SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, Colorado 80203	DATE FILED: April 22, 2024 3:08 PM
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 2023-2024 #160 ("Public Athletics Programs for Minors") **Petitioner: Lori Hvizda Ward,** **v.** **Respondents: Linda White and Rich Guggenheim.** **and** **Title Board: Theresa Conley, Jeremiah Barry, and Kurt Morrison**	▲ COURT USE ONLY ▲
Attorneys for Petitioner: Mark G. Grueskin, #14621 Nathan Bruggeman, #39621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com nate@rklawpc.com	**Case No. 2024SA78**

PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2023-2024 #160 ("PUBLIC ATHLETICS PROGRAMS FOR MINORS")

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, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

X It contains 3,813 words.

☐ It does not exceed 30 pages.

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

/s Mark G. Grueskin
Mark G. Grueskin
Attorney for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION

The Title Board and Objector Ward agree on one critical point. The Board is presumed to correctly decide the question of whether an initiative comprises a single subject. *See* Title Board Opening Brief ("Bd. Op. Br.") at 6-7. But the parties disagree on a related matter: *which* Title Board should be presumed to have correctly decided this issue.

On March 6, the Title Board denied Objector's Motion for Rehearing, challenging the single subject of Initiative #160. On April 2, 2024, the Title Board filed its Opening Brief, defending Initiative #160's single subject. At issue was that measure's provision that regulates any organization that hosts, organizes, or facilitates an athletics event for minors as well as public schools.

On April 3, at its regularly scheduled meeting, the Title Board reversed its position and *refused* to set a ballot title for a parallel measure, Initiative #220. The Board refused to set title *because* the proposal sought to regulate any organization that hosts, organizes, or facilitates an athletics event for minors as well as public schools.

At the April 3 rehearing, the Board had the advantage of asking proponents additional questions about what their measure meant and what it was intended to accomplish. These were questions the proponents could not answer, such that the

Board could not understand or define what the language that is at the heart of this appeal sought to do. And as such, the Board ruled it lacked jurisdiction to set a title.

Now, this Court is presented with a case of first impression. Both parties will urge the Court to defer to the Board's expertise, but each will point to a different Board decision to frame this Court's holding. The Board will ask the Court to defer to its April 2 decision on this language, and Objector will ask the Court to defer to the Board's April 3 decision on this language.

If the Title Board didn't know what organizations that host or facilitate athletic events would be covered by this language and subjected to lawsuits for noncompliance, neither will voters. And that was precisely the Board's concern on April 3 and why it ruled it lacked jurisdiction.

This Court's standards in such an instance are clear. When the Title Board cannot comprehend an initiative, it cannot set a ballot title. Here, the Board crystalized this concern in its decision not to set a title for Initiative #220, and it was right to do so. The proponents' own confusion about their measure kept the Board from framing an accurate single subject statement, and it properly refused to set a ballot title.

The Court should defer to the decision that was based on more Board inquiry and information, not less. In so doing, it should find that Initiative #160 fails the

single subject test and order the Board to return Initiative #160 to its designated representatives just as the Board did with #220.

LEGAL ARGUMENT

I. The Board correctly found a single subject violation in an initiative that regulates school athletes as well as any organizations that merely organize, host, or facilitate an athletics event.

Initiative #160 defines "public athletics program for minors" as "a public school, public school district, activities association or organization hosting, organizing, or facilitating public school athletics, or private school when its students or teams compete against a public school." R. at 2. Initiative #220's definition of "public athletics program for minors" is virtually identical to #160's definition.[1]

[1] The only differences are Initiative #220's addition of "other" before "organization" and use of "that hosts, organizes, or facilitates" rather than "hosting, organizing, or facilitating" which is found in Initiative #160. The definition of "public athletics program for minors" in Initiative #220 reads:

> FOR PURPOSES OF THIS SECTION, "PUBLIC ATHLETICS PROGRAM FOR MINORS" MEANS A PUBLIC SCHOOL, PUBLIC SCHOOL DISTRICT, ACTIVITIES ASSOCIATION, OR *OTHER* ORGANIZATION THAT HOSTS, ORGANIZES, OR FACILITATES PUBLIC SCHOOL ATHLETICS, OR A PRIVATE SCHOOL WHOSE STUDENTS OR TEAMS COMPETE AGAINST A PUBLIC SCHOOL.

https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/220Final.pdf (Proposed Section 22-32-116.6(1)(b)) (emphasis added) (last viewed April 20, 2024). These stylistic differences played no role in the Board's decision on Initiative #220.

Further, the lead proponent of #160, Dr. Rich Guggenheim, is also the lead proponent of #220.[2]

Even though it had seen and considered this language before and ruled Initiative #160 to be a single subject, the Board retained concerns about this language when it considered setting titles for Initiative #220. Its discussion of this key phrase – "organization that hosts, organizes, or facilitates public school athletics" – occupied the Board for well over half an hour.[3]

The Title Board chair noted that she "constantly" had concerns over this language as it was reflected in earlier measures,[4] of which Initiative #160 is one. She found the initiatives' references to unspecified organizations facilitating athletic events to be "really unclear."[5]

---

[2] The additional designated representative of Initiative #220, Gina Steadman, was present at the Title Board hearing on Initiative #160 and testified to the Board to support its status as a single subject initiative. *See* Mar. 6, 2024, Title Bd. Hr'g, at 59:07-1:01:01 (rehearing on Initiative #160), *available at* https://csos.granicus.com/player/clip/434?view_id=1&redirect=true

[3] *See* Apr. 3, 2024, Title Bd. Hr'g, at 6:59:00-7:36:00 (rehearing on Initiative #220), *available at* https://csos.granicus.com/player/clip/443?view_id=1&redirect=true.

[4] *Id.* at 7:24:30-35.

[5] *Id.* at 7:10:45-50.

In reaction to the proponents' frustration with the Board members' concerns, the chair defended the deliberative process used in evaluating subsequent iterations of the same ballot measure. "When you sit with something more, you see it more, you understand it more. And our rehearing process is not perfunctory. It has an intention and a purpose. Like there was one earlier today that brought up language that I think we all missed."[6]

Of course, this dedication to substantive review of single subject and ballot title clarity is a priority that has been validated by this Court. "These public meetings are the Title Board's opportunity to engage both proponents and opponents of an initiative in discussion regarding the intent and purpose of the proposed measure as the Board carries out its title setting duties. Such meetings are a critical part of the title setting process*." In re Title, Ballot Title & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, & 69*, 2013 CO 1, ¶ 15, 293 P.3d 551, 555.

Initiative #220's designated representatives were asked what other "organizations" were implicated by their measure and couldn't answer the question. The dialogue with one of #220's designated representatives went as follows:

> Board Chair: But what's the "other organization"? Who's intended to be covered?... You're shaking your head like you don't know.

[6] *Id.* at 7:30:30-52.

> Designated Representative: No, no, no. I was trying to think what other…. I mean, I see CHSAA [Colorado High School Activities Association]. That's the only one I'm aware of….
>
> …
>
> Board Chair: ... I don't understand why there's this "activities association" and "other organization"…. I don't know who the "other organizations" [are]…. It's written broadly, and that's where we're -- the "other organizations." And then you're ascribing them liability and responsibilities, and we don't know who they are….[7]

Later, speaking of #220, the Board Chair stated that the measure is "extending liability to entities [and] they may not know" they fall within its terms.[8]

At that point, Dr. Guggenheim, a designated representative of both Initiative #160 and Initiative #220, stepped to the microphone. Similar to his co-proponent, he described organizations "such as CHSAA," although activities associations are already specifically covered by the definition of "public athletics program for minors." Then he mentioned the possibility of organizations "that we don't know about yet existing, in theory, such as the future version of CHSAA, is what that

---

[7] *Id.* at 7:11:20-7:12:58.

[8] *Id.* at 7:33:23-29. As Objector pointed out in her Opening Brief, "When liability is extended to any group that hosts, organizes, or facilitates a school athletics event, this measure creates new causes of action affecting entities that are unrelated to either the operation of schools or the identification of players who qualify for their athletic teams." Objector's Opening Brief (("Ob. Op. Br.") at 12.

[other organization] is intended to encompass."[9] In sum, he was able to identify one activities association and the possibility of future activities associations, all of which would be covered by initiative's reference to "activities association" rather than "organization." But he could not even describe the functions or undertakings of the additional organizations his proposal would, by its terms, regulate and potentially penalize.

The Board's unsuccessful effort to discover what this language meant is at the heart of the appeal in this case. As Objector has argued in her Opening Brief, "The single subject requirement was adopted to protect voters from hidden aspects of an initiative. Subjecting ***any*** organization that hosts or facilitates an athletic event to liability for adhering to its non-discrimination policies is just such a hidden feature." Ob. Op. Br. at 3 (emphasis in original).

Further, the breadth of organizations subject to this measure was identified as the hidden secret that creates an obstacle to title setting for Initiative #160.

> The fact that the measure is so broad as to reach private groups of any sort that make school athletics programs easier to operate is a cudgel that can be used to pursue organizations that adhere to their own anti-discrimination policies and expect, in return, that the institutions they help will do the same. But voters will never know from the title set what entities are actually subject to this measure. This is a "'surreptitious' change not anticipated by the seemingly neutral requirement" that schools and school associations take responsibility for their athletic

[9] *Id*. at 7:33:30-7:34:15.

programs.

Id. at 13, citing *In re Title, Ballot Title, & Submission Clause for 2015-2016 #132*, 2016 CO 55, ¶26, 374 P.3d 460, 467. Accordingly Objector pointed to the fact that, contrary to what is communicated in its ballot title, Initiative #160 is not limited to enforcement actions against schools and school districts. Instead, it subjects to potential litigation "**any** organization that hosts, organizes, or facilitates an athletic event that results in the alleged harm." Ob. Op. Br. at 13 (emphasis in original).

The Board was committed to discerning some meaning in the initiative text's reference to organizations that could be sued and held responsible for a student athlete's emotional or psychological harm, whether direct or indirect. The Board needed to understand this element of the initiative in order to identify the single subject and accurately communicate the measure in the title. But the designated representatives simply couldn't tell them what types of groups their measure affected in this manner. And when this became clear, the Board properly refused to set a title.

This refusal was based on this Court's clear direction. Based on a title setting hearing or rehearing, "**if the Board cannot comprehend a proposed initiative sufficiently** to state its single-subject clearly in the title, it necessarily follows that **the initiative cannot be forwarded to the voters**." *In re Title for Nos. 67, 68, & 69, supra*, 2013 CO 1, ¶ 15 (emphasis added) (citing *In re Title, Ballot Title &*

Submission Clause, & Summary for 1999-2000 No. 25, 974 P.2d 458, 465 (Colo. 1999)). This Court has held it is error for the Board to shrug its collective shoulders and set a title when it doesn't understand the measure's central workings. *Id.*

Here, there were multiple hearings and rehearings on measures imposing the same regulations and restrictions as are found in #160. The Board bent over backward to give the proponents of those measures the benefit of the doubt. Perhaps as to Initiative #160, the Board was too generous in granting the initiative's supporters an extensive benefit of the doubt. But when it realized its error, the Board properly acted to deny these proponents a ballot title.

Ultimately, the Board voted 2-1 that the broadness of "organization" that facilitates these events would surprise voters and thus violated the single subject requirement.[10] And the proponents of that measure did not challenge the Board's action in #220 to this Court.

Again, the Board was acting in a manner that is consistent with its constitutional obligations. "If the proposal contains, for example, a surreptitious measure, such that the **voters cannot comprehend what is being proposed or**

[10] *Id*. at 7:35:00-7:36:58. The Board's basis for declining to set a title for this measure parallels Objector's concern in her Opening Brief, "[T]he initiative's regulation of any organization 'facilitating public school athletics'… is sweeping and overbroad." Ob. Op. Br. at 8.

could be misled or surprised, neither the Title Board nor this court can approve the titles and summary and forward them together with the initiative to the voters." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 29*, 972 P.2d 257, 261 (Colo. 1999) (emphasis added).

As exemplified by the above interchanges with the designated representatives of #220, the Board's inability to know how this measure is intended to operate is a feature of Initiative #160 that lies at the feet of initiative drafters. "The ultimate responsibility for formulating a clear and understandable proposal for the voters to consider belongs to the proponents of the initiative." *Id*. at 262.

This process works because the Title Board is permitted to depart from its earlier decisions. Here, the Board corrected its previous error, even stating on the record that it was aware of the appeal as to Initiative #160,[11] and thus it prioritized protection of voters over a rigid policy of agency stare decisis.

The question in this matter, then, is whether the Court should defer to a more informed or less informed Title Board. Objector urges the Court to look to the more informed decision for several reasons.

First, the Board should be encouraged to make the correct decision rather than

[11] *Id.* at 7:28:13-59.

just rely on its erroneous precedent, merely because it is precedent. This Court has endorsed that approach for the Title Board. "[T]he Board was not bound by its previous decisions regarding jurisdiction…. There is therefore no reason why the Board, like a court, could not correct its own practice." *In re Title, Ballot Title & Submission Clause, and Summary for Initiative 1999-2000 #255*, 4 P.3d 485, 493 (Colo. 2000).

Second, the Board's workload is substantial – to the point of becoming almost unmanageable. At its April 17 meeting, for instance, the Board had sixty-seven (67) ballot measures set for hearing or rehearing, and it needed to extend its usual one-day hearing to three days.[12] If the Board realizes it has made an error in handling any part of this avalanche of initiatives, it should be encouraged to correct that error.

Third, it takes courage to admit a mistake has been made, all the more so when a fundamental constitutional right is at issue. If there was ever a time in our country's history to promote and reward principled governance, this is that time.

Finally, the Board's reconsidered decision reflected its latent uncertainty about this language, and that realization is practically and legally meaningful.

> [T]he Board's uncertainty as to whether the instant initiatives contained multiple subjects necessarily leads us to the conclusion that the title

12 https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/agenda/20240417MeetingNotice.pdf (last viewed April 21, 2024).

> does not satisfy the long-standing requirement that it "clearly" state the single subject proposed by the initiatives. Before a clear title can be written, the Board must reach a definitive conclusion as to whether the initiatives encompass multiple subjects.

In re Initiative 1999-2000 No. 25, supra, 974 P.2d at 468. There was ample reason for the Board to revisit its decision to set titles on #160. When it refused to set titles for #220, it did so based on lingering questions and a continuing lack of clarity about key language in the measure itself.

This Court should defer to the Board as its decision making evolved on April 3. It should not simply affirm the erroneous decision on Initiative #160 but should, instead, acknowledge the Board's reasoned correction of that decision.

The Court's holding in this matter will determine whether one essential standard is still applicable. "The Board must simultaneously consider the potential public confusion that might result from misleading titles and exercise its authority in order to protect against such confusion." *In re Title for No.25, supra*, 974 P.2d at 468. Objector urges the Court not to depart from this precept.

Therefore, because the measure seeks to regulate activities of school personnel in schools and school districts but also restricts, and potentially subjects to litigation, unknown groups that even proponents of this concept cannot identify, this Board's titling decision on Initiative #160 should be reversed, and the measure should be returned to its designated representatives.

II. Initiative #160's coverage of non-school organizations that merely host or facilitate an athletics event is not merely an enforcement issue.

The Title Board asserts that including organizations that host or facilitate athletic events is an enforcement feature of the measure. Bd. Op. Br. at 8-11.

To be clear, the Board's argument suggests that there are discrete stages of regulating sports for female athletes. First, Initiative #160 requires a determination if an athletic event is for males, females, or is coed. The Board refers to this as the "Designation" phase. *Id.* at 10. Second, Initiative #160 limits who may compete in certain athletic events. Those that are designated as "female" are restricted to only females, based on their biological sex at birth. This is the "Prohibition" aspect of Initiative #160. *Id.* According to the Board, if harm to an athlete is the result of either the Designation or Prohibition phases, a student may sue schools, school personnel, school districts, or any organization that hosted or facilitated the athletic event in question. The Board refers to this as the "Enforcement" phase of #160.

The Board cites *In re Title, Ballot Title & Submission Clause for Initiative 2007-2008 #57*, 185 P.3d 142 (Colo. 2008) ("*Blake v. King*"), as support for its contention that authorizing litigation is an enforcement detail. Bd. Op. Br. at 11. But in *#57*, there was no uncertainty about who was affected by this new potential liability. In that case, the "agents" and "high managerial agents" of a business could be criminally liable for certain acts. Both "agent" and "high managerial agent" were

defined by already existing law. *See id.,* 185 P.2d at 144, n.2. Thus, there was no question about who would be affected by the initiative, and the enforcement piece of that initiative would not result in voter surprise after the election.

Here, as the Title Board observed as to #220, that is not case. No one – including the backers of that initiative – could say what "organizations" were being targeted by this proposed law. Because no one at rehearing comprehended this key fact, no title could be set.

Thus, the "organization" aspect of this measure is not controlled by the case law cited by the Board. Further, the Board's position in its Opening Brief is inconsistent with its more recent position taken on #220.

III. Initiative #160's coverage of any non-school organizations that merely host or facilitate an athletics event is not merely a policy choice by proponents.

The Board asserts that including any organizations that host or facilitate athletic events is just a policy choice of proponents. Bd. Op. Br. at 12-15. This generalized defense is also incorrect.

Every initiative provision reflects a policy choice. Those that are part of a single subject are acceptable. The same is true for those that do not frustrate the voting public's (or the Title Board's) understanding of the measure. But policy choices that defy comprehension are legislative time bombs that neither this Court

nor the Board are required to ignore because they are policies that the proponents say they seek to advance.

The creation of liability against an unlimited array of non-school parties is not an enforcement feature that, at its core, is intended to and does create an offense in order to control the behavior and policies of schools and school personnel. This initiative's impenetrable vagueness is not justified because proponents of an initiative were unaware of just how broadly they had drafted their measure. As noted earlier, it is the job of proponents to draft a measure in a way that titles can be set. Here, they failed to fulfill that "ultimate responsibility" of drafting "a clear and understandable proposal." *In re Title for 1999-2000 No. 29, supra*, 972 P.2d at 262.

Therefore, the Board acted properly when it had time to reconsider the substance of this measure. The Court should honor that decision and reverse the inconsistent Board conclusion about Initiative #160.

CONCLUSION

The Board could have taken the easy path when it considered Initiative #220. It could have decided it was bound by its previous decision in this matter. Or it could have left the jurisdictional dispute to this Court to resolve in the instances of both Initiative #160 and Initiative #220. To its credit, the Board didn't use either of these excuses to avoid controversy.

Instead, the Board focused on an issue that had "constantly" been bothering it – whether the broad reach of this measure, unknown to everyone in the process, meant that voters would be lured to vote "yes" without understanding the meaning of such a vote. In doing so, it followed this Court's directives from multiple cases that no title can be set where the Board cannot comprehend the measure and the result would be an enactment that would surprise voters in its implementation.

The Board should be allowed to base its decisions on more, not less, information. That's what occurred here. Various forms of this measure to regulate public school athletics by gender assigned at birth came to the Board over the last several months. The Board's ongoing concerns with the language relating to "organizations" finally ripened into a decision that the meaning of this language was unknown to everyone in the title setting process – Board members, designated representatives, as well as the objector. It is that deliberative process that has earned the Title Board the "great deference" this Court assigns to its decisions. *In re Title for Initiative 2007-2008 #57, supra*, 185 P.3d at 146. The Court should defer to the Board's greatest insight about the issues presented here, not a decision based on less information that the Board itself has reversed.

Clearly, in this appeal, the Board is aware of its own actions. It was certainly aware that this appeal was linked to its decision on Initiative #220 because it took

note of that fact on the record. There is no reason to think that, had Initiative #160 been considered after the Board refused to set title on Initiative #220, the Board would have ignored the insights it gained to find the wording in question to be unclear and incomprehensible to voters.

For these reasons, the Court should order that Initiative #160 be returned to the designated representatives and that this measure not be eligible for presentation to voters in 2024.

Respectfully submitted this 22nd day of April, 2024.

/s Mark G. Grueskin
Mark G. Grueskin, #14621
Nathan Bruggeman, #39621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
Email: mark@rklawpc.com,
nate@rklawpc.com
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF ON PROPOSED INITIATIVE 2023-2024 #160** was sent electronically via Colo. Courts E-Filing System or by FedEx overnight delivery service, this day, April 22, 2024, to the following:

Counsel for the Title Board:
Michael T. Kotlarczyk
Kyle M. Holter
Peter G. Baumann
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Designated Representatives of Initiative #160:
Linda White
22931 E. Del Norte Circle
Aurora, CO 80016

Rich Guggenheim
755 E. 19th Ave
Apt 339
Denver, CO 80203

/s Erin Mohr