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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
In Re The Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #4 **Petitioners:** D. Michael Kopp and Scott E. Smith, v. **Respondents:** Daniel Hayes and Julianne Page, and **Title Board:** Suzanne Staiert, Sharon Eubanks, and Glenn Roper	▲ **COURT USE ONLY** ▲
Attorneys for Petitioner Kopp: Jason R. Dunn, #33011 David B. Meschke, #47728 BROWNSTEIN HYATT FARBER SCHRECK LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Tel: 303.223.1100; Fax: 303.223.1111 jdunn@bhfs.com; dmeschke@bhfs.com	Case Number: 2017SA6

PETITIONER D. MICHAEL KOPP'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 3,836 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/ Jason R. Dunn

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Petitioner D. Michael Kopp submits his Answer Brief and in support thereof states as follows.

SUMMARY OF THE ARGUMENT

In its opening brief, the Title Board presented no compelling rationale as to how the measure's various distinct subjects are properly connected. Rather, the Title Board placed the measure's subjects under an impermissibly broad umbrella topic, and the only case it cites in support demonstrates why measures that contain such umbrella topics do not satisfy the single-subject requirement.

Similarly, with regard to the abstract, the Title Board defers to Legislative Council Staff's comments at the rehearing that it was not possible to create a meaningful abstract because of the measure's potential wide-ranging effects. Nevertheless, in part because the measure places a one percent housing growth limitation on Front Range counties that is permanent absent voters amending or repealing it, it was possible to create both qualitative and quantitative assessments of the measure's likely fiscal impact, including the measure's likely benefits and impacts.

RESPONSE ON STANDARD OF REVIEW

The parties agree to the proper standard of review for the single-subject issue. However, the parties disagree on the standard of review for the measure's abstract. The Title Board requests that this Court adopt an "abuse of discretion" standard for reviewing the Title Board's and the Legislative Council Staff's ("LCS") decisions in drafting and approving the abstract. Title Board's Opening Brief, at 12. This is too deferential: the proper standard of review is reasonableness. When coupled with the Title Board's argument that the Initiative was too indeterminate for LCS to provide a meaningful abstract for voters, an abuse of discretion standard would allow LCS and the Title Board to skirt their responsibility in situations where an abstract was properly challenged because it failed to provide voters a means to assess a measure's likely fiscal impact.

Instead, this Court first should apply de novo review to assure that the abstract complied with the requirements in section 1-40-105.5. If there is a question as to whether the abstract fails to meet those requirements, as is the case, then this Court should apply a reasonableness standard in reviewing the Title Board's and LCS's

decisions to draft and approve the abstract. Although this Court should give some deference to the Title Board and LCS, their decisions in drafting and approving the abstract must have support in the record and, if the abstract fails to adequately meet any of the requirements, must explain why such requirement was not reasonably determinable. If the explanations do not meet this reasonableness standard, then this Court must return the abstract to the Title Board with directions to have LCS rewrite it.

This standard of review is based on how this Court assessed fiscal impact statements when the Title Board was required to produce them under since-repealed law. Under former section 1-40-101(2) (1973) and former section 1-40-106(3)(a), which were repealed in 2000, if the Title Board determined that a proposed measure "will have a fiscal impact on the state or any of its political subdivisions," then the Title Board utilized the assistance of LCS and other state departments to include in the measure's summary "an estimate of any such fiscal impact, together with an explanation thereof." In reviewing fiscal impact statements under those laws, this Court noted that while the Title Board had discretion, this discretion "is not unlimited and must have some support

in the record." *In re Proposed Initiative for an Amendment to Article XVI, Section 5 Colorado Constitution, Entitled "W.A.T.E.R."*, 831 P.2d 1301, 1306 (Colo. 1992). The Court then stated its role as determining "whether the summary contains an estimate and explanation of any fiscal impact which the proposed law may have upon the state or any of its political subdivisions, to the extent that such impact is **reasonably determinable**." *In re Increase of Taxes on Tobacco Products Initiative*, 756 P.2d 995, 998 (Colo. 1988) (emphasis added). This forms the basis of the reasonableness standard.

Because the since-repealed laws required less factual information on a measure's fiscal impact than current section 1-40-105.5's requires for the abstract, and a fiscal impact statement was required under the former laws only if the Title Board determined that the proposed measure would "have a fiscal impact on the state or any of its political subdivisions," this Court should give the Title Board and LCS less discretion when reviewing an abstract under section 1-40-105.5 than it previously gave the Title Board under the former laws. Because this Court's "goal in construing a statute is to ascertain and give effect to the General Assembly's intent," *Hayes v. Ottke*, 293 P.3d 551, 554 (Colo.

2013), a review of an abstract under section 1-40-105.5 must be accomplished in light of the legislature's clear intent to provide voters with meaningful information on a proposed measure's fiscal impacts before they sign the petition. *See* Petitioner Kopp's Opening Brief, at 20–28.

ARGUMENT

I. PETITIONER KOPP TIMELY FILED HIS PETITION FOR REVIEW WITH THE COURT

The Title Board argues that Kopp failed to timely file his Petition for Review. That is incorrect. Kopp timely filed his petition on January 11, 2017, and served a copy on all other parties, including counsel for the Title Board, on that date. However, the following day the Court notified Kopp that his filing was rejected because the Court had already accepted Petitioner Smith's filing and assigned a case number, and thus Kopp's filing should have be filed under that case number rather than as a new case.[1] Kopp then refiled its petition under that existing case number.

[1] Because the Court does not assign case numbers until it accepts a petition after a review, and the Court did not accept Petitioner Smith's petition until the next day, Kopp had to open a new case in order to meet the deadline.

II. THE TITLE BOARD'S ARGUMENTS FAIL TO CREATE A NECESSARY CONNECTION BETWEEN THE VARIED SUBJECTS.

As articulated in Kopp's Opening Brief, Proposed Initiative #4 contains at least three separate subjects in violation of the single-subject requirement. Petitioner Kopp's Opening Brief, at 8–18. Those three subjects are: (1) a one percent housing growth limit on specific Front Range counties[2] starting in 2019; (2) a fundamental change to the long-standing relationship between home-rule municipalities and counties that gives county electors, through initiative or referendum, the right to limit housing growth across a county, including within any home-rule municipality; and (3) a change to the statutory initiative process that permits only one challenge to an initiative's petition form, including an "expedited" judicial determination of such challenges, and only one challenge to the sufficiency of signatures, for measures that relate to housing growth. While the measure's proponents did not file an opening brief in this matter, and thus have not provided any

[2] The Front Range counties are the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, Larimer, and Weld, and the city and counties of Broomfield and Denver.

explanation as to how those subjects are properly connected, the Title Board's opening brief is equally lacking in justification.

A. The Initiative contains multiple subjects that lack a necessary or proper connection and are characterized under an impermissibly broad umbrella topic.

The Title Board contends that Proposed Initiative #4 should withstand scrutiny because the separate parts of the measure all relate to "limiting housing growth in Colorado," and the separate subjects are only means through which the measure accomplishes limiting such growth. Title Board's Opening Brief, at 6. Such an argument relies upon an impermissibly broad umbrella topic. *See In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002) ("[A]ttempt[ing] to characterize his initiative under some overarching theme will not save an initiative containing separate and unconnected purposes."). Although there may be some instances where a measure regarding "limiting housing growth in Colorado" contains only one subject, this measure is not such an instance. Here, this umbrella subject is impermissibly broad because of the means through which it attempts to limit housing growth and the dramatic changes it makes along the way.

First, rather than covering straight-forward provisions on limiting housing growth under one regime, the measure contains major provisions that appeal to different factions of voters and that arguably would not be able to pass on their own merit. *See In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012); *Matter of Title, Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d 76 (Colo. 2014) ("[T]he single subject requirement limits the voters to answering 'yes' or 'no' to a straightforward, single subject proposal."). Only a Colorado voter who wants housing growth limitations statewide would be potentially content with the measure's overall potential impacts. Otherwise, the measure's design essentially places voters who want housing growth limitations in only parts of the state (the crowded Front Range) into factions with distinct and potentially competing interests. Therefore, because the measure contains multiple purposes, each of which may appeal to only a subset of voters, it presents one of the very "dangers" the single-subject requirement was designed to prevent: "combining multiple subjects to attract a 'yes' vote from voters who might vote 'no' on one or more of the subjects if they were proposed separately." *In re Proposed Initiative for*

1997-1998 #84, 961 P.2d 456, 458 (Colo. 1998); s*ee also* § 1-40-106.5(1)(e) (noting that the single-subject requirement in article V, section 1(5.5) of the Colorado Constitution is intended "[t]o forbid . . . the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits").

Second, the measure's central feature, the one percent growth limitation on Front Range counties, overshadows the two other major provisions of the measure. Not only might voters be surprised to learn that the Initiative includes a fundamental change to the constitutional and long-standing home-rule framework, voters would be even more surprised at the more subtle changes that limit challenges to measures on the petition and as to signatures. Compared with the one percent housing growth limitations, these provisions have the potential to cause voter fraud because their implications are "'coiled up in the folds' of a complex initiative." *In re Title, Ballot Title & Submission Clause for 2015-2016 #132 and #133*, 374 P.3d 460, 465 (Colo. 2016).

Therefore, although the measure could be characterized under a broad umbrella topic, such topic is impermissibly broad. This topic only hides the facts that the measure includes component parts that lack a necessary or proper connection and would cause the very dangers the single-subject requirement was designed to preclude.

B. The sole case relied on by the Title Board actually illustrates why the Initiative cannot withstand single-subject scrutiny.

In its single-subject argument, the Title Board cites just one case, *Matter of Title, Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d 76 (Colo. 2014), which it contends is an example of where a measure with both procedural and substantive provisions still contained a single subject. Title Board's Opening Brief, at 7–8. Although this Court determined that certain aspects of that measure may be a single subject, the Court ultimately held in that case that the measure contained at least two subjects that violated the single-subject requirement. *Matter of Title, Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d at 85. In so doing, this Court explained why measures such as Initiative #76 and Proposed Initiative #4 include multiple subjects.

Although Initiative #76 concerned a different topic – recall of government officers – Initiatives #4 and #76 share many similarities. First and foremost, Initiative #76 contained multiple subjects: (1) "new recall petition, election, and vacancy provisions, for the purpose of altering the requirements for triggering and conducting state and local recall elections," which "constitute at least one subject"; and (2) a provision that "proposes to institute a new constitutional right to recall non-elected officers, in addition to elected officers." *Id.* at 79. Moreover, they both share overly broad umbrella descriptions – "recall of government officers" and "limiting housing growth." *Id.* ("We have previously found such umbrella proposals unconstitutional."). Initiative #76 also contained provisions that "would repeal, replace, and preempt multiple but unspecified existing constitutional, statutory, and home rule charter provisions," *id.*, which has some similarities to how Initiative #4 would alter home-rule and statutory provisions for housing growth initiatives.

In light of these similarities, it comes as no surprise why Initiatives #4 and #76 both violate the single-subject requirement. Like Proposed Initiative #4, which contains provisions that change how

initiatives for housing growth limitations are run *and* an affirmative one percent housing growth limitation for Front Range counties starting in 2019, Initiative #76 would have established "preemptive changes to the manner in which state and local recall elections are triggered and conducted" *and* would have expanded "recall to non-elected state and local officers." *See id.* at 84. In both proposed measures, the obvious second subject is "distinct and independent" and "has no necessary connection" to the rest of the measure. *Id.* at 85 (noting that "[s]uch separate subjects must stand and be examined on their own merits"). Both measures put together separate subjects to garner support from different factions of voters. *Id.* at 79 (noting that "some voters might favor changes to the manner in which recall elections for elected officers are triggered and conducted, but not favor establishing a new constitutional right to recall non-elected officers, or visa-versa" and thus the measure "unconstitutionally combines the two subjects in an attempt to attract voters who might oppose one of these two subjects if it were standing alone").

Similarly, Proposed Initiative #4's two other main subjects, like Initiative #76's expansion of recall to non-elected state and local

officers, go beyond merely changing how initiatives for housing growth limitations occur. First, by giving counties authority over home-rule municipalities to enact housing growth limitations through the initiative and referendum process, Proposed Initiative #4 would fundamentally change the constitutional home-rule relationship by stripping some of home-rule municipalities' power. Colo. Const. art. XX, § 6 (vesting home-rule municipalities with the "power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters"). Unlike, Initiative #76, which would have preempted some existing home rule charter provisions as to "the manner in which state and local recall elections are triggered and conducted," *see Matter of Title, Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d at 82, Proposed Initiative #4 is written so broadly that a county's initiative authority would not be limited to just percentage growth limitations and could include any limitation that has the effect of limiting housing growth, such as limitations on lot size, square footage, rooms, set-backs, etc. *See In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002* #43, 43 P.3d 438, 448 (Colo. 2002) (noting

that "zoning matters are peculiarly a matter of local concern and that local citizens' rights of initiative and referendum can be an important part of this process"). Such a stark change is another subject.

Second, Proposed Initiative #4's significant changes to the initiative process itself, like Initiative #76's changes that alter the requirements for triggering and conducting state and local recall elections, are at least another separate subject. *See Matter of Title, Ballot Title, & Submission Clause for 2013-14, #76*, 333 P.3d at 79.

Therefore, both measures combine multiple distinct subjects under an impermissibly broad umbrella topic and each present an example of where the Title Board incorrectly "set a title for an initiative that combines process changes with other substantive changes that have no necessary or proper connection with each other." *Id.* at 86.

III. THE TITLE BOARD FAILS TO JUSTIFY THE NEARLY NON-EXISTENT ABSTRACT.

The Initiative's abstract fails to comply with the statutory requirements for the specific reasons stated in Kopp's Opening Brief. This brief addresses the two issues raised in the other parties' opening briefs: (1) whether the abstract adequately stated the measure's economic benefits, and (2) whether it was possible to create both

qualitative and quantitative assessments of the measure's likely fiscal impact.

A. The Initiative's abstract does not adequately address the measure's economic benefits and impacts.

Every abstract must include "[a] statement of the measure's economic benefits for all Coloradans." § 1-40-105.5(3)(b). During Proposed Initiative #4's rehearing, the Title Board debated whether the measure's abstract must include both "impacts" and "benefits." Because the Initiative's abstract does *not* state either what were the measure's economic benefits to Coloradans or that the measure will not result in any economic benefits, but does include statements under the heading "economic impacts," the discussion turned to LCS's mindset when it wrote the abstract and whether "impacts" and "benefits" were synonymous. (*See* Exhibit 1 to Petitioner Kopp's Opening Brief, Transcript of the January 4, 2017 Rehearing, at 69:10–75:18).[3]

After the issue was raised by counsel for both Petitioners, LCS explained at the rehearing that it believed the abstract it drafted meets the requirement in section 1-40-105.5(3)(b). Larson Silbaugh, an

[3] Audio recording Title Board's January 4, 2017 rehearing can be found at http://www.sos.state.co.us/pubs/info_center/audioArchives.html.

economist for LCS, stated that "our attempt to meet that requirement is in the paragraph entitled Economic impacts where we can't say conclusively whether this would be – what the economic impacts would be for all Coloradans." (Ex. 1, at 69:12-15). Mr. Silbaugh elaborated that "because we can't identify an impact for all Coloradans, we tried to provide a narrative just explaining that there are going to be impacts, you know, in terms of jobs and population growth." (Ex. 1, at 69:20-23).

Mr. Silbaugh's comments sparked an exchange between the Title Board members, where one board member, Sharon Eubanks, expressed that she thought "economic benefits means something different than economic impacts," and that she did not "think the negative impact should be included at all." (Ex. 1, at 70:20-21, 74:1-2). Another board member, Glenn Roper, disagreed and stated that "I would view it as maybe to discuss net benefits, which I think you can't do without taking into account some of the costs that would be imposed" because "to accurately address benefits, you need to address net benefits, which would have included a discussion of costs." (Ex. 1, at 74:23–75:1, 75:6-8). His viewpoint was echoed by the third board member, Suzanne

Staiert, who stated that "to obtain a benefit, you need to know what the cost was and to see what the benefit is." (Ex. 1, at 75:17-18).

This debate was more academic than practical. The statute requires that an abstract include a statement on the economic benefits, and this measure's abstract clearly does not.[4] That alone is a failure. In addition, in order to provide meaningful and accurate information to voters, the abstract must include a measure's benefits weighed against its costs.[5] This measure's abstract also fails to do that, and instead provides only general statements obvious to most people.

At the rehearing's conclusion, although the board members expressed concern that the measure's abstract did not adhere to section 1-40-105.5(3)(b), they eventually moved to adopt the abstract as

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[4] The full text of the abstract's "Economic impacts" paragraph states:

> The value of existing housing units may increase in communities where there are binding growth limits, impacting homeowners and landlords. For Colorado residents that would like to move into communities with binding housing limits, this measure may make it more expensive to find homes to buy or rent. Limits on housing permits will also impact the distribution of construction employment, retail trade, and population within Colorado.

[5] For example, it would be misleading to include only a measure's economic benefits if the measure had a positive benefit of $1 million to Coloradans but also a $2 million loss.

written. (*See* Ex. 1, at 75–76). Amidst its discussion on "economic benefits," however, the Title Board specifically noted for the record that "this is a matter of first impression" and that it would likely receive guidance from this Court on the proper interpretation of the statutory requirements. (Ex. 1, at 72:21–73:2). This Court now has that opportunity to clarify that not only did the measure's abstract fail to include the economic benefits but it also did not meet the other statutory requirements. Such guidance is necessary so that the Title Board understands its role and that future abstracts provide meaningful information on their measures' fiscal impacts to help voters decide whether they want to sign the petitions.

B. Despite LCS's statements at the rehearing, it was possible to create both qualitative and quantitative assessments of the measure's likely fiscal impact.

The Title Board's argument is not that it was impossible to detail *all* of the economic impacts of the Initiative, but rather that because it might be impossible to describe *some* of the Initiative's economic impacts, it need not describe *any* of the impacts. In particular, the Title Board agrees with LCS's comments at the rehearing and asserts that "it simply is not possible for formulate a qualitative assessment" because of

the measure's "wide-ranging effect," and that the best that could be done are "indeterminate qualitative fiscal impact statements."[6] Title Board's Opening Brief, at 15–16. As stated in Kopp's Opening Brief, however, the one percent housing growth limit on Front Range counties would survive at least two years, which provided a definite time period. This alone was sufficient for LCS to include, at minimum, quantitative numbers on reduced local government revenue, increased property values, impact on local housing markets, reduced local government spending, and the distribution of population, construction employment, and retail trade locally and statewide. *See* Petitioner Kopp's Opening Brief, at 35–38.

Moreover, because the one percent limit would be in place permanently absent voters amending or repealing it, LCS could have provided an analysis for longer periods of time, such as over five or ten years. It cannot be disputed in good faith that most any economist could quantify this information. Even with regard to the rest of the state, LCS could have discussed already available growth statistics and used tailored assumptions to provide helpful information on what would

[6] Perhaps a reason for LCS's uncertainty is the fact that the measure contains multiple subjects.

be the impact of certain housing limitations in various parts of the state if housing growth limitations were enacted by voters. *See* Petitioner Kopp's Opening Brief, at 37–39. Perhaps more importantly from the Court's perspective, if this particular abstract is deemed sufficient, it sets a dangerous precedent that will permit future inadequate abstracts to survive scrutiny to the detriment of voters.

CONCLUSION

Petitioner Kopp therefore asks this Court to reverse the Title Board and hold that: (1) the measure violates the single-subject requirement, and thus the measure should return to the Proponents because the Title Board lacked the power to set title; and (2) the measure's abstract does not comply with section 1-40-105.5.

Respectfully submitted this 21st day of February, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, I electronically filed a true and correct copy of the foregoing PETITIONER D. MICHAEL KOPP'S ANSWER BRIEF via the Colorado Courts E-Filing system and was served via electronic mail to the following:

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