SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED May 8, 2026 3:27 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2025-2026 #328 ("Congressional Redistricting") **Petitioners:** John Brackney and Robyn Carnes, **v.** **Respondent:** Colorado Ballot Title Setting Board, **and** **Title Board:** Michael Dohr, Theresa Conley & Kurt Morrison.	**▲COURT USE ONLY▲**
Attorneys for Amicus Curiae: Mark G. Grueskin, #14621 Nathan Bruggeman, #39621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com; nate@rklawpc.com;	Case Number: 2026SA157

BRIEF OF AMICUS CURIAE CURTIS HUBBARD IN SUPPORT OF RESPONDENTS

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, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

X It contains 2,163 words.

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

☐ For the party raising the 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, not to an entire document, where the issue was raised and ruled on.

X For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s Nathan Bruggeman
Nathan Bruggeman
Attorney for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

IDENTITY OF THE AMICUS CURIAE

The *amicus curiae* is Curtis Hubbard, a registered elector of Boulder County and the State of Colorado.

INTEREST OF THE AMICUS CURIAE IN THE CASE

Mr. Hubbard appeared through counsel at the April 23, 2026, hearing before the Title Board on Petitioners' motion for rehearing. (*See* Apr. 23, 2026, Title Bd. Hr'g ("Apr. 23 Hr'g") at 6:55:50.[1]) Mr. Hubbard opposed Petitioners' motion, arguing that Initiative 2025-2026 #328 (the "Initiative" or "Proposed Initiative") lacked a single subject. He further disputed Petitioners' position that the Board was bound by its single subject decision regarding a prior initiative. As he opposed the motion for rehearing below, the Court should permit Mr. Hubbard to be heard in the subsequent appeal of the Board's decision. *See* C.R.S. § 1-40-107(2).

Mr. Hubbard is personally interested in the resolution of the appeal of the Board's decision regarding the Proposed Initiative. He was deeply and directly involved in the development and passage of Amendment Y, which created the independent congressional redistricting construct in the Constitution. He has,

---

[1] The Title Board's hearing is available at https://tinyurl.com/2ujdumvc.

therefore, subject matter expertise in this area, and a long-standing connection and interest to the issues being decided by the Court.

ARGUMENT

Petitioners substantively advanced a single argument below: the Board had to follow its single subject decision in Initiative 2025-2026 #242 ("#242"). Petitioners are wrong about that, and, having failed to advance a merits argument on single subject below, they have waived those arguments for appeal.

I. Petitioners waived any argument on the merits that #328 satisfies the single subject standard.

Although Petitioners' motion for rehearing states that #328 has a single subject, (*see* CF pp. 2-3), the argument was, at best, skeletal in nature. And that is because Petitioners' real argument was that, because the Board found jurisdiction for another initiative (#242[2]) that is substantively similar to theirs, the Board was obligated to find jurisdiction to set titles for their measure. As they put it in their motion for rehearing:

> The Title Board previously found that Proposed Ballot Initiative 2005-2006 [*sic*] #242 contained a single subject. That proposed initiative is, in all material respects, identical to Proposed Ballot

[2] Petitioners' counsel also appealed the Title Board's decision in #242, and the appeal is pending before this Court in case 2026SA123.

> Initiative 2005-2006 [*sic*] #328. The Title Board has an obligation to treat people equally under the law. It should not treat proponents differently.

(CF p. 2.) Petitioners did not offer any argument during the hearing on their motion as to how their Initiative satisfies the single subject requirement. Instead, they argued again that the Board had to follow its decision in on #242:

> **Board Chair**: Proponents would like to present their motion for rehearing.
>
> **S. Gessler**: Thank you. You may remember that 328 was identical to proposed ballot initiative 242, which was a new map and a contingent provision within the initiative under the effective date. And basically what it said was that, under the effective date, this motion, this ballot initiative will go into effect if another ballot initiative passes. Under that reasoning, or in response to that argument that it provided two separate subjects, this Title Board rejected that argument by a 2-1 vote. It then accepted that exact same argument by a 2-1 vote with respect to this initiative.
>
> So, I understand the comment earlier that sometimes the Title Board will change its approach during the course of an election cycle, but I would respectfully submit that this Board has an obligation to treat people equally and to treat proponents equally. And when there are different proponents who have proposed the same thing, merely one week or two weeks apart from one another [*omitted review of timing of the two measures*] that this Board should treat people equally, and I would urge this Board to do so, to accept jurisdiction, and set title.

(Apr. 23 Hr'g at 6:47:10 to 6:49:04.) Petitioners' counsel later only disputed whether the issue that was concerning the Board Chair came up before, (*see id.* at

6:50:07 to 6:50:13), and to recap the votes of the Board members on the two measures, (*id.* at 6:50:16 to 6:50:42, 6:54:40 to 6:55:07).

Petitioners' petition for review, however, indicates that they intend to argue on appeal not that the Board was obligated by its prior decision but instead the substance of the single subject issues with their measure:

> Petitioners Brackey and Carnes raise two advisory issues. First, the proposed initiative contains a single-subject. Second, the proposed initiative is an understandable measure that would allow the Title Board to set a ballot title and submission clause.

(Pet. for Rev. at 3.) If Petitioners intend to present issues beyond whether the Board was obligated to follow its prior decision—which was their argument before the Board—they did not preserve those issues for appeal. *See In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1130 n.3 (Colo. 1996) (declining to consider unpreserved issue).

Arguments not relied upon by a party in the lower tribunal are generally not considered on appeal. *See Estate of Stevenson v. Hollywood Bar & Cafe, Inc.*, 832 P.2d 718, 721 n.5 (Colo. 1992) (explaining that party "did not rely" on an argument below, and that "[a]rguments never presented to, considered or ruled upon by a trial court may not be raised for the first time on appeal"); *Melat, Pressman & Higbie, L.L.P. v. Hannon Law Firm, L.L.C.*, 2012 CO 61, ¶ 18

("arguments ***not advanced in the trial court*** and on appeal are generally deemed waived" (emphasis added)). Preservation requires more than a general assertion of the issue or boilerplate recitation of it. Appellate courts "review only the specific arguments a party pursued before the district court." *Valentine v. Mt. States Mut. Cas. Co.*, 252 P.3d 1182, 1188 n.4 (Colo. App. 2011); *see also, e.g.*, *Wall v. Astrue*, 561 F.3d 1048, 1066 (10th Cir. 2009) (explaining that a "perfunctory presentation" of an issue is insufficient to preserve it for appeal).

The "specific[] argument" Petitioners advanced below was that the Board was obligated to follow its prior decision in #242. Having failed to pursue or develop any meaningful argument to the Board that the Proposed Initiative in fact satisfies the single subject standard, the Court should consider any such issue raised on appeal as unpreserved. *See, e.g.*, *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 721 (10th Cir. 1993) ("We have therefore repeatedly stated that a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory.").

II. The Board must determine whether it has jurisdiction as to each measure presented to it, and a decision it made concerning a prior measure is not binding as to a later measure.

In substance, Petitioners argued that a prior decision by the Board on its jurisdiction for a different but related measure is later binding on the Board's jurisdiction determination for another measure.

Although there is no dispute that consistency across decisions is an important objective, it is not an inflexible rule. In the analogous circumstance of *stare decisis*, which recognizes the importance of decisional consistency, the doctrine is, nonetheless, "not an inexorable command." *Payne v. Tenn.*, 501 U.S. 808, 828 (1991). It is accepted that it is appropriate not to follow a prior decision where "the precedent was originally erroneous or is no longer sound given changed conditions." *People v. Porter*, 2015 CO 34, ¶ 23.

Similarly, in applying the "law of the case" doctrine, it is well recognized that the doctrine does not prevent error correction: "The doctrine provides that prior relevant rulings made in the same case are to be followed unless such application would result in error or unless the ruling is no longer sound due to changed conditions." *People v. Dunlap*, 975 P.2d 723, 758 (Colo. 1999). Thus, the doctrine "neither requires nor encourages courts to follow erroneous judgments,"

and a tribunal "may properly decline" to follow a prior decision that "is not legally sound." *In the Interest of C.A.B.L.*, 221 P.3d 433, 438 (Colo. App. 2009).

The issue that led the Board Chair to vote against jurisdiction is that the Proposed Initiative amends a statute that does not yet exist and, as a result, she concluded the Board cannot adequately understand the measure to set a title. As the Chair explained, she had not understood in setting titles for #242[3] that this problem may have existed in that measure. But in reviewing #328, she came to realize it was an issue, and that realization led her to change her position: "I didn't catch it on a similar measure. I trust that a similar measure that we set title on had it, but I missed it. … I didn't catch it. … I did not pick that up on 242, whichever the prior one was." (Apr. 23 Hr'g at 6:49:50-6:50:17, 6:55:40 to 6:55:47.) She further explained, "We want to be consistent, but sometimes when you see things, you get better at it." (*Id.* at 3:54:31-3:54:36.) Thus, this is not a situation where the Board has simply chosen to treat different proponents unequally. Rather, the outcome changed because the Board became aware of an issue it did not recognize

[3] While Petitioners may contend that the issue came up before, (Apr. 23 Hr'g at 6:50:07 to 6:50:13), it bears mentioning that neither motion for rehearing filed in #242 raised the issue that concerned the Board Chair here. (*See In re Ballot Title of Proposed Initiative 2025-2026 #242*, 26SA123, Pet. for Rev., at PDF pp. 6-9 (first motion for rehearing), 11-16 (second motion for rehearing).)

before, and, once it recognized the issue, the Board members reassessed their jurisdiction.

It was particularly appropriate for the Board's members to consider this new issue because of its jurisdictional nature. *See* Colo. Const., art. V, sec. 1(5.5). Put differently, if the Board does not have jurisdiction, then it lacks the authority to follow its decision on a prior decision no matter how similar the measures are. As the courts recognize, whatever force is to be given to decisional consistency principles, where questions of jurisdiction are at stake, prior decisions are "particularly suitable for reconsideration." *Kennedy v. Lubar*, 273 F.3d 1293, 1299 (10th Cir. 2001) (quoting Wright & Miller § 4478, at 799 & n. 32) (addressing application of the law of case doctrine); *see also In the Interest of C.A.B.L.*, 221 P.3d at 438 ("the law of the case doctrine may not be used to confer subject matter jurisdiction on the district court").

Accordingly, to the extent Petitioners contend that the Board was obliged to follow its decision in #242, that is inaccurate. It was appropriate and necessary for the Board to determine whether it had jurisdiction to set titles for the Proposed Initiative, and, upon a majority of the Board concluding it lacked jurisdiction, the

Board lacked the authority to set titles irrespective of its decision on #242. *See* Colo. Const., art. V, sec. 1(5.5); C.R.S. § 1-40-106(1).

III. Petitioners should not be able to achieve a different substantive outcome in their appeal of the Proposed Initiative than the Court's decision in #242.

It appears that Petitioners and their counsel are attempting to obtain a different result with respect to the appeal of the Proposed Initiative than in the appeal of #242. Petitioners conceded in their motion for rehearing that #242 "is, in all material respects, identical to Proposed Ballot Initiative 2005-2006 #328." (CF p. 2.) With respect to #242, Petitioners' counsel, who is challenging #242 on appeal, contends that it lacks a single subject. As the petitioner's opening brief states, "This Court should reverse the Title Board's finding that Proposed Ballot Initiative 2005-2006 #242 is limited to a single subject and find that the Title Board did not have jurisdiction to set a title." (*In re Ballot Title of Proposed Initiative 2025-2026 #242*, 26SA123, Pet.'s Opening Br., at 16.) Although the Proposed Initiative is "in all material respects" the same as #242, the petition for review here states that they will argue that the Proposed Initiative satisfies the single subject requirement. (*See* Pet. for Rev.)

It cannot be the case that #242 fails on single subject grounds but the Proposed Initiative, which is #242's doppelganger (albeit with different district lines), somehow satisfies the standard. Thus, to the extent the Court determines that Petitioners preserved their single subject arguments, they cannot obtain a different single subject determination in this appeal than the Court's decision with respect to #242.

CONCLUSION

Accordingly, Mr. Hubbard, in support of Respondents, respectfully urges that the Court hold that Petitioners failed to preserve their single subject arguments as the only issue they pursued below is whether the Board was bound by its prior single subject decision on #242. If the Court does reach their single subject arguments, the resolution of those single subject arguments should not differ from the resolution of the single subject arguments in #242.

Respectfully submitted this 8th day of May, 2026.

s/ Nathan Bruggeman
Mark G. Grueskin, #14621
Nathan Bruggeman, #39621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
mark@rklawpc.com
trey@rklawpc.com
nate@rklawpc.com
ATTORNEYS FOR AMICUS CURIAE

CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **BRIEF OF AMICUS CURIAE CURTIS HUBBARD IN SUPPORT OF RESPONDENTS** was sent electronically via Colorado Courts E-Filing this day, May 8, 2026, to the following:

Counsel for the Title Board:

Kyle Holter
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Counsel for Proponents:

Scott E. Gessler
Geoffrey N. Blue
Gessler Blue LLC
7350 E. Progress Place, Suite 100
Greenwood Village, CO 80111

/s Erin Mohr