SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 31, 2018 4:53 PM
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 2017-2018 #169 ("Compliance with Federal Immigration Law") **Petitioner: Kyle Huelsman** **v.** **Respondents: Floyd Trujillo and Thomas Tancredo** **and** **Title Board: SUZANNE STAIERT; JASON GELENDER; and GLENN ROPER**	▲ COURT USE ONLY ▲
Attorney for Petitioner: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com	**Case No. 2018SA119**
PETITIONER'S ANSWER 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 these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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/s Mark Grueskin
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SUMMARY

Initiative #169 is deeply flawed, as is its title. The measure itself imposes unrelated state obligations that share only the fact that they are aimed at non-U.S. citizens. As noted in Objector's Opening Brief, even here the measure is overly broad, as it requires information transfers among federal, state, and local entities for persons who have a lawful immigration status as well as an unlawful immigration status. But simply sharing a target involving immigration law does not comprise a single subject, a fact that this Court confirmed in 2006.[1] There is no reason to depart from that precedent now, and the Title Board erred in doing so.

Further, Initiative #169's ballot title fails to tell voters that the "local government" referred to is, in fact, exceptionally broad, based on the initiative text. The Board used that encapsulation to reflect instrumentalities, agencies, school districts, special districts, and law enforcement, as well as the more traditional notion of cities and counties. The Board suggests it is "obvious" that "local government" is an all-encompassing term. But this Court has previously noted that what is "typically considered" to be a "local government" is, in fact, a more narrow set of governmental units. Further, the potential for voter confusion is great, given voter-approved initiatives from previous years (of which the electorate is deemed

[1] *In re Title, Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006).

to be aware) and the specific initiative title set for another measure being circulated for the 2018 ballot – Initiative #66. As such, this title will mislead voters about the true meaning and expanse of #169.

LEGAL ARGUMENT

I. Initiative #169 contains multiple subjects: an intergovernmental information exchange that includes Colorado "jurisdictions" and a prohibition on the "harboring" of persons not lawfully in the United States.

The Title Board maintains that its single subject designation – "compliance with federal immigration law" – "is not the type of 'umbrella' theme that this Court has previously disapproved." Title Board's Opening Brief at 6.

This contention assumes that voters will perceive "federal immigration law" as a single point of law with a single objective. The measure at issue here belies that. It addresses two unrelated provisions within the expansive immigration law rubric.

"Federal immigration law" is a set of diverse legal sources, addressing a wide range of topics. "The term 'immigration laws' includes **this Act** (the Immigration and Nationality Act) **and all laws, conventions, and treaties of the United States** relating to the immigration, exclusion, deportation, expulsion, or removal of aliens." 8 U.S.C. 1101(1)(a)(17) (emphasis added). This

categorization of immigration laws (e.g., statutes, treaties, and conventions) "is a broad one" and includes laws that do "not specifically regulat[e] immigration itself." *United States v. Lazaro-Guadarrama*, 71 F.3d 1419, 1421 (8th Cir. 1995).

Voters would not easily discern the scope of "federal immigration laws." Specifically, the two itemized subjects – a prohibition on the refusal to engage in an information exchange with federal officials and a prohibition on any act that serves to encourage or foster the harboring of persons who are not legally authorized to be in the country – do not resolve the ambiguity of "compliance with federal immigration laws." The fact that the initiative specifically identifies these two unrelated mandates underscores the multiple subjects in this measure.

That an initiative addresses "separate (legal) schemes is meaningful and relevant to the single subject analysis." *In re Title, Ballot Title & Submission Clause for Initiative 2015-2016 #132 and #133*, ¶31, 374 P.3d 460, citing *In re Title, Ballot Title & Submission Clause, & Summary for Proposed Amendment Adding Section 2 to Article VII*, 900 P.2d 104, 109 (Colo. 1995) (initiative that combined procedural and substantive changes to recall, referendum, and initiative petitions involved multiple subjects, in part, because the "Colorado Constitution treats these different citizen initiated measures in separate sections"). Initiative #169 violates the single subject requirement because it contains two purposes, including a "separate and discrete objective," evident because these two subjects

"affect[] separate… (legal) processes derived from different sources of… (legal) authority." *Initiative #132 and #133, supra,* ¶ 30.

Initiative #169 expressly addresses multiple federal statutes: 8 U.S.C. §1324, 8 U.S.C. §1373, and 8 U.S.C. §1644. The first of those three statutes establishes criminal penalties for bringing in, harboring, transporting, or encouraging the entry into the United States by a non-citizen. The other two mandate communication between state and local government agencies and federal immigration offices. While it is not a single subject violation to combine two or more provisions relating to the information exchange statutes found in federal law, the inclusion of the anti-harboring statute does violate the single subject requirement. The two prohibitions apply to very different acts that, in turn, can reflect very different political motivations for voters in the 2018 election. Because it is foreseeable that voters could be required to trade off one policy interest they hold against another, the concerns that gave rise to the single subject requirement – forcing voters to choose between inconsistent provisions in an initiative – are in play here.

In addition, Initiative #169 is not simply a matter of applying federal statutes to immigrant-related acts that take place in Colorado. Initiative #169 applies these prohibitions to "jurisdictions" whereas two of the three referenced federal statutes apply, in whole or in part, to "persons." 8 U.S.C. §§ 1324(a)(1)(A), (2), (3) ("any person"); 1373(a) ("Federal, State, or local government entity or official), (b)

("person or agency"). Thus, the Board erred when it crafted a title that states that Initiative #169 relates to "compliance" with federal immigration law. This initiative creates an expanded state mandate that adds to federal laws and thus does not effect a single objective or purpose.

As a result, this measure violates the single subject requirement and should be returned to its proponents for correction.

II. Initiative #169 will confuse voters by failing to give them notice about the entities that are covered even though those entities are not typically considered to be "local governments."

In arguing for the adequacy of the ballot title, the Board makes two arguments. First, it states that clarifying the meaning of "local government" "would work at cross-purposes with the requirement that the titles include a concise summary of the underlying measure." Title Board Opening Brief at 8-9.

Brevity in the ballot title is not a default position in title setting. Its pursuit is a balancing act. "In preparing the critical documents, especially the title and the ballot title and submission clause, **the Board must navigate the straits between brevity and unambiguously stating the central features** of the provision sought to be added, amended, or repealed." *In re Title, Ballot Title & Submission Clause & Summary for the Proposed Initiative Concerning 'Auto. Ins. Coverage'"*, 877

P.2d 853, 857 (Colo. 1994) (emphasis added), citing *In re Election Reform Amendment*, 852 P.2d 28, 32 (Colo. 1993). Thus, title brevity is a goal, but clarity in a ballot title is a necessity. "[I]f a choice must be made between brevity and a fair description of essential features of a proposal, the **decision must be made in favor of full disclosure** to the registered electors." *Id.* (emphasis added); *see* C.R.S. § 1-40-107(3)(b) (title "shall correctly and fairly" express the ballot measure's true intent and meaning).

Regardless, the needed addition to the titles would add very few words. One other clause consisting of 13 words could read, "applying these requirements to political subdivisions including school districts, special districts, and instrumentalities."

Second, the Board states, "**It should be obvious to any voter** that 'local government' is shorthand for any political subdivision of the State—whether a county, municipality, school district, special district, or other similar entity—that is accountable to voters through periodic elections." Title Board Opening Brief at 9 (emphasis added). The Board cites no legal or factual support for its argument.

This bare assertion runs counter to the Court's own observations about the meaning of "local government." In *Regents of the Univ. of Colo. v. Students for Concealed Carry on Campus, LLC*, 2012 CO 17, 271 P.3d 496, this Court reviewed a statute that, among other things, prohibited "local governments" from

negating state law that allowed for concealed carry of firearms. The Court assessed public entities that are "**typically considered** a 'local government,'" pointing to C.R.S. § 24-32-102. *Id*. at ¶22 (emphasis added). That statute had the purpose of "defining[2] a 'local government' as 'all municipal corporations, quasi municipalities, counties, and local improvement and service districts of this state'." *Id*.

Contrary to the Title Board's position here, the public entities that are "typically considered" to be "local governments" – including most likely by persons who consider signing the Initiative #169 petition or who cast votes on it – do not include school districts, special districts, or instrumentalities. Thus, it would not be apparent to a voter who is unfamiliar with this measure that these other public entities are included in the title's reference to "local government."

As noted in Objector's Opening Brief, voters who adopted other measures pertaining to "local government" in previous election cycles have done so in ways that more narrowly define that phrase than does Initiative #169. Objector's Opening Brief at 12-14. This Court may consider those other initiatives, as voters adopting a ballot measure are subject to the "presumption that all laws are passed

[2] The Court specifically used "defining" here, even though the statute uses "including."

with knowledge of those already existing." *City & County of Denver v. Rinker*, 366 P.2d 548, 550 (1961).

Likewise, voters who will consider 2018 initiative petitions addressing "local government" will see "local government" narrowly defined and described in the ballot title set for Initiative #66. Objector's Opening Brief at 15-17. "The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal." *In re Title, Ballot Title & Submission Clause, and Summary for Initiative 2001-2002 #21 & #22*, 44 P.3d 213, 222 (Colo. 2002). Therefore, voters' institutional knowledge and their contemporary awareness are both pertinent in testing whether the Board fulfilled its statutory duties.

In this latter regard, it is appropriate – and even required – that the Board consider other ballot measures that could appear on the same ballot. For instance, ballot titles "shall not conflict with those selected for any petition previously filed for the same election." C.R.S. § 1-40-107(3)(b). Such a conflict becomes problematic if the Board has not used the titles to distinguish one measure from another. *See In re Title, Ballot Title & Submission Clause, and Summary for "Fair Treatment of Injured Workers Amendment,"* 873 P.2d 718, 722 (Colo. 1994). And an overlap between initiatives proposed for the same election is ripe for consideration by this Court if, as here, both petitions have been approved for

circulation. *In re Second Initiated Constitutional Amendment Respecting the Rights of the Public to Uninterrupted Service by Public Employees of 1980*, 613 P.2d 867, 870 (Colo. 1980) (court will only consider a potential conflict where both petitions are to be circulated for signatures). This Court can consider whether Initiative #66, whose title is clear about the limited meaning of "local government," will confuse voters about the meaning of the broader coverage of "local government" as used (but not clarified in the title) in Initiative #169. *See* C.R.S. § 1-40-107(3)(b) (Title Board must "consider the public confusion that might be caused by misleading titles").

The Board does not err when it sets a ballot title that uses a broad or inclusive descriptor for a term of art in the measure. *Election Reform Amendment, supra*, 852 P.2d at 34 (title was adequate where it used "political jurisdictions" to describe the state and its political subdivisions as well as local governments). The Board, however, does commit error when its title omits an aspect of an initiative that will affect voter understanding. *See In re Title, Ballot Title & Submission Clause, and Summary for Initiative 1999-2000 #104*, 987 P.2d 249, 259 (Colo. 1999) (ballot title was unclear where it failed to state that judicial recall petitions were sufficient if signed by electors in a number "not to exceed 5%" of the vote at the previous general election, thus setting an upper limit of signatures without designating a required minimum number or percentage of signatures).

As such, these titles must be returned to Board for correction.

CONCLUSION

The Title Board erred, and this Court should reverse one or both of its decisions in setting a title and in setting this title for Initiative #169.

Respectfully submitted this 31st day of May, 2018.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S ANSWER BRIEF** was sent this day, May 31, 2018, via Colorado Courts Electronic Filing to Counsel for the Title Board and via FedEx overnight to the Respondents as follows:

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