

<p>COLORADO SUPREME COURT 1300 Broadway Denver, Colorado 80203</p>	<p>DATE FILED: January 8, 2015 7:06 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #5</p> <p>Petitioners: NATALIE MENTEN and MIKE SPALDING, Proponents</p> <p>v.</p> <p>Respondents: SUZANNE STAIERT, DAVID BLAKE, and JASON GELENDER, in their official capacities as members of the Title Board.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>JOHN W. SUTHERS, Colorado Attorney General LEEANN MORRILL, First Assistant Attorney General* 1300 Broadway, 6th Floor Denver, Colorado 80203 Phone: (720) 508-6000 Fax: (720) 508-6041 Email: leeann.morrill@state.co.us Registration Number: 38742 *Counsel of Record</p>	<p>Case No.: 2014 SA 379</p>
<p>OPENING BRIEF OF TITLE BOARD</p>	

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 those rules.

Specifically, the undersigned certifies that:

1. The brief complies with C.A.R. 28(g) because it contains 2,151 words.

2. The brief complies with C.A.R. 28(k) because, 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 (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

I acknowledge that the 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/ LeeAnn Morrill
Attorney for the Title Board

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE ISSUES.....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF FACTS.....	2
SUMMARY OF THE ARGUMENT.....	3
ARGUMENT.....	3
I. THE MEASURE CONTAINS AT LEAST TWO SUBJECTS.....	3
A. The single subject rule.....	4
B. Standard of single subject review by this Court.....	5
C. Application of the single subject rule to #5.....	7
CONCLUSION.....	13

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>In re Ballot Title 1999-2000 #25</i> , 974 P.2d 458 (Colo. 1999).....	5
<i>In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #219</i> , 999 P.2d 819 (Colo. 2000).....	6
<i>In re Title, Ballot Title and Submission Clause for 2001-02 #21 and #22</i> , 44 P.3d 213 (2002).....	5-6
<i>In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43</i> , 46 P.3d 438 (Colo. 2002).....	5-6
<i>In re Title, Ballot Title and Submission Clause for 2005-06 #55</i> , 138 P.3d 273 (Colo. 2006).....	5-7, 11
<i>In re Title, Ballot Title and Submission Clause for 2007-08 #17</i> , 172 P.3d 871 (Colo. 2007).....	6
<i>In re Title, Ballot Title, and Submission Clause for 2013-2014 #76</i> , 333 P.3d 76 (Colo. 2014).....	11-12
STATUTES	
§ 1-40-106.5(1)(e)(I), C.R.S. (2013).....	4
§ 1-40-106.5(1)(e)(II), C.R.S. (2013).....	4, 12
§ 1-12-101, C.R.S. (2014).....	9
§ 13-6-205, C.R.S. (2014).....	9
§ 13-6-206, C.R.S. (2014).....	9

OTHER AUTHORITIES

Colo. Const., art. V, § 1(5.5).....4
Colo. Const., art. XXI, § 1.....7-8
Colo. Const., art. XXI, § 1.....8
Colo. Const., art. VI, § 20.....9
Colo. Const., art. VI, § 25.....9
DENVER, COLO. CHARTER, §§ 4.1.1 – 4.1.6.....10
DENVER, COLO. CHARTER, § 4.1.5.....10

Title Board members Suzanne Staiert, David Blake, and Jason Gelender (hereinafter “the Board”), by and through undersigned counsel, hereby submit the Opening Brief of Title Board.

STATEMENT OF THE ISSUES

Whether the Board properly refused to set a title because the proposed initiative had more than one subject?

STATEMENT OF THE CASE

Natalie Menten and Mike Spalding (hereinafter “Proponents”), seek to circulate Proposed Initiative 2015-2016 #5 (“#5”), to obtain the requisite number of signatures to place a measure on the ballot to repeal and reenact Article XXI of the Colorado Constitution, which governs “Recall from Office.” Proponents amended the original draft of #5 after a review and comment period before the Offices of Legislative Council and Legislative Legal Services, and submitted their final draft of #5 to the Board on October 24, 2014. *Exhibit A.*

The Board conducted an initial public hearing on December 3, 2014, at which it declined to set a title because it found that #5 violated the single subject rule. *Exhibit B*. Proponents timely filed a motion for rehearing on December 9, 2014. *Exhibit C*. A rehearing was held on December 17, 2014, at which the Board again declined to set a title because it found that #5 violated the single subject rule. *Exhibit D*. Proponents timey filed a petition for review with this Court on December 19, 2014.

STATEMENT OF FACTS

Measure #5 would amend Article XXI of the Colorado Constitution by repealing and reenacting the existing provisions governing “Recall from Office.” *Exhibit A*. As explained by “**Section 1. Eligibility,**” the purpose of reenacting Article XXI “is to increase public accountability of public officers,” which the measure purports to accomplish by subjecting “elective officers in *any* state or local legislative, executive, or judicial office” to recall. *Exhibit A* (emphasis added).

SUMMARY OF THE ARGUMENT

As proposed, #5 contained more than one subject. Not only would the measure have resulted in substantial changes to the manner in which state and local recall elections are triggered and conducted under current statutory and constitutional law, but it also extends the existing right of recall to include those state and county judicial officers who have stood for at least one retention election. The existing right of recall is further extended by #5 to include county court judges for the City and County of Denver. As such, the Board properly refused to set a title for the measure because #5 violated the single subject rule.

ARGUMENT

I. THE MEASURE CONTAINS AT LEAST TWO SUBJECTS.

Proponents contend that the Board erred by not setting a title because #5 contains only one subject. For the following reasons, the Court should reject this contention.

A. The single subject rule.

The Board must abide by the single subject rule when considering proposed initiatives. Indeed, Colo. Const., art. V, § 1(5.5), states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. *If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.*

(emphasis added). Colorado law further prevents the Board from setting a title for a measure that contains “incongruous subjects... having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits.” § 1-40-106.5(1)(e)(I), C.R.S. (2014). Likewise, the Board cannot set a measure that would cause surprise and fraud to be practiced upon the voters. § 1-40-106.5(1)(e)(II), C.R.S. (2014).

A proposed measure violates the single subject rule if “it relates to more than one subject, and has at least two distinct and separate purposes that are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for 2005-06 #55*, 138 P.3d 273, 277 (Colo. 2006) (“#55”); *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-02 #21 and #22*, 44 P.3d 213, 215 (Colo. 2002) (“#21”). In contrast, a proposed measure that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). The single subject rule serves to prevent both the joinder of multiple subjects to secure the support of various factions, and voter fraud and surprise. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002) (“#43”).

B. Standard of single subject review by this Court.

Whether a proposed initiative contains a single subject is a question of law that must be determined by the Board before it

exercises jurisdiction to set a title. In this case, the Board denied the title setting request because #45 did not constitute a single subject.

Exhibit D. As such, the Board's decision is subject to *de novo* review by this Court. See *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #219*, 999 P.2d 819, 820-22 (Colo. 2000).

In determining whether the single subject requirement has been satisfied, the Court will not address the merits of a proposed initiative, interpret it, or construe its future legal effects. #21, 44 P.3d at 215-16; #43, 46 P.3d at 443. However, the Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. #55, 138 P.3d at 278. To do so, the Court will “examine sufficiently the initiative’s central theme to determine whether it contains a hidden purpose under a broad theme.” *In re Title, Ballot Title and Submission Clause for 2007-08 #17*, 172 P.3d 871, 875 (Colo. 2007). Through its exam, the Court will “determine unstated purposes and their relationship to the central theme of the initiative.” #55, 138

P.3d at 278. If the unstated theme is consistent with the general purpose, the single subject requirement will be met. *Id.*

C. Application of the single subject rule to #5.

The Board correctly refused to set a title because the measure, on its face, had at least two subjects. The first is to bring about substantial changes to the manner in which state and local recall elections are triggered and conducted under current statutory and constitutional law. *Exhibit A*, at §§ 2(1-8), 3(1-3). The second is to extend the existing right of recall to include state and county judicial officers who have stood for at least one retention election. *Exhibit A*, at §§ 1, 3(2).

Under the existing provisions of Article XXI, an “elective public officer of the *state of Colorado* may be recalled from office at any time *by the registered electors entitled to vote for a successor of such incumbent[.]*” Colo. Const., art. XXI, § 1. The plain language of the emphasized portion of that provision establishes that only those elected

state officers who are capable of being succeeded as an incumbent by an elected successor are currently subject to recall. Other existing constitutional and statutory provisions support this construction of the existing right of recall that #5 seeks to expand. *See* Colo. Const., art XXI, § 1 (“A petition signed *by registered electors entitled to vote for a successor of the incumbent* sought to be recalled...*demanding the election of the successor* to the officer named in said petition, shall be filed in *the office in which petitions for nominations to office held by the incumbent sought to be recalled* are required to be filed[.]”; Colo. Const., art. XXI, § 3 (“If such officer shall offer his resignation, it shall be accepted, and the vacancy caused by such resignation, or from any other cause, shall be filled as provide by law; *but the person appointed to fill such vacancy shall hold his office only until the person elected at the recall election shall qualify.*”; Colo. Const., art. XXI, § 3 (“[I]f a majority shall vote ‘yes’, *such incumbent shall thereupon be removed from such office upon the qualification of his successor.*”); Colo. Const., art XXI, § 3 (“If the vote had in such recall elections shall recall the officer *then the*

candidate who has received the highest number of votes for the office thereby vacated shall be declared elected for the remainder of the term[.]”); § 1-12-101, C.R.S. (2014) (“Every elected officer of this state or any political subdivision thereof is subject to recall from office at any time by the eligible electors entitled to vote for a successor to the incumbent.”).

And, although state and county judicial officers periodically stand for retention election under Article VI, § 25 of the Colorado Constitution, current law provides that when “a majority of those voting on the [retention] question vote ‘No’,” a vacancy exists in that judicial office at the end of the non-retained officer’s present term of office, which must be filled by appointment in accordance with the provisions of Article VI, § 20. *See also* § 13-6-205, C.R.S. (2014) (the term of office for a county court judge is four years); § 13-6-206, C.R.S. (2014) (county court judges – except those for the city and county of Denver – are subject to the retention election and vacancy provisions of sections 25 and 20 of Article VI of the Colorado Constitution). Simply put, a state

or county judicial officer is not an “incumbent” for whom a “successor” may be elected and, therefore, such officers are not subject to recall under Colorado’s existing recall provisions.

The broad language of proposed reenacted Article XXI in #5 also would have extended the existing right of recall to include county court judges for the City and County of Denver. Under Article VI, section 26 of the Colorado Constitution, the mayor of the City and County of Denver has the power to appoint Denver’s county court judges, and “[t]he number, manner of selection, qualifications, term of office, tenure, and removal of such judges shall be as provided in the charter and ordinances of the City and County of Denver.” *See also See DENVER, COLO. CHARTER, §§ 4.1.1 – 4.1.6.* Denver’s Charter, in turn, requires its county court judges to periodically stand for retention election. *See DENVER, COLO. CHARTER, § 4.1.5.*

However, as noted by this Court in determining that the Board erred by setting a title for a prior measure that was highly similar to #5 because it contained more than one subject, Denver’s county court

judges “are not currently subject to recall elections.” *In re Title, Ballot Title, and Submission Clause for 2013-2014 #76*, 333 P.3d 76, 84 (Colo. 2014) (“#76”). By its express terms, #5 authorizes the recall of an officer “in any...local...judicial office,” provided that such officer has successfully withstood at least one retention election. See Exhibit A, at §§ 1, 3(2). The text of #5 also makes clear that reenacted Article XXI “shall supersede any conflicting...local...charter...provision,” such as the Charter for the City and County of Denver. See Exhibit A, at § 3(3). As a result, #5 contains yet another subject in violation of the single subject requirement for proposed measures because it authorizes the recall of Denver’s county court judges.

The second and third subjects of #5 have a “distinct and separate purpose[]” from the first subject – changing the manner in which state and local recall elections are triggered and conducted under current statutory and constitutional law – and the multiple subjects are “not dependent upon or connected with each other.” #55, 138 P.3d at 277. Indeed, like the measure at issue in #76, the instant measure

impermissibly “combines proposals to expand the types of officers that are subject to recall with proposals to change the process for recalling officers, replacing and preempting multiple existing constitutional statutory provisions.” #76, 333 P.3d at 85. Finally, the inclusion of at least two subjects in the measure very likely would have caused surprise to the voters if the Board had set a title for #5 – a result that must be avoided. § 1-40-106.5(1)(e)(II), C.R.S. (2014); #76, 333 P.3d at 85 (“Voters would be surprised to learn that, 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.”).

As a result of these legal defects, the Board properly declined to set a title for #5.

CONCLUSION

For the above-stated reasons, the Court should affirm the Board's determination that #5 violated the single subject rule.

DATED: January 8, 2015.

JOHN W. SUTHERS
Attorney General

s/ LeeAnn Morrill
LEEANN MORRILL, 38742*
First Assistant Attorney General
Public Officials Unit
State Services Section
Attorney for Plaintiff
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that on January 8, 2015, I electronically filed a true and correct copy of the foregoing **OPENING BRIEF OF TITLE BOARD** with the Clerk of the Court via the ICCES e-filing system, and arranged for service via FedEx Express Mail (with a courtesy copy via email) upon each of the following individuals:

Natalie Menten
1755 S. Carr St.
Lakewood, CO 80232
nmlakewood@gmail.com
Petitioner

Mike Spalding
18 Buckthorn Drive
Littleton, CO 80127
mspalding@aol.com
Petitioner

s/LeeAnn Morrill

Be it Enacted by the People of the State of Colorado:

S. WARD
9:13 A.M.

RECEIVED

Article XXI of the Colorado Constitution is repealed and re-enacted as follows:

DATE FILED: OCT 21 2014 7:06 PM

Article XXI. RECALL FROM OFFICE.

Colorado Secretary of State

Section 1. Eligibility. Elective officers in any state or local legislative, executive, or judicial office are eligible for recall. The purpose of this article is to increase public accountability of public officers.

Section 2. Procedures. (1) Any four registered electors in the recall area may file at any time signed requests to recall eligible officers. Legislative, council, court, and other local election districts shall be the recall area for their officers. Statewide recalls shall be held by the secretary of state and local recalls by the election office of any county, or city and county, in the recall area, except the governor shall select another office or court in two days when an election or judicial officer is named for recall.

(2) Election offices shall deliver a sample petition section within two days. Each black ink section shall contain 100 entry lines, 20 per 8 1/2" by 14" page in portrait layout; the affidavit required in 2006 for state initiatives; and the question, "Shall (names of officers) be recalled as (titles and government)?" No government agent shall detain, stop, cite, or arrest petition circulators or signers for, while, or related to peaceably petitioning, but petition-based perjury, forgery, and other felony frauds shall be prosecuted.

(3) Statewide petition entries shall be first filed within 180 days of sample section delivery, and local entries within 90 days. One 30-day extension to file added entries signed at any time shall start when a first report of invalidity is issued by the later of the election office or court. Added entries shall be reviewed similarly.

(4) The required number of valid petition entries shall be the lesser of 5% of active registered electors in the recall area or 100,000 such entries. Signers shall be registered electors in the recall area. Entry lines shall require only signature, printed name, residential address, and city or town. No error, use, or lack of minor details like middle name, common nickname, initials, street type or direction, apartment, or postal code shall void entries. No sample section or affidavit error shall void entries. Entries shall be reviewed individually, with no random or statistical sampling or machine reading. Varied entries with a signature, readable first and last name and street address, and attached affidavit with or without errors shall be presumed valid until the officer disproves validity by clear and convincing evidence in a court review.

(5) Within 15 days of filings, the election office shall count, review, itemize, and report entries for validity. Within five days of the report, only recall filers and the officer may each protest without fee to the supreme court for its new review of disputed entries. A report of that validity review shall issue within 30 days of the protest filing. Only recall filers prevailing in a protest shall receive attorney fees and costs.

(6) Local elections on eligible officers shall occur on a Tuesday within 60 days after final validation, and statewide elections on the first November election date at least 60 days after. Ballots shall repeat the question for each officer, list "Yes" and "No" choices, and list one website from each side. Death, resignation, or announced retirement shall stop recalls but not pending successor petitions or elections.

(7) Ballots shall then list eligible successors and one website from each. The officer is ineligible. The required number of valid successor petition entries shall be the lesser of 0.5% of active registered electors in the recall area or 10,000 such entries. Entries shall be first filed by 90 days before the election. Successor entry validation and extension time shall be 20% of that time for recall entries. Otherwise, relevant petition procedures in section 2 (2) to section 2 (5) shall apply to successor petitions.

(8) Recalled officers shall lose their offices at once. If no successor be elected, local successors shall be elected similarly within 120 days, and statewide successors the next November. Runoff elections are



prohibited. Interim replacement of governor and mayors only shall occur. Successors are ineligible for a recall election for that office for two years.

Section 3. Enforcement. (1) Except by good faith mistake, no person shall sign a petition more than once or if ineligible. Any adult citizen may circulate any petition. To reduce retaliation and coercion, circulator payments and recall donations shall never be identified, reported, or limited. Other campaign costs and all petitions shall be public records. Except to provide public records, no one shall directly or indirectly give or receive government funds, labor, or aid in any recall or successor campaign or to repay its costs. Election dates also include the first Tuesday in November of odd-numbered years.

(2) "Elective" means in an office subject to regular, special, or retention elections, even if term limited. Judicial officers shall be eligible for recall after their election. This article also applies in all home rule jurisdictions as a matter of statewide concern. Recalled officers and those who resign or announce retirement during their recall process shall not be any officer for the next five years. Officers who defeat a recall election are ineligible for a recall election for that office for four years. A recall election occurs on its last election date. Up to five officers in one recall area may be listed on one recall petition, but they shall be voted on separately. The secretary of state website shall always list by name, title, and government all officers eligible for recall, and all persons ineligible for recall until the election date on that website.

(3) To enforce this article unrelated to specific petition validity, any adult citizen may file a court case in any district court, and the case shall be decided within 30 days. Direct appeals shall be filed within 10 days to the supreme court and shall be decided within 60 days. Only successful plaintiffs enforcing this article shall be awarded their costs, attorney fees, and damages, and only against governments and officers. Added recall requirements or any local recall laws are prohibited. This article shall be self-executing, severable, and effective upon passage. It shall be interpreted strictly in favor of this fundamental right to petition for recall and succession, and against governments and officers. It shall supersede any conflicting state or local constitutional, statutory, charter, ordinance, or other law, prior opinion, rule, regulation, or legal provision.

Ballot Title Setting Board

Proposed Initiative 2015-2016 #5¹

Hearing December 3, 2014:

Title setting denied on the basis that the measure does not constitute a single subject.

Hearing adjourned 1:38 p.m.

¹Unofficially captioned “Recall of Officers” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.



December 9, 2014

To: Ballot Title Setting Board

RECEIVED SWARD
DEC 09 2014 11:22 A.M.

Colorado Secretary of State

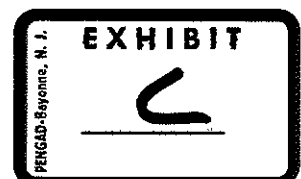
We are requesting a re-hearing for Proposed Ballot Initiative #5 2015-2016.

We believe we were erroneously denied a title setting and that our initiative constitutes a single subject.

Petition Representatives:

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

Mike Spalding
18 Buckthorn
Littleton, CO 80127



Ballot Title Setting Board

Proposed Initiative 2015-2016 #5¹

Hearing December 3, 2014:

Title setting denied on the basis that the measure does not constitute a single subject.

Hearing adjourned 1:38 p.m.

Rehearing December 17, 2014:

Motion for Rehearing denied.

Hearing adjourned 1:15 p.m.

¹Unofficially captioned “Recall of Officers” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

