

COLORADO SUPREME COURT

2 East 14th Avenue
Denver, CO 80203

Original proceeding pursuant to § 1-40-107(2), C.R.S. (2019)

Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2024 #205 (“Parental Notification of Gender Incongruence”)

Petitioners: Margaret Bobb, Jonathan Wright, and Janet Wright,

v.

Respondents: Erin Lee and Lori Gimelshteyn,

and

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

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Case No.: 2024SA124

TITLE BOARD’S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I 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:

A. The brief complies with C.A.R. 28(g) because it contains 1,782 words.

B. The brief complies with C.A.R. 28(a)(7)(A) because each 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, and not to an entire document, where the issue was raised and ruled on.

/s/ LeeAnn Morrill
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Respondents Theresa Conley, Jeremiah Berry, and Kurt Morrison, in their official capacities as members of the Ballot Title Board (collectively, the “Board”), by and through undersigned counsel, hereby submit their Opening Brief in this appeal:

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the Board correctly found that Proposed Initiative 2019-2024 #205 (“#205”) contains a single subject as required by Colo. Const. Art. V, § 1(5.5).

STATEMENT OF THE CASE

Erin Lee and Lori Gimelshteyn are the proponents of #205, which concerns “Parental Notification of Gender Incongruence.” *See* Pet. for Rev., at 1. Specifically, #205 proposes to amend the Colorado Revised Statutes to add section 22-1-144, which would govern “Parental rights – definition – information regarding gender incongruence.” *See* #205 Cert. Pckt., at 3. If #205 is adopted by the voters, the statute will require certain representatives of any public school who obtain information that a child in the school is experiencing gender

incongruence to notify the school principal within two days of receiving the information who, in turn, must notify at least one of the child's parents within two days. *See id.*, at 15. The proposed statute expressly defines the term "public school" as "any preschool, primary, or secondary school that receives state or federal funds." *Id.*, at 3.

The Board held a public hearing to consider #205 on April 3, 2024, at which it found that the measure contains a single subject and set title. *See #205 Cert. Pckt.*, at 5. Margaret Bobb, Jonathan Wright, and Janet Wright (the "Petitioners") objected to the Board's actions and timely filed a motion for rehearing on April 10, 2024. *See Pet. for Rev.*, at 1. "The rehearing was held on April 19, 2024, at which time the Title Board granted the Motion only to the extent that the Board made changes to the titles." *Id.*, at 1-2; *see also #205 Cert. Pckt.*, at 7-8. The Board denied all motions and objections except to the extent that it made changes to the title previously set for #205. *See id.* The final version of the ballot title reads as follows:

A change to the Colorado Revised Statutes concerning parental notification of a child's gender incongruence from a

school representative, and, in connection therewith, requiring a school representative who obtains information that a child enrolled in the school is experiencing gender incongruence to notify the school's principal within two days; requiring the school's principal to notify the child's parent within two days after receiving the information; defining "gender incongruence" as the difference between the child's biological sex and their perceived or desired gender; and applying this requirement to a school representative, regardless of existing confidentiality requirements, which includes an administrator, teacher, nurse, counselor, social worker, or coach, and to any preschool through secondary school that receives any state or federal funds.

Id. at 7.

The Petitioners timely appealed the Board's final decision to this Court on April 26, 2024. *See generally* Pet. for Rv.

SUMMARY OF THE ARGUMENT

The Board's determination that #205 contains a single subject should be affirmed because the sole purpose of the measure is requiring certain public school representatives who obtain information that a child in the school is experiencing gender incongruence to ensure the prompt notification of at least one of the child's parents.

ARGUMENT

I. The Board correctly found that #205 contains a single subject.

A. 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). 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 Title, Ballot Title, and Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014) (citation omitted). Where an initiative “tends to . . . carry out one general objective” or central purpose, “provisions necessary to effectuate [that] purpose . . . are properly included within its text,” and the “effects th[e] measure could have on Colorado . . . law if adopted by voters are irrelevant” to the single subject inquiry. *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 159-60 (Colo. 2014) (quotations omitted).

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, 442 P.3d 867, 869 (Colo. 2019). Instead, the Court “must examine the initiative’s wording to determine whether it comports with the constitutional single-subject requirement.” *Id.* When this Court reviews “the Title Board’s single subject decision, [it] employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions.” *In re Title, Ballot Title, & Submission Clause for 2011-2012 #45*, 274 P.3d 576, 579 (Colo. 2012) (quotation omitted). 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*, 489 P.3d 1217, 1220 (Colo. 2021) (quotations omitted).

The Board agrees that Petitioners preserved their single subject challenge by raising it in the motion for rehearing and through verbal objections made on the public records at the April 19, 2024 rehearing. *See #205 Cert. Pckt.*, at 7-12.

B. Number 205 contains only one subject.

The Colorado Constitution provides that an initiative may relate to only one subject: “No measure shall be proposed by petition containing more than one subject” COLO. CONST., art. V, § 1(5.5). A proposed measure that “tends to effect or to carry out one general objective or purpose presents only one subject.” *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). In contrast, “to constitute more than one subject, the text of the measure must relate to more than one subject and it must have at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 441 (Colo. 2002) (quotations omitted).

The Board correctly determined that #205 contains only one subject—namely, requiring certain public school representatives who obtain information that a child in the school is experiencing gender incongruence to ensure the prompt notification of at least one of the

child's parents. To implement this singular objective, #205 expressly defines the term "public school" as "any preschool, primary, or secondary school that receives state or federal funds." #205 Cert. Pckt., at 3. It is well-established that "[i]mplementing provisions that are directly tied to an initiative's central focus are not separate subjects." *In re Title, Ballot Title & Submission Clause for 2007-2008* #17, 172 P.3d 871, 874 (Colo. 2007), as modified on denial of reh'g (Dec. 17, 2007) (citing *In re Title, Ballot Title & Submission Clause for 1999-2000* #258(A), 4 P.3d 1094, 1097 (Colo. 2000)).

Furthermore, the definition of "public school" and its operation in effectuating the single subject of #205 are similar to the provision of the initiative at issue in *In re Title, Ballot Title, & Submission Clause for 2013-14* #129, 333 P.3d 101 (Colo. 2014) ("#129"). There, this Court considered a single subject challenge to an initiative that sought "to amend the state constitution to add a provision defining "fee" as a "voluntarily incurred governmental charge in exchange for a specific benefit conferred on the payer." *Id.* at 103. The Court noted that the

initiative would make “amend TABOR to add a provision defining ‘fee’ and then apply that definition to a wide range of contexts, including ‘the Colorado Constitution, Colorado Revised Statutes, Codes, Directives and all public Colorado legal documets [sic].” *Id.* at 105. In rejecting the petitioner’s single subject challenge, this Court reasoned:

After defining “fee,” Initiative # 129 provides the circumstances under which that definition will apply. Although that definition applies broadly, its breadth does not necessarily make its provisions disconnected or incongruous. To the contrary, Initiative # 129’s provisions are necessarily and properly connected with each other: it defines the term “fee” and then renders uniform that definition throughout Colorado law. In other words, Initiative # 129 “tends to effect or carry out one general objective or purpose”—that is, changing the definition of “fee.”

Id. (citing *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #256*, 12 P.3d 246, 253-54 (Colo. 2000) (“#256”).

Here, the definition of “public school” in #205 merely explains the contexts in which the requirement of parental notification of gender incongruence by certain school representatives applies—namely, in “any preschool, primary, or secondary school that receives state or

federal funds.” #205 Cert. Pckt., at 3. This explanation is “necessarily and properly connected” to #205’s sole purpose of requiring certain school representatives who obtain information that a child in the school is experiencing gender incongruence to ensure the prompt notification of at least one of the child’s parents. #129, 333 P.3d at 105 (citation omitted).

Petitioners argue that #205 violates the single subject rule “by providing that private schools, receiving federal or state funds, are ‘public schools’ and thus must disclose a student’s gender identity to the student’s parents.” Pet. for Rev., at 3. And in their motion for rehearing before the Board, they stated that “[t]he inclusion of private schools is a surreptitious change in that law that is coiled in the folds of this measure.” #205 Cert. Pckt., at 11. But even assuming *arguendo* that Petitioners are correct that #205’s definition of “public school” is broad enough to encompass schools that self-identify as “private” or even are defined as such in other provisions of Colorado law, the Board respectfully contends that those considerations are beyond this Court’s

review. Indeed, as this Court stated in #129, “[t]he mere fact that an initiative may change the law does not mean that it violates the single-subject requirement, even if it ‘makes policy choices that are not inevitably interconnected.’” 333 P.3d at 105 (quoting #256, 12 P.3d at 254). This Court went on to acknowledge that “[i]n any event, we cannot consider ‘[t]he effects this measure could have on Colorado ... law if adopted by voters.’ Those concerns, however valid, ‘are irrelevant to our review of whether [the proposed initiative] and its Titles contain a single subject.’” *Id.* (quoting *In re Title, Ballot Title, Submission Clause for 2011–2012 #3*, 274 P.3d 562, 568 n.2. (Colo. 2012)).

For these reasons, Petitioners’ single subject challenge to #205 lacks merit and should be rejected.

CONCLUSION

For the above reasons and based on the above authorities, the Board respectfully requests that the Court affirm its determination that #205 contains a single subject.

DATED: May 3, 2024.

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CERTIFICATE OF SERVICE

This is to certify that on May 3, 2024, I electronically served the foregoing **TITLE BOARD'S OPENING BRIEF** upon all parties and/or counsel of record for the parties who have appeared in this appeal via the Colorado Courts E-filing System:

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