SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	Supreme Court Case No: 2024SA117 DATE FILED: May 9, 2024 4:32 PM
Original Proceeding Pursuant to C.R.S. § 1-40-107(2). Appeal from the Initiative Title Setting Review Board 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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PETITIONER'S ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains **3,104** words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 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).

For each issue raised by the appellant, 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS

STATUTES

OTHER AUTHORITIES

SUMMARY OF THE ARGUMENT

Both the Title Board and Respondents contend that the Petitioners did not timely file with this Court their right to appeal the Title Board's decision of April 3, 2024, when it reversed its own initial single subject determination. Respondents additionally contend that the original language was not a single subject. The Title Board and Respondents also argue that the revised language submitted on April 5, 2024, is not permissible, but those arguments are now moot for reasons set forth below.

To the first argument regarding the timeliness of the appeal, both the Title Board and Respondents confuse the plain meaning of the statute regarding the filing deadlines, misconstruing when the seven-day period to file an appeal with this Court begins. They each argue that it begins immediately upon the conclusion of the motion for rehearing. It does not. It begins after the petitioner receives the certified documents from the Colorado Secretary of State that are necessary to file the appeal.

Second, Respondents contend that the original language did not constitute a single subject. Petitioners have addressed this already in their Opening Brief, but submit that Respondents' arguments, while not founded, would go to the merits of the policy anyway, a question for the voters, and not to the singularity of the subject matter.

Finally, since filing their Opening Brief, Petitioners have determined to narrow their request to this court to their preferred prayer for relief only, that the Court reverse the decision of the Title Board from the rehearing on April 3, 2024, affirm the Initiative Title set by the Title Board on March 6, 2024, and order it approved for circulation. If so narrowed, the Title Board's and Respondents' arguments related to the Revised Measure become moot.

REPLY ARGUMENT

I. Issues were Timely Appealed & Properly Preserved

Both the Title Board and Respondents claim that Petitioners failed to timely appeal the Title Board's reversal on April 3, 2024, of its single subject decision. Both parties rely on section 1-40-107(2), C.R.S., which states:

> If any person presenting or the designated representatives of the proponents of an initiative petition for which a motion for a rehearing is filed, any registered elector who filed a motion for a rehearing pursuant to subsection (1) of this section, or any other registered elector who appeared before the title board in support of or in opposition to a motion for rehearing is not satisfied with the ruling of the title board upon the motion, then the secretary of state shall furnish such person, upon request, a certified copy of the petition with the titles and submission clause of the proposed law or constitutional amendment, the fiscal summary, or the determination whether the petition repeals in whole or in part a constitutional provision, together with a certified copy of the motion for rehearing and of the ruling thereon. **If filed with the clerk of the supreme court within seven days thereafter**, the matter shall be disposed of promptly, consistent with the rights of the parties, either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the title board is in error.

(emphasis added).

Here, the opponents of Initiative #175 contend that the phrase "If filed with the clerk of the supreme court within seven days thereafter" refers only to seven days after the rehearing. This is not a plain reading of the text. *Fontanari v. Snowcap Coal Co.*, 2023 COA 29, ¶ 18, 531 P.3d 1073 (Colo. App. 2023) ("When construing statutes, [the courts] look first to the plain meaning of the statutory language, reading words and phrases in context and construing them according to the rules of grammar and common usage"), *St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 2014 CO 33, ¶ 10, 325 P.3d 1014 (Colo. 2014) ("When legislative language is unambiguous," a court will "give effect to the statute's plain and ordinary meaning without resorting to other rules of statutory construction.")

The opponents of Initiative #175 ignore the entire focus of the only preceding sentence. That first sentence is about the provision by the Secretary of State (the "Secretary") of the certified record necessary for a petitioner to file an appeal. By a plain reading, the seven-day period starts after the party not satisfied with the ruling is provided the certified record by the Secretary.

A petitioner must have a certified record in order to file an appeal with this Court. The language "[i]f filed" includes filing with the certified record. *See* C.R.S. § 1-40-107(2). This is the very reason that the statute describes it within the same subsection. There would be no other reason for its provision to be necessary.

Consequently, as both the Title Board and the Respondents interpret it, if the Secretary was unable or, for some reason, unwilling to provide the record within the seven day period, then a petitioner would lose her right to appeal due to no fault of her own. If however, the seven day deadline to file starts after the petitioner receives the very records necessary to file from the state, then any failure to file timely rests solely with the petitioner.

One possible rebuttal could be the intent to move challenges through the process quickly so as not to unnecessarily delay an initiative from advancing. The statute says that the Secretary "shall furnish such person, **upon request**, a certified copy . . . ." C.R.S. § 1-40-107(2) (emphasis added). Although not present in this case, there could be systemic concern that a disgruntled challenger might then deliberately fail to timely request the documents from the Secretary in hopes of causing delay or surprise with a late challenge. This too, however, would be unfounded. There is nothing in the statute that precludes the Secretary from furnishing the record to all parties even without a request. The Secretary must furnish them upon a request, but nothing precludes a proactive approach. There is also nothing in the statute that precludes the Secretary from promulgating procedures that reasonably limit when that request may be made for purposes of the appeal. For example, the Secretary could easily provide in its Title Board Policies and Procedures that such a request must be made within three days from

the conclusion of the rehearing. This would both protect the speed and integrity of the process while also protecting the petitioner from undue harm.

The confusion here by the Title Board and Respondents, however, may stem from either current custom or from conflating the timing for appealing the initial hearing or the fiscal note. Motions to appeal either of the latter must be filed within seven days after the relevant decision. *See* C.R.S. § 1-40-107(1)(a).[1] In those instances, however, the party filing the motion is not dependent upon the Secretary providing any certified documents. The party under Section 1-40-107(1) already has what it needs to file. Any failure to timely file rests with it. Here, unless and until the Secretary acts, the party does not have the same control.

Petitioners filed their Petition for Review on April 24, 2024, one day after receiving the certified record from the Secretary. R. at 1. The right to appeal the single subject determination was properly preserved at the April 3, 2024, rehearing, as noted in the Title Board's Opening Brief. See Title Board's Opening Brief 6.

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[1] It is instructive that Subsection (1)(a)(I) provides for filing within "seven days after the decision is made or the titles and submission clause are set," whereas Subsection (2) provides for filing "within seven days thereafter." The use of the phrase "seven days thereafter" indicates that the legislature intended a different beginning date for the filing period than the relevant decision. The legislature used, earlier in the same section, the phrase "seven days after the decision is made," to refer to filing a motion for rehearing, but chose different language when referring to filing an appeal to the Colorado Supreme Court. Because the legislature used different language in Subsection (2) to describe the same thing (the calculation of a limitation period), it must have meant something different, namely, a starting point other than the date of the decision being appealed.

II. Rebuttal to Challenges Regarding the Original Measure's Single Subject

Respondents claim that Initiative #175 violated the single subject requirement and that, therefore, the Title Board properly reversed its original decision to set title. In support of this claim, Respondents point to a string of supposed evils that will result if a title is set for Initiative #175, enough signatures are gathered to add it to the ballot in the upcoming General Election, and it is approved by Colorado voters and becomes law. Respondents' imagined horribles do not, however, demonstrate that Initiative #175 contains more than one subject. Instead, while unfounded, they demonstrate Respondents' opposition to the single subject contained within the Initiative. Accordingly, Respondents' complaints regarding the effects of Initiative #175—if it were to pass at the General Election—should be disregarded in their entirety.[2]

While Respondents' arguments regarding the single subject requirement should be ignored because they are simply disagreements with the single subject contained in the Initiative, which were improperly considered by the Title Board, they are also wrong. Petitioners previously addressed many of these arguments in

[2] Of course, Respondents are welcome to oppose the wisdom of the Initiative, and to attempt to persuade others to oppose it as well. The correct forum for that objection is the ballot box, not the Title Board hearing room and not the courthouse. Any other interpretation of Section 5.5, Article V, of the Colorado Constitution would allow the Title Board to substitute its political preferences for those of the people.

their Opening Brief, *see* Petit'r's Opening Br. 6–14, but one objection raised in Respondents' Opening Brief bears discussion. Specifically, Respondents claim that "Initiative #175 prohibited any person who 'supported' the minor in addressing their identity as a matter of biologically assigned sex" and that "[t]hese provisions had nothing to do with the asserted single subject of the measure . . . ."[2] Resp'ts' Opening Br. 13.

Respondents are incorrect that the language regarding support for a violation of the proposed statute constitutes a separate subject. As the Colorado Supreme Court has repeatedly held, a proposed initiative contains one subject when it "'tends to effect or to carry out one general objective or purpose.'" *In re Title, Ballot Title & Submission Clause for 2017–2018 #4*, 2017 CO 57, ¶ 13 (*quoting In re Title, Ballot Title and Submission Clause, and Summary for 1999–00 #256*, 12 P.3d 246, 253 (Colo. 2000)); *accord In re Titles, Ballot Titles, and Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, and #128* ["*Fine v. Ward*"], 2022 CO 37, ¶ 13; *In re Title, Ballot Title, and Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 11. The Court has "recognized that '[m]ere implementation or enforcement details directly tied to the initiative's single subject will not, in and of themselves, constitute a separate subject.'" *Fine v. Ward*, 2022 CO 37, ¶ 14.

The case of *Fine v. Ward* is instructive regarding what constitutes more than a single subject. That case involved three initiatives, each of which included

provisions allowing food retailers already licensed to sell beer to begin selling wine, and provisions allowing third-party delivery services to deliver alcohol sold by retail establishments to the consumers at their homes. *Id.* ¶ 1. The proponents of the initiatives at issue in *Fine v. Ward* argued that these two subjects were both within the general subject of "'expanding the retail sale of alcohol beverages,' . . . ." *Id.* ¶ 20. The Court rejected this argument, noting that "'expanding the retail sale of alcohol beverages' is such a general focus that it could encompass a nearly limitless array of subjects." *Id.* Initiative #175 is in no way similar to the initiatives at issue in *Fine v. Ward*.

The language Respondents claim creates a separate subject is as follows:

> A minor, or the parent of a minor, injured as a result of a violation of this section, may bring a civil cause of action to recover compensatory damages, punitive damages, and reasonable attorney's fees, court costs, and expenses, and all other relief available under law against a health-care provider, person, or other entity alleged to have violated this section **or a health-care provider, person, or other entity that supported the alleged violation of this section**. The parent of a minor injured as a result of a violation of this section may bring a civil cause of action against a health-care provider or another person even if the parent consented to the conduct that constituted the violation on behalf of the minor.

Proposed C.R.S. § 12-30-123(7)(a) (emphasis added). In context, it strains credulity to think that more than one subject is contained within the Initiative. Rather, Subsection (7)(a) provides parents and injured minors a private right of action against any person violating, either directly or indirectly through support,

the prohibition on medical procedures intended to enable a minor to "identify with, or live as, a purported identity inconsistent with the minor's sex," or to treat a "purported discomfort or distress from a discordance between the minor's sex and asserted identity." *Id.* § -123(2)(a). The Initiative's single subject is to prevent minors from permanently altering their bodies, either through surgical or pharmaceutical means, based on an asserted gender identity inconsistent with the minor's sex. The plain language of Subsection (7)(a) is consistent with this single subject because it prevents intentional acts assisting a healthcare provider violating the statute. This is dissimilar to *Fine v. Ward*, where the purported subject was so broad as to include "a nearly limitless array of subjects." Instead, the single subject in Initiative #175 is narrow, and every subsection of the proposed statute points in the same direction.

Respondents claim that recently adopted U.S. Department of Education regulations would cause school nurses, school counselors, and schools to be liable under Initiative #175. *See* Resp't's Opening Br. 13, n.7. First, while Respondents are mistaken, this is still not a question of a separate subject, but is a question of the "merits of the proposed initiative [or its] validity or efficacy if approved by voters and enacted," which is beyond the scope of the Court's review. *See Fine v. Ward*, 2022 CO 37, ¶ 10. Even if Respondents are correct that the interaction between Initiative #175 and the newly adopted U.S. Department of Education

regulations would subject school nurses, school counselors, and schools to liability under Proposed Section 12-30-123, that has nothing to do with whether the Initiative contains a single subject.

Second, Respondents incorrectly interpret the newly adopted U.S. Department of Education regulations and how they interact with the Initiative. Respondents point to two regulatory sections that produce their imagined effect: 34 C.F.R. §§ 106.2 & 106.44(g)(1). According to Respondents, "school personnel must provide 'supportive measures' to a student with gender identity concerns, ..." Resp'ts' Opening Br. 13, n.7. This is false.

The requirement to offer supportive measures contained in 34 C.F.R. § 106.44(g)(1) is not effective unless and until the Title IX Coordinator (defined in the regulations) of a school is "notified of conduct that reasonably may constitute sex discrimination under Title IX or this part." *See id.* § 106.44(f)(1)(ii). Further, the only "supportive measures" required (or indeed permitted) under the regulation are those that are offered to the complainant and are "designed to protect the safety of the parties or the recipient's educational environment, or to provide support during the recipient's grievance procedures . . . or during the informal resolution process . . . ." *Id.* § 106.44(f)(1)(ii), (g)(2).

None of the supportive measures required by the regulation could be violative of Proposed Section 12-30-123 and at the same time be consistent with 34

C.F.R. § 106.44(g). As is clearly laid out in Proposed Section 12-30-123(2)(a), the only conduct proscribed by the Initiative is medical procedures or support for such medical procedures carried out "for the purpose of enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex, or treating purported discomfort or distress from a discordance between the minor's sex and asserted identity." 34 C.F.R. § 106.44(g) is limited only to measures meant to promote the safety of the parties or educational environment during the resolution of a complaint under Title IX. A valid supporting measure under the regulations would not be carried out for the purpose of transitioning a minor to an identity inconsistent with the minor's sex because such a measure is unrelated to the safety of the parties or educational environment. Nothing in either section implicates the other and no conflict exists between them.

In summary, nothing Respondents have raised goes to the single subject requirement, but is instead an objection, however misapplied, to the merits of the Initiative. This is plainly the case from the language they have employed and the nature of their objections. Respondents are free to hold that position and are free to attempt to persuade others of its worth. They are not, however, free to deny other electors of the State of Colorado the right of initiative guaranteed to them by the Colorado Constitution. As this Court has repeatedly held, the title setting process and the single subject requirement are not the proper place to challenge the wisdom

of an initiative. The Court should reject Respondents' claims that Initiative #175 contains more than one subject, reverse the Title Board's decision on rehearing and set title as initially set by the Title Board.

III. Petitioners wish to Abandon their Claim to Relief Related to the Revised Measure.

Petitioners now desire to narrow their request to this court to their preferred prayer for relief only, that the Court reverse the decision of the Title Board from the rehearing on April 3, 2024, affirm the Initiative Title set by the Title Board on March 6, 2024, and order it be approved for circulation. The Petitioners no longer seek for this Court to remand the revised language of April 5, 2024, back to the Title Board to set title, which, once set, might then itself be subject to another rehearing. Accordingly, if granted by this Court, the Title Board's and Respondents' arguments related to the revised language become moot.

CONCLUSION

The Court should reverse the decision of the Title Board from the rehearing on April 3, 2024, affirm the Initiative Title set by the Title Board on March 6, 2024, and order it approved for circulation.

Respectfully submitted on May 9, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2024, I electronically filed a true and correct copy of the foregoing OPENING BRIEF with the clerk of the court via the Colorado Courts E-Filing system and on all parties and their counsel of record:

Person Served	**Method**
Title Board c/o Office of the Attorney General 1300 Broadway, 10th Floor Denver, CO 80203 Counsel for the Title Board	Colorado Courts e-Filing
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