COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: April 22, 2024 2:30 PM
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 2023-2024 #160 ("Public Athletic Programs for Minors") **Petitioner:** Lori Ward, **v.** **Respondents**: Linda White and Rich Guggenheim, **and** **Title Board**: Theresa Conley, Jeremiah Barry, and Kurt Morrison.	▲ **COURT USE ONLY** ▲ Case No. 2024SA78
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THE TITLE BOARD'S ANSWER 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 1,380 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.

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INTRODUCTION

In regulating who can participate in school athletic events designated as for females only, proposed initiative #160 imposes obligations on a wide range of organizations. Specifically, any "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." Record at 2.

But choosing to apply the measure's obligations to a broad range of actors is not a second subject. Instead, it is a policy choice left to a measure's proponents and, ultimately, to the voters. And although Petitioner Ward disagrees with that policy, such a disagreement is not grounds to deprive the Title Board of jurisdiction. "Whether a proposed initiative is a 'bad idea' is not the test of whether it meets the single subject requirement." *In re Title, Ballot Title & Submission Clause for 2013–2014 #90*, 2014 CO 63, ¶ 21.

Moreover, the measure's broad scope is sharply limited by its causation provision, which both limits the parade of hypothetical horrors imagined by the Petitioner and ties neatly to the measure's single subject. The Court should affirm that the Board had jurisdiction to set title for Initiative #160.

ARGUMENT

I. The proposed initiative contains a single subject.

A. The Title Board's single subject determination is entitled to considerable deference.

When assessing a single subject challenge, this Court employs "all legitimate presumptions in favor of the propriety of the Title Board's actions." *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶ 6 (quotations omitted). Moreover, the single subject requirement is "liberally construe[d] . . . to avoid unduly restricting the initiative process." *In re 2013-2014 #90*, 2014 CO 63, ¶ 12 (quotations omitted). As such, the Court only overturns the Title Board's single subject determination in a "clear case." *In re Title, Ballot Title, &*

Submission Clause for 2013-2014 #89, 2014 CO 66, ¶ 8 (quotations omitted).

B. Number 160's scope is a policy choice left to the measure's proponents.

"An initiative that tends to carry out one general, broad objective or purpose does not violate" the single subject rule. *In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010). Instead, a proposed initiative only violates the single subject requirement if it has "at least two distinct and separate purposes not dependent upon or connected with each other." *In re 2011-2012 #3*, 2012 CO 25, ¶ 9. Among other things, the requirement guards against the danger of voter surprise. *Id.* ¶ 11.

Proposed Initiative #160 carries out one objective: restricting who can participate in school athletic events designated as for females only. Nonetheless, Petitioner argues that Proposed Initiative #160 contains two subjects: 1) "set[ting] 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," Pet.'r's

Opening Br. at 5, and 2) "subjecting private organizations to liability for adhering to their own anti-discrimination policies and practices." But these subjects are neither "distinct" nor "separate" enough to trigger single subject concerns. *See In re 2011-2012 #3*, 2012 CO 25, ¶ 9.

Proposed Initiative #160's core purpose is to limit participation in female-only school athletic events to persons designated as female at birth. Requiring private institutions whose policies and practices would not permit such limitations to refrain from "hosting, organizing, or facilitating public school athletics," Pet. at 2, is not a second subject. It is "necessarily and properly connected" to the measure's single subject. *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 13.

This Court has previously held that provisions setting the scope of the actors covered by a proposed initiative do not constitute second subjects. For example, in *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 11, the Court rejected the argument that a housing measure contained a second subject because it applied

broadly to "electors in every city, town, city and county, or local county, whether statutory or home rule." Instead, the Court held that "the identification of who may act under an initiative is necessarily and properly connected to the initiative's central subject." *Id.*

So too here. The measure sets out a broad list of entities whose actions cannot cause harm flowing from the participation of persons designated as male at birth in female-only athletic events. That policy decision does not violate the single subject requirement. *See, e.g.*, *In re 2013–2014 #90*, 2014 CO 63, ¶ 17 ("[T]he effects this measure could have on Colorado law if adopted by voters are irrelevant to our review of whether the proposed initiative and its Titles contain a single subject.") (cleaned up).

C. Proposed Initiative #160's scope is limited by its causation clause.

Petitioner presents a parade of hypothetical horrors that may stem from Proposed Initiative #160's enactment. Pet.'r's Opening Br. at 8–10. Most prominently, Petitioner objects to the measure's imposition of obligations on organizations that "facilitate" an athletic program for

minors, arguing that this provision would prevent "any group that makes it easier for athletes to engage in this extracurricular activity" from "condition[ing] its participation on a non-discrimination policy when it comes to transgender athletes." *Id.* at 8.

Petitioner argues that voters would be surprised to learn that the measure "affects the activities of third parties who are not decision makers about who plays and who doesn't." *id.* at 9–10 (quotations omitted). But that's not what the proposed measure does. Proposed Initiative #160 only imposes liability on public athletics programs for minors that cause direct or indirect harm to a student. If an organization is not a "decision maker" about who plays and who doesn't, they have not caused such harm.

A hypothetical is instructive. Imagine a rental car agency that lends a school a van to transport athletes to an event. *Cf.* Pet.'r's Opening Br. at 9. If that rental car agency lends a van, without conditions, and a student later suffers harm from a violation of Proposed Initiative #160's non-participation policy, the rental car

agency has not "caused" that harm. Even though it "facilitated" the athletics program for minors, it faces no liability precisely *because* it was not a "decision maker" as to who could and could not participate in the event.

Now, imagine that rental car agency conditions providing their van on the school violating Proposed Initiative #160's non-participation provision. In that case, where the agency does become a decision maker, it is possible (but not certain) that the agency may be exposed to liability for causing the ultimate harm. And if an agency does not want to put itself, or the team, in this position, it can choose not to lend the school a van.

As a policy matter, Proposed Initiative #160 wants all organizations that play a role in public athletics programs for minors to enforce its preferred policy of not allowing persons designated as male at birth to participate in female-only athletics events. Where a student suffers harm from a violation of that policy, the entity causing that harm is subject to liability. Just because the measure broadly defines

what entities are subject to that enforcement does not mean it includes a second subject.

II. To the extent Petitioner now challenges Proposed Initiative #160's title, that challenge is waived.

In her Opening Brief, Petitioner argues that the Board's title for Proposed Initiative #160 is "worded so that voters will be unaware that Initiative #160 addresses entities that are unrelated to school decision making about student athletes." Pet.'r's Opening Br. at 12. To the extent Petitioner is bringing a clear title challenge in this section, such a challenge is waived.

The Petition for Review raised only a single-subject challenge. Pet. for Review at 2–3. Thus, any challenge to the title set by the board is waived. *Cf. Vikman v. Int'l Bhd. Of Elec. Workers, Local Union No. 1269*, 889 P.2d 646, 658–59 (Colo. 1995) (declining to consider question not raised in notice of appeal).

CONCLUSION

The Title Board correctly determined that #160 contains a single subject and set an appropriate title. The Court should therefore affirm the title set by the Title Board on 2023-2024 #160.

Respectfully submitted on this 22nd day of April, 2024.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 22nd day of April, 2024, addressed as follows:

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