DATE FILED: May 2, 2024 6:06 PM

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2024)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #175 ("Prohibit Certain Medical Procedures for Minors")

Petitioners: Wayde Goodall and Darcy Schoening,

v.

Respondents: Jamie Gentry-Cunningham, Jenna Lea Candreia Clinchard, Jude Kacey Clinchard, Iris Halpern, and Dr. Lora Melnicoe,

and

Title Board: Theresa Conley, Kurt Morrison, and Jeremiah Barry.

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Case No. 2024SA117

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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 3,080 words.

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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I. Whether Petitioners timely appealed the Title Board's decision that Initiative 2023-2024 #175 did not satisfy the single subject requirement.

II. Whether Colo. Const. art. V, § 1(5.5) permits initiative proponents to add language to a resubmitted measure without review and comment from the Legislative Council.

STATEMENT OF THE CASE

Proposed initiative 2023-2024 #175 ("175") seeks to prohibit, among other things, certain medical procedures from being offered to or performed on minors for specified purposes. Petitioners Wayne Goodall and Darcy Schoening ("Petitioners") filed the original text of #175 with the Title Board on February 22, 2024, and, after an initial hearing, the Board set title for #175 on March 6, 2024. Record at 11, 19.

Respondents Jamie Gentry-Cunningham, Jenna Lea Candreia Clinchard, Jude Kacey Clinchard, Iris Halpern, and Dr. Lora Melnicoe ("Respondents") filed a motion for rehearing on #175 on March 13, 2023.

Id. at 21–28. At the rehearing on April 3, 2024, the Board concluded that #175 contained multiple subjects and therefore the Board lacked jurisdiction to set a title. *Id.* at 19.

Instead of seeking review by this Court within seven days of April 3, 2024, pursuant to § 1-40-107(2), C.R.S., Petitioners chose to revise and resubmit the measure to the Title Board on April 5, 2024, relying on Colo. Const. art. V, § 1(5.5). Pet. for Review at 3; Record at 3–9, 17. Petitioner's resubmitted version of #175[1] added, removed, and changed language in the proposed measure.[2]

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[1] For the sake of clarity, this Brief refers to the original text of #175, filed with the Title Board on February 22, 2024, as "#175 (Original)" or "#175, as originally submitted" and the resubmitted text of #175, filed with the Title Board on April 5, 2024, as "#175 (Resubmitted)" or "#175, as resubmitted."

[2] The text of #175 (Original), as submitted to the Title Board on February 22, 2024, is contained in the Certified Record for this matter at pp. 11–16. The final text of #175 is contained in the Certified Record for this matter at pp. 3–9. An "amended draft showing the changes from the original," as submitted to the Title Board by Petitioners pursuant to the Board's Policies and Procedures on April 5, 2024, is attached hereto as **Exhibit 1**. *See 13. Resubmissions to meet single subject*, TITLE BOARD POLICIES AND PROCEDURES, https://www.sos.state.co.us/pubs/elections/Initiatives/files/2021-2020TitleBoardPoliciesAndProcedures.pdf

The Board held a hearing on #175 (Resubmitted) on April 17, 2024. At the April 17, 2024 hearing, the Board concluded that it lacked jurisdiction to review the resubmitted measure without further review and comment under Colo. Const. art. V, § 1(5.5). Record at 17. Section 1(5.5) provides that a measure "contain[ing] more than one subject" may be resubmitted without further review and comment "unless the revisions involve more than the elimination of provisions to achieve a single subject, or unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that review and comment is in the public interest." Colo. Const. art. V, § 1(5.5). Because Petitioners' resubmission did more than merely eliminate provisions of #175 (Original) to achieve single subject, but also added and changed provisions in the proposed measure, the Board concluded the resubmission did not fall within Section 1(5.5)'s exception to the review and comment requirement. Record at 17.

(requiring such resubmissions to include "an original draft (consisting of the draft first submitted to the Board but denied title setting), an amended draft showing the changes from the original, and a final draft").

Petitioners filed a petition for review with this Court on April 24, 2024.

SUMMARY OF THE ARGUMENT

Petitioners raise two arguments in this appeal. First, Petitioners contend that the Board erred in concluding #175, as originally submitted, violated the single subject requirement. Pet. at 5. Second, Petitioners contend that changes they made to #175, as resubmitted, satisfied Colo. Const. art. V, § 1(5.5)'s exception to the review and comment requirement. *Id.* The first argument is either untimely or irrelevant and the second contradicts Section 1(5.5)'s plain text.

The Board determined that #175, as originally submitted, violated the single subject requirement at a rehearing held on April 3, 2024. Per § 1-40-107(2), Petitioners had seven days, until April 10, 2024, to file an appeal with this Court. Because they failed to do so, any argument that #175, as originally submitted, satisfied single subject is untimely. To the extent that Petitioners contend that #175, as resubmitted, satisfies single subject, their argument is irrelevant. The Title Board did not, and could

not, reach that issue before Petitioners submitted the revised measure for review and comment pursuant to art. V, §§ 1(5) and (5.5) of the Colorado Constitution.

Under Section 1(5.5), the Board lacked jurisdiction to set title on #175, as resubmitted, because Petitioners' revisions to the measure "involve[d] more than the elimination of provisions to achieve a single subject." Colo. Const. art. V, § 1(5.5). Petitioners not only eliminated but also added and altered language throughout the measure. No law supports, and the plain text of Section 1(5.5) rejects, the notion that initiative proponents may revise a resubmitted measure in any way other than by eliminating provisions to achieve a single subject.

ARGUMENT

I. Petitioner failed to timely appeal the Title Board's single subject determination.

A. Standard of review and preservation.

This Court reviews "the statutes governing the Board's authority to act," including § 1-40-107(2), C.R.S., which governs the timeliness of a petition for this Court's review, de novo. *Hayes v. Ottke*, 2013 CO 1, ¶ 12.

Where the statutory language is "clear and unambiguous, [the Court] gives effect to the plain and ordinary meaning of the statute." *Id.*

Petitioner objected to the Title Board's single subject determination at the rehearing held on April 3, 2024.

B. Petitioner's appeal of the Board's single subject determination is untimely or irrelevant.

It is unclear whether Petitioners intend to challenge the Board's determination of April 3, 2024, when the Board concluded that #175 (Original) did not advance a single subject, or its determination of April 17, 2024, when the Board did not reach the single subject issue. Pet. for Review at 3 ("Petitioners maintain that the language [of #175 (Original)] . . . constitutes a single subject . . . .").

If Petitioners challenge the Board's single subject determination at the April 3 rehearing, this appeal is untimely. Pursuant to § 1-40-107(2), C.R.S., initiative proponents have seven days after such rehearing to petition for this Court's review. Plaintiffs did not petition for this Court's review until April 24, 2024, two weeks after the appeal deadline lapsed.

If Petitioners challenge the Board's decision of April 17, 2024, the single subject issue is irrelevant. The Board did not reach the question of whether #175 (Resubmitted) encompassed a single subject because, as discussed below, Petitioners were required to submit the measure for review and comment under Colo. Const. art. V, §§ 1(5), (5.5).

II. #175, as resubmitted, does not qualify for an exception to review and comment under Article V, Section 1(5.5).

A. Standard of review and preservation.

This Court has not specifically addressed the standard of review applicable to the Title Board's decision on whether a resubmitted measure satisfies Section 1(5.5). But in construing the Board's other responsibilities imposed by Section 5.5—ensuring "no measure shall be proposed by petition containing more than one subject" and ensuring that subject is "clearly expressed in its title"—the Court has, without exception, extended a deferential standard of review. *See In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 1 ("[W]e draw all legitimate presumptions in favor of the propriety of the Title Board's decision and only overturn the Board's decision in a clear

case."). This is because "the General Assembly has squarely placed the responsibility of carrying out the dual mandate of Article V, section 1(5.5) on the Title Board." *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999). All the Board's decisions under Section 5.5 are therefore entitled to deference.

Like the single-subject and clear-title inquiries, resubmission under Section 5.5 sets the Board the "difficult task of balancing the competing interests of the proponents of the proposed initiative against concerns raised by its opponents and other members of the public." *Hayes*, 2013 CO 1, ¶ 15. For example, the Board must implement all of Section 5.5 so as to "assist potential proponents in implementing their right to initiate laws while concurrently protecting the voters against confusion and fraud." *Id.* (quoting *In re 1999-2000 #25*, 974 P.2d at 465). This balancing should not be second-guessed by the Court except "in a clear case." *In re 2017-2018 #4*, 2017 CO 57, ¶ 1. Accordingly, the Court should "draw all legitimate presumptions in favor of the propriety of" the

Title Board's decision that Proponents' revisions failed to satisfy Section 5.5. *Id.*

Petitioners raised the Section 1(5.5) issue before the Title Board at the April 17, 2024 hearing on #175 (Resubmitted).

B. Petitioners' revisions to #175 involve more than the elimination of provisions to achieve single subject.

Petitioners contend the post-rehearing changes they made to #175 fall within Section 1(5.5)'s exception for revisions involving no "more than the elimination of provisions to achieve single subject," and therefore they are excused from Section 1(5)'s review and comment requirement. But Petitioners concede that those changes not only eliminated provisions but also added and changed language in the measure in an attempt to "clarify" it. Pet. for Review at 3. This concession, and a review of the many changes—additions, subtractions, and substitutions—Petitioners made to #175 on resubmission, ends the argument. Section 1(5.5) does not allow proponents to revise and resubmit measures without review and comment except to eliminate provisions to achieve single subject.

Pursuant to Article V, § 1(5.5), the original text of proposed initiatives "shall be submitted to the legislative research and drafting offices of the general assembly for review and comment." *Id.* Comments made by the Legislative Council "are not binding on the proponents of an initiative, although the proponents may choose to amend the initiative in light of such comments." *In re Title, Ballot Title & Submission Clause, & Summary Adopted May 16, 1990*, 797 P.2d 1283, 1285 (Colo. 1990). This process serves at least two purposes: "assist[ing] the proponents in drafting their initiative" and an "overriding public purpose" to ensure that the public is informed of "the potential impact . . . of any proposed initiative." *Id.* (quotation omitted). Thus, review and comment is a "constitutionally required predicate" for title setting. *Id.*

Section 1(5.5) creates an exception. "If the Board rejects an initiative for violating the single subject requirement, then proponents may pursue two courses: 1) Proponents may commence a new review and comment process, or 2) Proponents may present a revised [initiative] to the Board." *In re Proposed Initiative 1996-4*, 916 P.2d 528, 534 (Colo.

1996) abrogated in part on other grounds by *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 57. Such a resubmitted measure may be presented to the Title Board without a new round of review and comment unless either of two conditions applies:

> [T]he measure may be revised and resubmitted for the fixing of a proper title without the necessity of review and comment on the revised measure in accordance with subsection (5) of this section, [1] unless the revisions involve more than the elimination of provisions to achieve a single subject, or [2] unless the official or officials responsible for the fixing of a title determine that the revisions are so substantial that such review and comment is in the public interest.

Colo. Const. art. V, § 1(5.5). Because the changes Petitioners made to #175 "involve more than the elimination of provisions to achieve single subject," the Section 1(5.5) exception to review and comment does not apply.

Exhibit 1 details some[3] of the changes Petitioners made to #175 prior to resubmission. For example, proposed section 12-30-123(5), in the text of #175, as originally submitted, reads as follows:

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[3] As discussed above, *see supra*, n.1, Exhibit 1 is the redline or "amended draft showing the changes from the original [initiative]" submitted by Petitioners to the Title Board on April 5, 2024. A comparison of Exhibit 1 with the original text of #175 and the resubmitted text of #175, however, reveals that Petitioners' redline in Exhibit 1 is not comprehensive.

For example, the text of #175, as resubmitted, routinely substitutes the word "any" where #175, as originally submitted, uses "all" or "the." *Compare* Record at 14 (allowing compensatory damages for economic losses including "the out-of-pocket costs the minor or parent paid to the health-care provider" (emphasis added)) with *id.* at 7 (allowing compensatory damages for economic losses including "any out-of-pocket costs the minor or parent paid to the healthcare provider (emphasis added)). It also substitutes the word "must" for "shall." *Compare id.* at 8 ("A civil penalty collected pursuant to this section must be into the general fund of the state." (emphasis added)) with *id.* at 15 ("A civil penalty collected pursuant to this section shall be paid into the general fund of this state." (emphasis added)).

Exhibit 1, prepared and submitted by Petitioners to the Title Board on April 5, 2024, omits these and other changes made to the original text of the measure. The submission of an amended draft serves an important role in allowing the Board to assess whether a proponent's revisions satisfy Section 1(5.5). Petitioners' submission of an incomplete "amended draft" that details certain changes but omits others provides additional

> (5) THIS SECTION SUPERSEDES ALL COMMON LAW RULES REGARDING A MINOR'S ABILITY TO CONSENT TO A MEDICAL PROCEDURE THAT IS PERFORMED OR ADMINISTERED FOR THE PURPOSE OF:
>
> (A) ENABLING THE MINOR TO IDENTIFY WITH, OR LIVE AS, A PURPORTED IDENTITY INCONSISTENT WITH THE MINOR'S SEX; OR
>
> (B) TREATING PURPORTED DISCOMFORT OR DISTRESS FROM A DISCORDANCE BETWEEN THE MINOR'S SEX AND ASSERTED IDENTITY.

Record at 14.

Proposed section 12-30-123(5), in the text of #175 as resubmitted to the Title Board on April 5, 2024, reads as follows:

> (5) THIS SECTION SUPERSEDES ANY COMMON LAW RULE REGARDING A MINOR'S ABILITY TO CONSENT TO A MEDICAL PROCEDURE THAT IS PERFORMED OR ADMINISTERED FOR THE PURPOSE OF:
>
> (A) CHANGING THE GENDER OF THE MINOR.

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support and alternative grounds for affirming the Board's conclusion that Petitioners' resubmission does not qualify for an exception to the review and comment requirement. *See In re Proposed Const. Amend. under the Designation 'Pregnancy'*, 757 P.2d 132, 135 (Colo. 1988) (explaining the purpose of review and comment is "to ensure that non-substantive draft defects and irregularities in form do not hinder the presentation of initiatives to the electorate").

Record at 6. This new language in proposed section 12-30-123(5)'s supersession clause appears nowhere in the text of the original measure, and therefore involves, by definition, "more than the elimination of provisions to achieve single subject." Colo. Const. art. V, § 1(5.5) (emphasis added). Indeed, even the word "gender"—an undefined term in #175 (Resubmitted)—is absent from the supersession clause in proposed section 12-30-123(5) of #175 (Original). Record at 14.

Likewise, Petitioners' revisions included substantive additions to #175's legislative declaration. #175 (Original)'s legislative declaration, at sections 1 (f) and (g), discussed the advocacy of "Dr. John Money" and the alleged "rapidly increasing frequency" of certain medical procedures' performance on minors. *See* Ex. 1 at 2; Record at 11. #175 (Resubmitted) deleted those portions of the proposed legislative declaration and substituted a new subsection (f): "Over half of US states prohibit medical procedures that aim to change a minor's sex or gender." *Id.* #175 (Original) contains no reference to the prevalence of such prohibitions in states other than Colorado. *Id.*

#175 (Resubmitted) also added a reference to Colorado's restrictions on tattoos for minors. *See* Exhibit 1 at 2. The resubmitted legislative declaration for #175 suggests that "current Colorado law . . . prohibits minors from receiving tattoos, [a procedure] much less drastic than the procedures described herein." *Id.*; *see* Record at 4. Not only is this addition novel to #175 (Resubmitted) and unrelated to Petitioner's attempt to achieve single subject, but it is also incorrect. Colorado law does not prohibit minors from receiving tattoos, but rather permits minors to receive tattoos with the express consent of a parent or guardian. *See* § 25-4-2103, C.R.S. ("No body artist shall perform a body art procedure upon a minor unless the body artist has received express consent from the minor's parent or guardian."). The presence of such an inaccuracy in the resubmitted measure underscores the General Assembly's purpose in subjecting new initiatives—or, in this case, revised initiatives—to additional review and comment. *See In re Designation 'Pregnancy'*, 757 P.2d at 135 (explaining one purpose of review and

comment is to ensure that "draft defects and irregularities in form do not hinder the presentation of initiatives to the electorate").

Article V, Section 1(5.5) permits a narrow exception to the review and comment requirement for revisions that "eliminate provisions to achieve a single subject." Petitioners' revisions did more than that. Among other things, the revisions changed the scope of the measure's supersession clause, expanded its legislative declaration, and altered word choices throughout #175. Petitioners' suggestion that such additions, made with the goal to "clarify" various of the measure's provisions, should also be excepted from review and comment finds no support in the constitutional text or any of this Court's precedents. *See In re Great Outdoors Colorado Tr. Fund*, 913 P.2d 533, 538 (Colo. 1996) ("When the language of an amendment is plain, its meaning clear, and no absurdity involved, constitutional provisions must be declared and enforced as written."). No plausible reading of Section 1(5.5) offers initiative proponents free rein to supplement a measure's legislative declaration, or make any other additive changes, while avoiding the

"constitutionally required predicate" of review and comment. *In re Title Adopted May 16, 1990*, 797 P.2d at 1285.

Petitioners do not suggest that Section 1(5.5) is ambiguous, and this Court cannot read into Section 1(5.5) the exception Petitioners would prefer. *See Hart-Bartlett-Sturtevant Grain Co. v. Burton*, 297 P.2d 267, 269 (1956) ("To sustain the position of counsel for plaintiffs we would have to read something into [the law]. This, we cannot do."). Therefore, the Title Board did not err in determining it lacked jurisdiction to set title on #175 (Resubmitted).

CONCLUSION

The Court should affirm the Title Board's refusal to set title on #175, as resubmitted.

Respectfully submitted on this 2nd day of May, 2024.

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

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