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SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	▲ COURT USE ONLY ▲
Petition for Review 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 2019-2020, #3 **Petitioners/Proponents:** CAROL HEDGES and STEVE BRIGGS **v.** **Ballot Title Board:** BEN SCHLER, LEEANN MORRILL, and JASON GELENDER	
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PETITIONERS' OPENING 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). It contains 2,566 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

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.

For the party responding to the issue:

☐It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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.AR. 32.

By: *s/Edward T. Ramey*

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Petitioners Carol Hedges and Steve Briggs, through counsel, respectfully submit their Opening Brief.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Does the "single subject" requirement of Colo. Const. art. V, §1(5.5) prevent the people from exercising their reserved power of the initiative by wholly repealing a single constitutional provision they previously adopted by initiative, even if the provision being repealed may contain multiple subjects?

STATEMENT OF THE CASE

Petitioners are the designated representatives of the proponents of Proposed Initiative 2019-2020 #3 (the "Proposed Initiative"). The Proposed Initiative consists of one sentence: "In the constitution of the state of Colorado, repeal section 20 of article X."

Petitioners submitted the Proposed Initiative to the Title Board for the setting of a title and submission clause pursuant to §1-40-106, C.R.S. (2018), on January 4, 2019. The Title Board held a hearing on January 16, 2019, and determined the Proposed Initiative contained more than a single subject as required by Colo. Const. art. V, §1(5.5), and §1-40-106.5, C.R.S. (2018), and, therefore, denied the setting of a title for lack of jurisdiction. The Title Board subsequently denied Petitioners' Motion for Rehearing on February 6, 2019. Petitioners timely

filed their Petition for Review with this Court on February 13, 2019, pursuant to §1-40-107(2), C.R.S. (2018).

SUMMARY OF THE ARGUMENT

By approving the adoption of Colo. Const. art. V, §1(5.5)'s single subject limitation upon the exercise of their constitutionally reserved power of the initiative, the people did not express an intention to eliminate their power to wholly repeal a single constitutional provision, previously adopted as a single measure, should that provision later be determined to have contained multiple subjects.

ARGUMENT

I. Standard of Review and Preservation of Issue.

The interpretation of a constitutional provision is a question of law that this Court reviews de novo. *Gessler v. Smith*, 419 P.3d 964, 969 (Colo. 2018).

While the Court "generally defer[s] to [the Title Board's] broad discretion in the exercise of its drafting authority" – *Hayes v. Ottke*, 293 P.3d 551, 554 (Colo. 2013) – and will "employ all legitimate presumptions in favor of the Title Board's actions" in evaluating whether a particular proposed initiative may address multiple subjects – *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014) – interpretation of constitutional provisions and statutes "governing the Board's

authority to act" in the first instance are reviewed de novo. *Ottke,* 293 P.3d at 554. Such is the issue in this case.

Colo. Const. art. V, §1(5.5) states that "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." The Title Board interpreted this constitutional provision and its implementing statute – §1-40-106.5, C.R.S. (2018) – as precluding the setting of a title for an initiative that sought nothing more nor less than a complete repeal of another constitutional provision, formerly adopted by the people as a single measure, though later determined to have contained multiple subjects. The issue presented is whether the single subject requirement of Colo. Const. art. V, §1(5.5) should be interpreted to negate the people's reserved right of initiative in this specific and narrow context.

This issue was preserved. Please see paragraph 1 of Petitioners' Motion for Rehearing before the Title Board, together with the Title Board's denial of the Motion, appended to the Petition for Review in this case.

II. By Adoption of Colo. Const. art. V, §1(5.5), the Voters Should Not Be Presumed to Have Intended to Eliminate Their Reserved Constitutional Right to Directly Repeal the Entirety of a Provision, Formerly Adopted as a Single Measure, Yet Later Held to Have Contained Multiple Subjects.

Colorado's voters, upon referral by the General Assembly of a proposed amendment to Colo. Const. art. V, §1, at the state's general election in 1910, approved the reservation to the people of the right of initiative. L. 10 (Ex. Sess.). While this reservation of direct legislative power did not initially include a "single subject" limitation, the General Assembly's own exercise of legislative power had been subject to such limitation since statehood via Colo. Const. art. V, §21:

> **Section 21. Bill to contain but one subject – expressed in title.** No bill, except general appropriations bills, shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.

Upon referral by the General Assembly, Colorado's voters approved the adoption of Colo. Const. art. V, §1(5.5) at the state's general election in 1994. Tracking the existing Colo. Const. art. V, §21, the new paragraph (5.5) stated:

> No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its 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.

This was followed, however, by the following additional proscription:

> 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.

There is no clear guidance in the language of Colo. Const. art. V, §1(5.5) regarding its application to a proposal directed specifically and exclusively to a full and complete *repeal* – with nothing more nor less – of a single constitutional provision or statute theretofore adopted as a single and unitary measure. The question posed in this proceeding is whether the people – in approving Colo. Const. art. V, §1(5.5) – should be presumed to have intended to foreclose their constitutional right to undo by a single legislative act the complete product of an earlier legislative act (irrespective of whether that earlier product may now be deemed to contain more than a single subject).

The question is posed here in the context of a proposed initiative directed to the full and complete repeal – with no accompanying revisions, amendments, or reenactments – of the entirety of Colo. Const. art. X, §20 (The Taxpayer's Bill of Rights – "TABOR"). Colo. Const. art. X, §20 was adopted by initiative at the 1992 state general election, two years prior to the advent of Colo. Const. art. V, §1(5.5)'s application of a single subject requirement in that context. In its discussion of proposed Colo. Const. art. V, §1(5.5) in 1994, the Legislative

Council of the General Assembly – in its Analysis of Ballot Proposals ("Blue Book") – noted that Colo. Const. art. X, §20 had "included provisions relating to taxes, elections, state mandated programs, and spending and revenue limitations" and "might be considered" as an example of a measure including "more than one subject." *Court v. Poole*, 916 P.2d 528, 533 (Colo. 1996).

Subsequent to the adoption of Colo. Const. art. V, §1(5.5), this Court has generally concurred with the view that Colo. Const. art. X, §20 contains multiple subjects. It has done so in the context of disapproving the setting of titles for initiatives that proposed to amend that section by addition of a multifaceted new subsection – *In re Amend TABOR 25*, 900 P.2d 121 (Colo. 1995) – to repeal and reenact various of its provisions – *Court, supra* – to add a paragraph restricting local district revenue sources while requiring the state to backfill local programs within its own revenue limits – *Outcelt v. Bruce*, 959 P.2d 822 (Colo. 1998) – to exempt Colo. Const. art. X, §20 as a whole from application of proposed general modifications to the single subject requirement itself – *Polhill v. Campbell*, 46 P.3d 438 (Colo. 2002) – and to impose automatic expiration dates on multiple voter approved actions required under Colo. Const. art. X, §20 – *Ausfahl v. Caldara*, 136 P.3d 237 (Colo. 2006). Significantly, however, none of these proposed measures

involved a full and complete repeal unaccompanied by amendments, exclusions, exemptions, or full or partial reenactments.

One of this Court's opinions regarding Colo. Const. art. X, §20, however, may be read to go further – albeit in dicta. In the context of a full repeal *and reenactment* proposal, the majority opinion observed "[i]f, for example, a constitutional provision contains multiple subjects and an initiative proposes to repeal the entire underlying provision, then the initiative contains multiple subjects." *Court*, 916 P.2d at 533. Aside from the majority's observation being nonessential to its holding, three Justices disagreed on that precise and specific point and concurred only in the judgment. 916 P.2d at 535 (Mullarkey, J. concurring). While the Title Board in the present case may quite appropriately have considered itself bound by the guidance of the dicta in the majority opinion, this Court assuredly is not – *Pineda-Liberato v. People*, 403 P.3d 160, 167-68 (Colo. 2017); *Town of Eagle v. Scheibe*, 10 P.3d 648, 652 (Colo. 2000). Petitioners respectfully request clarification on this specific and limited issue.

The concurring opinion in *Court, supra,* is quite instructive on the broader issue of voter intent in their approval of Colo. Const. art. V, §1(5.5). First, the concurrence notes that the language used in Colo. Const. art. V, §1(5.5) – specifically that a "measure" may not properly contain more than a single subject –

"gives [the voters] no suggestion that it includes a repeal." 916 P.2d at 536. Second, the majority opinion's emphasis on the apparent rejection by the voters of the concern (expressed in the 1994 Blue Book) that adoption of Colo. Const. art. V, §1(5.5) would preclude system-wide affirmative *revisions* to complex aspects of state government "does not address the repeal-by-initiative situation." *Id*. Third, the concurrence observes that the only example offered to the voters in the 1994 Blue Book of a "repeal" arguably impacted by Colo. Const. art. V, §1(5.5) would be a proposed repeal of multiple (obsolete) constitutional provisions rather than a single discreet provision. *Id*. In sum:

> If the single-subject requirement was meant to apply to repeals, that was not disclosed to the voters. Given such lack of notice, I would not interpret the single-subject requirement as applicable to a repeal of a constitutional provision. To interpret the single-subject requirement, as the majority does, improperly infringes upon the voters' power of initiative.

Id. at 537 (Mullarkey, J., concurring).

If ambiguity exists in the meaning and intended application of the language of a proposal adopted by the voters, this Court attempts to construe its meaning "in light of the objective sought to be achieved and the mischief to be avoided." *Gessler,* 419 P.3d at 969; quoting *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1254 (Colo. 2012). The General Assembly (whence the

referral of Colo. Const. art. V, §1(5.5) to the voters came) identified its objectives in the provision's enabling legislation as follows:

> (I) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure 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;
>
> (II) To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.

§1-40-106.5(1)(e), C.R.S. (2018). The same objectives were presented to the voters in the "arguments for" section of the 1994 Blue Book. This Court has repeatedly referred to the same objectives in its opinions regarding application of Colo. Const. art. V, §1(5.5)'s single subject requirement. *See, e.g., Johnson v. Curry*, 374 P.3d 460, 465 (Colo 2016); *Court*, 916 P.2d at 531; *Outcelt*, 959 P.2d at 825. "At the same time" – per §1-40-106.5(2), C.R.S. (2018), and this Court, *see, e.g., Court, supra,* at 531 – Colo. Const. art. V, §1(5.5) is intended "to preserve and protect the right of initiative and referendum."

In the context of a complete and clean repeal of a single clearly identified constitutional provision, any "putting together" of "subjects having no necessary or proper connection" for purposes of "logrolling" support has already been accomplished; indeed, a complete and full repeal would effectively *undo* the

mischief. Nor is there anything confusing, ambiguous, "surreptitious," "coiled up in the folds" – *Johnson,* 374 P.3d at 465 – or likely to engender voter "surprise and fraud" in an initiative seeking nothing more nor less than a full repeal of a clearly identified single measure. The alternative of a forced piecemeal approach to the same end – in the context of a single constitutional provision initially explained to, understood by, and adopted by the voters as a single measure – would be far more tortuous, prohibitively expensive, and confusing to all concerned.

All that is accomplished by application of Colo. Const. art. V, §1(5.5) to a straightforward and complete repeal of a single, clearly identified unitary measure is an unnecessary, costly, and unjustifiable intrusion upon the present exercise of the people's right of initiative. "If the electorate can adopt such a provision in one initiative, it certainly should be empowered to repeal it in another." *Court*, 916 P.2d at 537 (Mullarkey, J., concurring).

As discussed by the concurring Justices in *Court*, 916 P.2d at 537-38 (Mullarkey, J., concurring), applying Colo. Const. art. V, §1(5.5)'s restrictions to a full and unadorned repeal – as posed in this case – creates additional problematic consequences. First, multi-subject measures pre-dating Colo. Const. art. V, §1(5.5) become impervious to repeal through a single initiative. Second, per Colo. Const. art. V, §1(5.5), should the Title Board erroneously set a title for an initiative

containing multiple subjects, and should a timely petition for review of the title setting not be filed (by someone) with this Court pursuant to §1-40-107(2), C.R.S. (2018), "such measure shall be void only as to so much thereof as shall not be . . . expressed" in the title. If – in the wake of the requisite litigation – the title is deemed sufficiently broad to encompass the multiple subjects, the measure stands. If the title randomly encompasses some but not all of the multiple subjects, the "some" stand and the rest are lost. If the offending multi-subject measure is a statute passed by the General Assembly in contravention of Colo. Const. art. V, §21, it may become impervious to legal challenge upon codification. *Tinsley v. Crespin*, 324 P.2d 1033, 1037 (Colo. 1958). By applying Colo. Const. art. V, §1(5.5) to full repeals, we unnecessarily remove the power of the people to seek an efficient remedy for any of this through a directed and complete repeal of the offending measure. This cannot have been the intent of the voters in adopting Colo. Const. art. V, §1(5.5).

In sum, Petitioners respectfully submit that the concurring Justices in *Court, supra*, were correct. The single subject requirement of Colo. Const. art. V, §1(5.5) was not reasonably intended by the voters to apply to an initiative proposing a full and complete repeal – with nothing more nor less – of a single constitutional provision or statute theretofore adopted as a single and unitary measure.

CONCLUSION

Petitioners respectfully request the Court to reverse the actions of the Title Board in this case and direct the Board to set a title for Proposed Initiative 2019-2020, #3.

Respectfully submitted this 5th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of March, 2019, a true and correct copy of the foregoing was filed and served via the Court's E-filing system [or hand delivery] upon the following:

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