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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding
Pursuant to C.R.S. § 1-40-107(2)
Appeal from the Ballot Title Setting Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #129 ("Definition of 'Fee'")

Petitioner: ANTHONY MILO

v.

Respondents: PETER COULTER and LISA BRUMFIEL

and

Title Board: SUZANNE STAIERT; DANIEL DOMENICO; and JASON GELENDER.

COURT USE ONLY

Case No.: 2014SA135

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PETITIONER'S OPENING BRIEF

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 those rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) and contains **2,259** words. The brief also complies with C.A.R. 28(k) and 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 where the issue was raised and ruled on.

/s/ Chip G. Schoneberger

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ISSUES PRESENTED

1. Whether the Ballot Title Setting Board ("Title Board") erred in setting a ballot title for an initiative that contains multiple subjects.

2. Whether the Title Board erred by setting a misleading title that does not inform voters of the true nature and scope of the initiative.

STATEMENT OF THE CASE

This is an original proceeding under C.R.S. § 1-40-107(2) to review the Title Board's findings that proposed Initiative 2013-2014 No. 129 ("Initiative 129"), its title, and its submission clause (the "titles") contain a single subject and are not misleading. Peter Coulter and Lisa Brumfiel (collectively, "Proponents") proposed Initiative 129, after which a review and comment hearing was held before representatives of the Office of Legislative Council and Legislative Legal Services.

Proponents thereafter submitted a final version of the proposed Initiative 129 to the Secretary of State to submit to the Title Board. Initiative 129 would amend Article X, section 20 of the Colorado Constitution to add the following:

> The official definition of "fee" as used in the Colorado constitution, Colorado Revised Statutes, Codes, Directives and all Public Colorado Legal Documents is as follows:
>
> A fee is a voluntarily incurred governmental charge in exchange for a specific benefit conferred on the payer, which fee should reasonably approximate the payer's fair share of the costs incurred by the government in providing said specific benefit.
>
> Ancillary and/or extraneous benefits, as those terms are defined by Black's Law Dictionary, of any fee shall not be considered in determining the value of said fee.

Initiative 129 goes on to state that "all provisions of this section ..., except where otherwise indicated in the text, shall supersede conflicting constitutional, state statutory, court findings of fact, local charter, ordinance, or resolution, and other state

and local provisions. All provisions of this section specifically supersede the Colorado Supreme Courts findings of fact in Barber v. Ritter."

The Title Board held a hearing on April 17, 2014 to establish the proposed initiative's single subject and to set title. The Title Board set following title:

> Shall there be an amendment to the Colorado constitution establishing a definition of a "fee" as a voluntarily incurred governmental charge in exchange for a specific benefit conferred on the payer, which fee should reasonably approximate the payer's fair share of the costs incurred by the government in providing the benefit?

Petitioner filed a motion for rehearing on April 23, 2014, challenging both the Title Board's single-subject determination and the title it set. The Title Board denied Petitioner's motion in all material respects.

SUMMARY OF THE ARGUMENT

The Title Board lacked jurisdiction to set title for Initiative 129 because it contains multiple subjects. Indeed, the measure applies to, and supersedes, without limitation, all conceivable Colorado state and local statutory laws, common law, and "all Colorado public legal documents." The Title Board could not possibly comprehend the measure's breadth sufficiently to state its single subject and thus it lacked jurisdiction to set title.

Moreover, even assuming this Court finds Initiative 129 to contain a single subject, the Title Board nonetheless erred by setting a title that is misleading. To wit, the title only advises voters that the measure amends the Colorado constitution, but fails to advise voters that it expressly applies to and supersedes a myriad – indeed all – other areas of Colorado law and "legal documents." The voters should be advised that it also applies to and supersedes all Colorado Revised Statutes, codes, directives and all public Colorado legal documents, court findings of fact, local charters, ordinances, or resolutions, and all other state and local provisions.

ARGUMENT

I. Initiative 129 Violates the Constitutional Single-Subject Requirement and thus the Title Board Lacked Jurisdiction to Set a Ballot Title for It

A. Standard of review and preservation of issue

The Court reviews the "statutes governing the [Title] Board's authority to act *de novo*" and will overturn the Title Board's determination when it clearly violates the constitutional single subject requirement. *Hayes v. Ottke*, 293 P.3d 551, 554 (Colo. 2013); *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 579-80 (Colo. 2012). Petitioner raised the single subject objection in his motion for rehearing and subsequent proceedings on that motion.

B. The breadth of Initiative 129 makes it impossible to comprehend the virtually limitless number of unrelated subjects it contains

Article V, section 1(5.5) of the Colorado Constitution limits the Title Board's jurisdiction to proposed initiatives containing a single subject: "No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title[;] ... [i]f a measure contains more than one subject ... no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls." Therefore, without considering the merits of a proposed initiative or its application, this Court nonetheless must engage in a limited analysis of its subject or subjects.

When reviewing a challenge to the Title Board's single-subject determination, this Court assumes legitimate presumptions in favor of the propriety of the title Board's actions. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010) (citation omitted). The Court does not consider the initiative's efficacy, construction, or future application. *Id.* However, it "will characterize the proposal sufficiently to enable review of the Title Board's action." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). A "proposal that has at least two distinct and separate purposes which are not dependent upon or connected with each other violates the single-subject requirement." *In re Ballot Title 1999-2000 No. 104*, 987 P.2d 249, 253 (Colo. 1999).

In order to determine whether an initiative carries out a single object or purpose, an initiative is reviewed as a whole rather than piece meal, and individual statements are examined in light of their context. *In re Title, Ballot Title, and Submission Clause for 2009-2010, No. 24*, 218 P.3d 350, 353 (Colo. 2009) (citing *In re Title, Ballot Title, Submission Clause, and Summary for 1999–2000 # 235*, 3 P.3d 1219, 1223 (Colo. 2000) (interpreting a sentence of an initiative in light of the sentence that preceded it). Under that standard, "the subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *In re Title, Ballot Title,*

Submission Clause for 2011-2012 No. 3, 274 P.3d 562, 565 (Colo. 2012) (internal citation omitted). Generally speaking, something is "necessary" if it is essential or indispensable and is "proper" if it is authorized by law. *Cf. Jones v. Stevinson's Golden Ford*, 36 P.3d 129, 133 (Colo. App. 2001); *Colorado Repub. Party v. Benefield*, 2011 WL 5436483, ¶ 12 (Colo. App. 2011).

It is axiomatic that "if the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 25*, 974 P.2d 458, 465 (Colo. 1999).

That is the case here. Initiative 129's definition of "fee" purports to supersede and control all "Colorado Revised Statutes, codes, directives and all public Colorado legal documents," as well as all court findings of fact, all local charters, all ordinances, all resolutions, and all other state and local provisions. The overwhelming breadth of this language makes it impossible to comprehend the virtually limitless number of subjects and/or purposes it contains. Even setting aside the manifest vagueness of "all Colorado legal documents"[1] and all "court findings of fact," its impact on a variety of unrelated subjects set forth in Colorado's statutes is clear.

[1] The following represent just a few of the "legal documents" under this broad language: Real estate contracts, building permits, rental car agreements, probate and estate planning documents, franchise agreements, and employment records.

For instance, the Colorado legislature has mandated a reduced administrative fee for employees and volunteers of non-profit organizations and certain other individuals seeking a commercial driver's license. C.R.S. § 42-2-406(3)(b) ("[t]he fee for the administration of driving tests by the department shall be one hundred dollars; except that the fee for the administration of such driving test to any employee or volunteer of a nonprofit organization that provides specialized transportation services for the elderly and for persons with disabilities, to any individual employed by a school district, or to any individual employed by a board of cooperative services shall not exceed forty dollars"). Initiative 129 alters (and eliminates) this legislative policy by defining "fee" to require uniform distribution of the cost to provide a particular benefit across all payers.

Initiative 129's broad language also eliminates the statutory cap on other administrative "fees," such as those charged for boiler inspections under the statutes regulating building safety issues. *See* C.R.S. § 9-4-109 ("such fees shall not exceed the amount necessary to accumulate and maintain in the boiler inspection fund a reserve sufficient to defray the division's administrative expenses for a period of two months, and in no event shall the basic fee for an annual inspection exceed one hundred fifty dollars for an internal inspection or eighty-five dollars for an external inspection").

No logical corollary or necessary connection exists between overriding the legislature's public policy choice to discount administrative fees charged to non-profit employees, while simultaneously eliminating the statutory cap on fees for boiler inspections. And the examples of other wholly disconnected subjects and purposes contained within Initiative 129's attempt to control the definition of "fee" for all conceivable purposes are legion. *See, e.g.*, C.R.S. § 24-32-1709.5(1)(a) ("[i]n no event shall the amount of the fee specified in this paragraph (a) be set so as to reimburse the department for more than thirty percent of the direct and indirect costs of administering this part 17"); C.R.S. § 16-11-101.6 (establishing time payment fee of twenty-five dollars and penalty fee of ten dollars); C.R.S. § 25-4-1607 (fixing fees for certain enumerated restaurant licenses and services at specific amounts whereas fees for all other services not to exceed "the actual cost of such service"). These distinct subjects simply are not sufficiently "connected" to satisfy the single subject requirement. *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 565 (Colo. 2012) (internal citation omitted).

II. The Title Board Failed to Set a Title that Communicates the Broad Impact of the Initiative

A. Standard of review and preservation of issue

The Title Board must set titles that "correctly and fairly express the true intent and meaning" of the proposed initiative and "unambiguously state the principle of the

provision sought to be added, amended, or repealed." C.R.S. § 1-40-106(3)(6). This Court's duty is to ensure that the title "fairly" reflects and characterizes the proposed initiative so petition signers and voters will not be misled into supporting or opposing a measure due to the words employed by the Title Board. *In re Initiative No. 200A*, 992 P.2d 27, 30 (Colo. 2000); *In re Proposed Initiated Constitutional Am. Concerning Limited Gaming in the Town of Burlington*, 830 P.2d 1023, 1026 (Colo. 1992).

If the title clearly and concisely summarizes the measure's "central features," the Title Board will be deemed to have done its job and the title will be upheld. *In re Title, Ballot Title, Submission Clause for 2007-2008 No. 61*, 184 P.3d 747, 752 (Colo. 2008). However, where the Title Board omits reference to, or mischaracterizes, a central element of the measure, the title is legally deficient because voters will be misled and thus the title must be sent back to the Title Board for correction. *See Matter of Proposed Election Reform Amend.*, 852 P.2d 28, 34-35 (Colo. 1993). In other words, "titles, standing alone should be ... capable of informing the voter of the major import of the proposal ... [and] must allow the voter to understand the effect of a yes or no vote on the measure." *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2001-2002 Nos. 21 and 22*, 44 P.3d 213, 217 (Colo. 2002).

B. The title misleads voters by omitting Initiative 129's application to all Colorado statutory and common law, as well as "all Colorado public legal documents"

If the Court finds Initiative 129 not to contain multiple subjects, the title set by the Title Board nonetheless should reflect its broad application as established *supra*. After all, the single subject analysis and the assessment of the initiative's central elements are interrelated. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249, 253 (Colo. 1999).

The current title only advises voters that Initiative 129 amends the Colorado Constitution – a document with which many citizens undoubtedly are somewhat unfamiliar and assume has limited application to their daily lives. Therefore, voters should know that Initiative 129 not only applies to the Colorado Constitution, but also brings about potentially drastic change across all aspects of Colorado statutory law, common law, and all other legal concepts. The title thus should advise voters that Initiative 129 applies to and supersedes: (1) all elements of the Colorado Revised Statutes; (2) all local and state codes; (3) all "directives"; (4) "all public Colorado legal documents" of every nature; (5) all court findings of fact; (6) all local charters, ordinances or resolutions; and (7) all other state and local provisions.

CONCLUSION

For the foregoing reasons and upon the cited authorities, Petitioner requests this Court reverse the Title Board's action in setting title to Initiative 129 because it contains multiple subjects and because the titles are misleading.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May, 2014, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was served via e-mail, U.S. Mail and/or ICCES to the following:

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In accordance with C.A.R. 30(f), a printed copy of this document with original signature(s) is maintained by Foster Graham Milstein & Calisher, LLP, and will be made available for inspection by other parties or the Court upon request.