

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
2019-2020, #3

Petitioners: Carol Hedges and Steve
Briggs,

v.

Title Board: Ben Schler, LeeAnn Morrill,
and Jason Gelender

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Case No.: 2019SA25

TITLE BOARD'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I 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, I certify that:

1. The brief complies with C.A.R. 28(g) because it contains 1,594 words.
2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and C.A.R. 28(b) because, for the party raising the issue, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

/s/ Emily B. Buckley

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Attorney for the Title Board

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STATUTES

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Title Board members Ben Schler, LeeAnn Morrill, and Jason Gelender (hereinafter “the Board”), by and through undersigned counsel, hereby submit the Title Board’s Answer Brief.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

1. Whether Proposed Initiative 2019-2020 No. 3 contains a single subject under Article V, § 1(5.5) of the Colorado Constitution.

STATEMENT OF THE CASE

The Title Board adopts the statement of the case presented in its Opening Brief, filed March 5, 2019.

STATEMENT OF FACTS

The Title Board adopts the summary of facts set forth in its Opening Brief.

SUMMARY OF THE ARGUMENT

The Title Board’s decision should be affirmed. Measure No. 3 would amend the Colorado Constitution by repealing the Taxpayer Bill of Rights (“TABOR”), Colo. Const., art. X, § 20. *See* Petition for Review at p. 7 (“In the constitution of the state of Colorado, **repeal** section 20 of article X.”). TABOR contains multiple subjects. Because No. 3 seeks

the repeal of TABOR, a constitutional provision consisting of multiple subjects, No. 3 contains multiple subjects. As such, the Board properly determined that it lacked jurisdiction to set title.

STANDARD OF REVIEW AND PRESERVATION

The Title Board's Opening Brief lists the applicable standard of review. The Title Board agrees with Proponents' statements concerning the standard of review and preservation.

ARGUMENT

I. Measure No. 3 contains more than one subject.

A. A repeal of a multi-subject constitutional provision contains more than one subject.

It is well established that a proposed initiative contains more than one subject when it proposes the repeal of a multi-subject provision. *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 584 (Colo. 2012). As this Court has explained, *all* initiatives must comply with the single subject requirement. Colo. Const. art V, § 1(5.5). Neither § 1(5.5) nor § 1-40-106.5, C.R.S. (2018) “creates any exemptions for initiatives that attempt to repeal constitutional provisions.” *In re Proposed Initiative 1996-4*, 916 P.2d 428, 532 (Colo. 1996). To the

contrary, it is “well established” that ‘measure’ as used in § 1(5.5) “includes initiatives that either enact or repeal.” *Id.* “A proposed initiative contains multiple subjects not only when it proposes new provisions constituting multiple subjects, but also when it proposes to repeal multiple subjects.” *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 104*, 987 P.2d 249, 254 (Colo. 1999). Further, “no special permission exists for initiatives that seek to address constitutional provisions adopted prior to the enactment of the single subject requirement.” *In re Proposed Initiative 1996-4*, 916 P.2d at 532.

Relying on a 1996 concurrence by Justice Mularkey, Proponents ask the Court to overturn its longstanding precedent on this point. Proponents’ Opening Brief at 7-11 (citing *In re Proposed Initiative 1996-4*, 916 P.2d at 535-38 (Mularkey, J., concurring)). In *In re Proposed Initiative 1996-4*, the majority held that if “a constitutional provision contains multiple subjects and an initiative proposes to repeal the entire underlying provision, then the initiative contains multiple subjects.” 916 P.2d at 533. Concurring in the majority’s result but not

its reasoning, Justice Mullarkey explained her view that the single-subject requirement should not apply to a repeal. *Id.* at 535-38 (Mullarkey, J., concurring). Proponents ask the Court to reconsider its precedent on this matter and adopt Justice Mullarkey’s reasoning here. Proponents’ Opening Brief at 7-11.

The Title Board is bound by this Court’s precedent, and may not rely on Justice Mullarkey’s contrary reasoning. *Cf. In re Estate of Ramstetter*, 411 P.3d 1043, 1050 (Colo. 2016) (holding that the court of appeals is bound to follow Colorado Supreme Court precedent). Further, “[t]he principle of stare decisis, which promotes uniformity, certainty, and stability of the law ... requires [the Court] to follow a preexisting rule of law unless [it is] clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come from departing from precedent[.]” *McShane v. Stirling Ranch Prop. Owners Ass’n, Inc.*, 393 P.3d 978, 984 (Colo. 2017) (internal citations and quotation marks omitted).

Since 1996, the Court has had several opportunities to reexamine whether a repeal of a multi-subject provision itself contains multiple

subjects. And rather than adopt Justice Mullarkey’s divergent position, the Court has affirmed that a proposed initiative contains more than one subject if it seeks the repeal of multi-subject provision. *See, e.g., In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 No. 43 (“No. 43”),* 46 P.3d 438, 447 (Colo. 2002); *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45,* 274 P.3d 576, 584 (Colo. 2012). For example, in 2014, the Court described its interpretation of the single subject rule as consistent with the voter’s intent in enacting the single subject requirement:

We must give effect to the voters’ intent in amending the Colorado Constitution to include the single subject requirement for ballot initiatives. This amendment to the constitution occurred after the voters approved a 1992 initiative, which its proponents called “The Taxpayer's Bill of Rights” (referred to as “TABOR” or “Amendment 1” in our case law), a multiple subject measure that changed the approval process for new taxes, established revenue limits, and imposed refund requirements, among other provisions. After the voters approved the institution of the single subject requirement in 1994, we held that repeal of the multiple subjects enacted by Amendment 1 could not be accomplished through a single initiative. Repeal of Amendment 1’s multiple subjects would have to be accomplished, if at all, through separate proposals.

Matter of Title, Ballot Title, & Submission Clause for 2013-2014 No. 76 (“No. 76”), 333 P.3d 76, 84–85 (Colo. 2014) (citations omitted).

Proponents have not demonstrated that the Court’s prior interpretation of the single subject rule was erroneous or is no longer sound because of changing conditions, much less shown that more good than harm would come from departing from precedent, as required to overturn precedent on this point. *See McShane*, 393 P.3d at 984.

B. A repeal of TABOR contains more than one subject.

A repeal of TABOR would violate the single subject requirement. TABOR contains more than one subject, as this Court has held on several occasions. *See In re Amend Tabor 25*, 900 P.2d at 121, 126 (Colo. 1995) (observing that TABOR “itself was not subject to the single subject requirement and contains multiple subjects”); *No. 43*, 46 P.3d at 447 (“TABOR contains multiple subjects”); *No. 76*, 333 P.3d at 84–85 (describing TABOR as a “multiple subject measure that changed the approval process for new taxes, established revenue limits, and imposed refund requirements, among other provisions”). Proponents do not

dispute that TABOR contains more than one subject. *See* Proponents' Opening Brief at 5–6.

The Court strongly suggested in *In re Proposed Initiative 1996-4*, that if a measure involved a simple repeal of TABOR, it would violate the single subject requirement:

If, for example, a constitutional provision contains multiple subjects and an initiative proposes to repeal the entire underlying provision, then the initiative contains multiple subjects. On the other hand, if an initiative proposes anything less than a total repeal, it may satisfy the single subject requirement. We recently noted that Amendment 1 would not have met the single subject requirement of article V, section 1(5.5): “Amendment 1 itself was not subject to the single subject requirement and contains multiple subjects.” *In re Amend Tabor 25*, 900 P.2d at 126.... Because the proposed Initiative does not seek a total repeal of Amendment 1, our dictum in *In re Amend Tabor 25* does not dispose of the present case. Rather, we must examine the proposed Initiative to determine whether it satisfies the single subject requirement.

916 P.2d at 533. While the foregoing passage may be dicta, its inference that a repeal of TABOR—a multi-subject provision—would violate the single subject rule supports the Board’s decision that No. 3 contains more than one subject.

More recently in *No. 43*, this Court held that an initiative designed to *prevent* the repeal of TABOR contains multiple subjects, in violation of Colo. Const. art V, § 1(5.5):

An amendment to the Colorado Constitution which prevents the repeal of TABOR itself constitutes multiple subjects in violation of article V, section 1(5.5). TABOR contains multiple subjects. *In re Proposed Initiative Amend TABOR 25*, 900 P.2d at 126. If “a constitutional provision contains multiple subjects and an initiative proposes to repeal the entire underlying provision, then the initiative contains multiple subjects.” [*In re Proposed Initiative 1996-4*,] 916 P.2d at 533. It follows that an initiative proposing to prevent the repeal of a constitutional provision containing multiple subjects also contains multiple subjects. Therefore, an initiative proposing to prevent the wholesale repeal of TABOR contains multiple subjects.

46 P.3d at 447; *see also No. 76*, 333 P.3d at 84–85 (“Repeal of Amendment 1’s multiple subjects would have to be accomplished, if at all, through separate proposals.”). If, as this Court held in *No. 43*, an amendment prohibiting the repeal of TABOR contains multiple subjects because TABOR contains multiple subjects, it must also be true that an amendment *repealing* TABOR contains multiple subjects.

Because TABOR contains multiple subjects and No. 3 proposes to repeal TABOR, No. 3 necessarily contains multiple subjects. *See In re*

Proposed Initiative 1996-4, 916 P.2d at 533. Accordingly, the Board properly determined that No. 3 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 No. 3 violated the single subject rule.

Respectfully submitted on this 25th day of March, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I served the **TITLE BOARD'S ANSWER BRIEF** and related documents upon the following counsel of record and parties through either Colorado Courts E-Filing or FedEx overnight delivery this 25th day of March, 2019, addressed as follows:

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