DATE FILED: April 2, 2024 1:48 PM

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 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

PHILIP J. WEISER, Attorney General
PETER G. BAUMANN, 51620
Senior Assistant Attorney General*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: (720) 508-6152
E-Mail: peter.baumann@coag.gov
*Counsel of Record
Attorneys for the Title Board

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 2,464 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/ Peter G. Baumann

PETER G. BAUMANN, #51620
Senior Assistant Attorney General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGES

CASES

STATUTES

CONSTITUTION

OTHER AUTHORITIES

ISSUES ON REVIEW

I. Whether the Title Board correctly determined that Proposed Initiative 2023-2024 #21 contains a single subject, or whether regulating participation in public school athletics is a separate subject than imposing liability on entities that cause harm by violating the provisions of the measure.

STATEMENT OF THE CASE

Proposed initiative 2023-2024 #160 would restrict participation in in female school athletic programs to persons who are female, based on their biological sex at birth. *See* Record at 2, filed March 13, 2024. The measure accomplishes this goal in three steps: 1) Designation, 2) Prohibition, and 3) Enforcement. First, all "interscholastic, intramural, or club athletic events" that are "sponsored or sanctioned by a public athletics program for minors" must be designated as for "(I) females, women, or girls; (II) males, men, or boys; or (III) coeducational or mixed." *Id.* That's the Designation phase.

If an event is designated as being for "females, women, or girls," "only female students, based on their biological sex at birth, may participate" in that event. *Id.* There are no restrictions on who may participate in events designated as for males, men, or boys, or events designated as coeducational or mixed. *Id.* That's the Prohibition.

Finally, the measure's Enforcement comes in the form of a private cause of action. *Id.* Specifically, a female student who is either (1) "deprived of an athletic opportunity" or (2) "suffers direct or indirect harm as a result of a violation" of the measure's restrictions, may seek "injunctive relief, damages, and any other relief available under law" against the "public athletics program for minors that caused the harm." *Id.* The prevailing party in such an action is also entitled to reasonable attorney fees and costs. *Id.*

The measure defines "public athletics program for minors" to include 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." *Id.*

Finally, the measure also includes several limitations on liability for public athletics programs for minors based on their compliance with the measure's restrictions. Among those is a requirement that no "governmental entity" may "take any adverse action against a public athletics program for minors" or its agents "because of its or their compliance" with the measure's requirements. *Id.*

At its February 21, 2024, hearing, the Title Board concluded that the measure contained a single subject by a vote of 2-1. *Id.* at 4. The dissenting board member concluded that the limitation on a governmental entity's ability to take "adverse action" against an entity because of its compliance with the measure was a second subject. *See Hearing Before Title Board on Proposed Initiative 2023-2024 #160* (February 21, 2024), https://tinyurl.com/ynrj5zdm ("Hearing") at 5:32:45–5:33:00.

Lori Hvizda Ward filed a motion for rehearing consistent with § 1-40-107(1)(a)(I). Record at 7–12. The motion for rehearing raised both single subject and clear title concerns. *Id.* As to single subject, the Motion for Rehearing made several arguments, including that the measure would impose liability on organizations "hosting, organizing, or facilitating public school athletics" in addition to its primary focus of regulating participation in female school athletic programs. *Id.* at 10. Counsel for Ward reiterated this single subject concern at the Title Board's rehearing. *Rehearing Before Title Board on Proposed Initiative 2023-2024 #160* (March 6, 2024), https://tinyurl.com/4r8rzj3n ("Rehearing") at 9:50–11:50.

The Title Board granted the motion to the extent it made changes to the ballot title, but denied Ward's single subject challenge. Record at 6. The title fixed by the Board for #160 is as follows:

> 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.

Id. at 5.

Petitioner Ward now challenges whether #160 contains a single subject, raising only the argument that the measure's enforcement section creates a second subject. Pet. for Review at 3.

SUMMARY OF ARGUMENT

Number 160's single subject is the regulation of participation in female-only athletic events. It accomplishes its purpose by requiring entities sponsoring or sanctioning athletic events for minors to designate those events as female-only, male-only, or coed. Then it prohibits those entities from allowing someone whose biological sex at birth was not female to participate in a female-only event.

Number 160 enforces these requirements through a private right of action. That enforcement mechanism is directly tied to #160's core purpose, and not a second subject.

Petitioner argues that the second subject comes in the form of how broadly #160's requirements—and subsequent liability—sweep. But that is a policy choice, not a second subject. And by defining the term "public athletics program for minors," #160 ensures that voters are fully aware of its scope. The Court should affirm the Title Board's conclusion that #160 satisfies the single subject rule.

ARGUMENT

I. The proposed initiative contains a single subject.

A. Standard of review and preservation.

1. Standard of Review.

The Title Board has jurisdiction to set a title only when a measure contains a single subject. *See* Colo. Const. art. V, § 1(5.5). The Court will "overturn the Board's finding that an initiative contains a single subject only in a clear case." *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (quotations omitted). "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 Title, Ballot Title, & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 8. To satisfy the single-subject requirement, the "subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *In re 2013-2014 #76*, 2014 CO 52, ¶ 8.

2. Preservation.

Number 160 regulates participation in female-designated athletic events. The sole issue presented by the Petition is whether #160's imposition of "liability for violations [of the measure] on a wide array of non-school associations or organizations hosting, organizing, or facilitating those athletic events" is a second subject. Pet. at 3. Although Petitioner raised additional single-subject and clear title arguments at Rehearing, they do not pursue those additional arguments here.

The Board agrees that this issue is preserved. It was raised in Petitioner motion for rehearing, Record at 4, and discussed again by Petitioner's counsel at the March 6, 2024, rehearing. Rehearing at 9:50–11:50.

B. Number 160's enforcement provision, and the scope of entities to which it applies, is a policy choice, not a second subject.

The single subject of 2023-2024 #160 is to restrict participation in female athletic programs to females based on their biological sex at birth. The enforcement provision, which applies only to "public athletics

programs for minors" that "cause" a person harm by failing to follow the measure's requirements, is not a second subject. "[E]xamin[ing] the initiative's wording to determine whether it comports with the constitutional single-subject requirement" makes clear that the liability provision is directly tied to the newly created restriction on participation in female-designated athletic events. *In re 2019-2020 #3*, 2019 CO 57, ¶ 8.

The provision highlighted by Petitioner is the measure's enforcement provision. And "mere implementation or enforcement details directly tied to the initiative's single subject will not, in and of themselves, constitute a separate subject." *In re Title, Ballot Title & Submission Clause, & Summary for 2005-2006 #73*, 135 P.3d 736, 739 (Colo. 2006). Number 160 operates in three stages: 1) Designation, 2) Prohibition, and 3) Enforcement.

Designation	Any athletic event sanctioned by a "public athletics program for minors" must be designated as male, female, or coeducational. Record at 2 (§ 2(a)).
Prohibition	If an event is designated as for females, only females—based on their biological sex at birth—may participate. Record at 2 (§ 2(b)).
Enforcement	If a person "is deprived of an athletic opportunity or suffers direct or indirect harm as a result of a violation of" of either the Designation or Prohibition provisions, that person has a cause of action against the "public athletics program for minors" that caused the harm. Record at 2 (§ 3(a)).

Thus, a "public athletics program for minors" is only subject to the measure's enforcement provision if it 1) fails to designate an event as male, female, or coed, or 2) a non-female student—based on their biological sex at birth—participates in a female-designated event. And even then, the measure can only be enforced against a "public athletics program for minors" 1) if that violation *results* in either harm or a denial of athletic opportunities, and 2) the "public athletics program for minors" *caused* that harm. The enforcement provision is "directly tied to

the initiative's single subject," which does not violate the single subject rule. *See, e.g.*, *Blake v. King*, 185 P.3d 142, 146 (Colo. 2008).

Blake is instructive. There, the initiative's single subject was "extending the existing criminal liability of business entities to include their agents or high managerial agents." *Id.* The measure also included a provision "provid[ing] Colorado residents with a civil remedy for the entity or person's criminal conduct." *Id.* The Court concluded that this provision was not a separate subject because it "enforce[d] the extension of business entities' criminal liability to encompass agents and high managerial agents." *Id.*

So too here. Number 160's enforcement provision is directly related to violations of its key prohibitions, and in fact even more closely tied to its single subject than the enforcement provision upheld in *Blake*.

Before the Board, Petitioner's concern seemed primarily related to the scope of how "public athletics program for minor" is defined. For example, in their motion for rehearing, Petitioner argued that the

"reach" of #160's enforcement provision is a "reflection of its overly broad theme." Record at 10.

But a measure's reach is a policy choice at the heart of Colorado citizens' right to the initiative. *See* Colo. Const. art. V § 1(2). Here, the proponents of #160 chose to define "public athletics program for minors" to include 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 (§ 1(b)). Petitioner's concern with this provision is that it goes beyond schools and school districts to encompass organizations that host, organize, or facilitate athletic events. *See* Pet. for Review at 3. In their motion for rehearing, Petitioner argued that this definition would encompass the NCAA, colleges and universities, and private golf courses that host high school golf tournaments. Record at 10.

As a threshold matter, such entities would not be subject to liability unless their failure to follow the Designation or Prohibition

provisions of #160 caused the harm at issue in the ensuing lawsuit. For example, it's unlikely a private golf course that simply hosts a golf tournament, but neither sponsors nor sanctions that event, could be liable under #160. And if it is that course that refuses to comply with #160's Designation or Prohibition provisions, then the proponents would presumably argue it is reasonable for liability to extend to the entity that violates the law.

Regardless, whether to restrict #160's applicability to schools and school districts, or extend it to organizations that host, organize, or facilitate athletic events, is a policy choice, not a second subject. Whether such broad applicability is wise goes to the merits of the proposed measure. And at this stage, this Court does "not address the merits of the proposed initiative[] nor suggest how [it] might be applied if enacted." *In re Title, Ballot Title, & Submission Clause for 2013–2014 #85*, 2014 CO 62, ¶ 10. In their measure regulating participation in female-designated athletic events, proponents chose to apply

restrictions to a potentially broad group of entities and organizations. That was their choice, and it does not constitute a second subject.

Especially because that choice does not implicate either of the two purposes of the single-subject rule. First, the single-subject rule seeks to avoid "log rolling," where the policy attempts to obtain support from various factions by combining unrelated subjects in a single matter. *See In re 2013-2014 #76*, 2014 CO 52, ¶ 32. But #160 presents no such risk. The provision imposing liability is directly tied to the restrictions contained in the measure, and is unlikely to attract support for the measure from anyone not already inclined to support it.

It appears Petitioner's concern is related to the second purpose of the single-subject rule, which ensures that a measure does not contain hidden aspects "coiled up in the folds of a complex proposal." *See id.*; *see also* Record at 10 (noting in motion for rehearing that "the reach of this provision would [] surprise voters").

But this is not a complex initiative. It encompasses less than two pages. And its scope is set by a defined term, "public athletics program

for minors," which any voter can read for themselves. Where, as here, the "plain language" of a measure sets out its scope and applicability in a straightforward manner, there is no danger of hidden surprises. *See, e.g.*, *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 19; *In re Title, Ballot Title, & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶ 20.

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 2nd day of April, 2024.

PHILIP J. WEISER
Attorney General

/s/Peter G. Baumann
PETER G. BAUMANN, 51620*
Senior Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

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, this 2nd day of April, 2024, addressed as follows:

Mark G. Grueskin
Nathan Bruggeman
David Beller
Recht Kornfeld, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
mark@rklawpc.com
nate@rklawpc.com
david@rklawpc.com
Attorneys for Petitioners

And by FedEx overnight delivery to:

Linda White
22931 E. Del Norte Cir.
Aurora, CO 80016

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

/s/ Carmen Van Pelt
Carmen Van Pelt