Colorado Supreme Court 2 East 14th Avenue, 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 2015-2016 #5 **Petitioners:** Natalie Menten and Mike Spalding **v.** **Respondent:** Ballot Title Setting Board	FILED IN THE SUPREME COURT JAN 07 2015 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Natalie Menten 1755 S. Carr St. Lakewood CO 80232 nmlakewood@gmail.com Mike Spalding 18 Buckthorn Drive Littleton CO 80127 mspalding@aol.com Petitioners	COURT USE ONLY Case No. 2014 SA 379
PETITIONERS' OPENING BRIEF	

This brief contains 2,925 words in 13 pages. The standard for review is a new review.

The only two issues before this court are to rule that this recall text is a single subject, and then to set a brief and fair ballot title so petitioners may petition, which is their right under the First Amendment of the U.S. Constitution; Article II, sections 10 and 24; and Article V, section 1 of the state constitution. That right has already been thwarted by this court in the last election cycle.

SINGLE SUBJECT

Article V, section 1 (5.5) of the state constitution was approved in 1994. Voters were told the goal was to apply to initiatives the same single subject limit used in the legislature, where bills are titled "concerning elections" or "concerning education" or "concerning taxes." The 1994 Blue Book and campaign literature said the limit was only to prevent, for example, one petition dealing with both fishing licenses and traffic laws. It would only prevent "Christmas tree" laws that contained wide-ranging "gifts" meant to build a supportive coalition of special interest groups.

A single subject does not require a tiny topic. We aim to strengthen a fundamental constitutional right of the people. We have a right to propose to voters a plan that is effective, not tepid, and solves the real problems discovered when first used against state officials in 2013, after a century on the shelf with its biased, unconstitutional, vague, verbose, arbitrary, dilatory, and nearly-impossible requirements, at least two of which ended up before this court in 2013.

This court must reject the political cover the Board offers it to kill any reference to accountability of judges. The prior Board brief noted judges were included in the 1912 constitutional amendment as elective officers. Were voters told the 1966 judicial selection ballot issue amended 1912's Article XXI by implication (which is illegal) to end judicial recalls? No.

Marians v. People ex rel. Hines, 69 Colo. 87, 169 P. 155 (1917) ruled that judicial recall petition comments criticizing a judge were privileged and not contempt of court. It proves the existing Article XXI, which we propose to repeal and replace, applies to recall of judges. Article XXI was only five years old at that time; the case is smoking gun proof that recalls apply to judges. That application has never been removed from Article XXI.

This court's prior opinion opined applying recalls to officers not previously subject to recall was a second subject. The rationale for denying recall of some appointed officers was "it has not been done before." Repeal of existing Article XXI offers petitioners a blank slate. New text need not be limited to rewriting existing law; the existing law is being repealed. The title and single subject of Article XXI remain the same. The only lawful limit on our right to petition is a text with a single subject, broadly defined.

The direct object of a recall petition is not a second subject of its text. The Board agreed in the first appeal, but now reverses itself. The Board is engaged in speculation on this court's personal desires.

The court's opinion (June 23, 2014, 14SA105, In the Matter of....2013-14 #76) said in the headnote, "Initiative #76 has a second purpose, to establish a new constitutional right to recall non-elected state and local officers." That wording proves that the alleged second subject is "connected with" and "related to" the single subject of the "right to recall" officers. Saying application X was not "historically" part of the recall process doesn't make X a second subject. Also see Marians. This court has also held dozens of times that connected, related topics can be one broad subject. See samples of statutory and constitutional case law annotations below.

The body of the court's majority (5-to-2) opinion said the text had "two subjects." See page 10, line 3. Recalling non-elective officers was claimed to be the second subject. On page 15, second full paragraph, the majority opined,

Collectively, these changes to the manner in which recall elections are triggered and conducted constitute a single subject. We turn now to the second subject of Initiative #76, which would establish a new constitutional right to recall non-elected state and local officers. (emphasis added)

The majority opinion there said again there were TWO subjects. Petitioners have deleted from the text the alleged second subject. This court must take judicial notice that 2 minus 1 leaves 1. The remaining "single subject" is the revised recall process described in the sentence quoted above. All references to non-elective officers in Section 1 and elsewhere have been removed. We capitulated.

The Board spins a theory to please this court. It infers the court did not mean what it said and really wants protection from a recall process that has been in Article XXI for 102 years. See the Marians case cited above. The Board is reversing its past unanimous ruling that the single subject was recall, not those who could be recalled. It adopts a blatant abuse of basic grammar, that a single subject rule equals a single direct object rule. The Board asserts direct objects to whom the recall process would apply are separate subjects, the antithesis of the rule of law. It makes every law a bill of attainder. The court ruled the broad application is "all elective officers," but is now urged to shave it to a narrower class, excluding judges. Under that rationale, it can be further narrowed until each individual officer vulnerable to a recall petition is a separate subject.

The Board contends judges are exempt from recall, i.e. above the law. That dangerous twisting of the single subject law can later exempt non-partisan officers, partisan officers, local officers, and others. Citizens will be unable to petition to make all public officers accountability. Voters passed the single subject rule based on government's solemn written promise it would be a harmless tweak, not a devastating evisceration of our rights.

The objection to including judges was not upheld in #76. The Board now says court silence means it was granted. That is not how to "interpret" opinions. The #76 opinion clearly, though erroneously, said only appointed officials cannot be recalled (because they

are not elective now). Two justices disagreed, siding with all three members of the Board. The ruling was a tie, with five decision makers on each side. The court minority noted that prior opinions stated that finding a second subject required a "clear" finding of gross incongruity. A 5-to-5 tie was not a "clear" mandate for the #76 decision.

Sadly, the opinion falsely asserted on page 17 that judges "are not subject to recall election. See Colo. Const. Art. VI, sections 23-25." Both petitioners have read those three sections word for word, and found NO reference to exemption from recall. Listing other procedures for public accountability did not repeal Article XXI, which the #76 opinion said applies to ALL elective government officers. Article XXI has not been amended to exempt judges since its enactment. Amendments in the 1980s (after the 1966 judicial selection ballot issue) did not delete recall of judges, showing no intent to change that power. We found no citation that the Marians case was ever overturned. Again, even if this court *ipse dixit* decrees out of the constitution the right to recall judges, we have the right to reinstate it explicitly. The court gave us the key in its unequivocal holding that applying recall to all elective officers is one subject.

Recall is a fundamental right of a republican form of government, which the people have reserved unto themselves. Such a reservation of power must be liberally construed in favor of the right of the people to exercise it. Conversely, limitations on the power of referendum must be strictly construed. Bernzen v. Boulder, 186 Colo. 81, 525 P.2d 46 (1974); Hazelwood v. Saul, 619 P.2d 499 (Colo. 1980); Groditsky v.

Pinckney, 661 P. 2d 279 (Colo. 1983). Recall is a fundamental right of citizens within a representative democracy. Reservation of that power is to be liberally construed. Shroyer v. Sokol, 191 Colo. 32, 550 P.2d 309 (1976). It is cumulative to the Article XIII power to remove. Groditsky. Every elective officer who discharges a governmental function is subject to recall. Groditsky. Reapportionment which virtually nullifies the power of recall cannot be constitutionally sanctioned. In re Reapportionment, 647 P.2d 191 (Colo. 1992). All justices and judges of the state judicial department are accountable to the people. Hamm v. Scott, 426 F.Supp. 950 (D. Colo. 1977).

Furthermore, the court's opinion in #76 clearly said recalling elective officers is one subject. Our text applies to judges only "after their election." That sentence was added to comply with the court's opinion. "Retention elections" are elections; that is stated in the prior sentence of the text and in existing law. For example, Co. Const. Art. VI, section 25, which the opinion quoted, has a bold print heading "**Election of justices and judges.**"

Page 18 of the opinion says, "The second (subject) expands recall to non-elected state and local officers." (emphasis added). Note the court again asserts non-elected officers are "the" second subject, not one of many and not a direct object. In finding that expanding recall is a second subject to recall, it contradicts all its prior single subject opinions in 20 years. Reforming X and and expanding X are not two subjects.

Even if the court insists it is currently exempt from recall, citizens have a right to

petition to change the law! Its opinion said recalling those who are subject to election is one subject. If an elected office were created after passage of this text, another initiative would not be required to include it simply because it did not exist in 1912 or 2016. It would be covered by the clear principle this court stated in #76. The opinion and text apply to ALL elective state and local officers---past, present, and future—legislative, executive, and judicial.

On page 21 of the opinion, the court misdescribes the text. It says "...in voting for the new article XXI's revamped procedures for recall petitions and elections, they are also authorizing the recall firing, at any time, of—for example--the appointed heads of Colorado's state executive departments, their appointed city or county manager, or the appointed head of their local library." Passing the text would not fire anyone. It simply allowed a process to call for an election at which a named officer would be listed by title on the ballot. The #76 Board ballot title disclosed the application of #76 to "non-elective officers," so "Voters would be surprised to learn that" is another falsity.

Speculative assertions about secret ballot decisions of hypothetical voters cannot justify smothering real First Amendment rights of free speech, petition, and assembly. This court invented some anonymous voters, out of three million, who might vote against the petition because it might be applied to favorite appointed officers (?) Any ballot issue or candidate election requires voters to weigh pros and cons. A fantasy projection of the

thought process of the court's imagined voters, not a party to this suit, cannot be the basis for constructing a second subject.

To find language allowed in the first text to be the basis for a multiple subject ruling in this second text would be an act of extreme judicial bad faith. It would be sandbagging for the obvious purpose of wearing down petitioners by a piecemeal or Chinese water torture technique. It would confront petitioners with the prospect the court intends to stall forever this reform. Petitioners reluctantly removed any reference to recalling appointed officials. Each later deletion would be guesswork. Each new text takes about a year for review and comment hearings, two Board hearings, appeal to this court, two sets of briefings, and an open-ended period of court delay before unveiling one more objection.

The court must not reverse 20 years of single subject jurisprudence. Review: An initiative may contain several purposes if those purposes are interrelated. In re Ballot Title #55, 138 P.3d 273 (Colo. 2006). A single subject exists if the matters included are necessarily or properly connected to each other. In re Parental Rights, 913 P.2d 1127 (Colo. 1996). Having multiple beneficial effects does not mean a measure embraces more than one subject. Ballot Title #113, 962 P.2d 970 (Colo. 1998). The single-subject requirement must be liberally construed to avoid restrictions on the initiative process. Ballot Title #74, 962 P.2d 927 (Colo. 1998). An initiative may spell out details for

implementation that relate to the substance of the text. Ballot Title #255, 4 P.3d 485 (Colo. 2000). Having different effects or making policy choices not invariably interconnected is allowed. Multiple issues in a detailed manner all related to management of development. Ballot Title #256, 12 P.3d 246 (Colo. 2000); Ballot Title #235(a), 3 P.3d 1219 (Colo.2000). If matters are not disconnected or incongruous, and can be stated in the title, the text is a single subject. Ballot Title #73, 135 P.3d 736 (Colo. 2006); Ballot Title #74, 136 P.3d 237 (Colo. 2006). A $60 tax credit applied to multiple taxes is a single subject. Amend TABOR #32, 908 P.2d 125 (Colo. 1995). A comprehensive text with numerous provisions is all related to the single subject of petition rights and procedures. Matter of Petition, 907 P.2d 586 (Colo. 1995). Our recall reform text is such a petition.

A text on qualification, appointment, and retention of judges which proposes voter information about judges standing for **REMOVAL** or retention **ELECTIONS** is one subject. **RECALL** of judges is within the single subject of how judges are qualified, appointed, and retained. Matter of #104, 987 P.2d 249 (Colo. 1999).

Federal courts have invalidated a slew of Colorado statutes over the past 30 years. The U.S. Supreme Court has repeatedly invalidated our state's anti-petition laws and constitutional barriers to the First Amendment rights to free speech, assembly, and petition. They defend vigilantly our rights. Our rights to substantive and procedural due

process and fundamental fairness are at risk when state officials act in bad faith. Why do federal courts intervene? To uphold our federal civil rights, the duty of this court as well.

The single subject here is the recall process; those to whom it applies are the direct objects of the recall. Can one say that recalling legislative elected officers is different than executive elected officers? What about state elected officers and local elected officers? After all, it isn't "necessary" that both be included in one text. Citizens have a right to propose comprehensive solutions to perceived problems in order to secure their rights to accountability in all elected officials. This court has so ruled in prior opinions concerning the right to recall to ensure public accountability. That right protects our republican form of government under Article IV, section 4 of the U.S. Constitution. Article VI says "...the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Here is a simple analogy. "Bill 123 raises fees on cars and boats." The single subject is raising fees. Cars and boats are direct objects of the fee increase. Adding "planes" would not be a new subject. This court agreed with that idea in prior tax cut petitions and other texts; see above regarding the $60 tax credit petition case.

This court drew a bright line between officers subject to election and those who are not. We amended the text to incorporate that distinction, though we disagreed with the rationale for it. We made the difference crystal clear in section (3) (2) of the text:

"Elective" means in an officer subject to regular, special, or retention elections, even if term limited. Judicial officers shall be eligible for recall after their election.

To reject this text requires this court to adopt Orwellian Newspeak, that an election is not an election. When people called "voters" mark a document called a "ballot" for or against a person to be an "officer," THAT is an "election." It is not an appointment process. State law refers repeatedly to retention "elections" for judges. Petitioners simply applied the #76 opinion to revise our text. To redefine "election" now would subject this court to instant Federal court intervention.

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The seminal document in Anglo-American law is the Magna Carta, signed at Runnymede by King John on June 15, 1215. It embodies the principle that no one is above the law, not even the King. This court should not minimize that 800th anniversary this June 15 by rejecting the Rule of Law in favor of a holding more congruent with self-interest.

BALLOT TITLE WORDING

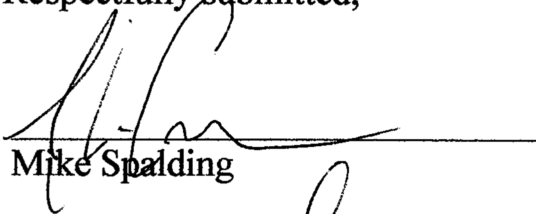
C.R.S. 1-40-106 (3)(b) says, "Ballot titles shall be brief...." They should cite only major features, not every detail. Our text is half the length of the existing Article XXI. We propose the following ballot title and submission clause:

Shall there be an amendment to the Colorado constitution concerning recall of elective officers, which lists recall procedures for state and local legislative, executive, and judicial elective officers; prohibits elective officers who are recalled, or resign or announce retirement during the recall process, from being an elective officer for five years; and exempts recalls from certain campaign finance requirements?

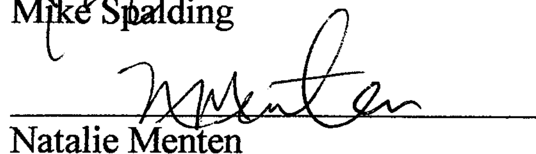
PRAYER FOR RELIEF

We request the text be found a single subject, that the ballot title be set by this court as suggested above, and that the six-month period to collect signatures begin only when the secretary of state approves in writing the specific petition format for this measure that is later submitted by petitioners at a time of their choosing.

Respectfully submitted,



Mike Spalding



Natalie Menten

CERTIFICATE OF SERVICE

I hereby certify on January 7, 2015, I hand-delivered a copy of this PETITIONERS' BRIEF, first-class postage paid, to:

John Suthers, attorney general
1300 Broadway, tenth floor
Denver CO 80203