

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

Original Proceeding Pursuant to  
§ 1-40-107(2), C.R.S. (2021-2022)  
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and  
Submission Clause for Proposed Initiative  
2021-2022 #8 (“Petitions”)

**Petitioners:** John Ebel and Donald  
Creager

v.

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

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Case No. 2021SA62

**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 1, 676 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 #8 contains multiple subjects.

## STATEMENT OF THE CASE

Proponents John Ebel and Donald Creager seek to circulate #8 to obtain the necessary 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* Pet. for Review #8, p 7, filed Feb. 24, 2021.<sup>1</sup>

**A. Number 8 is nearly identical to #6 and the Court just affirmed the Title Board's decision on #6.**

Numbers 6 and 8 are almost the same. The Title Board denied setting title for #6 because it determined it had multiple subjects. In addition to liberalizing the petitioning process, #6 purported to alter the means for amending the Colorado Constitution (by permitting an

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<sup>1</sup> The record for this appeal is attached to the petition. Because the record was not filed as a separate document, this brief will cite to the pages of the PDF of the petition.

amendment through statute) and to expand standing to sue in areas unrelated to petitioning. The Court affirmed, without opinion, the Title Board's decision not to set title. *See In re Title, Ballot Title, & Submission Clause for 2021-2022 #6*, 2021SA10.

Number 8, from the same proponents, makes minor changes from #6. The only changes are in the final section of the measure, and are shown here in redline:

**Section 4. Enforcement.** ~~Article V section 1 (2)-(10) are repealed except~~ Except the first sentence of (4)(a), (7.3), and (8). ~~The, Article V section 1 (2)-(10) and the~~ last sentence of Article X section 20 (3)(b)(v) shall not apply to petitions. Those who stop, detain, eject, cite, or arrest a circulator or signer for petitioning peaceably in public access areas shall be fined \$3,000. *Government hostility to petitions must cease.* Hearings may use telephones; court filings may use email. Changing any voter-approved petition requires voter approval of a petition. This statute shall be self-executing, severable, effective at once, and repeal all conflicting ~~laws~~ statutes. Anyone has standing to sue for any issue ~~in this statute~~.

*See* Pet. 7; Record (Jan. 11, 2021), 2021SA10, p 2.

The Title Board held a hearing on #8 and determined that #8, like #6, contained multiple subjects. Pet. 8. The Board also denied Proponents' motion for a rehearing, concluding that the first sentence of section 4 created a second subject because it declared, by statute, provisions of the Colorado Constitution inapplicable. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #8* (Feb. 17, 2021), <https://tinyurl.com/hv3jwhjw> (statement at 7:30).

**B. Other measures similar to #8.**

Last year, the Title Board set title on two measures similar to #8: 2019-2020 #245 and #299. But those two measures, unlike #8, proposed constitutional amendments rather than statutory amendments. *See* 2020SA92, 2020SA135. The Board concluded both measures contained a single subject and set title for both. This Court affirmed the titles set by the Board. *See id.*

The Proponents also have several similar measures before the Court for the 2021-2022 cycle. The following table summarizes those measures:

<b>Initiative</b>	<b>Title Board action</b>	<b>Supreme Court action</b>
<b>6</b>	Single subject violations – statute can repeal Constitution; standing	Affirmed (2021SA10)
<b>8</b>	Single subject violation – statute can effectively repeal Constitution	Pending (2021SA62)
<b>9</b>	Single subject violation – statute can effectively repeal Constitution	Pending (2021SA63)
<b>10</b>	Title set	Pending (2021SA64)
<b>11</b>	Title set	Pending (2021SA65)
<b>12</b>	Single subject violations – separation of powers; initiative cannot be amended	Pending (2021SA66)

This measure, #8, is identical to #9 in all material respects. This opening brief is also nearly identical to the opening brief for #9.

## SUMMARY OF ARGUMENT

The Title Board correctly found that 2021-2022 #8 contains multiple subjects. Most of the proposal concerns liberalizing the citizen petitioning process. But the measure also purports to create a new method for amending the Colorado Constitution, which is a second subject unrelated to the petitioning process. Number 8 is a change to the Colorado Revised Statutes, but by its express terms, it supersedes the Colorado Constitution. Under current law, a statute cannot supersede the Colorado Constitution or declare any portion of the Constitution inapplicable. Changing Colorado law by permitting a statute to supersede the Constitution is another subject unrelated to the thrust of the measure. Even if a court later held that this provision is unenforceable — which is not an interpretation the Court can make at this time — it 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 Title Board. The 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.

Proponents challenged the Board’s single-subject determination in their motion for rehearing and so preserved that argument. *See* Pet. 9.

**B. The proposed measure contains a second subject of altering the means of amending the Colorado Constitution.**

Number 8 violates the constitutional single-subject requirement because it contains two subjects that are not “necessarily and properly connected.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. The measure mostly concerns 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 signature requirements, and limits the General Assembly’s ability to exempt measures from the referendum process. *See* Pet. 7. But section 4 does something different and unrelated to this purpose — it purports to allow a statute to effectively amend the Colorado Constitution.

The proposed initiative is a statute. Unlike the similar measures proposed last year, which both proposed an amendment to the Colorado Constitution, #8 is only a statutory change. Nonetheless, Section 4 of the proposed statute purports to limit the effectiveness of the

Constitution: “Except the first sentence of (4)(a), (7.3), and (8), Article V section 1 (2)-(10) and the last sentence of Article X section 20 (3)(b)(v) shall not apply to petitions.” Pet. 7.

Under current law, a statute cannot override 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”). As such, this provision of #8 may simply be ineffective if it 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.”).

The Court need not determine at this stage whether section 4 would be effective if enacted. *See 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.”) (citations omitted). 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 wording of #8 makes clear that it does not — creating a process by which statutes can effectively amend the Constitution is not necessarily and properly connected to liberalizing the petitioning process.

Relatedly, treating this as a single subject would undermine the purpose of the single-subject requirement 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). Number 8 either pioneers a new method for amending the Constitution or its key enforcement provision is ineffective. At best, this is confusing to voters, and at worst, it is misleading. Either way, voters should not have to engage in such guesswork when casting their ballots.

Proponents have offered two arguments for why #8 contains a single subject. First, Proponents argued #8 does not amend the Constitution, but instead only says parts of the Constitution shall not apply. As the Board noted, this is a “distinction without a difference.” *See Hearing Before Title Board on Proposed Initiative 2021-2022 #8* (Feb. 3, 2021), <https://tinyurl.com/n4u62xhc> (statement at 19:45). A statute declaring provisions of the Constitution unenforceable or inapplicable disrupts settled law that the Constitution is “paramount” just as much as a statute that expressly repeals parts of the Constitution. *Passarelli*, 742 P.2d at 872.

Second, Proponents argue that other initiatives have both repealed constitutional provisions and enacted statutory changes. But Proponents misunderstand the Board’s single-subject finding. 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 #8 doesn't do that; instead, it seeks to effectively amend the Constitution through a new statute. Such a statute would upend settled principles of constitutional interpretation in Colorado and creates a second subject.

Number 8 purports to liberalize the petitioning process and to create a new method for amending the Constitution. Because these two subjects are not necessarily and properly connected, the Title Board correctly held that it lacked jurisdiction and refused to set title on #8.

### CONCLUSION

The Court should affirm the decision of the Title Board that it lacked jurisdiction to set a title on 2021-2022 #8.

Respectfully submitted on this 24<sup>th</sup> day of March, 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 24th day of March, 2021, addressed as follows:

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*s/ Xan Serocki*  
\_\_\_\_\_  
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