

**SUPREME COURT OF COLORADO**

2 East 14th Ave.  
Denver, CO 80203

DATE FILED: March 21, 2016 5:24 PM

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 #73 (“Public Accountability of  
Officials”)

**Petitioner: Phillip Hayes**

v.

**Respondents: Mike Spalding and David  
Ottke**

**and**

**Title Board: SUZANNE STAIERT;  
FREDERICK YARGER; and JASON  
GELENDER**

▲ COURT USE ONLY ▲

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**Case No. 2016SA48**

**PETITIONER’S ANSWER BRIEF**

## 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).

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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*

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## SUMMARY OF ARGUMENT

The Proponents of Initiative 2015-16 #73 raise a number of points in their Opening Brief, only several of which require rebuttal. Petitioner's conclusion is unchanged. This measure violates the single subject requirement, and the title violates the clear title requirements. As such, the Court should reverse the Board's decision.

## LEGAL ARGUMENT

### **I. Initiative 2015-2016 violates the single subject requirement.**

#### **A. Recall petitions include four officials in four different offices.**

In response to the single subject arguments raised, Proponents maintain, "The single subject is the recall process; those to whom it applies are the direct objects of the recall." Respondents' Opening Brief at 3 (emphasis in original). This distinction is inconsistent with the Court's holding in *Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2013-172 #76*, 333 P.3d 76 (Colo. 2014). There, the Court found that broadening recall to apply to appointed (rather than elected) officials was a second subject. *Id.* at 83.

The Court did not answer the question of whether the aggregation of several officials on a single petition, in contravention of the effective "single subject" requirement that had always applied to recall petitions, violated the single subject requirement. *Id.* at n.2. Likewise, the Court did not address the question of

whether “different types of officials to be recalled by the same petition” was another subject. *Id.* The Court did not need to address these matters; it had already concluded #76 violated Colo. Const., art. V, sec. 1(5.5).

Proponents insist their change is necessary to address the “petition burden to recall a corrupt council.” Respondents’ Opening Brief at 4. Even assuming this is the goal of #73, the text does not limit recall petition names to the elected officials of the same governmental body. Initiative #73 only requires that the listed officials to be recalled be from the same “petition area.” “Up to four officials in the same petition area may be listed on one recall petition....” Proposed Art. XXI, sec. 2(2).

Prior briefing addressed various officers in the City and County of Denver to illustrate how the “same petition area” provision can include unrelated elected officials. Petitioner’s Opening Brief at 12. Because of #73’s wording, the elected officials included on a recall petition need not have anything to do with one another and certainly need not be part of the same allegedly “corrupt council.”

For example, the school district for a combined city and county will be represented, in part, by at-large school board members. C.R.S. § 22-31-131(b)(1). The City and County of Denver is such a district. C.R.S. § 22-31-131(1.5)(a)(I), (V). As such, a petition in Denver could seek recall of both an allegedly corrupt, at-large city council person and either one or both of the at-large school board members – recall efforts whose underlying reasons have absolutely nothing to do

with one another. For any reason at all, recall proponents could place Denver's city auditor on the same recall petition. As such, an allegedly "corrupt" city council person could be used to draw signatures to subject totally distinct school board members or other non-city council officials to recall elections.

Ironically, the Proponents' argument that they seek to recall a corrupt city council or at least a group of corrupt council members is undercut by the wording of their initiative. As officials on a recall petition must be from "the same petition area," the various city council people who represent individual city council districts would have to be recalled using petitions that are limited to their districts. Thus, a council person from District 1 could not be recalled with a petition for the council person representing District 2. *See Denver Municipal Code § 15-17* (setting forth distinct precinct boundaries for the city's 11 council districts). And neither could be recalled on the same petition as an at-large city council person.

The inquiry here is whether voters could be surprised by this change when they are confronted with a battery of procedural changes. This analysis asks whether a particular provision is "coiled in the folds" of an initiative, such that there would be voter surprise about the distinct change effected. *In re Title, Ballot Title and Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1077, 1079 (Colo. 2010). This question is particularly important where the Title Board did not disclose in the ballot title set the expansion of the recall petition to include four

officials or to state that the officials only need represent the same petition area in order to be so combined.<sup>1</sup> But disclosure in the title would not negate the fact that the process of recall is distinct from this type of “single subject” revision.

**B. Recalls will change every official’s qualifications for office.**

Because a recalled official cannot serve in public office for six years after being recalled, Proposed Art. XXI, § 2(9), the qualifications to run for office for every elected official in the state would be changed. As discussed in Petitioner’s Opening Brief, these changes to the constitutional qualifications to run for office are subjects hidden from view – topics of potential surprise to voters.

This change to the state’s elected officials’ qualifications to run for office is not a mere “enforcement” provision, as Proponents allege. Respondents’ Opening Brief at 5. An enforcement element is one that gives or sets forth a remedy that relates to the legal change in the initiative. *Blake v. King*, 185 P.3d 142, 146 (Colo. 2008) (initiative enforcement deals with liability, penalties, and judicial process). That provision must be “directly tied to the initiative’s purpose.” *In re*

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<sup>1</sup>“Shall there be an amendment to the Colorado constitution concerning recall of elective officials, and, in connection therewith, specifying recall and successor election procedures for state and local elective officials; stating that recalled officials shall not be any official for six years; restricting recall from the same office for an official who has already defeated a recall effort; requiring opposition donations and spending to continue to be public records; and prohibiting identification, reporting, or limitation of donations to recall campaigns and payments to recall petition circulators?”



*Proposed Initiative 2005–2006 # 73*, 135 P.3d 736, 739 (Colo. 2006). Even the Proponents admit that their objective is accountability in office. Respondents’ Opening Brief at 2. Accountability in one office is unrelated to whether officials, recalled from one elected office at one level of government, can hold any other elected office in the state for the next six years.

## **II. The ballot title is misleading.**

Two legal issues of note are raised by Proponents as to the clarity and accuracy of the ballot title. First, they state, “The existing Article XXI leaves signature review to private protestors, except for official review for number and legibility of entries.” Respondents’ Opening Brief at 7.

For ninety-eight years, that has not been the case. In *Landrum v. Ramer*, 172 P. 3 (Colo. 1918), a recall petition was filed to seek to recall a district court judge (then subject to election rather than retention). The suggestion was made that the petition should be accepted as filed without examination by the Secretary of State. *Id.* at 4. The Court flatly rejected that notion, asking, “how can it be supposed that the officer, to whom certain official duties are committed by the filing of a petition, has no right to determine whether or not the papers filed, in fact, constitute a petition?” *Id.* As such, a petition is only “filed” at the time that it is deemed sufficient after the election official’s review. *Id.* at 5. More recent case law confirms this analysis. *Adams v. Hill*, 780 P.2d 55, 56 (Colo. App. 1989)

(recall petition of special district directors required analysis of petition signatures to ensure the petition contained an adequate number of signatures).

Therefore, #73's prohibition on a meaningful signature review by election officials – an aspect of the initiative that is not denied by Proponents – is a central feature of the measure that was not addressed in the title. Given this departure from existing law, that fact should have been stated in the title.

A second issue raised by Proponents is their concurrence with Petitioner that the Title Board erred in including a statement of existing campaign finance law relating to the requirement that committees opposing a recall file disclosure reports indicating contributions and expenditures. “The last objection is to restating existing law. We agree that clause should be deleted.” Respondents' Opening Brief at 7 (emphasis in original). The Proponents state that the phrase involved is problematic in terms of the title's brevity and clarity. *Id.* Petitioner argued that the restatement of existing law was at odds with this Court's direction on addressing current law in the title, but the parties' end point is the same. As such, the title should be returned to the Board for revision.

## **CONCLUSION**

Given the Title Board's errors, its decision should be reversed.

Respectfully submitted this 21<sup>st</sup> day of March, 2016.

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**CERTIFICATE OF SERVICE**

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF** was sent this day, March 21, 2016, via overnight delivery or first class U.S. mail, postage pre-paid to the proponents and to counsel for the Title Board at:

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