

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 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, 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 2,351 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

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/ Michael Kotlarczyk

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ISSUE ON REVIEW

Whether the Title Board correctly determined that Proposed Initiative 2021-2022 #6 contains multiple subjects.

STATEMENT OF THE CASE

Proponents John Ebel and Donald Creager seek to circulate #6 to obtain the requisite number of signatures to place an initiative on the ballot. The proposed initiative seeks to amend the Colorado Revised Statutes by, among other things, changing the petitioning process for initiatives and referenda. *See* Record for Initiative #6, p 2, filed Jan. 11, 2021 (“Record”).

A. The hearing and rehearing on 2021-2022 #6

On December 16, 2020, the Title Board held a hearing on #6. *See id.* at 4. The draft that Proponents submitted to the Board was an “original and final” draft, reflecting that they made no edits to their original proposal following review and comment from the Legislative Council Staff and the Office of Legislative Legal Services. *See id.* at 2; *see also* § 1-40-105(1), C.R.S. (2020). The Board concluded that #6

contained multiple subjects and so the Board lacked jurisdiction to set a title.

The Title Board identified two single subject problems with #6. First, the Board discussed the final sentence of the proposed initiative, which reads, “Anyone has standing to sue for any issue.” *Id.* at 2. The Board noted that this language was broader than simply whether individuals had standing to sue for violations of the new statute. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #6* (Dec. 16, 2020), <https://tinyurl.com/y6ozujmd> (statement at 9:15).¹ Reading this broad language literally creates a second subject by changing Colorado standing jurisprudence in matters unrelated to the petitioning process. The Proponents, however, stated this sentence was intended to be “limited to petitions.” *Id.* at 10:40.

Second, the Board discussed whether the first two sentences of subsection 4 created a second subject. *Id.* at 11:25. Number 6 is styled as a change to the Colorado Revised Statutes, but the first two

¹ This recording will be cited throughout this brief as the “Hearing.”

sentences of subsection 4 purport to repeal provisions of the Colorado Constitution. The language in question reads: “Article V section 1 (2)-(10) are repealed except the first sentence of (4)(a), (7.3), and (8). The last sentence of Article X section 20(3)(b)(v) shall not apply to petitions.” Record at 2 (proposed § 1-40-137(4)). The Board stated this language meant one of two things: either these two sentences of subsection 4 would ultimately be held ineffective because a statute cannot amend the Constitution; or the two sentences create a second subject because they provide a new means of amending the Colorado Constitution. Hearing at 17:55.

After forty minutes of discussion, the Board voted unanimously that the measure contained multiple subjects. *Id.* at 42:50. The Board’s motion did not specify which of the two single subject concerns discussed above were the basis of its conclusion or whether both were.

The Proponents filed a timely motion for rehearing. Record, p 5. At the January 6, 2021 rehearing, the Board discussed again both bases for finding multiple subjects over the course of a 35-minute motion for rehearing. *See Hearing Before Title Board on Proposed Initiative 2021-*

2022 #6 (Jan. 6, 2021), <https://tinyurl.com/oadwijyt>.² The Board then denied the motion for rehearing in its entirety. *Id.* at 6.

B. Past and future measures similar to #6

One of the Proponents also proposed initiatives similar to #6 last year. The Title Board set title on two such measures last year: 2019-2020 #245 and #299. While similar, those two measures did not contain the standing provision discussed above. *See* 2020SA92, 2020SA135. Additionally, those measures were proposed constitutional amendments rather than statutory amendments like #6. *Id.* The Board concluded both measures contained a single subject and set title for both. No one challenged the Board’s single-subject determination and this Court affirmed the titles set by the Board. *See id.*

In addition, the Proponents also have several other measures similar to #6 currently pending before the Board. *See* Colorado Secretary of State, 2021-2022 Initiative Filings, Agendas & Results, <https://tinyurl.com/y7crwep2> (Initiatives #8-12).

² This recording will be cited as the “Rehearing.”

SUMMARY OF ARGUMENT

The Title Board correctly found that 2021-2022 #6 contains multiple subjects. The majority of the proposal concerns liberalizing much of the citizen petitioning process. But the measure also does two things that are unrelated to this central purpose.

First, #6 purports to grant standing to “anyone” to sue on “any issue.” Proponents believe this can be limited to “any issue” related to the subject of petitions, but neither the Board nor this Court can predict the future application of this language. The Court must therefore apply the plain language of the measure, which purports to upend settled standing law in all cases throughout Colorado. This subject is not necessarily and properly connected to the liberalization of the initiative process, and so is a second subject.

Second, #6 also purports to create a new method for amending the Colorado Constitution, which is also a second subject unrelated to the petitioning process. Number 6 is a change to the Colorado Revised Statutes, but by its express terms, it amends the Colorado Constitution. Under current law, a statute cannot amend the Colorado Constitution.

Providing a new means of amending the Constitution via statute is yet another subject unrelated to the thrust of the measure. Even if this provision were ultimately held to be unenforceable — which is not an interpretation the Court can make at this time — this provision undermines one of the central purposes of the single-subject requirement: ensuring that voters are not confused or misled by a measure on which they are asked to vote.

ARGUMENT

I. The Title Board correctly concluded that the measure contains multiple subjects.

A. Standard of review and preservation.

This Court’s standard of review is deferential to the Board. The Title Board only has jurisdiction to set a title for a measure that contains a single subject. *See* Colo. Const. art. V, § 1(5.5). “In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52 ¶ 8. In doing so, the Court does “not address

the merits of the proposed initiative” or “suggest how it might be applied if enacted.” *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 8. Nor can the Court “determine the initiative’s efficacy, construction, or future application.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Instead, the Court “must examine the initiative’s wording to determine whether it comports with the constitutional single-subject requirement.” *In re 2019-2020 #3*, 2019 CO 57, ¶ 8.

The Proponents preserved their single-subject arguments. *See* Record at 5.

B. The proposed measure contains a second subject of granting any person standing to sue.

“The single-subject requirement is intended to prevent voters from being confused or misled” *In re Title, Ballot Title, & Submission Clause for 1997-98 #74*, 962 P.2d 927, 928 (Colo. 1998). In reviewing the Title Board’s single-subject determination, the Court’s role “is limited to determining whether the contested language within the initiative creates a distinct and separate subject which is not connected to or dependent upon the remaining aspects of the initiative.” *In re 2013-*

2014 #76, 2014 CO 52, ¶ 8. To pass this test, the various parts of the proposed initiative “must be necessarily and properly connected.” *Id.*

The provisions of #6 concerning standing are not necessarily and properly connected to the rest of the initiative and so are a second subject. The majority of #6 focuses on liberalizing the initiative process. Among other things, it mandates shorter ballot titles, requires a shorter title setting process, allows any adult to circulate or file petitions, decreases the signature requirements, and limits the ability of the General Assembly to exempt measures from the referendum process. *See Record*, p 2.

But the measure also purports to radically alter Colorado’s standing jurisprudence. By its plain terms, the initiative states that “Anyone has standing to sue for any issue.” *Id.* On its face, this is a drastic change to the law that is unrelated to the rest of the measure concerning the petitioning process. “Standing is a jurisdictional prerequisite” that applies in all civil proceedings in state court. *See Hickenlooper v. Freedom from Religion Found., Inc.*, 2014 CO 77, ¶ 7. Standing requires determining whether a plaintiff suffered an injury in

fact to a legally protected interest. *Id.* ¶ 8. “If a court determines that standing does not exist, then it must dismiss the case.” *Id.* ¶ 7.

On its face, the proposed initiative would overrule decades of Colorado case law establishing standing in areas of the law that have nothing to do with citizens’ petition rights. This standing provision is not necessarily and properly connected to the rest of the measure, so the Board correctly held that #6 contains multiple subjects.

Proponents stated that this language was intended to be “limited to petitions.” Hearing at 10:40. But that is not what the measure says, and the Board could not apply such a limiting construction to the initiative when assessing its single subject. *See In re 2013-2014 #76*, 2014 CO 52, ¶ 8 (Court cannot “determine the initiative’s efficacy, construction, or future application”); *see also In re Title, Ballot Title, & Submission Clause for 1997-1998 #10*, 943 P.2d 897, 901 (Colo. 1997) (“Any problems in the interpretation of the measure or its constitutionality are beyond the functions assigned to the title board and outside the scope of [this Court’s] review of the title board’s actions.”). Instead, the Court is limited to looking at the language of the

measure, which here proposes a sweeping change to Colorado jurisprudence unrelated to petition rights.

Even if the Court could apply the limiting construction requested by the Proponents, it would not cure the single-subject problem. Specifically, it would still be unclear whether the expansion of standing to any person for “any issue” refers only to the issues in the new § 1-40-137, or whether it would apply to all of article 40. Article 40 includes numerous provisions related to initiatives and referenda that are not directly addressed by #6. For example, article 40 contains requirements for the Secretary of State’s authorization of petition forms (§ 1-40-113(1)(a)), for printing titles on the ballot (§ 1-40-115), and for the contents of the Blue Book (§ 1-40-124.5). Granting standing to anyone to sue on this diversity of issues would not be necessarily and properly connected to the specific measures currently contained in #6.

Proponents’ assertion that this standing provision is “limited to petitions” thus sheds no light on how far that limitation extends. So even if the Court could apply the requested limiting construction, it would not cure the single subject problem or avoid voter confusion.

C. The proposed measure also contains a second subject of altering the means of amending the Colorado Constitution.

Number 6 also contains another subject that is not necessarily and properly connected to the rest of the measure. Specifically, it purports to alter the manner for amending the state constitution.

The proposed initiative is a statute. Unlike the similar measures proposed last year, which both proposed an amendment to the Colorado Constitution, #6 is only a statutory change. Nonetheless, Section 4 of the proposed statute purports to repeal or limit the application of certain constitutional provisions: “Article V section 1 (2)-(10) are repealed except the first sentence of (4)(a), (7.3), and (8). The last sentence of Article X section 20 (3)(b)(v) shall not apply to petitions.” Record at 2.

Under current law, a statute cannot amend the Constitution. *See, e.g., Passarelli v. Schoettler*, 742 P.2d 867, 872 (Colo. 1987) (“where a statute and the constitution are in conflict the constitution is paramount law.”); accord *In re Interrogatory on H. Joint Res. 20-1006*, 2020 CO 23, ¶ 67 (Samour, J., dissenting) (the “legislature [cannot]

amend the state constitution through a statute”). This would suggest that these two sentences would simply not be effective if #6 were enacted. On the other hand, when “enacting a statute, it is presumed that . . . [t]he entire statute is intended to be effective.” § 2-4-201(1)(b); *see also Coloradans for a Better Future v. Campaign Integrity Watchdog*, 2018 CO 6, ¶ 16 (“In construing statutes and citizen initiatives, [courts] seek to give effect to the General Assembly’s and the electorate’s intent, respectively.”).

Treating this as a single subject would undermine the rationale supporting the single-subject requirement of “prevent[ing] voters from being confused or misled.” *In re 1997-98 #74*, 962 P.2d at 928. Voters would be confronted with a ballot initiative that either pioneers a new method for amending the Constitution or that is unenforceable. Either way, voters would be confused or misled as to the efficacy of the measure they would be asked to vote on.

The Proponents responded to the Board’s single-subject concerns at the rehearing by suggesting that this provision of the initiative may not be effective. *See* Rehearing at 6:00. But the Board is not able to

speculate as to “the initiative’s efficacy, construction, or future application.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Although, this Court has previously recognized that it has some ability to interpret the language of an initiative “when necessary” to review the Board’s actions, it has not previously done so in circumstance likes these . *See In re Title, Ballot Title, & Submission Clause for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). Specifically, the Board is unaware of any instance in which the Court has held that a measure contained a single subject only after concluding that provisions containing a second subject were unenforceable. The Court should not make this case the first.

Therefore, because changing the means by which the Colorado Constitution can be amended is not “necessarily and properly connected” to the liberalization of the petitioning process, the Board correctly determined that #6 contains multiple subjects. *Id.*

CONCLUSION

The Court should affirm the decision of the Title Board that it lacked jurisdiction to set a title on 2021-2022 #6.

Respectfully submitted on this 1st 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 OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado and via Fed Ex overnight delivery, this 1st day of February, 2021, addressed as follows:

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