

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2019)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2021-2022 #6 (“Petitions”)

Petitioners: John Ebel and Donald
Creager

v.

Title Board: Theresa Conley, David
Powell, and Jason Gelender.

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Case No. 2021SA10

THE TITLE BOARD’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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,179 words.

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/ Michael Kotlarczyk

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INTRODUCTION

The Title Board concluded that 2021-2022 #6 contained multiple subjects and did not set a title. The central purpose of #6 is liberalizing certain aspects of the initiative and referendum process, but it also does two other things that are not necessarily and properly connected to this central purpose:

- It grants “anyone . . . standing to sue for any issue,” with no limitation on what those issues may be.
- It purports to amend the Colorado Constitution by statute, which would fundamentally alter the means by which the Constitution may be amended.

For the reasons stated in its opening brief, the Title Board’s determination of multiple subjects was correct. The Board here briefly responds to the main arguments in the Proponents’ opening brief.

ARGUMENT

I. Number 6’s provision concerning standing is a second subject.

By its plain terms, 2021-2022 radically alters standing jurisprudence in the state by granting “anyone” standing related to “any issue.” *See Record*, p 2. This is not necessarily and properly connected to the rest of the measure, so it is a second subject. *See Title Board Opening Br. 7-10*. Proponents offer two arguments in support of why this could be a single subject.

First, Proponents say that they offered to delete or amend the sentence granting “anyone” standing to sue on “any issue,” but that this “offer was denied.” Proponents’ Opening Br. 3.¹ But neither the Proponents nor the Title Board can amend a petition in the middle of a hearing. Instead, if the Board concludes the proposal contains multiple subjects, “the measure may be revised and resubmitted” and may be permitted to skip the review-and-comment process measures ordinarily

¹ Proponents’ Opening Brief does not contain page numbers, so the Board’s citations are to the pages of the electronic copy.

must go through. Colo. Const. art V, § 1(5.5). But Proponents didn't revise and resubmit, so their proposed amendment of this language was never put before the Board.

Proponents did later submit two related measures that either amended or deleted this standing provision (and also removed the language purporting to amend the constitution by statute). When reviewing these measures, the Board found a single subject and set title. *See* Colorado Secretary of State, 2021-2022 Initiative Filings, Agendas & Results, <https://tinyurl.com/y7crwep2> (Proposed Initiatives #10 & #11). This is an appropriate process to fix single-subject problems and fulfills the Board's mandate to "assist potential proponents in implementing their right to initiate laws . . . while concurrently protecting the voters against confusion." *In re Title, Ballot Title & Submission Clause for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999). On the other hand, Proponents' suggestion that either the Board or this Court "ha[ve] the power to add . . . words to clarify the text" is wrong. Proponents' Opening Br. 3.

Second, Proponents argue that their interpretation of the standing language — that it grants standing only to sue to enforce the new statute — should be given substantial weight. *Id.* They cite *Bedford v. Sinclair*, 112 Colo. 176, 147 P.2d 486 (1944), as saying that a “contemporary . . . interpretation by petition proponents shall be accorded substantial weight by this court in enforcing allegedly unclear words.” Proponents’ Opening Br. 3. But *Bedford* did not concern an interpretation offered by petition proponents to avoid a single subject violation. Instead, *Bedford* addressed a novel interpretation of the old age pension amendment several years after it was enacted. In rejecting that interpretation, the *Bedford* Court found it persuasive that the parties who would benefit from that interpretation never suggested it before, even in the years right after the amendment was enacted. 112 Colo. at 182, 147 P.2d at 488-89. Nothing in that case supports granting deference to an initiative proponents’ interpretation of their own measure for single subject purposes.

In other contexts, this Court has recognized that the Board should afford some “deference to a proponent’s expression of his or her initiative’s intent.” *In re 1999-2000 #25*, 974 P.2d at 469. But this deference cannot come “at the expense of [the Board’s] other equally important duties,” including its duty to avoid “potential public confusion.” *Id.* Here, any deference to which the Proponents are entitled does not extend so far as to impose limiting constructions on the plain language of the words employed by the Proponents in their proposed measure. Requiring the Board to defer to the Proponents’ proposed reading of the standing provision would swallow up the Board’s other duties, including its duty to avoid potential confusion, and would be contrary to this Court’s recognition that it ordinarily cannot “determine the initiative’s efficacy, construction, or future application.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8.

II. The effort to repeal constitutional provisions by statute is a second subject and, contrary to Proponents, has not been condoned in any recent proposal to the Title Board.

Number 6 also contains a second subject because it purports to upend settled law by amending the Colorado Constitution by statute. *See* Title Board Opening Br. 11-13. Proponents' principal response to this objection is that other initiatives have both repealed constitutional provisions and enacted statutory changes. But Proponents misunderstand the Board's single-subject objection. No one disputes that a single initiative can amend both the Colorado Constitution and statutes — 2019-2020 #257 (appearing on the ballot as Amendment 77), for example, contained a section 1 that amended the Constitution, and sections 2-5 that amended the Colorado Revised Statutes. *See* Colorado Secretary of State, 2019-2020 Initiative Filings, Agendas & Results <https://tinyurl.com/gdwmuzjz>. But #6 doesn't do that; instead, it seeks to amend the Constitution by a provision in a statute. *See* Record, p 2 (proposed § 1-40-137(4)). This also differentiates #6 from its related initiatives from last cycle, 2019-2020 #245 and #299, both of which

proposed a constitutional amendment (which could repeal other constitutional provisions).

III. Proponents' conclusion consists almost entirely of matters that are not before the Court.

This is an expedited review under § 1-40-107, C.R.S. (2020) of the Title Board's determination that #6 contained multiple subjects. This Court's review is thus limited to "either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions." § 1-40-107(2).

But the last three pages of Proponents' brief contains a laundry list of items not presently before the Court, including:

- what title should be set for #6 if it contains a single measure;
- how long that title should be;
- the propriety of titles set by the Board last year on different measures;
- whether statutes relating to the time period for collecting signatures on petitions are constitutional; and

- whether statutes concerning the disqualification of certain signatures on petitions are constitutional.

As the Court is well aware, none of these matters are before the Court.

Instead, this Court is presented only with the question of whether the

Title Board correctly refused to set title because 2021-2022 #6 contained multiple subjects.

CONCLUSION

The Court should affirm the Board's conclusion that 2021-2022 #6 contained multiple subjects and that the Board lacked jurisdiction to set a title.

Respectfully submitted on this 17th day of February, 2021.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado and via **Fed Ex** overnight delivery, this 17th day of February, 2021, addressed as follows:

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