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COLORADO SUPREME COURT 2 East 14th Ave. Denver, Colorado 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2018) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #122 ("Limits on Local Housing Growth") **Petitioner**: Scott Smith, v. **Respondents**: Daniel Hayes and Charlotte R. Robinson, **and** **Title Board:** Melissa Polk; David Powell; and Julie Pelegrin.	▲ **COURT USE ONLY** ▲
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THE TITLE BOARD'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 these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,156 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).

> Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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/ *Emily Buckley*
EMILY B. BUCKLEY, 43002*
Assistant Attorney General

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STATUTES

The Colorado Title Board ("Board"), by and through undersigned counsel, hereby submits the following Opening Brief.

STATEMENT OF THE ISSUES

1. Whether the Proposed Initiative contains multiple subjects;
2. Whether #122 is incomplete or misleading.

STATEMENT OF THE CASE AND FACTS

Proponents Daniel Hayes and Charlotte Robinson ("Proponents") seek to circulate #122 to obtain the requisite number of signatures to place a measure on the ballot to enact a new article, § 29-4-736, in Colorado's revised statutes. The proposed initiative would allow electors in every city, town, and county to limit privately-owned residential housing by initiative and referendum beginning in 2021 and would limit privately owned residential housing growth in eleven specified cities and counties to one percent annually for 2021 and 2022, unless amended or repealed beginning in 2023. Record for Initiative #129, pp. 2–3, filed October 9, 2019 ("Record").

The Board conducted a public hearing on September 4, 2019 and set a title. Record, pp. 4–5. Petitioner Scott Smith ("Petitioner") filed a

motion for rehearing on September 11, 2019, *id.* at 6–7, and the Board denied that motion after holding a rehearing on September 22, 2019,[1] Record, p. 11. Petitioner then timely petitioned this Court.

SUMMARY OF THE ARGUMENT

The Board's actions in setting title for #122 should be affirmed. First, the title does not contain multiple subjects. Second, the title accurately summarizes the substance of the initiative and is not misleading.

ARGUMENT

I. Standard of review and preservation.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title, and Submission Clause for 2009-10 #45* ("*#45*"), 234 P.3d 642, 645, 648 (Colo. 2010). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title

[1] One of the designated representatives for # 122 did not appear at the rehearing scheduled for September 18, 2019. The Board voted to layover the rehearing until its next meeting on October 2, 2019. Record, p. 11.

properly reflects the intent of the initiative. *Id.*, at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water,* 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board only if the title is insufficient, unfair, or misleading. *In re #45*, 234 P.3d at 648.

The Court will "employ all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title, and Submission Clause for 2009-10 #91,* 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re Title, Ballot Title, and Submission Clause Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Petitioner preserved the arguments asserted here by raising them in the motion for rehearing. Record, pp. 6–7.

II. Standards governing titles set by the Board.

Section 1-40-106(3)(b), C.R.S., establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title, and Submission Clause for 2007-08 #62,* 184 P.3d 52, 58 (Colo. 2008). The statute provides:

> In setting a title, the title board shall consider the public confusion that might be caused by

> misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes/for" or "no/against" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed…within two weeks after the first meeting of the title board. …Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered "yes/for" (to vote in favor of the proposed law or constitutional amendment) or "no/against" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S.

III. The Board correctly found that #122 contains a single subject.

A. The single subject rule.

The Colorado Constitution provides that an initiative may relate to only one subject: "No measure shall be proposed by petition containing more than one subject …." Colo. Const., art. V, § 1(5.5). A proposed measure that "tends to effect or to carry out one general objective or purpose presents only one subject." *In re Title, Ballot Title*

& Submission Clause & Summary for 1999-2000 #25, 974 P.2d 458, 463 (Colo. 1999). In contrast, "to constitute more than one subject, the text of the measure must relate to more than one subject and it must have at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 441 (Colo. 2002) (quotations omitted).

When this Court reviews "the Title Board's single subject decision, [it] employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions. [It] will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re Title, Ballot Title, & Submission Clause for 2011-2012, #45*, 274 P.3d 576, 579 (Colo. 2012) (quotation omitted).

B. Application of the single subject rule to #122.

The Board correctly determined that #122 contains only one subject: limiting housing growth in Colorado. This Court's decision in *Matter of Title, Ballot Title & Submission Clause for 2017-2018 #4*, 395 P.3d 318 (Colo. 2017), governs here. In that case, this Court considered

a similar initiative aimed at limiting housing growth in Colorado ("#4"). The Court held that the central provisions of #4—which, similar to #122, placed limits on growth in certain jurisdictions; prohibited the issuance of building permits for a set time period; designated authority to electors within certain jurisdictions to enact, alter, and repeal regulations on housing growth; and established certain initiative and referendum procedures applicable to limiting housing growth—comprised a single subject. *Id*. at 320–322.

For the very same reasons articulated in *In re 2017-2018 #4*, #122 contains a single subject, i.e., limiting housing growth in Colorado. Subsection 2 of #122[2] designates who has authority to limit housing growth by initiative and referendum—namely, the "electors of every city, town, city and county, or local county, whether statutory or home rule." Record, p. 2. As this Court held in *In re 2017-2018 #4*, "the identification of who may act under an initiative is necessarily and properly connected to the initiative's central subject." *Id*. at 322 (citing *In re Title, Ballot Title, Submission Clause for 2013–2014 #90*, 328 P.3d

[2] Subsection 1 of #122 concerns definitions. Record, p. 2.

155, 161 (Colo. 2014) ("The designation of the government entities that hold the regulatory power authorized under the initiative[ ] is necessarily and properly connected to the central purpose of the measure[ ]."). Like the similar subsection in #4, here, subsection 2 is not a "disconnected or incongruous attempt to shift voting powers broadly, but rather is properly connected to the central goal of limiting housing growth in Colorado." *In re 2017–2018 #4*, 395 P.3d at 322 (internal quotation marks omitted).

Subsections 3, 4, and 5 of #122 limit privately owned residential housing growth in eleven jurisdictions to one percent annually for the years 2021 and 2022 and for subsequent years unless amended or repealed by initiative and starting in 2023; require these jurisdictions to allot building permits to ensure that the annual growth rate does not exceed one percent in the years 2021 and 2022; and permit an additional fifteen hundredths of one percent additional growth each for affordable and senior privately owned residential housing growth in these jurisdictions. *See* Record, pp. 3, 10–11. Again, *In re 2017–2018 #4*, is instructive. This Court held that subsections of #4 that limited

housing growth to one percent annually in ten jurisdictions until 2021 and prohibited permits for new residential housing units in the same jurisdictions until 2019 constituted a single subject. This Court reasoned that "[b]oth provisions "tend to ... carry out [the] one general objective" of limiting housing growth in Colorado by providing a means for reducing the number of new homes built. The provisions are thus interrelated and necessarily and properly connected to the subject of limiting housing growth in Colorado." *Id.* at 321 (citing *In re 2009–2010 #45*, 234 P.3d at 647 (finding provisions "seek[ing] to achieve the central purpose of the initiative" to be "directly connected and related" to the initiative's single purpose)). Here, too, subsections 3, 4, and 5 provide a means for limiting growth in Colorado and are thus directly connected and related to #122's single purpose.

Finally, subsection 6 establishes a signature requirement for proposals to regulate the growth of privately owned residential housing and outlines procedures for challenging signatures and the form and content of a petition. This subsection provides for the implementation of Initiative #122 and is thus "directly tied to the initiative's central

focus." *In re 2017–2018 #4*, 395 P.3d at 322. This Court approved a similar initiative and referendum provision in #4, holding that as it

> provides procedures for implementing the initiative and referendum requirements detailed in [earlier subsections] … [i]t is therefore interrelated with and properly connected to the other provisions of Initiative #4. It is also necessary to effectuate Initiative #4's central purpose of limiting housing growth, as it sets forth initiative and referendum procedures for entities seeking to regulate housing growth that may not have such procedures in place. Because subsection 4 is an "[i]mplementing provision[ ] that [is] directly tied to the initiative's central focus," it is not a separate subject and is properly included in the text of Initiative #4.

Id. (internal citations omitted). Like the correlating provision in #4, subsection 6 in #122 provides procedures for implementing #122's referendum requirements, is necessary to effectuate #122's central purpose, and is directly tied to the initiative's central focus.

Initiative #122 does not present either of the dangers the single-subject requirement seeks to prevent. As in *#4*, "[t]here is no threat of logrolling here, because those who favor limits on housing growth would also favor establishing procedures through which electors may implement those limits." *Id.* at 322. Further, "all aspects of Initiative [#122] are interrelated and point in the same direction—limiting

housing growth in Colorado. Likewise, voters will not be surprised by provisions "coiled up in the folds" of Initiative #122." *Id.* The language of #122 is not overly complex or lengthy, nor is its plain language confusing. *See id.* Thus, #122 complies with the single-subject requirement.

IV. The title set by the Board is not incomplete.

Petitioner claims that the title for #122 is incomplete, arguing that: (1) "the title fails to state that, for two years (2019-2021), there is no right of initiative or referendum on growth limits in the 11 named counties," and (2) "the title fails to identify what procedural requirements for initiatives and referenda are affected by this initiative." Pet's. Motion for Rehearing, Record, p. 4.

Petitioner's first argument is contradicted by the language of the title, which makes clear that prior to 2023, there is no right of initiative or referendum on housing growth limitations for the eleven cities and counties. The title provides that for the specified jurisdictions, the initiative would "limit[] privately owned residential housing growth countywide to one percent annually for the years 2021 and 2022 and for

subsequent years unless amended or repealed by initiative and referendum starting in 2023[.]" Record, pp. 10–11. If the ability to repeal or amend the one percent housing growth limitation *starts* in 2023, then it is clear that such rights are not available *prior* to 2023.

Petitioner's second contention, i.e., that the title fails to describe the procedural requirements for initiatives and referenda that are affected, fails for two reasons. *First*, the Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for 2001-02 #21 and #22*, 44 P.3d 213, 222 (Colo. 2002). Because including the procedural changes in the title would not assist voters and could lead to confusion, these details were not required.

And *second*, in setting titles, the Board may not ascertain the measure's efficacy, construction, or future application. *In re #45*, 234 P.3d at 645. Rather, title-setting is about distilling the proposed initiative down to a "reasonably ascertainable expression of the initiative's purpose." *Id.*, at 648, *citing In re Title, Ballot Title, and Submission Clause for 2009-10 #24,* 218 P.3d 350, 356 (Colo. 2009). In

this case, the Board's title plainly and briefly expresses the measure's core purpose.

CONCLUSION

For the foregoing reasons, the Court should affirm the Board's actions in setting the title for #122.

Respectfully submitted this 29th day of October, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado, this 29th day of October, 2019 addressed as follows:

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