

<p>SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203</p>	
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	<p>COURT USE ONLY</p>
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #66 ("Limit on Local Housing Growth")</p> <p>Petitioner: Scott Smith</p> <p>v.</p> <p>Respondents: Daniel Hayes and Julianne Page</p> <p>and</p> <p>Title Board: Troy Bratton, Julie Pelegrin, and Melanie Snyder</p>	<p>Case No. 2017SA305</p>
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PETITIONER SCOTT SMITH'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 1159 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 Petitioner's Opening 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.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee

agrees with appellant'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 or 28.1, and C.A.R. 32.

s/Heather R. Hanneman

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ARGUMENT

The Board acknowledges in its answer brief that there is a difference between initiatives #4 and #66. Title Board's Opening Brief, at 5. Initiative #4 proposed the following changes to the Colorado Constitution: (1) a change to permit local government electors to limit housing growth through initiatives and referenda; (2) a change placing specific growth limitations for certain counties; and (3) a change to the existing constitutional percentage of required elector signatures for such initiatives and referenda. *See Matter of Title, Ballot Title & Submission Clause for 2017-2018 #4*, 395 P.3d 318 (Colo. 2017).

Initiative #66 proposes changes to the Colorado Revised Statutes to effect purposes (1) and (2) above. It also, however, purports to change the existing constitutional percentage of required elector signatures for such initiatives and referenda *via statute*. And it does so without any notice to voters that it seeks to effect a *constitutional change* to home rule powers granted to cities and towns pursuant to Colo. Const., art. XX, sec. 6.

The Board argues that this distinction between #66 and #4 makes no difference in the single subject analysis; that the change to the existing constitutional percentage of required elector signatures is simply a procedural

means of implementing the statutory provision of local housing growth initiatives and referenda.

The problem with this argument is that it ignores the substantive nature of a covert attempt to limit a home rule constitutional right by a proposed statutory change. Initiative #4 only purported to amend the constitution. Initiative #66, in contrast, has separate and distinct purposes – providing statutory rights for local limits on housing growth *and* disingenuously portraying that such a statute could restrict constitutional home rule and referendum/initiative rights.

Initiative #66 implicates the very concerns underlying the single subject requirement. Voters will be surprised to learn that the proposed measure to change the Colorado Revised Statutes actually attempts to evade the Colorado Constitution. And voters will be surprised to learn that the signature requirement provision in #66 is simply an empty gesture. *See Matter of Title , Ballot Title and Submission Clause for 2017-2018 #4*, 395 P.3d 318, 321 (Colo. 2017) (single subject requirement functions to prevent voter surprise and fraud by passage of a surreptitious provision).

Initiative #66 also impermissibly implicates “logrolling” – combining subjects with no “necessary” or “proper” connection for purposes of “garnering

support for the initiative from various factions . . . [in order to] lead to the enactment of measures that would fail on their own merits. . . .” *Id.* The Board argues that “logrolling” is not implicated here because it is “the substance of the proposed initiative, and not the location of the laws that it amends or repeals” that govern the single subject analysis.

This argument ignores the undisclosed nature of the signature requirement in #66, which purports to restrict home rule constitutional rights. Electoral procedures can be a central feature of a measure, and therefore, voters might choose to vote for or against this measure in light of its attempt to change the requirements for local petitioning. *See Matter of Title , Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565, 570 (Colo. 2016), *reh'g denied* (May 16, 2016); *see also In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. #43*, 46 P.3d 438, 442 (Colo. 2002) (discussing “the danger that measures, incapable of being enacted on their own merits, will nonetheless be passed because joining multiple subjects having no necessary or proper connection will secure the support of various factions that may have different or even conflicting interests”).

For example, in *Ballot Title 2015-2016 #73*, the measure at issue, which related to recall and successor elections, did not provide information regarding the procedures that would be used to effect the measure's proposal. *Ballot Title 2015-2016 #73*, 369 P.3d at 570. The Court found that such information was a central feature of the measure and therefore necessary and important for the voters to make an informed decision on their votes. *Id.* Here voters may choose to vote for or against this measure based on its attempt to change the requirements for local petitioning.

The restriction on constitutional rights is not "necessary" to effectuate the goal of providing local governments with initiative and referenda rights to place limits on housing growth. Nor is it "proper" in any sense of the word because it purports to change covertly home rule constitutional rights under the guise of a statutory change. This is the type of mischief the single subject requirement is intended to prevent. *See Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014) ("To avert such mischief, the single subject requirement limits the voters to answering 'yes' or 'no' to a straightforward, single subject proposal.").

The Board also argues that the issue raised here only “goes to the ultimate constitutionality of the measure,” not to the single subject question. Again, this ignores the undisclosed nature of the purported purpose of restricting home rule constitutional rights. In addition, under these circumstances, there is no requirement to engage in the fiction that the proposed change to home rule constitutional rights via statute is constitutional. This is a matter of common knowledge of which the Court can take judicial notice; it does not require any analysis or substantive consideration of the constitutionality of the provision itself. *Cf. In re Senate Bill No. 95 of the Forty-Third General Assembly of the State of Colorado*, 361 P.2d 350, 354 (Colo. 1961).

Because the signature provision in the measure cannot be given effect *on its face*, the Court can address the fact that this provision can only – and may well be intended to – confuse voters. In short, the measure involves a provision that serves only as “theoretical posturing.” *See In the Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d 257, 275 (Colo. 1999) (Scott, J., concurring and dissenting) (single subject requirement ensures initiatives are applied “in the practical sense” and “not just serve as theoretical posturing”).

Initiative #66 also implicates the “*how*” and “*what*” problem addressed in *Ballot Title #43*, 46 P.3d 438 (Colo. 2002). The signature requirement provision in #66 does not just implicate the “how” to effect the purpose of providing local governments a means of limiting housing growth through initiatives and referenda; it implicates the “what” of constitutional rights home rule municipalities (i.e. limiting constitutional control of petition signature requirements for local initiatives and referenda).

CONCLUSION

In sum, Initiative #66 will cause voter surprise and will implicate the “logrolling” problem in a manner that the single subject requirement is meant to prevent. For these reasons, Mr. Smith respectfully requests the Court to determine that proposed Initiative #66 violates the single subject requirement and that the Title Board lacked jurisdiction to set the title for the proposed initiative, rendering the ballot title void.

Respectfully submitted this 8th day of February, 2018

s/Heather R. Hanneman

CERTIFICATE OF SERVICE

I, Heather Hanneman, hereby affirm that a true and accurate copy of the foregoing was sent this day, February 8, 2018, to the following as indicated below:

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