

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 #12 (“Petitions”)

Petitioners: John Ebel and Donald
Creager

v.

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

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Case No. 2021SA66

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 1,687 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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CONSTITUTIONS

Colo. Const. art. V, § 1(4)(a) 6

Colo. Const. art. V, § 1(5.5) 4

OTHER AUTHORITIES

Hearing Before Title Board on Proposed Initiative 2021-2022 #12

(Feb. 3, 2021), <https://tinyurl.com/n4u62xhc> 2

Hearing Before Title Board on Proposed Initiative 2021-2022 #12

(Feb. 17, 2021), <https://tinyurl.com/hv3jwhjw> 2

ISSUE ON REVIEW

Whether the Title Board correctly determined that Proposed Initiative 2021-2022 #12 contains multiple subjects.

STATEMENT OF THE CASE

Proponents John Ebel and Donald Creager seek to circulate #12 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 #12, p 7, filed Feb. 24, 2021.¹

At the February 3, 2021 hearing on #12, the Title Board held that #12 contained multiple subjects and that it lacked jurisdiction to set a title. *Id.* at 8. The Board focused in particular on two sentences in #12's final paragraph:

¹ 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.

- “Changing any voter-approved petition requires voter approval of a petition.”
- “Any repeal or change to any part of this statute violates the First Amendment, United States Constitution Bill of Rights, and section 24 of Article II, Colorado Constitution Bill of Rights.”

Id. at 7. The Board concluded that these were separate subjects unrelated to the measure’s overall purpose. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #12* (Feb. 3, 2021), <https://tinyurl.com/n4u62xhc> (statement at 1:51:00). Proponents moved for rehearing and the Board reaffirmed its conclusions. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #12* (Feb. 17, 2021), <https://tinyurl.com/hv3jwhjw> (statement at 1:14:30).

Number 12 is similar to several other measures proposed by these Proponents, as well as 2019-2020 #245 and #299. The final paragraph of #12 is unique among these measures, however, and the exact single-subject violations identified by the Board here do not appear in the other measures. The following table summarizes the Board’s actions with respect to this year’s related initiatives:

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

SUMMARY OF ARGUMENT

Number 12 contains three separate subjects. First, the measure liberalizes numerous parts of the initiative and referendum process. Second, #12 purports to make itself and any other voter-approved initiative immune from amendment or repeal by the General Assembly. Under current constitutional law, the General Assembly has the power to amend or repeal any statute. This measure proposes to take away that power from the General Assembly. Third, #12 purports to fundamentally rebalance the distribution of powers among Colorado’s branches of government. Rather than allowing the courts to determine what constitutes a violation of the state and federal constitution, #12 declares that any repeal or change to it violates the constitutions. These

additional subjects are not necessarily and properly connected to the overarching purpose of the measure to alter the petitioning process. The Title Board therefore correctly determined that it lacked jurisdiction to set a title for #12.

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. Number 12’s provision making a statute immune from change by the General Assembly is a second subject.

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.*

Number 12 mostly 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 General Assembly's ability to exempt measures from the referendum process. *See* Pet. 12.

But the measure also purports to alter Colorado law by prohibiting the General Assembly from amending, modifying, or repealing voter-approved initiatives. Number 12 is a statute, and statutes can always be amended by other statutes. *See, e.g., Dorsey v. United States*, 567 U.S. 260, 274 (2012) (“[S]tatutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute . . . [or] to modify the earlier statute . . .”). That is true even when the statute is adopted by citizen initiative. The constitutional provision related to initiatives and referenda expressly states that it “shall not be construed to deprive the general assembly of the power to enact any measure.” Colo. Const. art. V, § 1(4)(a). This Court has long recognized that this means the General Assembly can repeal or modify statutes enacted through initiative or referendum. *See In re Senate Res. No. 4*, 54 Colo. 262, 270, 130 P. 333, 336 (1913) (the

General Assembly “clearly has the power to repeal any statute law, however adopted or passed”).

Number 12 thus creates a second subject of limiting the power of the General Assembly to repeal or modify a statute. This subject is not necessarily and properly connected to the rest of the measure’s focus on the initiative and referendum process. It is therefore a second subject and the Board correctly did not set a title.

Proponents may argue that this sentence may ultimately be held ineffective. But the Board is unaware of any instance in which the Court has found a single subject only by declaring part of the measure unenforceable. And, in any event, the Court should not determine at this stage whether this sentence 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 #12 makes clear that it does not — limiting the powers of the General Assembly to enact statutory law is not necessarily and properly connected to liberalizing petitioning.

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 12 either limits the General Assembly’s powers in ways previously unknown in Colorado or this 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.

C. Number 12 contains another subject — redistributing judicial power by permitting a statutory initiative to declare what violates the state and federal constitutions.

The proposed measure also works a second unprecedented change in Colorado law that is unrelated to the measure’s central purpose. Specifically, the measure provides: “Any repeal or change to any part of

this statute violates the First Amendment, United States Constitution Bill of Rights, and section 24 of Article II, Colorado Constitution Bill of Rights.” Pet. 7. This fundamentally alters current separation-of-powers doctrine and would rebalance the powers between the branches of government.

“It is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The problematic sentence from #12 seeks to usurp that power from the judiciary by declaring that any repeal or change to the statute violates the state and federal constitutions. The role of the courts “in the separation of powers is to interpret Colorado law.” *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003). Thus, under our governmental system, courts determine what violates the constitutions, not the legislative power exercised by the General Assembly or the people. This initiative purports to do that instead of the courts. Because that is a second subject unrelated to liberalizing the petitioning process, the Title Board could not set title.

In addition, this sentence also suffers from the same defect discussed in part B. Although it is difficult to discern its precise meaning, the challenged sentence appears to make any attempted change to this statute unconstitutional and thus ineffective. This would again limit the General Assembly's powers — and presumably, the people themselves in the initiative process — from being able to amend or repeal this statute. For all the reasons given above in part B, this is another subject unrelated to the rest of the measure.

CONCLUSION

The Court should affirm the decision of the Title Board that it lacked jurisdiction to set a title on 2021-2022 #12.

Respectfully submitted on this 24th 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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