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<tr><td>COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203</td><td rowspan="3">DATE FILED
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<tr><td>Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2025)
Appeal from the Ballot Title Board</td></tr>
<tr><td>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2025-2026 #328 (“Congressional Redistricting”)

Petitioner: John Brackney and Robyn Carnes,

v.

Title Board: Theresa Conley, Michael Dohr, and Kurt Morrison.</td></tr>
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<tr><td colspan="2">THE TITLE BOARD’S ANSWER BRIEF</td></tr>
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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 2,036 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.

s/ Nicholas Riley

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ARGUMENT

In this case, the Title Board found that it lacks jurisdiction to set title for Proposed Initiative 2025-2026 #328 ("#328"). The Title Board previously set title for proposed initiative 2025-2026 #242 ("#242"). However, #328 and #242 are indistinguishable for purposes of setting title. Both ballot measures propose new congressional maps for Colorado; both measures are effective only if a separate measure is passed; and both measures have been petitioned to this Court for review. *See In re Title, Ballot Title, & Submission Clause for 2025-2026 #242*, No. 2026SA123 (Colo. 2026). While the parties dispute other issues, the petitioners, the Title Board, and the amicus[1] agree that the Board's jurisdictional analysis should be the same for #242 and #328. Pet'rs' Opening Br. at 2 ("this Court should consider #242 and #328 as a pair and render a decision that treats both initiatives (and both sets of proponents) the same"); Amicus Br. at 10 ("It cannot be the case that #242 fails on single subject grounds but the Proposed Initiative, which

[1] On May 8, 2026, Curtis Hubbard, through counsel, filed a motion for leave to file an amicus brief. The Title Board does not oppose Mr. Hubbard's motion.

is #242's doppelganger (albeit with different district lines), somehow satisfies the standard."). This Court should grant the petition for review and provide guidance on the proper jurisdictional analysis in this case.

I. This Court should decide whether #328 contains a single subject.

The Colorado Constitution states that no measure "shall be proposed by petition containing more than one subject[.]" *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 10 (quoting Colo. Const. art. V, § 1(5.5)); *see also* § 1-40-106.5(1)(a), C.R.S. The single subject requirement serves two functions: (1) "it ensures that each proposal depends upon its own merits for passage" and (2) it "prevents surprise and fraud from being practiced upon voters" by stopping the "inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative." *In re Title, Ballot Title, & Submission Clause for 2025-2026 #158*, 2026 CO 13, ¶¶ 16–17 (citations, quotations, and alterations omitted).

Ballot measures 2025-2026 #241 ("#241"), #242, and #328 raise the same single subject concern: whether a ballot measure includes multiple subjects if it becomes effective only upon the passage of

another measure. Measure #241 removes the constitutional authority for Colorado's independent congressional redistricting commission. Record, *In re Title, Ballot Title, & Submission Clause for 2025-2026 #241*, No. 2026SA122 (Colo. 2026) at 16–31 (hereinafter "#241 Record"). The initiative relocates the authority to a statutory provision. *Id.* However, #241 is only effective if the voters pass a new congressional map, as proposed by #242 or #328. *See id.* at 31. Ballot measures #242 and #328 contain similar effective provisions, requiring #241 to be passed before either measure can take effect. *See* Record, *In re Title, Ballot Title, & Submission Clause for 2025-2026 #242*, No. 2026SA123 (Colo. 2026) at 47 (hereinafter "#242 Record"); Record at 39. The initiatives are therefore codependent.

One board member, Michael Dohr, found that this codependency violated the single subject requirement. *See Rehearing Before Title Board on Proposed Initiative 2025-2026 #241* (Apr. 1, 2026) ("#241 Rehearing"), at 4:59:23–5:02:46, https://tinyurl.com/y9f399by; *Rehearing Before Title Board on Proposed Initiative 2025-2026 #328* (Apr. 23, 2026) ("#328 Rehearing"), at 6:59:33–6:59:38,

https://tinyurl.com/ypsep2fj. While Mr. Dohr was in the minority for the #242 measure, he was part of the majority determination that #328 violates the single subject requirement. *See* #242 Record at 14; Record at 5.

Petitioners disagree that #328 contains multiple subjects. Pet'rs' Opening Br. at 7–15. They adopt the Title Board's arguments from its opening brief in the #242 appeal, which was filed three weeks ago. Pet'rs' Opening Br. at 7–15 ("[T]he following argument is nearly identical to the Title Board's arguments in Case No. 26SA123. Except for minor editing, the argument below employs the Title Board's exact words."). In that case, the Board's opening brief defended the conclusion that #242 contains a single subject. *See* Bd.'s Opening Br., *In re 2025-2026 #242*, No. 2026SA123, at 5–10. Specifically, the Board maintained that #242's effective provision did not violate the single subject requirement by rendering the measure void unless #241 is passed. *Id.* at 8–10. The Board asserted this Court has not held "that the anti-logrolling concern applies not only within a measure but across multiple measures." *Id.* at 9. In its answer brief, the Title Board acknowledged

that it reached a different conclusion for #328 and welcomed this Court's guidance. Bd.'s Answer Br., *In re 2025-2026 #242*, No. 2026SA123, at 1. The Board agrees that its prior arguments are meritorious absent further direction from the Court.

Nevertheless, Mr. Dohr explained that #328 raises logrolling concerns because #241 and #328 are interdependent. *See* #241 Rehearing at 5:01:16–5:01:55; Rehearing at 6:59:33–6:59:38. He feared that #241 might garner votes not because voters want to remove the constitutional authority for the redistricting commission but because they want the congressional map of their choice. #241 Rehearing at 5:01:16–5:01:55. Thus, there is an argument that the interconnected effective provisions of #328 and #241 circumvent the requirement that "each proposal depends upon its own merits for passage." *In re 2025-2026 #158*, ¶ 16 (citation and quotation omitted). This Court should provide guidance on whether codependent ballot measures violate the single subject requirement.

II. The Court should clarify whether the Board has jurisdiction to set title in this case.

Petitioners maintain that the Title Board has jurisdiction to set title for #328. Pet'rs' Opening Br. at 15–19. They argue that (1) the Board improperly raised an issue regarding its jurisdiction during the rehearing and (2) that #328 is intelligible such that the Board could have set title. *Id.* at 17–19.

A. The Title Board may reconsider its jurisdiction at any time.

Petitioners contend that "it was improper for the Title Board to raise, for the first time at the rehearing, new concerns that the Board lacked jurisdiction." *Id.* at 17. They claim that the Board is restricted to considering only the arguments raised in the motion for rehearing. *Id.*

First, petitioners misstate the record. During the hearing, board member Theresa Conley raised the issue that prior Board precedent indicates that the Board lacks jurisdiction to set title when a ballot measure seeks to amend a statute that has yet to be enacted. *See Hearing Before Title Board on Proposed Initiative 2025-2026 #328* (Apr. 15, 2026), at 7:47:24–7:49:02, https://tinyurl.com/se5fu7yx ("Hearing").

Board member Kurt Morrison found that #328 violates the single subject requirement on this basis and that the Board lacked jurisdiction to set title. *Id*. at 7:57:15–7:58:29; Record at 5. Ms. Conley disagreed. Hearing at 7:58:05–7:58:29. Ms. Conley and Mr. Morrison reached opposite conclusions at the rehearing. Rehearing at 6:58:20–6:59:30. Thus, the single subject concern that swayed Ms. Conley's vote at the rehearing was previously raised.

Second, petitioners' assertion that it was improper for the Title Board to raise jurisdictional issues at the rehearing is unsupported. *See* Pet'rs' Opening Br. at 17. "Administrative agencies' authority extends only so far as determined and limited by the statutes by which they are created." *Williams v. Dep't of Pub. Safety*, 2015 COA 180, ¶ 77 (quotation marks omitted); *Flavell v. Dep't of Welfare*, 355 P.2d 941, 942 (Colo. 1960) ("agencies are without power to act contrary to the provisions of the law or the clear legislative intendment, or to exceed the authority conferred on them by statute" (alterations omitted)). "The statutes that define an agency's authority are jurisdictional," and "the question of their applicability may be raised at any time." *Williams*,

¶ 77 (citation omitted) (collecting cases); *see also Fontanari v. Colo. Mined Land Reclamation Bd.*, 2023 COA 15, ¶ 33.

The Board's consideration of whether #328's attempt to amend a nonexistent statute satisfies the single subject requirement was jurisdictional. Regardless of how the Court resolves this issue, there is no impediment to the Board considering its own jurisdiction at any stage in the proceedings. *Fontanari*, ¶ 33 ("an agency isn't required to act in excess of its jurisdiction until such time as a court in another proceeding says it has done so"). Thus, even if it were true that Ms. Conley raised the issue of the Board's jurisdiction for the first time at the rehearing, the Board may consider jurisdictional issues regardless of whether such issues were raised by the motion for rehearing.

B. Board members debated whether a title can be set for a ballot measure that seeks to alter a law that does not exist.

Petitioners argue that the Board applied the wrong standard to determine whether #328 was sufficiently definite to set title. Pet'rs' Opening Br. at 17–19. They maintain that the Title Board must return ballot measures to the proponent only "where the Board has

acknowledged that it cannot comprehend the initiatives well enough to state their single subject in the titles." *Id.* at 17–18 (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #25*, 974 P.2d 458, 469 (Colo. 1999)).

The Court has cautioned that the Board "must, in the process of setting a title, consider the public confusion that might be caused by misleading titles, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear, and correctly and fairly express the true intent and meaning of the initiative in the title." *In re Title, Ballot Title, & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶ 10 (citation and quotations omitted). The Court has acknowledged that the Board risks creating an unintelligible title when the measure is difficult to comprehend. *Id.* at ¶¶ 13–15; *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999) ("Here, perhaps because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear."). If "the Board has acknowledged that it cannot comprehend the initiatives well enough to state their single subject in

the titles, we hold that the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent." *In re 1999-2000 #25*, 974 P.2d at 469; *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #37*, 977 P.2d 845, 846 (Colo. 1999); *In re 1999-2000 #44*, 977 P.2d at 857–58.

Petitioners claim that, as a practical matter, voters and the Board can comprehend the provisions of #328 by cross-referencing the provisions of #241. Pet'rs' Opening Br. at 18–19 ("To understand the references to new, proposed Colorado statutes, one can simply read Proposed Initiative #241."). However, Ms. Conley's conclusion that the Board lacks jurisdiction to set title was not based on a determination that #328 is incomprehensible because it is overly complex. Ms. Conley agreed that #328 is less complex than matters where the Board has previously declined to set title. Rehearing at 6:58:08–6:59:30. Nevertheless, Ms. Conley concluded that, as a doctrinal matter, a ballot measure that seeks to amend law that has yet to be enacted is indefinite in scope and the Board therefore "cannot comprehend the initiative[ ] well enough to state the[ ] single subject." *In re 1999-2000*

#25, 974 P.2d at 469; *see* Rehearing at 6:53:04–6:53:51, 6:59:05–6:59:31. The Court has yet to address the issue of whether the Board can return a ballot measure to the proponent when the Board concludes that the proposed measure is, by its own terms, indefinite. The Board welcomes the Court's guidance.

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The Title Board rests on its opening brief as to petitioners' remaining arguments.[2]

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[2] The amicus brief raises many of the same issues addressed above. *See* Amicus Br. at 2–10. The Title Board agrees with Mr. Hubbard that the Board is generally considered not to be bound by its prior determinations. *Colo.-Ute Elec. Ass'n, Inc. v. Pub. Utils. Comm'n*, 760 P.2d 627, 639 n.13 (Colo. 1988) (the "doctrines of *stare decisis* as well as equitable estoppel are generally held not to apply to the determination of administrative tribunals" (citing *B&M Serv., Inc. v. Pub. Utils. Comm'n,* 429 P.2d 293, 295 (Colo. 1967)).

Respectfully submitted on this 15th day of May, 2026.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon all counsel of record electronically via CCEF, at Denver, Colorado, this 15th day of May.

/s/ Carmen Van Pelt

Carmen Van Pelt