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<tr><td>SUPREME COURT OF COLORADO
2 East 14th Ave.
Denver, CO 80203
<hr>Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Board
<hr>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</td><td>DATE FILED: April 29, 2014 6:31 PM

▲ COURT USE ONLY ▲</td></tr>
<tr><td>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</td><td>Case No. 14SA105</td></tr>
<tr><td colspan="2" align="center">PETITIONER’S OPENING BRIEF</td></tr>
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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:

☐ It contains ______ words.

X 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 Petitioners

TABLE OF CONENTS

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW....................1

II. STATEMENT OF THE CASE..1

A. Statement of Facts..1

B. Nature of the Case, Course of Proceedings, and Disposition Below.............2

III. SUMMARY..4

IV. LEGAL ARGUMENT..5

A. The Title Board lacked jurisdiction to set a ballot title..............................5

1. Standard of review; preservation of issue below..............................5

2. Initiative #76 violates the constitutional single subject requirement..6

a. The primary subject of #76: procedural changes to the right of recall..6

b. The second subject of #76: recall of appointive officials...........9

c. The third subject of #76: recall of judges................................12

d. The fourth subject of #76: prohibiting timely replacement of certain recalled officials..14

e. The fifth subject of #76: eliminating the "single subject" requirement of recall petitions..15

f. The sixth subject of #76: allowing five different types of officials to be recalled by the same petition......................................17

B. The Title Board failed to set an informative title, one that communicates the central features of this initiative..18

1. Standard of review; preservation of issue below 18

2. The title fails to alert voters to central elements in the initiative 20

a. The five subjects, other than recall petition procedures, should have been disclosed to voters in the titles 20

b. The title should disclose that anti-fraud measures are curtailed by #76 22

c. The title should inform voters about changes to the signatures required to qualify a recall petition to the ballot 23

V. CONCLUSION 24

TABLE OF AUTHORITIES

Cases

Buckley v. Chilcutt, 968 P.2d 112, 119 (Colo. 1998)..........22

Colorado Ethics Watch v. Clear the Bench Colorado, 277 P.3d 931 (Colo. Ct. App. 2012)..........12

Colorado Republican Party v. Benefield, 2011 WL 5436483, ¶12 (Colo. Ct. App. 2011)..........5

Fraternal Order of Police, Colorado Lodge #19 v. City of Commerce City, 996 P.2d 133 (Colo. 2000)..........11

Groditsky v. Pinckney, 661 P.2d 279, 281-82 (Colo. 1983)..........10,12,13

Guyer v. Stutt, 191 P. 120, 122 (Colo. 1920)..........10

Hoffler v. Colo. Dept. of Corrections, 27 P.3d 271, 274 (Colo. 2001)..........13

In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Burlington, 830 P.2d 1023, 1026 (Colo.1992)..........19

In re Proposed Initiative Adding Section 2 to Article VII, 900 P.2d 104 (Colo. 1995)..........13

In re Proposed Initiative Petition Procedures, 907 P.2d 586 (Colo. 1995)..........8

In re Proposed Initiative for 1997–1998 # 64, 960 P.2d 1192 (Colo. 1998)..........11,12

In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104, 987 P.2d 249 (Colo. 1999)..........5, 20

In re Title, Ballot Title, Submission Clause for 2007-2008 Initiative #61, 184 P.3d 747 (Colo. 2008)..........19

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 (Colo. 1999)....................5

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 (Colo. 2002)....................20

In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001–02 # 43, 46 P.3d 438 (Colo. 2002)....................6

Jones v. Stevinson's Golden Ford, 36 P.3d 129 (Colo. Ct. App. 2001).....5

Loonan v. Woodley, 882 P.2d 1380, 1388-89 (Colo. 1994)....................22

Matter of Proposed Election Reform Amendment, 852 P.2d 28 (Colo. 1993)....................15, 19

Shroyer v. Sokol, 550 P.2d 309, 311 (Colo. 1976)....................6

Statutes

C.R.S. § 1–40–106(3)(b)....................19

C.R.S. § 1-40-106.5....................13

C.R.S. § 1-40-107(2)....................3

Other Authorities

Colo. Const., art. IV, § 4....................13

Colo. Const., art. IV, § 8....................14

Colo. Const., art. V, § 1(5.5)....................15

Colo. Const., art. VI, § 25....................12

Colo. Const., art. XIII....................12

Colo. Const., art. XXI....................1,9,18

Colo. Const., art. XXI, § 1....................15,23

Colo. Const., art. XXI, § 3 21
Colo. Const., art. XXI, § 4 10

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 six separate subjects, including changes to the recall process as well as allowing the recall of appointed public officials, allowing the recall of judges, prohibiting the immediate replacement of certain recalled officials, eliminating the single subject requirement for recall petitions by allowing five officials to be recalled via a single petition, and allowing five different types of officials to be recalled by means of the same petition.

Whether the Board erred by setting a misleading title that does not convey or insufficiently conveys the five subjects other than recall procedures.

Whether the Board erred by setting a misleading title that does not inform voters certain circulator names will no longer be made public as an anti-fraud assurance.

Whether the Board erred by setting a misleading title that does not inform voters about the radically changed manner of calculating the minimum number of signatures required to recall a governmental official.

STATEMENT OF THE CASE

A. Statement of Facts.

Initiative #76 would amend Article XXI of the Colorado constitution such that any elective officer in any state or local legislative, executive, or judicial office

is eligible for recall. Additionally, non-elective officers can also be eligible for recall, when that person is the head, a board member, or a judicial officer of any state or local government entity that has governmental power or collects, spends, borrows, or loans public money.

An elected or non-elected officer who is recalled pursuant to the procedures set forth in the measure, as well as those officers who resigned or were removed from office during their recall process, shall not be any officer (as defined above), for the next four years. Up to five officers can be listed on one recall petition. Additionally, the measure eliminates campaign finance reporting by persons or entities supporting any recall effort, whether it is for an elective, non-elective, or judicial officer.

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

Mike Spalding and Natalie Menten (hereafter "Proponents") proposed Initiative 2013-2014 #76 (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 March 19, 2014 to establish the Proposed Initiative's single subject and set a title. The following title was set at that time:

> Shall there be an amendment to the Colorado constitution concerning the recall of government officers, and, in connection therewith, defining which officers are eligible for recall; describing procedures and requirements to initiate, conduct, protest, and enforce recall elections; prohibiting any officer who is recalled, resigns, or is removed during the recall process from serving in certain offices for four years; and prohibiting the application of certain campaign finance requirements to recalls?

On March 26, 2014 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 April 2, 2014, 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 the recall of government officers, and, in connection therewith, defining which officers are eligible for recall, including certain non-elective officers; describing procedures and requirements to initiate, conduct, protest, and enforce recall elections; altering the number of signatures required to initiate a recall; prohibiting any officer who is recalled, resigns, or is removed during the recall process from serving in certain offices for four years; and prohibiting the application of certain campaign finance requirements to recalls?

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

If ever the value of the single subject requirement for initiatives was called into question, Initiative #76 would be the answer to that challenge. It expands the right of recall to include most appointed and all judicial officers. It eliminates what is effectively a single subject requirement for recall petitions by allowing five persons to be recalled using the same petition. And those five individuals do not even need to be officials in the same branch of government; they can be an array of elected, appointed, and judicial officers. Finally, the measure institutionalizes certain vacancies resulting from recalls by prohibiting the filling of vacant offices until the next November election.

None of these issues were adequately described in the ballot title, which is therefore legally insufficient. Similarly, the Title Board failed to inform voters of the constitutional repeal of anti-fraud measures or the striking change that will reduce the number of required signatures in order to recall officials throughout Colorado. Even if it were a single subject, this measure is not adequately described in the title so as to allow voters to cast ballots with some minimum basis of knowledge about the key aspects of the initiative.

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.

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). Generally speaking, something is "necessary" if it is essential or indispensible and is "proper" if it is authorized by law. *Cf. Jones v. Stevinson's Golden Ford*, 36 P.3d 129, 133 (Colo. Ct. App. 2001) (citing statute defining "necessary" for certain contract purposes); *Colorado Republican Party v.*

Benefield, 2011 WL 5436483, ¶12 (Colo. Ct. App. 2011) (meaning of undefined terms, including "proper," dictated by context and their common usage).

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 2013-2014 #76 at 2.

2. Initiative #76 contains six subjects.

In many respects, the Court decided this case twelve years ago. In *Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001–02 # 43*, 46 P.3d 438 (Colo. 2002), the Court held that initiative proponents can alter initiative procedures in significant ways, and they can do the same to substantive rights implicated by the initiative process. They simply cannot do both under the same banner, as thoroughly changing such processes ***and*** circuitously expanding or limiting such rights represent separate and distinct purposes. *Id.* at 446. Given the equivalent treatment given to the fundamental rights of initiative and recall, *Shroyer v. Sokol*, 550 P.2d 309, 311 (Colo. 1976), the inclusion of exhaustive procedural changes and major, unrelated, substantive changes to the right of recall reflects the same constitutional deficiency.

a. The primary subject of #76: procedural changes to the right of recall.

Among its many provisions, Initiative #76 alters a startling number of procedures for recalling public officials including but not limited to:

- changes the number of proponents to five (5) to initiate a recall effort, Section 2(1);
- states which election officials shall conduct recall elections for designated offices, *id.*;
- requires the election officials to deliver a requested sample petition to proponents within two (2) days of receiving a request, Section 2(2);
- requires 100 signature lines on each petition, *id.*;
- mandates the size of a recall petition page at 8½ inches by 14 inches, *id.*;
- sets petitioning time at 180 days for statewide petitions, Section 2(3);
- sets petitioning time at 90 days for local petitions, *id.*;
- provides for a 30-day extension after an election official invalidates a petition, *id.*;
- establishes a new manner of calculating the number of signatures required for state and local recalls, Section 2(4);
- provides the type of information to be completed by signers on the petition form, *id.*;
- mandates review criteria for petition signatures to be used by election officials, *id.*;
- establishes time periods for review and appeal of election official decisions, Section 2(5);

- requires certain wording on recall ballots, Section 2(6);
- establishes the process for nominating successor candidates, Section 2(7);
- establishes the number of signatures required for a successor candidate petition, *id.*;
- sets the timeframe for circulation and submission of candidate petitions, *id.*;
- sets a timeframe for review of such petitions, *id.*;
- establishes criteria for petition circulation and court review of circulator activities, Section 3(1);
- requires listing of officers subject to a recall petition on the secretary of state's website, Section 3(2); and
- provides for enforcement in the district courts according to a specific timeline set forth. Section 3(3).

In short, the initiative is a "soup-to-nuts" listing of new recall procedures.

There is no single subject violation where proponents suggest a measure that contains "a single, if quite general, subject." *In re Proposed Initiative Petition Procedures*, 907 P.2d 586, 590-91 (Colo. 1995). Had this measure been limited to "how a citizen exercises his right to petition – in other words, the actual mechanics of how a proponent goes about placing" a recall question on the ballot, the proposal "would obviously" be procedural in nature and thus a single subject. *#43, supra,* 46 P.3d at 443.

Initiative #76 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 recall procedures. Moreover, it does so in ways that are hidden from voters who, frankly, would be shocked by the systematic changes to our representative form of government that would result from enactment of this measure.

b. The second subject of #76: recall of appointive officials.

"Any non-elective officer is eligible for recall...." Section 1. Non-elective officers are defined with stunning breadth. For purposes of this recall expansion, the sole requirement to be a covered official is that the person be either "the head [or] a board member" of "any" state or local authority, agency, commission, department, division, enterprise, bureau, district, office, or board or other government entity that has governmental power or collects, spends, borrows, or loans public money. *Id.*

The Proponents here assert that recall of non-elective officials is already permitted and that they are actually narrowing the recall right. That statement is legally incorrect, as this Court has been clear: Article XXI's right of recall applies to officials that have been **elected** at some level of government. Therefore, allowing voters to recall appointed officers is a second subject.

The proponents argued to the Board that the Constitution already permits recall of these officials, citing this sentence in the Constitution:

> Every person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers, each of which said elective officers shall be subject to the recall provision of this constitution.

Colo. Const., art. XXI, § 4.

This Court has actually addressed this provision, including the clarity of the words chosen by the drafters. "It is practically impossible to understand or construe this section because of its ambiguity." *Guyer v. Stutt*, 191 P. 120, 122 (Colo. 1920). Nevertheless, the reach of this sentence is not nearly what the Proponents believe it to be, a legal conclusion accepted by the Title Board. Instead, the right of recall is limited to elected officials.

> We perceive the intent of the framers of the article XXI, section 4 of the Colorado Constitution to be clear: Every elective officer who discharges a governmental function is subject to recall, provided there is a constitutional provision or enabling legislation prescribing the procedure to be followed.

Groditsky v. Pinckney, 661 P.2d 279, 281-82 (Colo. 1983) (emphasis added). The point of the language in question is not to make appointed enterprise board members or division chiefs subject to recall. Instead, it prevents the unlawful delegation of constitutional authority by mandating that there be an elected official

who is accountable for the decisions of his or her appointees. *Fraternal Order of Police, Colorado Lodge #19 v. City of Commerce City*, 996 P.2d 133, 135-37 (Colo. 2000). In that respect, this provision does not expand the right of recall but acts as another assurance that there will be responsive, representative government. *Id.* The Title Board was aware of this fact, Motion for Rehearing at 2, but agreed to set a title anyway. That act was error.

The sheer breadth of this change would alter the essence of government as we know it. Under the measure, the recall process would apply to someone in government merely because he or she sits on a local historical and architectural review commission (as a commission board member), is a member of the Colorado Bridge Enterprise board (as an enterprise board member), or heads up the Division of Property Taxation within the Department of Local Affairs (as a division head). Individuals who serve on a county scientific and cultural facilities district board or are appointed to the Colorado Housing Finance Authority may be recalled as persons who do work for a government entity that "collects, spends, borrows, or loans public money." The examples are boundless. And that is both the Proponents' intent and a signal that the single subject requirement has been violated. If an entire branch of government cannot be a single subject, a newly created right to recall all appointees serving throughout all of state and local government cannot be a part of the subject of recall election procedures. *See In re*

Proposed Initiative for 1997–1998 # 64, 960 P.2d 1192, 1200 (Colo. 1998) ("If the entire judicial branch were regarded as a single subject, incongruous and disconnected provisions could be contained in a single initiative and the very practices the single subject requirement was intended to prevent would be facilitated.").

c. The third subject of #76: recall of judges.

Since Colorado ended the practice of electing judges, judges have been appointed officers subject to retention elections. *See* Colo. Const., art. VI, § 25. Administrative law judges and hearing officers are appointed but are not subject to the retention requirement. Yet, they too would be subject to the expanded right of recall as "a judicial officer" of "any state or local agency..., department..., or other government entity." Section 1 of Initiative #76.

As noted above, the existing right of recall extends only to elective officers. *Groditsky, supra,* 661 P.2d at 281-82. Judges are clearly not in that category. "The recall provisions in the Colorado Constitution and statutes do not refer to justices or judges." *Colorado Ethics Watch v. Clear the Bench Colorado*, 277 P.3d 931, 935 (Colo. Ct. App. 2012). Judges and justices, as "judicial officers," are subject to the prospect of impeachment but only for "high crimes or misdemeanors or malfeasance in office." Colo. Const., art. XIII, § 2; *Groditsky, supra*, 661 P.2d at 282. A person may be recalled from office without crossing these thresholds.

"Recall, on the other hand, may be used for a purely political reason." *Id.* at 283. Officials may be recalled for any act at all "regardless of whether the person is discharging his or her duties consistent with his or her abilities and conscience." *Id.* Thus, the proposed expansion of the right of recall to judges and justices is a major, substantive, undisclosed change in the law that is unrelated to petition procedure changes outlined above.

Moreover, the inclusion of persons performing judicial duties in the employ of a governmental agency is another step away from a mere revision of existing recall procedures. Administrative law judges and hearing officers perform a quasi-judicial role. In certain instances, administrative officials do as well. *See Hoffler v. Colo. Dept. of Corrections*, 27 P.3d 271, 274 (Colo. 2001) (Personnel Board performs quasi-judicial function in deciding disciplinary proceedings) (citing cases holding that Chiropractic Board members and Parole Board members also perform quasi-judicial functions). Voters would have no idea that this measure would have such an extraordinary reach. The recall of so many layers of judicial officers is thus one of those surreptitious elements that gave rise to the single subject requirement in the first place. C.R.S. § 1-40-106.5 (single subject mandate intended to "prevent surprise and fraud from being practiced upon voters"). *See In re Proposed Initiative Adding Section 2 to Article VII*, 900 P.2d 104, 109 (Colo.

1995) (substantive and procedural elements of measure dealing with, among other things, right of recall violated single subject requirement).

The Title Board erred by overlooking this additional subject contained in the Initiative #76.

d. The fourth subject of #76: prohibiting timely replacement of certain recalled officials.

Initiative #76 institutionalizes certain vacancies in office, a subject that is hidden from voters.

Section 2(7) of the measure provides a process for becoming a successor candidate to the recalled official. If there is no successor candidate (and given the wide variety of offices affected, that is well within the realm of the possible if not the probable), Section 2(8) provides that "[w]ith no successor, a vacancy is filled by like means in the next November election at least 90 days later." Thus, a successful recall election can result in a prolonged vacancy in that office where no successor candidate runs or an elected successor lacks the mandated qualifications. *See, e.g.,* Colo. Const., art. IV, § 4 (qualifications applicable to state executive branch office holders), art. V, § 4 (qualifications applicable to state legislative branch office holders), art. VI, § 8 (qualifications applicable to state judicial branch office holders).

If a recall election is held in December, the office could not be filled in any manner until the following November. Legislative districts, for example, would be left without representation during the legislative session. This reconfiguration of government is not a detail to be swept under the ballot titling rug. *Cf. Matter of Proposed Election Reform Amendment*, 852 P.2d 28, 36 (Colo. 1993) (mandated change in membership in both chambers of state legislature was a central element of the measure to be disclosed to voters).

The Title Board erred by setting a title in light of this additional subject.

e. The fifth subject of #76: eliminating the "single subject" requirement of recall petitions.

Tucked away at the end of the initiative text, in Section 3(2) which deals with "Enforcement," is the following sentence: "Up to five officers in the same government may be listed on one recall petition, but they shall be voted on separately." In one obscurely placed sentence, the Proponents have obliterated the single subject requirement that has always applied to recall petitons.

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 nonetheless. 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 violated 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. 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.

#43, supra, 46 P.3d at 446 (emphasis in original). In the very same sense, the Proponents here seek to change how the recall petitioning process works as well as what (or, to be more precise, who) a recall ballot may contain.

This measure is Initiative 2001-2002 #43, and it is only slightly disguised. It holds out a set of procedural changes as its pretext when its express language allows for the recall of whole county commissions or city councils or legislative delegations. The prospect of the inclusion of one lightening rod official as the way to attract petition signers who inadvertently agree to the recall of other officials is

real – in essence, logrolling in the recall context. There is not a more apparent violation of the single subject requirement than this measure. "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. It was true for initiatives, and it is equally true for 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.

f. The sixth subject of #76: allowing five different types of officials to be recalled by the same petition.

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

One needs to step away from that sentence just a bit to fully appreciate the meaning of this phrase, "the same government." This provision permits, for example, a city council person, a municipal judge, a utility board member, an anti-discrimination commission member, and a parks and recreation division director who all serve in the same city or town to be recalled using the same recall petition. There is no conceivable reason for allowing such a diverse and unrelated group to all be recalled with a single petition. It presents the likelihood of voters seeing one

or more names they might want to recall amidst a group of other officials they either want to retain or about whom they are totally neutral or even unaware. Signing the petition, though, helps put all five officials up for recall. The wisdom for drafting Article XXI to apply to only one incumbent to be recalled becomes immediately 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." *Id.* at 447. After all, the single subject requirement for initiatives was designed to protect against "uninformed voting caused by items concealed with a lengthy or complex proposal." *Id.* (citation omitted). There is no reasonable argument that authorizing the recall of various officials (whether elected, appointed, or judicial or a mix of the three) is just another recall "procedure." It is a hidden subject that could only comprise its own initiative.

The Title Board neglected to protect against the uninformed voting that is possible in maze-like measures like this one when it agreed to set this title. This Court should correct that failure.

B. The Title Board failed to set an informative 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). In sum:

> 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 #76 at 2-3.

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

a. The five subjects, other than recall petition procedures, should have been disclosed to voters in the titles.

If the Court finds them not to be separate subjects, the five key components of #76 that are discussed above 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:

- allows for the first time the recall of appointed public officials;
- allows for the first time the recall of judges;
- prohibits the timely replacement of certain recalled officials because successors were not nominated to run in the replacement election or do not qualify for election to office;

- eliminates the "single subject" requirement of recall petitions by allowing up to five (5) officials to be recalled by means of the same petition; and
- allows five different types of officials to be recalled by the same petition.

This measure radically reconfigures the rights surrounding – not just procedures related to – the recall of elected officials. If the Court finds that the above-listed topics are not separate subjects, these changes certainly must be disclosed to voters. Voters should know that appointed and judicial officials can be recalled. The reference in the title to the fact that the measure defines "which officers are eligible for recall, including certain non-elective officers" falls short of explaining the measure's intended breadth, including judges.

Further, voters should know that offices may remain vacant for a prolonged period after a recall, something that is not possible under existing law. *See, e.g.,* Colo. Const., art. XXI, § 3 (where successor candidate does not qualify for office, "the office shall be deemed vacant, and shall be filled according to law"). And voters should know that recall petitions would have a dramatically expanded scope, as they could apply to five officials rather than one and that the five officials need not share anything with any of the others listed in the recall petition except

that they all serve in some capacity in the same jurisdiction. These are central elements of the measure that warrant disclosure to petition signers and voters.

b. <u>The title should disclose that anti-fraud measures are curtailed by #76</u>.

Concealed at the end of the measure is the following statement: "no law, rule or court shall... require naming paid circulators or recall donors." Section 3(1). The measure thus prohibits public awareness about who is paying to instigate a recall and, more problematically, who is engaged in the circulation process for pay.

Paid petition circulation seems to be a reality of life in the exercise of rights of initiative, referendum, and recall. However, this Court and others have allowed persons objecting to a petition to evaluate it to ensure that there has not been fraud, abuse, or mistake in the petition circulation process. *Buckley v. Chilcutt*, 968 P.2d 112, 119 (Colo. 1998). The circulator's affidavit is the check against exactly the practices that would undermine the integrity of the petitioning system. *Loonan v. Woodley*, 882 P.2d 1380, 1388-89 (Colo. 1994). If no legislative body can pass a statute and no election official can pass a rule that would require the identification of circulators (including those who are paid), a significant check on the system evaporates. If voters are to open the door to circulator fraud in the recall process by keeping the names of certain circulators secret, they should at least be told that this measure will achieve that end. The Board failed to do so and thus erred.

c. The title should inform voters about changes to the signatures required to qualify a recall petition to the ballot.

For statewide petitions, the measure would require a much different calculation of the number of signatures in order 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.

For statewide measures under #76, proponents need to gather only "the lesser of 5% of active registered electors in the recall area or 100,000 such entries." Section 2(4). For local recall petitions, proponents need to gather only "the lesser of 1% of active registered electors in the recall area or 10,000 such entries." Section 2(7).

How great a change does this reflect? In 2010, there were 1,819,481 votes cast in the gubernatorial election. *See* 2010 Abstract of Votes Cast of the Colorado Secretary of State at 109.[1] Thus, in order to recall the governor, the proponents would have to collect 25% of that number or 454,871 valid signatures. Under #76, just 100,000 signatures would suffice and possibly less, depending on the then-current number of active registered voters.

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[1] http://www.sos.state.co.us/pubs/elections/vote/Abstract20110630.pdf (last viewed on April 27, 2014).

Yet, the Title Board chose to describe this change simply as "altering the number of signatures required to initiate a recall." The manner of calculating the required signatures is hardly a detail of implementation. Not only would there be more government personnel subject to the right of recall under #76, it would be significantly easier to employ the recall process as to those officials. Given the expense and the disruption arising from these elections, voters should at least have been informed that #76 opens the floodgate. The Title Board failed in its duty to apprise voters of this key element of the measure.

CONCLUSION

Given the errors outlined herein, the Title Board should not have set a title but when it did, it needed to set an accurate title. The Board failed on both counts, and its decision should be overturned.

Respectfully submitted this 29th day of April, 2014.

s/ Mark G. 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@rechtkornfeld.com

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONERS OPENING BRIEF** was transmitted this day, April 29, 2014, via ICCES or overnight delivery to:

Natalie Menten
1755 S. Carr St.
Lakewood, CO 80232

Mike Spalding
18 Buckthorn Drive
Littleton, CO 80127

Maurice Knaizer
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203