

<p>COLORADO SUPREME COURT 1300 Broadway Denver, Colorado 80203</p>	<p style="text-align: right;">DATE FILED: May 19, 2016 7:28 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 #114 (“Civil Unions and Marriages”)</p> <p>Petitioner: D’ARCY STRAUB,</p> <p>v.</p> <p>Respondent: LAURA C. REINSCH,</p> <p>and</p> <p>Title Board: SUZANNE STAIERT, DAVID BLAKE, and JASON GELENDER.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">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 1,569 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

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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 lacked jurisdiction to set title because the proposed initiative contains multiple subjects?

STATEMENT OF THE CASE

D’Arcy Straub and Gene Straub (hereinafter “Proponents”), seek to circulate Proposed Initiative 2015-2016 #114 (“#114”), to obtain the requisite number of signatures to place a measure on the ballot to amend Colo. Const., art. II, § 31, which governs “Civil Unions and Marriages,” and to amend article 16 of title 14, C.R.S., to add the “Marriage and Establishment Clause Act.” Proponents submitted the final draft of #114 to the Board on April 7, 2016. *See* Petition for Review, at 8-9.

The Board conducted an initial public hearing on April 20, 2016, at which it determined #114 contains a single subject and proceeded to set title. *See* Petition for Review, at 14. Laura C. Reinsch (hereinafter “Objector”) timely filed a motion for rehearing on April 27, 2016, challenging the Board’s single subject determination and the title set by the Board. *See* Petition for Review, at 15-19. A rehearing was held on April 28, 2016, at which the Board reversed its determination that #114 contains a single subject and granted Objector’s motion for rehearing. *See* Petition for Review, at 20. Proponents timely filed a petition for review with this Court on May 5, 2016.

STATEMENT OF FACTS

Currently, the section 31 of article II of the Colorado Constitution provides that “[o]nly a union of one man and one woman shall be valid or recognized as a marriage in this state,” and various state statutes similarly define or otherwise govern the word “marriage.” *See, e.g.*, §§ 14-2-104(1)(b) and 14-15-103(4); *but see Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Holding that the right to marry is a fundamental right and

the Fourteenth Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out of state, and invalidating state constitutional and statutory provisions similar to Colo. Const., art. II, § 31.).

Measure #114 would amend the Colorado Constitution by replacing the above-quoted language with the following language: “The state of Colorado shall respect the establishment, equal protection, and due process clauses of the U.S. Constitution for issues concerning civil unions and marriages.” *See* Petition for Review, at 8. It also would amend Colorado statutes to create the “Marriage and Establishment Clause Act,” which would operate prospectively to abolish marriage as a legal relationship under Colorado law and retroactively to convert any existing marriage to a civil union. *See* Petition for Review, at 9.

SUMMARY OF THE ARGUMENT

As proposed, #114 contains multiple subjects. Namely, it amends the state constitution to require the State of Colorado to respect certain federally-created rights for any issue concerning civil unions and marriages, *and* amends existing state statutes—which currently recognize marriage and civil unions as distinct legal relationships—to abolish any laws governing marriage and to convert existing marriages to civil unions. As such, the Board properly determined that it lacked jurisdiction to set title because #114 contains more than one subject.

ARGUMENT

I. THE MEASURE CONTAINS AT LEAST TWO SUBJECTS.

Proponents contend that the Board erred by withdrawing the title it previously set for #114 upon rehearing because the measure does not contain multiple subjects. 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. (2016). Multiple subjects also are prohibited because their “surreptitious” nature may cause “surprise and

fraud [to be] practiced upon the voters.” § 1-40-106.5(1)(e)(II), C.R.S. (2016).

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. As such, this Court reviews *de novo* the Board's decision that #114 contains multiple subjects. *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) (“#17”). 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 #114.

The Board correctly determined that #114 contains multiple subjects. Currently, the Colorado Constitution recognizes only unions between one man and one woman as a “marriage.” The first subject of measure #114 would repeal the existing constitutional provision and replace it with one that requires the State to respect certain federally created rights “for issues concerning civil unions *and* marriages.” *See* Petition for Review, at 8 (emphasis added). And, in fact, existing statutes currently recognize marriage and civil unions as distinct legal relationships. *See, e.g.*, the Uniform Marriage Act, § 14-2-101, *et seq.*,

C.R.S. (2016), and the Colorado Civil Union Act, § 14-15-101, *et seq.*, C.R.S. (2016).

The second subject of measure #114 would prospectively abolish the legal relationship of marriage and retroactively convert any existing marriage to a civil union. *See* Petition for Review, at 9 (newly created §§ 14-16-103(1) and (3)). And this second subject is separate and distinct from the first, “not dependent upon” or necessarily connected with the former. #55, 138 P.3d at 277. Indeed, it is entirely possible that the same voter who supports requiring the State to respect certain federally created rights when it acts on the subjects of marriage and civil unions, does not also support abolishing the legal relationship of marriage, much less converting all existing marriages to civil unions.

The single subject rule exists to prevent “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative.” #17, 172 P.3d at 875. Measure #114 may be one that, “incapable of being enacted on [its] own merits” nonetheless passes because it “join[s] multiple subjects ... [that] will

secure the support of various factions that may have different or even conflicting interests.” #43, 46 P.3d at 442 (citation omitted). This is precisely the kind of “log rolling” or “Christmas tree tactics” the single-subject rule was designed to prevent. *In re Title, Ballot Title, Submission Clause, & Summary Adopted April 5, 1995*, 898 P.2d 1076, 1079 (Colo. 1995).

Accordingly, the Board properly determined that #114 contains multiple subjects.

CONCLUSION

For the above-stated reasons, the Court should affirm the Board’s decision that it lacked jurisdiction to set title because #114 violated the single subject rule.

DATED: May 19, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on May 19, 2016, 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 served the following counsel of record for the parties via ICCES and the following *pro se* individuals via FedEx overnight delivery:

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