the Initiative is fair, clear, and accurate.....	9
A. The standard of review and preservation of the issue on appeal.....	9
B. The title sufficiently informs voters of the principal features of the measure.....	9
CONCLUSION	11

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>Bruce v. Hobbs</i> (In re Title, Ballot Title & Submission Clause), 987 P.2d, 243 (Colo. 1999).....	4
<i>Colorado Ethics Watch v. Clear the Bench Colorado</i> , 277 P.3d 931 (Colo. App. 2012)	5, 6
<i>Colorado Republican Party v. Benefield</i> , 2011 Colo. App. LEXIS 1821 (November 10, 2011).....	2
<i>Groditsky v. Pinckney</i> , 661 P.2d 279 (Colo. 1983)	5
<i>In re Proposed Initiative 2001-02 #43</i> , 46 P.3d 438 (Colo. 2002) .	3, 4, 7, 8
<i>In re Title, Ballot Title and Submission Clause</i> , 907 P.2d 586 (Colo. 1995).....	10
<i>In re Title v. John Fielder</i> , 12 P.3d 246 (Colo. 2000)	11
<i>Jones v. Stevinson’s Golden Ford</i> , 36 P.3d 129 (Colo. App. 2001).....	2
<i>Kemper v. Hamilton (In re Title, Ballot Title, and Submission Clause for 2011-2012 #45)</i> , 274 P.2d 576, fn. 2 (Colo. 2012).....	5
<i>Outcalt v. Bruce</i> , 959 P.2d 822,, fn. 2 (Colo. 1998).....	6
CONSTITUTIONAL PROVISIONS	
Colo. Const., art. VI, § 25	6
Colo. Const., art. XXI	5, 6

Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board (the “Title Board”), by and through undersigned counsel, hereby submit their Answer Brief.

STATEMENT OF THE CASE

The Title Board incorporates its Statement of the Case from its Opening Brief.

STATEMENT OF THE FACTS

The Title Board incorporates its Statement of the Facts from its Opening Brief.

SUMMARY OF THE ARGUMENT

The initiative does not contain multiple subjects. The central purpose of the measure concerns the recall of government and judicial officials. The substantive changes and implementations provisions are related and necessary to the central purpose of #76, and do not constitute separate subjects.

The title is fair, clear, and accurate. The title does not need to include all provisions of the measure. The title properly conveys the

central purpose of the initiative so that voters are adequately informed.

The title should be upheld.

ARGUMENT

I. Initiative #76 contains a single subject.

A. The standard of review and preservation of the issue on appeal.

The Title Board concurs with the standard of review set forth by the Petitioner with supplementation of statements made in its own Opening Brief at 5-6, except as noted herein. The Petitioner cites to *Jones v. Stevinson's Golden Ford*, 36 P.3d 129 (Colo. App. 2001) and *Colorado Republican Party v. Benefield*, 2011 Colo. App. LEXIS 1821 (November 10, 2011) for examples of how the courts have interpreted “necessary” and “proper”, respectively, in other contexts. To the Title Board’s knowledge, these cases have never been cited to determine “necessary” and “proper” in the context of ballot titles, and therefore disagree that they are part of the proper standard of review for a single subject analysis. The Proponents did not provide a standard of review.

The Title Board agrees that the Petitioner preserved the issue for appeal.

B. There are not distinct subjects in Initiative #103.

The Petitioner looks to the effect the measure may have in order to argue a violation of the single subject requirement. The Petitioner raises six arguments for why the measure contains separate subjects, including: (1) the measure contains substantive and procedural changes; (2) the measure establishes the substantive right of recall to non-elective officers; (3) the measure establishes the right to recall judicial officers; (4) the measure changes the manner in which a vacancy is filled following a recall; (5) the measure eliminates “the single subject” for recall petitions; and (6) the measure allows up to five officials to be subject to the same recall petition. These arguments should be rejected.

First, substance and procedure may be included together without a single subject violation. The Petitioner mischaracterizes the holding from *In re Proposed Initiative 2001-02 #43*, 46 P.3d 438 (Colo. 2002) (“*In*

re #43”) in order to argue that substantive and procedural changes constitute separate subjects. *In re #43* contained numerous provisions that were unrelated to the changes proposed in the initiative process, specifically a provision that would prohibit the repeal of TABOR as a single subject. *Id.* at 446. This is a significant exclusion by the Petitioner because TABOR is considered multiple subjects, and so any measure that seeks to alter provisions of TABOR will also contain multiple subjects. *Id.*; see also *Bruce v. Hobbs (In re Title, Ballot Title & Submission Clause)*, 987 P.2d, 243, 247 (Colo. 1999) (any measure dealing with a broad portion of TABOR contains multiple subjects). This Court has never held that a measure that contains substantive and procedural changes violates the single subject requirement, so long as the provisions are related and congruous. The substance and procedures in #76 relate to each other and are not disconnected.

Second, defining who may be subject to recall is related to the central purpose of the measure, which is the removal of government officials from office. The measure allows for the recall of certain non-elective and appointed officers, as well as judicial officers. This Court

has allowed for the expansion of individuals who may be subject to recall, although they may not be officers of a town, city, or county. *See Groditsky v. Pinckney*, 661 P.2d 279, 282 (Colo. 1983) (holding there is no constitutional prohibition in article XXI, section 4 against including directors of special districts as elective officers subject to recall). Accordingly, expansion of that right through a measure to include non-elective and appointed officers does not constitute a separate subject. The Petitioner also focuses on the “sheer breadth” the measure would have if certain non-elective and appointed persons were subject to recall, which is inappropriate for a single subject analysis. *See Kemper v. Hamilton (In re Title, Ballot Title, and Submission Clause for 2011-2012 #45)*, 274 P.2d 576, 581, fn. 2 (Colo. 2012) (the Court rejected an argument that the measure would so “drastically alter the landscape of Colorado water law that it could not possibly contain a single subject” on grounds that it may not opine on how the initiative may be applied).

The Title Board agrees with the Petitioner that judicial officers are not currently subject to recall under Colo. Const., art. XXI. *See Colorado Ethics Watch v. Clear the Bench Colorado*, 277 P.3d 931, 935

(Colo. App. 2012) (the recall provisions of the constitution do not refer to judges or justices). Thus, the argument implying a current right of recall for judicial officers in the Title Board's Opening Brief was in error. Until 1967 when Colo. Const., art. VI, § 25 was passed which subjected judicial officers to retention, they were historically elected, and therefore within the ambit of Colo. Const., art. XXI. Because there was a time when judicial officers were subject to recall, it is not unrelated to once again include them in that constitutional provision.

Third, the change in the vacancy procedure for recall is an implementing provision related to the central purpose of the measure. The right of recall is related to the right to elect the person's successor. While the measure may result in an office being vacant until the next November election if a recalled officer's successor is not elected at the recall election, this Court may not look to the effects of the measure. *See Outcalt v. Bruce*, 959 P.2d 822, 825, fn. 2 (Colo. 1998) (the Court noted that it is neither appropriate nor possible to attempt to predict all the effects of an amendment in the pre-election phase).

And finally, the Petitioner argues that the procedural change that allows for five members of one government to be included on one petition violates the single subject of recall and is a hidden separate subject to voters. The Petitioner concedes that there is no explicit single subject requirement for recall as there is for initiatives. *See* Pet'r Opening Brief at 15. To the extent recall mandates a single subject, the measure does not alter that requirement, as the provision concerns *how* the recall of five individuals is initiated for placement on the ballot, but it does not change *what* the content of the ballot includes for voter approval.

The Petitioner cites to language from *In re #43* in which this Court held that a measure that sought procedural changes to the initiative process, as well as repealing the single subject requirement constituted two subjects. Pet'r Opening Brief at 16. The Court reasoned: "The procedural measures govern how a proponent exercises his right to petition. The single subject requirement, in contrast, controls what an initiative on the ballot may contain." *In re #43*, 46

P.3d at 446. Unlike *In re #43*, #76 does not change *the substance* of what would appear on the ballot.

The Title Board determined that because each recalled officer would be voted on separately by the electorate, the process that allows five individuals to be named on a single petition concerns the method by which those individuals are placed on the ballot, but does not affect the substantive vote to determine whether each official is recalled. Thus, the reasoning from *In re #43* is distinguishable. Because each individual placed on the ballot for recall would have to be voted on separately, there is no hidden subject for voters – either now at this stage during the title approval process or if this measure passed and voters of a particular governmental entity were presented with a petition for recall of five officers.

II. The title for the Initiative is fair, clear, and accurate.

A. The standard of review and preservation of the issue on appeal.

The Title Board concurs with the standard of review set forth by the Petitioner with supplementation of statements made in its own Opening Brief at 18-20. The Proponents did not include a standard of review. The Title Board agrees that the Petitioner preserved the issue for appeal.

B. The title sufficiently informs voters of the principal features of the measure.

The Petitioner raises three arguments to support the title set by the Title Board fails to disclose material information about the measure. The Petitioner's arguments should be rejected.

First, the Petitioner argues that the title should disclose the five key components of the measure including: (1) that certain appointed officers may be recalled; (2) judicial officers for the first time are subject to recall; (3) a vacancy of a recall officer's position may be vacant until

the next election; (4) elimination of the single subject requirement; and (5) allows for up to five officials to be named on a single petition. Pet'r Opening Brief at 21-22. The title informs voters that certain “non-elective officers” may be recalled – this encompasses both appointed positions and judicial officers. The title also informs voters that the measure sets forth procedures “to initiate, conduct, protest, and enforce recall elections.” The title is sufficient to inform voters that procedures have changed but it need not go into specifics. *See In re Title, Ballot Title and Submission Clause*, 907 P.2d 586, 598 (Colo. 1995) (a title does not need to disclose the numerous changes for petition procedures, otherwise the goal of brevity in titles would be defeated).

Second, the Petitioner argues that the Title Board fails to inform voters that paid circulators may no longer be identified. The Proponents indicate this measure affects the identification of *payments* made to the paid circulators, and not the identities of the paid circulators themselves, as the circulator petitions and affidavits remain public records. Proponent Opening Brief at 10. The title sufficiently informs voters whether they want to have certain campaign finance

requirements altered for recall petitions, and does not affect the ability of electors to challenge or protest a recall petition.

Finally, the title informs voters that the signature requirement to initiate a recall is changed by the measure. The Petitioner uses an example of the signatures required for the recall of the governor to argue that the number of signatures required is significantly reduced. This signature provision in the title is written in a neutral manner, however, as it is unclear the application of this provision based on the locality of the official and the population at that time. *See In re Title v. John Fielder*, 12 P.3d 246, 257 (Colo. 2000) (speculation of the future effects of a measure is beyond the Court's scope of review).

CONCLUSION

Based on the foregoing authorities and reasons, this Court should affirm the actions of the Title Board and approve the title for #76.

Respectfully submitted this 19th day of May, 2014.

JOHN W. SUTHERS
Attorney General

/s/ Sueanna P. Johnson

SUEANNA P. JOHNSON, 34840*

Assistant Attorney General

Public Officials Unit

State Services Section

Attorneys for the Title Board

*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that, on this 19th day of May, 2014, I duly served this **ANSWER BRIEF OF THE TITLE BOARD** on all parties via ICCES or overnight delivery, addressed as follows:

Mark Grueskin
Recht & Kornfeld, P.C.
1600 Stout Street, Suite 1000
Denver, CO 80201

Natalie Menten
1755 South Carr Street
Lakewood, CO 80232

Mike Spalding
18 Buckthorn Drive
Littleton, CO 80127

/s/ Sueanna Johnson