

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
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 2023- 2024 #291 Petitioners: Kevin Grantham and Cheri Jahn v. Respondent: Jessica Goad and Title Board: Theresa Conley, Jason Gelender, and Kurt Morrison	▲ COURT USE ONLY ▲
<i>Attorneys for Respondent</i> Martha M. Tierney, No. 27521 TIERNEY LAWRENCE STILES LLC 225 E. 16 th Street, Suite 350 Denver, CO 80203 Telephone: 303-356-4870 Email: mtierney@tls.legal	Case No.: 2024SA127
RESPONDENT’S OPENING BRIEF IN OPPOSITION TO PROPOSED INITIATIVE 2023-2024 #291	

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).

It contains 2742 words.

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.

By: s/Martha M. Tierney_____

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Jessica Goad (“Respondent”), registered elector of the State of Colorado, through her undersigned counsel, respectfully submit this Opening Brief in opposition to Proposed Initiative 2023-2024 #291 (“Initiative #291”).¹

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board appropriately determined that proposed initiative 2023-2024 #291 contains multiple subjects.
2. Whether the Title Board correctly denied Petitioners’ motion for rehearing seeking revisions to the initial title for proposed initiative 2023-2024 #291.

STATEMENT OF THE CASE

Petitioners Grantham and Jahn proposed Initiative #291. The Title Board conducted its initial hearing on April 17, 2024, at which time the Title Board found by a 2 - 1 vote that Initiative #291 contained a single subject and set a title. On

¹ Initiative #291 is nearly identical to Proposed Initiatives 2023-2024 #292 and #293, which have also been appealed by Petitioners Grantham and Jahn. Initiative #292 mirrors Initiative #291 except that it excludes from the definition of “land use regulation or decision” matters covered by Title 37 of the Colorado Revised Statutes (governing water and irrigation). Initiative #293 mirrors Initiative #292 except that it further excludes from the definition of “land use regulation or decision,” any “state government statute, regulation, or decision impacting local governments made for the purpose of implementing federal laws or regulations.”

April 24, 2024, Respondent Goad filed a Motion for Rehearing, alleging that Initiative #291 contained multiple subjects, and that its title was flawed.

Petitioners Grantham and Jahn also filed a motion for rehearing on April 24, 2024, seeking changes to the title previously set by the Title Board.

The Title Board held a rehearing on April 25, 2024, at which time the Title Board determined that the measure contained multiple subjects, and granted Respondent Goad's Motion for Rehearing on the single subject issue and vacated the title it had earlier set. The Title Board denied Petitioners' motion for rehearing in its entirety.

The Title Board properly exercised its broad discretion in determining that Initiative #291 contained multiple subjects.

SUMMARY OF THE ARGUMENT

As proposed, Initiative #291 contains multiple subjects because the measure risks both "dangers" at play in the ballot initiative process. First, under the broad theme of "local control of land use decisions" the measure combines subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions that may have different or even conflicting interests, which could lead to the enactment of a measure that would fail on its own merits. The measure grants "plenary and exclusive control" over "land use

regulations and decisions” – including explicitly zoning, development regulations, approved plans or permits, siting permits, development agreements, “or any other land use approval designation as may be utilized by a local government.” These disparate matters will inevitably create factions that have different interests, and some of those interests will appeal to some voters, and others to other voters. This is classic logrolling and violates the single subject requirement.

Second, it will create voter surprise and fraud occasioned by the surreptitious provisions coiled up in the folds of a complex initiative. Voters may vote for this measure thinking that they are standing up for local control but be surprised to find out they have also limited the state from being able to regulate on the whole host of topics that they did not intend, because the measure states that the “local government shall have plenary and exclusive control over land use regulations or decisions within their jurisdiction.” This removal of state authority on such a wide range of topics is coiled up in the folds of Initiative #291.

The Title Board properly denied Petitioners’ motion for rehearing on clear title when it determined that it lacked jurisdiction to set title based on a violation of the single subject requirement.

This Court should affirm the Title Board’s decision to reflect the measure on single subject grounds.

ARGUMENT

I. The Initiative Violates the Single Subject Requirement.

A. Standard of Review and Preservation.

Article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5(1)(a), C.R.S. state that a proposed initiative must be limited to “a single subject which shall be clearly expressed in its title.” “A proposed initiative violates this rule if its text relates to more than one subject, and has at least two distinct and separate purposes not dependent upon or connected with each other.” *In re Initiative for 2011-2012 #3*, 2012 CO 25, ¶ 9. When reviewing a challenge to the Title Board’s decision, this Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s action.” *In re Initiative for 2013-2014 #89*, 2014 CO 66, ¶ 8.

The Court does “not address the merits of the proposed initiative” or “suggest how it might be applied if enacted.” *In re Initiative for 2019-2020 #3*, 2019 CO 57, ¶ 8. Nor can the Court “determine the initiative's efficacy, construction, or future application, as these are matters properly considered if and after the voters approve the initiative.” *In re Initiative for 2015-2016 #63*, 2016 CO 34, ¶ 7. Instead, the Court “must examine the initiative’s wording to determine

whether it comports with the constitutional single-subject requirement.” *In re 2019-2020 #3*, 2019 CO 57, ¶ 8.

Respondent agrees that Petitioners preserved the single subject issue by participating in the discussion at the rehearing.

B. The Title Board Properly Concluded That Initiative #291 Contains Multiple Subjects.

In reviewing the Title Board’s single-subject determination, the Court’s role “is limited to determining whether the contested language within the initiative creates a distinct and separate subject which is not connected to or dependent upon the remaining aspects of the initiative.” *In re Initiative for 2013-2014 #76*, 2014 CO 52, ¶ 8. To satisfy the single-subject requirement, the “subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *Id.*

This Court has noted on frequent occasion that the “single subject” requirement embodied in Colo. Const. art. V, §1(5.5) is directed to avoiding two “dangers” in the ballot initiative process. “First, combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions – that may have different or even conflicting interests – could lead to the enactment of measures that would fail on their own merits” (often referred to as “logrolling”). *In re Initiative for 2011-2012 #3*, 2012

CO 25, ¶11. “Second, the single subject rule helps avoid ‘voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds’ of a complex initiative.” *Id.*

In this context, the Supreme Court has noted that “mere implementation or enforcement details directly tied to the initiative’s single subject will not, in and of themselves, constitute a separate subject.” *In re Initiative for 2021-2022 #67, 115, & #128*, 2022 CO 37, ¶14. “However, attempting to ‘characterize an initiative under some general theme will not save [it] from violating the single-subject rule if the initiative contains multiple subjects.” *Id.*, quoting *In re Initiative for 2019-2020 #315*, 2020 CO 61, ¶17. In *In re 2021-2022 #67, 115, & #128*, the proposed initiatives would have authorized both (1) the sale of wine in grocery stores and (2) home delivery of alcoholic beverages – under the general theme of “expanding the retail sale of alcohol beverages;” the Supreme Court – noting that “some voters might well support home delivery of alcohol while preferring to keep wine out of grocery stores, and others might feel precisely the opposite” – concluded that “[t]hese are simply two different subjects” and therefore reversed the Title Board and struck the titles. *Id.* at ¶23.

1. Initiative #291 Presents a Logrolling Risk.

The Title Board correctly found that the measure violates the single subject requirement by attempting to unite multiple subjects under its broad general theme of local control over land use decisions. This Court has previously found this type of “umbrella proposal” unconstitutional when there is a common theme such as "water," *In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995), or "revenue changes," *In re Amend TABOR 25*, 900 P.2d 121, 125-26 (Colo. 1995). “Such initiatives combine proposals that voters might favor with those they would otherwise oppose, in order to achieve passage.” *See In re Initiative for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006). “To avert such mischief, the single subject requirement limits the voters to answering "yes" or "no" to a straightforward, single subject proposal.” *See In re Petition Procedures*, 900 P.2d 104, 108 (Colo. 1995).

At the initial hearing on Initiative #291, Petitioners did not dispute that the initiative would grant “plenary and exclusive control” over “land use regulations and decisions” – including explicitly zoning, development regulations, approved plans or permits, siting permits, development agreements, “or any other land use approval designation as may be utilized by a local government” – with regard at least to (1) oil and gas exploration and operations (including set-backs, number of

wells allowed, road construction, refineries, even complete operational bans); (2) mining operations; (3) location and operating restrictions on the sale of alcoholic beverages; (4) operations and locations of retail marijuana businesses and natural medicine healing centers; (5) “water operations” – to include well locations, irrigation ditches, reservoir locations and management, drainage, wastewater disposal, and flood control; (6) use of state lands (agriculture, parks and recreation, natural resource extraction); (7) state buildings; (8) location and construction of state roads, highways, and bridges; (9) location, access requirements, and zoning for hospitals, (10) location and construction of airports, (11) administration of federal lands; (12) administration and regulation of tax-credit-backed conservation easements, and (13) housing density. There is no suggestion that this list is exhaustive.

Here, some voters might favor local control over energy production, for example, but might not favor a patchwork approach to the administration of state and federal lands, or to affordable housing availability, or to operating restrictions on the sale of alcoholic beverages, or visa-versa. Initiative #291 unconstitutionally combines multiple subjects in an attempt to attract voters who might oppose one of those subjects if it were standing alone. *See In re Title for 2013-2014 #76*, 2014 CO 52, ¶10.

2. Initiative #291 Risks Voter Confusion and Surprise.

The Title Board also accurately determined that Initiative #291 risks voter confusion or surprise. “The single-subject rule also serves to prevent voter surprise by prohibiting proponents from hiding effects in the body of a complex proposal.” *In re initiative for 2009-2010 #91*, 235 P.3d 1071, 1079 (Colo. 2010). Voters may vote for this measure thinking that they are standing up for local control, but be surprised to find out they have also limited the state from being able to regulate on the litany of topics listed out in Section B.1. above, because the measure states that the “local government shall have plenary and exclusive control over land use regulations or decisions within their jurisdiction.” This removal of state authority on such a wide range of topics is coiled up in the folds of Initiative #291.

While Petitioners contend that these separate purposes can be united under the broad umbrella topic of “local control of land use decisions,” this theme is too broad to unite all of these separate policy areas in a single ballot initiative.

Initiative #291 violates the single subject requirement.

II. The Title Board Properly Denied Petitioners’ Motion for Rehearing on Clear Title.

A. Standard of review and preservation.

“The Title Board’s duty in setting a title is to summarize the central features of a proposed initiative.” *In re 2013-2014 #90*, 2014 CO 63, ¶ 24. The Title Board

is “afforded discretion in resolving interrelated problems of length, complexity, and clarity in designating a title and ballot title and submission clause.” *In re Initiative for 2015-2016 #73*, 2016 CO 24, ¶ 23.

Respondent agrees that Petitioners preserved their challenge to clear title.

B. The Title Board Lacked Jurisdiction to Set a Title.

The Title Board properly denied Petitioners’ motion for rehearing on clear title because it lacked jurisdiction to set a title. Colo. Const., art. V, § 1(5.5), states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. *If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.*

(emphasis added). Here, the Title Board determined that Initiative #291 contained multiple subjects and that it, therefore, lacked jurisdiction to set a title. As a result, it properly denied Petitioners’ motion for rehearing. *Id.*

CONCLUSION

Respondent respectfully requests the Court to affirm the actions of the Title Board regarding Proposed Initiative 2023-2024 #291.

Respectfully submitted this 7th day of May 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of May 2024 a true and correct copy of the foregoing **RESPONDENT'S OPENING BRIEF IN OPPOSITION TO PROPOSED INITIATIVE 2023-2024 #291** was filed and served via the Colorado Courts E-Filing System to the following:

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