COLORADO SUPREME COURT 2 E. 14th Ave. Denver, CO 80203	DATE FILED: April 29, 2014 3:11 PM
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2013) 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 Galender	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General SUEANNA P. JOHNSON, Assistant Attorney General, Reg. No. 34840* 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: 720-508-6155 FAX: 720-508-6041 E-Mail: sueanna.johnson@state.co.us *Counsel of Record	Case No. 2014SA105

OPENING 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 4,375 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

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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 Opening Brief.

STATEMENT OF THE ISSUES

1. Whether Proposed Ballot Initiative 2013-2014 #76 contains multiple subjects.

2. Whether the title set for Proposed Ballot Initiative 2013-2014 #76 is misleading, confusing, and not reflective of the Proponents' intent.

STATEMENT OF THE CASE

Proponents Mike Spalding and Natalie Menten seek to place Proposed Initiative 2013-2014 #76 on the ballot. Philip Hayes through counsel objected to the title set by the Title Board on grounds the measure contains multiple subjects and the title is misleading and confusing. At the rehearing, the Title Board determined the measure contained a single subject, but modified the title in response to two of the objections raised. This appeal follows.

STATEMENT OF THE FACTS

On March 6, 2014, Proponents Mike Spalding and Natalie Menten ("Proponents") filed Proposed Initiative 2013-2014 #76 ("#76") with the Colorado Secretary of State. The proposed initiative seeks to repeal in its entirety Colo. Const., Art. XXI, and reenact with new provisions that change the recall procedures for government officials. Specifically, the measure defines who may be subject to recall to include certain non-elective or appointed officers and judicial officers, allows for five officials from the same government to have a recall initiated by one signature petition, and prohibits the regulation or limitation of recall donors or payments to circulators for recall petitions.

The Title Board held a hearing on March 19, 2014, and set title for the measure. On March 26, 2014, Philip Hayes ("Petitioner") filed a motion for rehearing ("motion") on grounds that #76 did not contain a single subject. Specifically, the motion argued that the measure contained multiple subjects because: (1) it repealed Colo. Const., Art. XXI which contains both substantive rights and procedures concerning recall; (2) it added the substantive rights to recall "non-elective" and

judicial officers; (3) it surreptitiously allowed for the recall of up to five different government officials on the same petition; (4) it provided for the possibility that a recalled officer's position might be vacant until the next regular election; and (5) it altered certain campaign finance requirements for recall donors and paid circulators. In addition, the motion argued that the title set was misleading and incomplete on the same grounds it allegedly violated the single subject requirement, as well as the title failed to disclose that the measure would significantly reduce the number of signatures required for a sufficient recall petition.

At the rehearing, the Title Board found #76 contained a single subject on grounds that while substantive and procedural issues were contained in the measure, the single subject of the initiative was focused on the narrow topic of recall. The Title Board also modified the title in response to two concerns raised by the Petitioner, by indicating the measure allows for the recall of certain non-elective officers, as well as alters the number of signatures required to initiate a recall. The Petitioner then filed this appeal on April 9, 2014 raising both single subject and unclear title arguments.

SUMMARY OF THE ARGUMENT

The proposed measure contains a single subject. Even though the measure seeks to repeal and reenact Colo. Const., Art. XXI, this does not violate the single subject requirement, because the repeal and reenactment deals with a single subject – the removal of government officials. Altering substantive rights and procedural issues does not violate the single subject requirement if the changes are made to a narrow subject, and the changes are necessarily or properly connected.

The title set by the Title Board is not confusing or misleading, as it provides notice to the voters that various recall provisions are repealed and reenacted. The Title Board need not put in all aspects of the measure in order for the title to be considered fair, clear, and accurate.

ARGUMENT

I. The measure satisfies the single subject requirement.

The Petitioner raises five arguments for why the measure violates the single subject requirement. The Petitioner's arguments must fail, as the substance and procedure of the measure relate to a narrow single subject – that of recall.

A. The standard of review to determine single subject.

The Title Board may not set title for a ballot initiative that contains more than one subject. Colo. Const., Art. V, § 1(5.5); *see also* § 1-40-106.5(1)(a), C.R.S. The single subject requirement prohibits the inclusion of "incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection." § 1-40-106.5(1)(e)(I), C.R.S.; *see also Kelly v. Tancredo (In re Proposed Ballot Initiative on Parental Rights)*, 913 P.2d 1127, 1130-31 (Colo. 1996); *In re Title*, 900 P.2d 104, 113 (Colo. 1995) (stating that "… so long as an initiative encompasses *related* matters it does not violate the single subject requirement of [the] state constitution.") (Scott, J., concurring) (emphasis in original).

A measure contains a single subject if the matters encompassed are "necessarily and properly connected" to each other rather than "disconnected or incongruous." *Kemper v. Hamilton (In re Title, Ballot Title & Submission Clause 2011-2012 #3),* 274 P.3d 562, 565 (Colo. 2012) ("*In re #3*"). Stated differently, if a measure tends to carry out one general purposes, then minor provisions necessary to effectuate that purpose will not violate the single subject rule. *In re Title v. John Fielder,* 12 P.3d 246, 253 (Colo. 2000). Likewise, the measure contains a single subject even if it has different effects or it makes policy decisions that are not inevitably interconnected. *Id.* at 254. In order to satisfy the single subject requirement, the Title Board is "vested with considerable discretion in setting the title," and therefore the Supreme Court liberally construes the single-subject requirement. *Title v. Apple*, 920 P.2d 798, 802 (Colo. 1996).

B. The addition of who may be recalled as part of the recall process is related to the single subject of recall.

The Petitioner argues that because the measure would expand who may be recalled – specifically certain non-elective or appointed

officers and judicial officers – along with changes to existing recall procedures, the Proponents have combined substantive and procedural changes in violation of the single subject requirement. The Petitioner's arguments should fail.

i. The substantive right of which government officials may be recalled is related to the single subject of recall.

The right of recall is a fundamental constitutional right of the Colorado people, and the reservation of the power must be liberally construed. *Groditsky v. Pinckney,* 661 P.2d 279, 281 (Colo. 1983). Here, the initiative subjects certain non-elected or judicial officials to the right of recall by the people. Even if this is an expansion of which officials currently may be subject to recall under Colo. Const., Art. XXI, it is related and connected to the single purpose of the measure, which is the removal of government officials.

The right of recall of non-elective or appointed officials is already contemplated by Colo. Const., Art. XXI, as the Supreme Court has held that the amendment does not expressly prohibit the General Assembly to implement legislation for the recall of certain non-elective or

appointed positions. In *Groditsky,* 661 P.2d at 280, the Supreme Court upheld the recall of two directors of a fire protection special district. The two directors argued that the recall provisions of Art. XXI did not apply to directors of a special district. The Court rejected that argument on grounds that the enabling legislation for the recall of special district directors is authorized by Art. XXI, § 4, and the legislation is likewise permissible because it is not prohibited by Art XXI. *Id.* at 281.

The pertinent provisions of Art. XXI, § 4 at issue in *Groditsky* provide:

> "Every person having authority to exercise or exercising any public governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by any elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers, each of which shall be subject to the recall provisions of this constitution . . .
> . . .
> This article is self-executing, but legislation may be enacted to facilitate its operations, but in no way limiting or restricting the provisions of this article or the powers herein reserved.

The *Groditsky* Court held that its rulings in *Guyer v. Stutt,* 191 P. 120 (Colo. 1920) and *Hall v. Cummings*, 213 P. 328 (Colo. 1923) were not

controlling, as the principle announced in those cases is that subordinate levels of government may not recall their officials without enacting procedural legislation. *Groditsky,* 661 P.2d at 281-82. In fact, the Court overruled *Stutt* and *Hall* on grounds that Art XXI is clear that all elective officials who discharge a government function may be recalled provided there is a constitutional provision or enabling legislation that specifies the procedures. *Id.* at 282. As such, a reenactment of Art. XXI that clarifies that non-elected or appointed officials are included in the scope of officials who may be recalled is not unrelated to and is necessarily connected to the right of recall.

Likewise, the right of recall of judicial officers is contemplated by Art. XXI. *In Marians v. People*, 169 P. 155, 156 (Colo. 1917), the Supreme Court addressed whether a person was improperly held in contempt for making a false statement based on information he provided in a recall petition for a state district court judge. The Court held that the statements in the recall petition, while "intemperate and ill-advised" were privileged, because Art. XXI requires a brief statement for the grounds upon which recall is sought. *Id.* at 155. More

importantly, however, the Court noted that if a person was prohibited from mentioning a pending case as a ground for recall, the recall petition may not be valid, which could result in "withdraw[ing] the office of judge from the scope of the constitutional provision which clearly includes that office." *Id.* at 156. As such, the Court noted that the "right is given to citizens to set up in a petition for the recall of a judge the facts upon which such recall is sought." *Id.* This case impliedly, if not explicitly, holds that recall of a judge is a power reserved to the people.

Even assuming that the power of recall does not currently extend to judicial officers under Art. XXI, expanding the power to include that class of government officials is not unrelated to the single purpose of the measure. In *Groditsky,* 661 P.2d at 283, the special district directors also argued that because they may be subject to removal under Art. XIII for misconduct or malfeasance, that the legislation enabling their recall was unconstitutional. The Supreme Court disagreed and held that the right of removal under Art. XIII and right of recall under XXI

are "cumulative and concurrent rather than exclusive remedies available to the people." *Id.*

Judicial officers are subject to removal through impeachment under Colo. Const., Art. XIII, § 2. Inclusion of judicial officers as a class of government officials who may be subject to recall provides the people with "cumulative and concurrent" remedies. As such, the inclusion of judicial officers as a class of government officials who may be subject to recall in #76 is part of the single subject of the reserved power of the people to recall those government officials as defined under a constitutional amendment.

ii. The combination of substantive and procedural changes in one measure does not necessarily violate the single subject rule.

The Petitioner relies on *In re Proposed Initiative 2001-02 #43,* 46 P.3d 438 (Colo. 2002) ("*In re* #43") and *In re Title,* 900 P.2d 104 (Colo. 1995) to argue that adding the substantive right of recall of non-elective and judicial officers is a distinct subject from existing recall procedures. Yet these cases are distinguishable from the initiative in this case.

In re #43 dealt with an initiative whose single purpose sought to "liberalize initiative and referendum procedures." *In re #43,* 46 P.3d at 448. The Court held that the measure violated the single subject requirement, because the initiative also sought to repeal the single subject requirement, prohibit the repeal of TABOR by a single initiative, and prohibit referendums that reduce property rights. *Id.* Part of the Court's analysis focused on the fact that because the measure prohibited the repeal of TABOR, and TABOR itself contains multiple subjects, #43 could not help but violate the single subject rule. *Id.* at 446.

In re Title also suffered from the same flaw, as the measure in that case dealt with changing procedures for initiatives, referendum and recall, in addition to establishing certain fundamental rights in all charter and constitutional provisions approved after 1990 and setting forth certain judicial standards. *In re Title,* 900 P.2d at 109. In holding the measure violated the single subject requirement, the Supreme Court noted that the Colorado Constitution treats initiated referendum, recall and initiatives separately and in different sections. *Id.*

The Court has never held that substantive and procedural changes combined *always* violate the single subject rule. When comprehensive substantive and procedural changes are made to a singular subject, such measures will not violate the single subject rule. *See e.g. In re Title, Ballot Title & Submission Clause*, 907 P.2d 586, 590-91 (Colo. 1995) (initiative that contained numerous changes to referred and initiated petition did not violate the single subject requirement because the changes all related to the single purpose of reforming petition rights and procedures); *Kemper v. Hamilton (In re Title, Ballot & Submission Clause for 2011-2012 #45),* 274 P.3d 576, 581 (Colo. 2012) (*"In re #45*") (a measure that sought to expand "public control of waters" did not violate the single subject rule because the subsections related to creating a new water appropriation doctrine); *Fielder,* 12 P.3d at 250 (numerous detailed provisions related to the management of development, which although a broad topic, was held to be a single subject).

Assuming *arguendo* that expanding the right of recall to non-elective, appointed and judicial officers is not already a substantive

right of the people, combining the expansion of those substantive rights with procedural changes to the proposed reenacted Art. XXI all deal with the single subject of recall. Specifically, Section 1 of the measure discusses who may be subject to recall. Section 2 includes procedures to initiate a petition and deals with successors and vacancies. And Section 3 concerns enforcement of the measure. Recall is not an overly broad theme that attempts to encompass numerous but unrelated topics, but is narrow to the reserved power of the people to remove government officials from office. *See In re #45*, 274 P.3d at 579-580 ("water" and "revenue changes" are two examples of "overarching themes" that violate the single subject requirement because the measures contain disconnected or incongruous subjects). Accordingly, the inclusion of substantive and procedural changes in #76 does not violate the single subject requirement.

C. The measure's vacancy provision relates to the procedural rules concerning recall.

The Petitioner argues that the measure is surreptitious because Section 2(8) creates the possibility that a government office may be left

vacant until the next November election if a successor is not elected at the recall election. The provision is not surreptitious.

The single subject requirement prevents the voters from passing a surreptitious provision coiled up on the folds of a complex initiative. Art. V, § 1(5.5); s*ee also* § 1-40-106.5(1)(e)(II), C.R.S. In *Outcelt v. Bruce*, 961 P.2d 456, 461 (Colo. 1998), the Court held that a measure that set forth new tax cuts contained a distinct subject from the provision that required replacement of monies to local governments to off-set the tax cuts. The Court reasoned that this was the very type of "mischief" that the single subject requirement was intended to prevent, as "[v]oters would be surprised to learn that by voting for local tax cuts, they also had required the reduction, and possible eventual elimination of state programs." *Id.*

Section 2(8) provides that a successor voted in following a successful recall vote would be installed immediately and that if there is no successor the position is filled at the next November election. The measure also states that non-elective officer positions would be filled by appointments. While the successor provision in the proposed reenacted

Art. XXI is certainly different from the current constitutional provisions, that does not necessarily make the provision surreptitious – or for that matter – a second subject. Unlike *Outcelt*, the public is not voting on two distinct subjects – tax cuts and reduction in state programs – but rather they would be voting on changes to the procedures for how recall petitions are handled and successors may be installed. The vacancy procedure is not a distinct subject from the nature of recall, but a provision necessary to effectuate the purpose of the measure. *See Fielder,* 12 P.3d at 253.

D. The amendment that allows for five officials to be recalled on the same petition does not violate the single subject.

Section 2(1) of the measure provides that up to five electors eligible to vote on the recall may submit a signed request to recall any officer defined in Section 1. Section 3(1), however, specifically states that while up to five officials from the same government may be listed on one recall petition, each officer will be voted on separately. Contrary to the Petitioner's contention, this procedure does not violate the single subject rule.

The method by which a recall petition is initiated is a detail of implementation of the measure. In the event a recall petition named five officials, voters still must vote to individually recall each officer listed on the petition. Therefore, to the extent this substantively changes the manner in which a recall petition may be initiated, the single subject of recall of *a specific officer* remains intact. The petition is a procedural change that is directly related to how recalls would be implemented in the future should the measure pass, and therefore does not contain a separate subject. *See Steadman v. Hindman (In re Ballot Title 1999-2000 200A),* 992 P.2d 27, 30-31 (Colo. 2000) (implementation details that are "directly tied" to the initiative's "central focus" do not violate the single subject requirement).

II. The title set by the Title Board is not misleading, confusing, and conveys the intent of the Proponents.

The Petitioner argues that the title set by the Title Board for #76 is not clear for three reasons. First, the measure fails to enumerate which non-elective officials and that judicial officers may be subject to recall. Second, the Petitioner argues that the title is incomplete,

because it fails to mention that a recall petition may include up to five officials, that an office might be vacant until the next November election if a successor is not elected, and that regulation of donors and paid circulators is prohibited. Finally, the Petitioner argues that the information in the title, specifically that the measure "alters" the number of signatures required for a recall petition is not helpful to the voter. All of Petitioner's arguments must fail.

A. Standard of review with respect to setting a fair, clear, and accurate title.

The Title Board's duty in creating a title and submission clause is to summarize the central features of a measure. *In re Petition on Sch. Fin.*, 875 P.2d 207, 210 (Colo. 1994). Not every feature of a measure must appear in the title. *Fielder,* 12 P.3d at 256. The title should be a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative. § 1-40-102(10), C.R.S.; *see also* § 1-40-106(1)(b), C.R.S. (ballot titles shall be brief, but the Title Board should consider the public confusion that might result with misleading titles).

The Court's limited review "prohibits [it] from addressing the merits of a proposed initiative, and from suggesting how an initiative might be applied." *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43,* 46 P.3d 438, 443 (Colo. 2002). The actions of the Title Board are presumptively valid. *In re 1999-2000 #104*, 987 P.2d 249, 254 (Colo. 1999); *see also Tancredo*, 913 P.2d at 1131 (stating that the Supreme Court grants "great deference to the board's broad discretion in the exercise of its drafting authority.")

The title set by the Title Board is reviewed as a whole to determine if it is fair, accurate, and complete. *In re #3,* 274 P.3d at 565. A title will be upheld if the Title Board's language "clearly and concisely reflects the central features of the initiative." *Paredes v. Corry (In re Title, Ballot Title, & Submission Clause 2007-2008 # 61*, 184 P.3d 747, 752 (Colo. 2008). The Supreme Court will only reverse the Title Board's title if it contains "a material or significant omission, misstatement, or misrepresentation." *In re Title v. Buckley*, 972 P.2d 257, 266 (Colo. 1999); *see also Brown v. Peckman (In re Title)*, 3 P.3d 1210, 1213 (Colo.

2000) (the Supreme Court will reverse the actions of the Title Board in setting the title when the chosen language is "clearly misleading.")

B. The title adequately discloses that certain "non-elective" officials may be subject to recall.

Petitioner argues that the title must inform voters that right of recall would extend to a "wide array" of non-elective officers and judicial officers. *See* Petition for Review at 4. The title set by the Title Board notifies voters that #76 defines "which officers are eligible for recall, including certain non-elective officers[.]" To include all officers defined in Section 1 of the measure would make the title longer than necessary. *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); *see also Fielder*, 12 P.3d at 257 (the title need not disclose all the businesses that would be impacted by the initiative). Likewise, as the Petitioner points out, judicial officers are not elected but retained; accordingly, the term "non-elected" encompasses both appointed and retained officials.

C. The title need not convey all aspects of the measure.

The Petitioner argues that that the title excludes material information about the measure, including the vacancy procedure, the form of the recall petition, and the prohibition regulating donors and paid circulators of recalls. *See* Petition for Review at 5. The additional information need not be included in the title.

First, the Title Board stated in the title that the measure "describ[es] procedures and requirements to initiate, conduct, protest, and enforce recall elections." That brief summary informs the voters that such procedures to the form of a recall petition or vacancy of an office may be changed, yet a voter need not know every detail of the measure in order to have a proper understanding. *See Aisenberg v. Campbell,* 8 P.3d 1194, 1197 (Colo. 2000) (the Title Board need not "touch on every aspect of a proposal" but rather "its task is to present straightforward, succinct, and nonargumentative titles and summaries.")

Second, the Petitioner's argument that the title should inform voters that "as many as five elective as well as appointed officials

within 'the same government' can be recalled by means of one petition" (*See* Petition for Review at 5), may actually be misleading and confusing to voters. The public might interpret the Petitioner's addition to the title to mean that five officials may actually be *recalled* by one petition, as opposed to what is proposed, which is one signature petition may initiate a recall election for up to five officials, at which point the public votes separately on whether each individual official *is* removed from office. Excluding this provision helps to prevent public confusion.

Finally, the title informs voters that the measure "prohibit[s] the application of certain campaign finance requirements to recall." While arguably the language could be more informative, this Court's job is not to write the best possible title, but only to make sure that voters are not misled to vote for or against a measure by reason of the words employed by the Title Board. *Outcelt v. Schuck*, 961 P.2d 1077, 1082 (Colo. 1998). Here, the voters may decide for themselves whether they want to prohibit certain campaign finance requirements from recalls, and therefore will not be misled if they vote for or against the measure on that basis.

Accordingly, the title for #79 does not omit material information, and the language employed by the Title Board informs voters of the central features of the measure, while avoiding public confusion.

D. The title informs voters that there are changes to the signature requirements to initiate a recall.

The Petitioner argues that the titles reference to "altering the number of signatures required to initiate a recall" is not useful or informative. *See* Petition for Review at 5. As raised in his motion, the Petitioner argues that the title fails to inform voters that the proposal "significantly reduces the number of signatures required for a sufficient" candidate or recall petition. The phrasing by the Title Board should be upheld, because to characterize the number of signatures as being "significantly reduced" is not currently known.

Section 2(4) of the measure states, "[t]he required number of valid petition entries shall be the lesser of 5% of the active registered electors in the recall area or 100,000 such entries." Because it is unclear upon implementation whether the valid signatures required are "significantly decreased" given the specific recall locality and registered voters at the

time of the petition, it was within the discretion of the Title Board to indicate the signature requirement is "altered." *See Paredes,* 184 P.3d at 752 (holding that the Title Board need not discuss every possible effect of the measure); *see also Fielder,* 12 P.3d at 257 (speculation of the future effects of a measure is beyond the Court's scope of review).

CONCLUSION

Based on the foregoing authorities and reasons, the Title Board properly found that #76 contained a single subject involving the recall of government officials. Likewise, the title is fair, clear, and accurate. As such, this Court should affirm the actions of the Title Board and approve the title for #76.

Respectfully submitted this 29th day of April, 2014.

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CERTIFICATE OF SERVICE

This is to certify that, on the 29th day of April, 2014, I duly served this **OPENING BRIEF OF THE TITLE BOARD** on all parties via ICCES or overnight delivery addressed as follows:

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