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SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	COURT USE ONLY
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #66 ("Limit on Local Housing Growth") **Petitioner:** Scott Smith v. **Respondents:** Daniel Hayes and Julianne Page and Title Board: Troy Bratton, Julie Pelegrin, and Melanie Snyder	Case No. 2017SA305
Attorney for Scott Smith: Heather R. Hanneman, #22383 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1000 Denver, Colorado 80202 Telephone: (303) 573-1900 Facsimile: (303) 446-9400 heather@rechtkornfeld.com	

OPENING 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 3188 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 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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ISSUE PRESENTED FOR REVIEW

Does Initiative 2017-2018 #66 (Limit on Local Housing Growth) violate the single subject requirement of Colo. Const., art. V, sec. 1(5.5) by imposing local growth limits as well as (1) establishing statutory requirements for the percentage of signers of initiative and referendum petitions that contradict (and thus violate) the existing constitutional percentages in Colo. Const., art., V, sec. 1(9) for local initiatives and referenda and (2) attempting to supersede the general election-related authority for home rule jurisdictions found in Colo. Const., art. XX, sec. 6.[1]

NATURE OF THE CASE

This case involves a proposed initiative that violates the single subject requirement of the Colorado Constitution. Initiative #66 proposes a *statutory* change to permit electors of cities, towns, cities and counties, and counties to limit housing growth through initiatives and referenda. At the same time, however, it

[1] Although Objector believes that he directors of the Office of Legislative Council and the Office of Legislative Legal Services erroneously waived the requirement for a review and comment hearing on Initiative #66, he is not making that error a subject of this appeal.

sets the percentage of required signatures for such initiatives and referenda without regard to the exercise of *constitutional* authority by those local governments.

The attempt to recast these constitutional provisions is not *necessarily* related to local growth limitations. And more importantly, it is not *proper*, because it purports to change a constitutional right under the guise of a statutory change. For these reasons, the Court should 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.

FACTS AND PROCEDURAL HISTORY

Initiative #66 is one of several initiatives proposed by Daniel Hayes and Julianne Page (the "Proponents") relating to the issue of limits on local housing growth. In *Matter of Title, Ballot Title & Submission Clause for 2017-2018 #4*, 395 P.3d 318 (Colo. 2017), this Court previously affirmed the Title Board's decision to grant single-subject approval and set a title for Initiative #4 (an initiative to amend the Colorado constitution imposing limits on local housing growth). The Proponents let Initiative #4 expire.

Proponents then proposed Initiative 2017-2018 #47, which also was related to limits on local housing growth. Following the review and comment hearing

before the Office of Legislative Legal Services, the Proponents abandoned 2017-2018 Initiative #47 (a statutory initiative) in order to pursue the statutory initiative at issue in this case, 2017-2018 #66.

On October 18, 2017, the Office of Legislative Legal Services determined that no review and comment hearing for Initiative #66 was required under C.R.S. § 1-40-105.1. Thereafter, the Proponents submitted a final version of the proposed initiative to the Secretary of State for purposes of submission to the Title Board. Initiative #66 seeks to change the Colorado Revised Statutes to:

- Permit electors of cities, towns, cities and counties, and counties to limit housing growth through initiatives and referenda;
- place specific limits on housing growth for the cities and counties of Broomfield and Denver, and the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, Larimer, and Weld;
- restrict the home rule powers granted to cities and towns pursuant to Colo. Const., art. XX, sec. 6, dealing with municipal control of all matters pertaining to municipal elections; and

- restrict the authority of cities and towns under Colo. Const., art., V, sec. 1(9) by setting the percentage of voters who must sign housing growth limitation referenda and initiative petitions.

Unlike Initiative #4, which was a constitutional initiative, Initiative #66 proposes to change the percentage of voters who must sign housing growth referenda and initiative petitions through statutory changes. It proposes that signatures for such petitions shall be "five percent of the voters participating in the most recent general election in such local government." R.2.

Colo. Const., art., V, sec. 1(9) sets the percentage of voters who must sign referenda and initiative petitions. Section 1(9) allows cities and towns to determine the number of signatures required for referendum petitions (up to 15% of the voters who voted in the last municipal election) and initiative petitions (up to 10% of the voters who voted in the last municipal election).

On December 6, 2017, the Title Board fixed the ballot title for Initiative #66. R.9. Petitioner Scott Smith (the "Objector") filed a motion for rehearing contending that the Board did not have jurisdiction to set a title because Initiative #66 violates the single subject requirement of Colo. Const., art. V, § 1(5.5). R.10-

13. The Title Board denied the motion for rehearing on December 20, 2017. Objector filed this appeal on December 27, 2017. R.15.

The Board set the following title:

> *Shall there be a change to the Colorado Revised Statutes concerning limitations on the growth of housing, and, in connection therewith, permitting the electors of every city, town, city and county, or county to limit housing growth by initiative and referendum; permitting county voters by initiative and referendum to limit housing growth uniformly within the county, including all or parts of local governments within the county; establishing procedural requirements for initiatives for local governments, whether statutory or home rule, concerning limits on housing growth; and for the city and counties of Broomfield and Denver, and in the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, Larimer, and Weld: 1) prohibiting the issuance of new permits for privately owned housing units by local governments located in whole or in part within such counties and such cities and counties until January 1, 2019, 2) limiting the growth of privately owned residential housing units to one percent annually starting in 2019, and 3) permitting the one percent growth limitation to be amended or repealed by initiative and referendum commencing in 2021?*

SUMMARY OF THE ARGUMENTS

Initiative #66 proposes a *statutory* change to permit electors of cities, towns, cities and counties, and counties to limit housing growth through initiatives and referenda. It also sets the percentage of required signatures for such initiatives and referenda without regard to the exercise of *constitutional* authority by those local governments. Initiative #66 is unlike Ballot Title 2017-2018 #4, which proposed

housing growth limitation measures solely through a ***constitutional*** change, because it proposes housing growth limitation measures and initiative and referenda signature requirements ***by statute***.

The attempt to recast the constitutional provisions relating to signature requirements is not *necessarily* related to local growth limitations. Indeed, it cannot be related to local growth limitations because ultimately, it is ineffective. Nor is the provision relating to signature requirements *proper*, because it purports to eliminate explicit constitutional authority under the guise of a mere statutory change. Voters will be surprised to learn that the promise of a liberalized form of initiative and referendum was never actually possible because of the very clear and specific requirements of our Constitution. Voters who support Initiative #66 to ease ballot access would be unaware that the measure cannot change the rights of any city, town, or municipality to require that initiative and referendum petitions require many more signatures than they are being told is possible under this measure or the rights of home rule municipalities to control all matters relating to local elections. *See* Colo. Const., art. XX, § 6.d, art. V. § 1(5.5).

This built-in source of voter confusion violates the single subject requirement, and the Board erred in finding otherwise.

ARGUMENT AND AUTHORITIES

I. STANDARD OF REVIEW AND PRESERVATION OF THE ISSUE BELOW.

The Colorado Constitution requires that any initiative must comprise a single subject in order to be considered by the Title Board. Colo. Const., art. V, § 1(5.5). Where a measure contains multiple subjects, the Board lacks jurisdiction to set a title. The Board's analysis and this Court's review is a limited one – addressing the meaning of an initiative to identify its subject or subjects. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 172*, *No. 173, No. 174, and No. 175*, 987 P.2d 243, 245 (Colo. 1999). In a clear case, this Court will overturn a Title Board's finding that an initiative contains a single subject. *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014) (Court "must sufficiently examine an initiative to determine whether or not it violates the constitutional prohibition against initiative proposals containing multiple subjects").

The single subject issues raised in this appeal were presented to the Board at the rehearing and thus preserved for review. *See* Motion For Rehearing On Initiative 2017-2018 #66 ("Limit On Local Housing Growth"), R.10-13.

II. THE TITLE BOARD LACKED JURISDICTION TO SET THE BALLOT TITLE BECAUSE INITIATIVE #66 VIOLATES THE SINGLE SUBJECT REQUIREMENT.

To find that a measure addresses only one subject, the Court must determine that an initiative's topics are "necessarily and properly" related to the general single subject assigned to the measure by the Title Board, rather than "disconnected or incongruous" with that subject. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted April 17, 1996 (1996-17)*, 920 P.2d 798, 802 (Colo. 1996); *see also Ballot Title #76*, 333 P.3d at 79 ("subject matter of an initiative must be necessarily and properly connected"); *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").

This Court's application of the single subject requirement is a nuts-and-bolts assessment of a proposed measure. It "ensures that the purposes behind prohibiting multiple subject initiatives are **applied in the practical sense, that is, to avoid confusion, fraud, and surprise among voters**, and not just serve as

theoretical posturing." *In the Matter of Title, Ballot Title and Submission Clause, and Summary for1999-2000 #29,* 972 P.2d 257, 275 (Colo. 1999) (Scott, J., concurring and dissenting) (emphasis added).

Here, unlike *Ballot Title 2017-2018 #4*, which proposed housing growth limitation measures solely through a *constitutional* change, Ballot Title #66 proposes housing growth limitation measures *by statute* in a manner that is patently, objectively, even numerically at odds with what the Constitution currently mandates. Whereas the right of local initiative is expressly reserved to "cities, towns, and municipalities" which can "provide for the manner of exercising the initiative and referendum powers as to their municipal legislation," Colo. Const., art. V, sec. 1(9), Initiative #66 sets the percentage of required signatures without regard to the exercise of constitutional authority by those local governments.

In addition, it does so in a way that is clearly contrary to this provision of the Constitution. The proposed statute purports to change signature requirements in section (1)(9) of Article V ("[n]ot more than ten percent of the registered electors" for a referendum and "not more than fifteen percent of the registered electors" for an initiative), *id.*, by setting a lower threshold – five percent. R.2-3. Thus, in two

ways – by wresting control from local governments and by resetting the percentages from the higher levels of required signatures that are authorized by the Constitution – Initiative #66 portrays that it is making certain local growth decisions more open to local attempts at direct democracy in a way that, as a matter of constitutional law, it cannot do.

The attempt to recast these constitutional provisions is not *necessarily* related to local growth limitations. But more importantly, it is not *proper*, because it purports to change a constitutional right under the guise of a statutory change. Some voters could certainly be surprised that a statute cannot amend the Constitution and that the required signature subject of Initiative #66 has no effect at all.

Objectors are not asking the Court to adjudicate the general constitutionality of Initiative #66 in this proceeding. *See In the Matter of Title, Ballot Title and Submission Clause for 2015-2016 #156*, 16SA157, 2016 WL 4780217, *2 (Colo. July 5, 2016) (Court will not address merits, efficacy, or construction of an initiative). However, the attempt to legislate a lesser signature percentage than the Constitution authorizes – and by an entity (here, the State of Colorado) that has no constitutional authority to regulate local government referenda and initiative

procedures on minimum signature amounts – requires little construction of the terms in Initiative #66 and no projection about its application. These are matters that are evident from the face of initiative and pertinent law.

Where a proposed bill in the legislature could not be applied except in a single case, this Court took judicial notice of those circumstances and based its opinion on those clear facts:

> We would be blind to stark reality indeed if we assumed the possibility of any other geographical areas in Colorado to which it would apply, save and except the city of Denver and the town of Glendale. . . . To say that this court cannot take judicial notice of these matters of public record and common knowledge is most unrealistic.

In re Senate Bill No. 95 of the Forty-Third General Assembly of the State of Colorado, 361 P.2d 350, 354 (Colo. 1961). The Court is therefore able to address in its single subject analysis the fact that this provision can only – and may well be intended to – confuse voters because it cannot be given effect.

Voters who are enticed to support this measure because they believe that the affected jurisdictions will now be able to place growth limits on the local ballot without regard for the Colorado Constitution, will be surprised to find that the measure did not – and cannot – take the signature decision out of local officials'

hands; they will be surprised that they cannot set such a low bar by an initiated statute and that instead, the signature requirement is a purely local decision.

The single subject requirement was enacted to "prevent surprise and fraud from being practiced upon voters." C.R.S. § 1-40-106.5(1)(e)(II). What could be a greater surprise than to find that the promise of a liberalized form of initiative and referendum was never actually possible under the clear requirements of our Constitution? *See* Colo. Const., art. XX, sec. 6.d. (providing home rule municipalities with authority to deal with "[a]ll matters pertaining to municipal elections in such city or town"); *Matter of Title, Ballot Title and Submission Clause, and Summary With Regard to a Proposed Pet. for an Amend. to Const. of State Adding Sec. 2 to Article VII (Pet. Procedures)*, 900 P.2d 104, 109 (Colo. 1995) (battle title violated single subject requirement where it proposed substantive fundamental constitutional rights in all charter and constitutional petitions and also proposed changes to different source of legal authority – judicial review of petitions).

In *Ballot Title #43*, 46 P.3d 438 (Colo. 2002), the initiative at issue established "a battery of procedures" governing the exercise of the right to petition, including the timing for review and comment hearings on initiative drafts,

guidelines for formatting and filing petitions, and procedures for challenging ballot titles on single subject grounds. *Id*. at 444. It also, however, proposed the elimination of the single subject requirement for "[a]ny petition adding, repealing, or rewriting within one article of the constitution, one title of state statutes, one charter article, or one ordinance." *Id*. The Court held that these provisions violated the single subject requirement. *Id*. at 446-47.

In its decision, the Court determined that the proposed procedural measures relating to the exercise of the right to petition "govern *how* a proponent exercises his right to petition." *Id*. at 446 (emphasis in original). It found that "in contrast," the single-subject requirement controlled "*what* an initiative placed on the ballot may contain." *Id*. (emphasis in original). The Court stated: "It is ironic that in approving a seemingly innocuous initiative proposing to relax the procedural requirements for placing a measure on the ballot, voters may inadvertently nullify their only protection against the dangers of including incongruous measures in a single initiative." *Id*.

The provisions in Initiative #66 are similar in that they implicate the "how" and "what" distinction discussed in *Ballot Title #43*. Initiative #66 proposes *how* cities, towns, and counties can limit housing growth (i.e. through voter approval at

the local level), while at the same time proposing *what* constitutional rights home rule municipalities – not to mention all other cities and towns – still have with respect to control of matters related to their elections (i.e. limiting constitutional control of petition signature requirements for local initiatives and referenda). Voters will be shocked to find that the "*what*" of Initiative #66 is just a mirage; it simply is not possible under the Constitution for the voters to set a preemptive and low bar for petition sufficiency by statute.

This change implicates the concern articulated by the Court in *Ballot Title #4* with respect to voters inadvertently nullifying constitutional rights. While Initiative #66 purports to make just a statutory change, it fails to inform voters that they are nullifying a home rule constitutional right in Article XX and a reserved right to local voters in Article V to determine signature requirements for petitions, including those that are related to housing growth limits. This is the type of mischief the single subject requirement is intended to prevent. *See Ballot Title #76*, 333 P.3d at 79 ("To avert such mischief, the single subject requirement limits the voters to answering 'yes' or 'no' to a straightforward, single subject proposal.").

Although the change to the constitutional home rule control over such signature requirements may be characterized as simply a means of implementing the statutory provision of local housing growth initiatives and referenda, such a characterization would be wrong. Unlike Initiative #4, which only purported to amend the constitution, Initiative #66 has separate and distinct purposes – providing statutory rights for local limits on housing growth and disingenuously portraying that this statute could restrict home rule and referendum/initiative rights as specified in the Constitution.

Initiative proponents violate the single subject requirement where they use bait in their measures to attract voters with differing interests. *See In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076, 1079 (Colo. 1995) ("the single subject requirement precludes the joining together of multiple subjects into a single initiative in the hope of attracting support from various factions"). This tactic is particularly problematic where the lure can have no effect whatsoever. In this scenario, it is only used to obtain an electoral majority, not effect actual change. That practice offends the essence of the single subject requirement which was adopted to "**help keep** unrelated or **misleading provisions out of initiated** and referred **measures to be voted on by the people**." Legislative Council of the

Colorado General Assembly, *An Analysis of 1994 Ballot Proposals*, Research Pub. No. 392, at 3 (1994) (emphasis added).

CONCLUSION

For the foregoing reasons, Objector 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 17th day of January 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, January 17, 2018, to the following as indicated below:

Matthew Grove
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Via ICCES

Daniel Hayes
5115 Easley Rd
Golden CO 80403
720-581-2851
futuredenver@gmail.com

Via Email and United States Mail through ICCES

Julianne Page
3565 Kline St.
Wheat Ridge CO 80033
720-891-7346
julipage13@gmail.com

Via Email and United States Mail through ICCES

/s Heather R. Hanneman