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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title 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**	▲ COURT USE ONLY ▲
Attorneys for Petitioner: 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@rechtkornfeld.com	**Case No. 2014SA105**
PETITIONER'S ANSWER 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).

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s/ Mark G. Grueskin
Mark G. Grueskin
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INTRODUCTION

Initiative #76 will reconfigure government by expanding the right of recall beyond recognition. Its titles are flawed and need to be invalidated (to the extent they violate the single subject requirement) or corrected (to the extent they violate the "clear titles" requirement).

LEGAL ARGUMENT

I. Initiative #76 violates the single subject requirement.

The Title Board is correct, of course, that procedural and substantive changes can be grouped together in the same initiative without violating the single subject rule. Title Board Opening Brief at 11-14. What is not tolerated is using procedural changes to mask one or more substantive changes voters would not anticipate. That is precisely what Respondents Menten and Spalding ("Menten") have done. In the guise of tweaking the procedures associated with the right of recall (the acknowledged first subject of their measure), they have fundamentally expanded that right in ways that it could not now be applied. As such, this measure is a far cry from just changing the process for recalling elected officials.

A. Authorizing the recall of appointed officials

The Title Board's citation of *Groditsky v. Pinckney*, 661 P.2d 279, 281 (Colo. 1983) is misplaced. Title Board Opening Brief at 8-9. That case only

stood for the proposition that any elective official could be recalled and that local level elected officials, such as school board members and special district members, would no longer be immune from the exercise of this right. It did *not* extend or countenance some anticipated or inherent ability to state and local recall appointed officials. *See* Proposed Art., XXI, sec. 1.

B. Authorizing the recall of judicial officials

The extension of recall to all a wide array of "judicial officials" is also an expansion of extraordinary proportion. *See* Proposed Art., XXI, sec. 1 Colorado moved away from an election and recall system when it replaced politicized election of judges with the current appointment and retention process.[1] Clearly, this is an additional subject of Initiative #76.

The Board's assertion that this measure just adds to the "cumulative and concurrent" remedies for addressing judges is error. Title Board Opening Brief at 10-11. Establishing a new system that alters how, when, and why any judicial official in the state at any level of government could be placed on a ballot – here, a recall ballot – is not just another remedy. *See In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1080 (Colo. 2010) (dramatic change to legislative powers, in addition

[1] The Title Board overlooked the change from election of judges to retention of judges in asserting that judges can currently be recalled. Title Board Opening Brief at 9-10.

to enactment of new tax, represented multiple subjects in an initiative). At a minimum, this provision applies to judges, ALJs, hearing officers, and any official whose decision-making is quasi-judicial in nature. That substantive change is not a mere procedure; it is a major legal shift and thus a second subject.

C. Authorizing irremediable vacancies in office

The hidden manner of creating vacancies in office is yet another subject. *See* Proposed Art. XXI, sec. 2(8). The provision that requires vacancies that result from recall elections where no successor qualifies be filled only at the next November election means that some or many subordinate, appointive offices that are now subject to recall would be unfilled. Just as voters "might be surprised to learn that the initiative, if adopted, would deprive the legislators they elect from exercising any authority over the basin roundtables and the interbasin compact committee for a substantial period of time," *id.* at 1079, voters would also be surprised to find that they had approved a so-called "government accountability" measure, *see* Proposed Art. XXI, sec. 1 ("This article intends to increase accountability of public servants"), only to find that no one would fill those offices for months, thus truly minimizing government effectiveness. This is not a procedure in how to conduct recall, *see* Title Board Opening Brief at

15-16, but a fundamental shift away from ensuring that governments throughout Colorado are staffed to fulfill their intended roles. As such, it is yet another subject of this initiative.

D. Five-in-one recall petitions

Initiative #76 allows for five officials in the same government to be recalled with the same petition, thus eliminating the effective single subject requirement for recall petitions. See Proposed Art. XXI, sec. 3(2). Menten insists that this change allows for administrative ease in checking petitions. "This efficiency reduces the signature verification burden by up to 80%, since all signers are in the same recall area." Respondents' Brief at 6.

What this requirement really accomplishes is a reduction in the signature threshold for each official on a recall petition to 20% of the newly required number of signatures. If 20% of signers sign the petition to recall Official A, and 20% of signers each sign to recall Officials B, C, D, and E, then the signature requirements to recall any individual official have been lessened beyond what is portrayed in the initiative text. For example, a petition circulated with the names of city council members from Districts 1, 2, 3, 4, and 5 needs only 20% of the signatures for each, as compared to a recall petition containing a single council member's name.

The single subject rule was designed to "protect[] against voter fraud and surprise caused by items concealed within a lengthy or complex proposal." *Id.* at 1077. This is just such a surprise.

The same can be said of the fact that the measure allows for five different types of officials in the same government to be recalled by means of a single recall petition. Five officials holding five unrelated offices could be recalled for five very different reasons; yet, the recall petition would present an all-or-nothing choice for signers. "Recall log-rolling" is thus another subject of this initiative.

The single subject rule's goal is to "to prevent proponents from joining incongruous subjects in the same measure, thereby ensuring that each proposal depends on its own merits for passage." *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001–02 # 43*, 46 P.3d 438, 441 (Colo.2002). The Constitution's recall provisions refer to a recalled official in the singular, and it would be incongruous to have multiple officials holding distinct and unrelated offices to now be recalled by means of a single petition. This change to the de facto single subject rule for recall petitions is a second subject.

II. The title set for #76 violates the clear title requirement.

A. The titles should disclose the measure's other topics.

The titles indicate that the measure applies to "elective and non-elective" officials, but voters would never know from that phrase alone that an incalculable number of appointive officials and officials whose functions are judicial in nature are covered by this measure. The Title Board would not have disserved the goal of brevity in titling by including "elected, appointed, and judicial," modifying "officials," in these titles.

Likewise, it would have been simple to state that the measure "prohibits the filling of certain vacancies until November elections" so that voters know they face the real prospect of turning out office holders for a prolonged period of time. Nor would it have lengthened the titles notably to say that the measure "permits the recall of five officials from the same government on one petition." A small head's up about the likely rush of recalled officials under #76 would have allowed for a title that would not mislead voters about the measure.

B. The titles should address the measure's preemption of disclosure about paid circulators.

Hayes and Menten differ over the meaning of the language in Initiative #76 that relates to payment of paid circulators. This provision states, "no law, rule, or court shall prohibit, regulate, or limit recall or

candidate petition circulator payments or recall donors, or require naming paid circulators or recall donors." Proposed Article XXI, Section 3(1).

Menten states that petitions will be public record and that this text "says payments to circulators shall be confidential." Respondents' Opening Brief at 10 (emphasis in original). Initiative #76 does not require that petition forms be public record, making this statement just speculation on the Menten's part. More to the point, the fact that no law or rule can in any way "regulate" based upon payment for petition circulation means that one or more existing statutes will be invalid if this measure is adopted. *See, e.g.,* C.R.S. §§ 1-40-112 (requiring circulators receiving compensation to wear badges stating "PAID CIRCULATOR); 1-40-121(2) (requiring reporting of dates, hours, gross wages paid, and false addresses of "all circulators who were paid to circulate a section of the petition). Voters should know that protections such as these will be a thing of the past under Initiative #76.

C. The titles should mention the significant changes to signature requirements needed to trigger recall elections.

Menten agrees the Board's description of the new minimum signature requirement was improper. See Proposed Art. XXI, sec. 2(4). The titles refer to "altering the number of signatures required to initiate a recall," a statement Menten wants stricken. Respondents' Opening Brief at 10 (emphasis added). Her proposal would further conceal this central feature.

A number that is "altered" can go up or down. *See Green Shoe Mfg. Co. v. Farber*, 712 P.2d 1014, 1017 (Colo. 1986), citing Black's Law Dictionary 905 (5th Ed. 1979) (an alteration "may be characterized, in quantitative sense, as an increase or a decrease"). The current language tells voters so little as to be misleading, leaving them to wonder if more or fewer signatures will be needed to get recall matters onto the ballot. This change in required signatures is a fundamental part of Initiative #76. A title must resolve confusion, not promote it. C.R.S. § 1-40-106(3)(b). The Title Board erred in barely describing this central feature of this measure.

CONCLUSION

Proponents violated the single subject requirement, and the Board violated the clear titles requirement. Its title decision should be reversed.

RESPECTFULLY SUBMITTED this 19th day of May, 2014.

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CERTIFICATE OF SERVICE

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