SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, Colorado 80203	DATE FILED: April 2, 2024 4:07 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 OPENING 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).

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X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

STATEMENT OF ISSUES PRESENTED

Whether an initiative that purports to affect participation in public school athletics by transgender athletes violates the single subject requirement when, by its own terms, it also seeks to regulate—and penalize—the activities of private actors who organize, host, or facilitate athletic competitions.

STATEMENT OF THE CASE

A. Statement of Facts

Linda White and Rich Guggenheim ("Proponents") are the designated representatives for Initiative #160 ("Initiative" or "#160"), a measure that proposes to ban minors who are transgender females from competing in any interscholastic, intramural, or club athletic events that have been designated for females. *See* Final Text of Initiative, Record for Initiative #160 ("R.") at 2-3 (appended to Petitioner's Petition for Review). Initiative #160 does not impose a similar ban on transgender males who compete athletically in competitions held for males.

By its express terms, #160 imposes its strictures on any organization defined as a "public athletics program for minors." Those entities are "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 (Proposed Section 22-32-116.1(1)(b)).

Initiative #160 creates new liability and a new cause of action for any female who "suffered direct or indirect harm as a result of a violation" of the prohibition on transgender female athletes competing in female-designated events. *Id.* (Proposed Section 22-32-116.1(3)(a)). That cause of action lies against "the public athletics program for minors that caused the harm." *Id.* A successful plaintiff can seek a variety of remedies including compensation for "any psychological, emotional, and physical harm suffered," including any "indirect harm" related to the violation. *Id.* (Proposed Section 22-32-116.1(3)(b)).

B. Nature of the Case, Course of Proceedings, and Disposition Below.

The Title Board held a hearing on February 21, 2024, at which time the Board approved a single subject and set a title. R. at 4. On February 28, 2024, Petitioner Lori Hvizda Ward ("Objector") filed a Motion for Rehearing, alleging that a title was set for Initiative #142, contrary to the requirements of Colo. Const. art. V, sec. 1(5.5), and that the Title Board set a title that is misleading and confusing and does not fairly communicate the intent and meaning of the measure. R. at 7-13.

The Title Board conducted a rehearing on March 6, 2024. It acknowledged certain errors (but not all) in the titles it initially set and made corrections to the titles related to those errors. But it denied Objector's contentions about the multiple subjects in this measure.

The Board's amended ballot title and submission clause reads as follows:

> *Shall there be a change to the Colorado Revised Statutes restricting participation in female school athletic programs based on biological sex at birth, and, in connection therewith, requiring a public school, private school, or a school activities association to designate each interscholastic, intramural, or club athletic team, sport, or event as female, male, or coeducational; only allowing females as listed on their birth certificate issued at or near birth to compete in a female-designated team, sport, or event and exposing these entities to liability for not complying with this measure; prohibiting any governmental entity from taking any adverse action against an entity or person for compliance with this measure; allowing a female student who suffers direct or indirect harm due to noncompliance to sue; waiving a public school's and public school district's immunity for such lawsuits; and requiring the state to assume financial responsibility for any expense related to a lawsuit or complaint related to compliance?*

R. at 5.

SUMMARY OF ARGUMENT

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, and the Title Board erred by setting any title for Initiative #160.

The Board compounded its single subject error by portraying to voters in the title it did set that this measure affects only "a public school, private school, or a school activities association." While it didn't mean to obfuscate the measure's reach,

its title will have that precise effect. Thus, the danger to voters from this hidden subject is a clear and present one and needs to be remedied by this Court.

LEGAL ARGUMENT

I. The Title Board lacked jurisdiction to set a title for #160 because this measure violates the single subject requirement.

A. Standard of review.

A proposed initiative must contain no more than one subject. Colo. Const. art. V, § 1(5.5). Provisions that are "disconnected or incongruous" violate this requirement. *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 13, 395 P.3d 318, 321 (quoting *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 13, 500 P.3d 363, 367). Assuring that initiatives do not contain such provisions serves a fundamental goal of the single subject requirement—to "prevent surprise and fraud from being practiced upon voters" by ensuring that the title of the measure "apprise the people of the subject." C.R.S § 1-40-106.5(1)(e)(II).

A linkage of concepts under a broad umbrella doesn't meet this standard. A justification that attempts to "characterize an initiative under some general theme will not save [it] from violating the single-subject rule if the initiative contains multiple subjects*." In re 2019-2020 #315, supra*, ¶ 16, 500 P.3d at 367. Historically, the Court has acknowledged that a measure's provisions might seem "related when

considered at a high level of generality," but those provisions "serve[] different purposes not sufficiently connected to constitute a single subject." *In re Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37 ¶ 19; 526 P.3d 927.

B. Preservation of issues for appeal.

Objector preserved this issue in her Motion for Rehearing. R. at 8, 10.

C. Subjecting private organizations to liability for adhering to their own anti-discrimination policies and practices is a second subject.

Initiative #160 sets new limits on the decisions made by school districts, individual schools, and school staff on who will—and who will not—be permitted to participate in female athletic contests. Despite the fact that the measure violates federal law,[1] our state Constitution preserves the ability of citizens to put forward

[1] *See, e.g., Hecox v. Little,* 79 F.4th 1009, 1026 (9th Cir. 2023) ("discrimination on the basis of transgender status is a form of sex-based discrimination"); *Doe v. Horne*, 2023 U.S. Dist. LEXIS 125488, *52 ¶167 (D. Az. 2023) ("The Act discriminates against Plaintiffs based on their status as transgender girls by providing that for purposes of school sports a student's sex is fixed 'at birth'" and thus violates the Equal Protection Clause); *A.M. v. Indianapolis Pub. Schs.*, 617 F. Supp. 3d 950, 966 (S.D. Ind. 2022) (in violation of Title IX, "[t]he singling out of transgender females is unequivocally discrimination on the basis of sex, regardless of the policy argument as to why that choice was made"), appeal dismissed sub nom. *A.M. by E.M. v. Indianapolis Pub. Sch. & Superintendent*, No. 22-2332, 2023 U.S. App. LEXIS 1994, 2023 WL 371646 (7th Cir. Jan. 19, 2023) (granting preliminary injunction of a similar Indiana law that banned transgender girls from playing on girls, sports teams based on Title IX); *B.P.J. v. W. Va. State Bd. of Educ.*, 550 F. Supp. 3d 347, 353-56 (S.D. W. Va. 2021) (West Virginia statute prohibiting transgender females

unconstitutional ideas for voters to adopt or reject. *See Romer v. Evans*, 517 U.S. 620, 624-25 (1996) (invalidating voter-passed "Amendment 2" based on the Equal Protection Clause). So despite the measure's underlying legal infirmity, these Proponents can advance it—at least as far as they have to this point.

The single subject requirement, Colo. Const., art. V, §1(5.5), was adopted to prohibit proponents of an initiative from continuing to the petitioning and voting phases where they have hidden cargo on a political bandwagon. Initiative #160 is just such a vehicle.

1. *Initiative #160 regulates athletics programs, provided by schools under clear constitutional authority, as well as private entities that do not provide such programs and without any such constitutional authority.*

On one hand, #160 regulates what schools, school districts, and school personnel can do in terms of placing minors on teams that engage interscholastic, intramural, and club team athletics. No transgender female can play on a school's female team.

A school or school board may overstep its own legal authority in setting limits on who can participate in which activity. For instance, a school district has exceeded its authority when it uniformly excluded married high school students from

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from participating in school-sponsored athletics "discriminates on the basis of transgender status" in violation of the Equal Protection Clause and Title IX).

competing in interscholastic athletics. *Beeson v. Kiowa Cnty. Sch. Dist*., 567 P.2d 801, 805-06 (Colo. App. 1977). Of course, a school district acts pursuant to the constitutional mandate to provide a "thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously." *Id*. at 805 (citing Colo. Const. Art. IX, § 2). Whatever may ultimately be said of its legality, the most obvious portion of Initiative #160 is at least proposed as a function of that authority.

But Initiative #160 doesn't stop there. It also affects any "activities association or organization hosting, organizing, or facilitating public school athletics." R. at 2 (Proposed Section 22-32-116.6(1)(b) (defining "public athletics program for minors")). The provision makes any such private entity susceptible to litigation "[i]f a student is deprived of an athletic opportunity or suffers direct or indirect harm as a result of a violation of subsection 2 of this section." *Id.* (Proposed Section 22-32-116.6(3)(a)). The direct or "indirect harm" for which defendants can sue includes any "psychological [or] emotional… harm suffered." *Id.* (Proposed Section 22-32-116.6(3)(b)).

2. *Penalizing anyone who "facilitates" public school athletic programs that do not discriminate against transgender females will surprise voters who expect regulation of school activities.*

An organization "hosting… public school athletics" could be a private golf course that allows its course to be used for a high school tournament. A private gymnastics studio may be the site of an intramural or club gymnastics competition. If their internal rules do not permit the type of discrimination that Initiative #160 requires, they will either have to abandon their principles or face civil liability. Not exactly something that would be top of mind for voters.

More problematic in this single subject analysis, though, is the initiative's regulation of any organization "facilitating public school athletics." By design, this provision is sweeping and overbroad.

"The plain and commonly understood meaning of 'facilitate' is to make easier." *United States v. Marrufo*, 661 F.3d 1204, 1207 (10th Cir. 2011) (citing *United States v. Gandy*, 36 F.3d 912, 914 (10th Cir. 1994) and Black's Law Dictionary 668 (9th ed. 2009)). If Initiative #160 was adopted, any group that makes it easier for athletes to engage in this extracurricular activity could not condition its participation on a non-discrimination policy when it comes to transgender athletes.

There are many ways to "facilitate" an athletic program for minors. For example, laying out a ball park and the associated grounds for athletic events is done

to "induce and facilitate athletic contests." *Tulsa Ent. Co. v. Greenlees*, 205 P. 179, 181 (Okla. 1922). Likewise, "assembl[ing] funds in a centralized place,… forward[ing] the meet entry fees to the meet sponsors and pay[ing] the coaches' expenses so that they could accompany the athletes" is done to "facilitate[] the ability of the teams and the athletes to participate in competitions." *Capital Gymnastics Booster Club, Inc. V. Comm'r, T.C*. Memo 2013-193 at *25 (U.S. Tax Court 2013) (citing Commissioner of Internal Revenue).

The same type of facilitation of athletic events occurs in lending an organization a van or bus so athletes can travel to game sites. Or providing energy drinks or meals to athletes to allow them to participate at optimum capacity. An organization that does not subscribe to the discriminatory approach of #160 is at risk under this measure. All of these acts are done for the purpose of making public school athletics easier—in other words, to "facilitate" them.

If this measure proceeds to the next phrases of petitioning and voting, voters will be asked to trigger liability for many non-school groups that assist student athletes, including transgender females. If a transgender female is transported to a game or meet in the booster organization's bus and a female by birth has been excluded, the group that provided the vehicle will be subject to suit. "[V]oters might not understand that what is nominally" a school regulation "initiative also affects"

the activities of third parties who are not decision makers about who plays and who doesn't, and as a result, this initiative presents "the very kind of voter surprise against which the single-subject requirement seeks to guard." *In re Title, Ballot Title & Submission Clause for 2021-2022 #1*, 2021 CO 55, ¶ 2, 489 P.3d 1217, 1219.

3. Providing the ability to sue for "facilitating" public school athletics is not just an enforcement aspect of Initiative #160.

Inevitably, an initiative's proponents argue that enforcement alone is not a distinct subject. And if that's all the questioned provision of an initiative achieves, they might be correct.

This Court has not accepted every opening to provide new judicial remedies as a mere detail of a complex measure. An initiative dealing with certain aspects of the judicial department also included a measure providing immunity to anyone who, outside a courtroom, criticized a judicial officer concerning his or her qualifications. *In re Title, Ballot Title & Submission Clause, and Summary for 1997-1998 #64*, 960 P.2d 1192, 1194-95. This last element "would set forth a new common law defamation standard when the subject of a critical comment is a judicial officer." *Id*. at 1199. As such, it was one of several incongruous subjects in that initiative.

Initiative #160 allows plaintiffs to seek relief for "indirect" harms. Because of how compensable injury is described in #160, these indirect harms can be emotional or psychological. R. at 2 (Proposed Section 22-32-116.6)(3)(b)).

The Title Board knew that this attenuated form of injury was a new cause of action in Colorado. R. at 8. As was argued to the Board at the rehearing, Colorado courts do not recognize "indirect emotional harm" as the basis for a compensable claim.

> While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree. The risks of indirect harm from the loss or injury of loved ones is pervasive and inevitably realized at one time or another. Only a very small part of that risk is brought about by the culpable acts of others.

James v. Harris, 729 P.2d 986, 988 (Colo. App. 1986), citing *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 301 N.Y.S.2d 554, 561-62, 249 N.E.2d 419, 424 (1969).

Further, Petitioner argued to the Title Board, Initiative #160 "reverses long-standing doctrine for what is and what is not compensable injury when an emotional harm is alleged. In fact, 'psychic harm' alone does not constitute injury-in-fact that would even confer standing to sue." R. at 8, (citing *Hickenlooper v. Freedom from Religion Found., Inc*., 2014 CO 77, ¶ 20).

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. The fact that Proponents make parties liable for acts that are unrelated to the regulatory mandates they create establishes that they have included a provision that is "coiled in the folds" of their measure and thus violated the single subject mandate. *In re Title, Ballot Title and Submission Clause* for 2007-2008 #17, 172 P.3d 871, 875 (Colo. 2007).

4. The title set by the Board guarantees that voters will be surprised by the additional subject in Initiative #160.

The Board's title is worded so that voters will be unaware that Initiative #160 addresses entities that are unrelated to school decision making about student athletes. They will be convinced by the title that the measure is limited in scope.

The title states that the affected entities are "a public school, private school, or a school activities association," and each is charged with designating school athletic events as female, male, or coeducational. R. at 5. The reference to "school activities association" does not include (or even suggest it includes) that any group that hosts or facilitates an athletic program is also covered by this measure.

The title further states that the measure "expos[es] **these entities** to liability for not complying with this measure." *Id.* (emphasis added). Of course, it is not just

"these entities" (a public or private school or school activities association) that can be sued if there is an indirect emotional or psychological harm to a female student. It is ***any*** organization that hosts, organizes, or facilitates an athletic event that results in the alleged harm.

Finally, the title for this initiative states that it "allow[s] a female student who suffers direct or indirect harm due to noncompliance to sue." *Id.* This reference is not actively misleading. It is simply incomplete because it fails to state what entity or person(s) the female student could sue. Presumably, it refers back to either "a public school, private school, or a school activities association" or to "these entities." Either cross-reference is misleading, and a voter reading the title would struggle to know what the measure's liability expansion references actually address.

The clarity sought is not a mere detail of this Initiative. 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 programs. *In re Title, Ballot Title,*

& Submission Clause for 2015-2016 #132, 2016 CO 55, ¶26, 374 P.3d 460, 467. Therefore, the Board's titling decision should be reversed.

CONCLUSION

For the reasons stated, the Title Board erred, and Initiative #160 should be returned to Proponents.

Respectfully submitted this 2nd day of April, 2024.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING 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 2, 2024, to the following:

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