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| SUPREME COURT OF COLORADO<br>2 East 14th Ave.<br>Denver, CO 80203 | |
| Original Proceeding<br>Pursuant to Colo. Rev. Stat. § 1-40-107(2)<br>Appeal from the Ballot Title Board | |
| In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #122<br>("Limits on Local Housing Growth")<br><br>**Petitioner:** Scott E. Smith<br><br>v.<br><br>**Respondents:** Daniel Hayes and Charlotte R. Robinson<br><br>and<br><br>**Title Board**: Melissa Polk, David Powell and Julie Pelegrin | ▲ COURT USE ONLY ▲ |
| Attorney for Scott E. Smith:<br><br>Thomas M. Rogers III, #28809<br>Recht Kornfeld, P.C.<br>1600 Stout Street, Suite 1400<br>Denver, Colorado 80202<br>303-573-1900 (telephone)<br>303-446-9400 (facsimile)<br>trey@rklawpc.com | **Case No. 2019SA000224** |

**PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #122 ("LIMITS ON LOCAL HOUSING GROWTH")**

## 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).

Choose one:

□ It contains _____ words.

X It does not exceed 30 pages.

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

X For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

□ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

*s/ Thomas M. Rogers III*
Thomas M. Rogers
*Attorney for Petitioner*

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## SUMMARY OF ISSUES PRESENTED

Whether Initiative #122 contains multiple subjects, contrary to Colo. Const. art. V, § 1(5.5).

Whether Initiative #122 contains elements that are not accurately described in the ballot title, that is: 1) whether the title fails to state that, for two years (2021-2022), there is no right of initiative or referendum on growth limits in the 11 named counties, and 2) whether the title fails to identify what procedural requirements for initiatives and referenda are affected by this initiative.

## STATEMENT OF THE CASE

A. Statement of Facts.

Daniel Hayes and Charlotte Robinson (the "Proponents") proposed Initiative 2019-2020 #122 ("Initiative #122" or "#122"). This measure would amend Colorado statute to establish multiple mechanisms that change the right of initiative, the rights of home rule jurisdictions and their voters, and the regulation of housing growth at the local levels. Among its various provisions, this initiative:

- Permits the electors of every city, town, city and county, or county to limit housing growth by initiative and referendum;

- Permits county voters by initiative and referendum to limit housing growth uniformly within the county, so that countywide limits are binding on all local governments;
- Establishes new procedures for housing growth initiatives and referenda at the local government level, whether such governmental units are statutory or home rule.

Initiative #122, §§ 1(2), (5)(a).

Moreover, Initiative #122 implements different, but very specific, restrictions that apply only to 11 named Front Range counties (the city and counties of Broomfield and Denver, as well as the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Elbert, Jefferson, Larimer, and Weld). Specifically, #122:

- Limits the growth of privately owned residential housing units to one percent (1%) annually starting in 2021;
- Suspends the statewide right of initiative to address housing growth matters for purposes of revising the 1% housing growth limitation for two years and allowing the exercise of initiative and referendum as to such issues only beginning in 2023; and

- Permits additional growth (by fifteen hundredths of one percent) of privately owned residential housing that meets the measure's definition of "affordable housing" and additional growth (by fifteen hundredths of one percent) of privately owned residential housing that meets the measure's definition of "senior housing".

Initiative #122, §§ 1(3),(4) and (5).

B. Nature of the Case, Course of Proceedings, and Disposition Below.

A review and comment hearing on #122 was held before representatives of the Offices of Legislative Council and Legislative Legal Services. Thereafter the Proponents submitted a final version of the Proposed Initiative to the Secretary of State for purposes of submission to the Title Board, of which the Secretary or her designee is a member.

A Title Board hearing was held on September 4, 2019, at which time a title was set for Initiative 2019-2020 #122. On September 11, 2019, Petitioner Scott Smith filed a Motion for Rehearing (the "Motion"), alleging that Initiative #122 contains multiple subjects, contrary to Colo. Const. art. V, § 1(5.5), and that #122 contains elements that are not accurately or adequately described in the ballot title. Mr. Hayes, one of the Proponents, also filed a Motion for Rehearing ("Mr. Hayes' Motion") alleging that #122 contains elements that are not accurately or adequately

described in the ballot title and alleging a deficiency in the Initial Fiscal Impact Statement for the measure. Rehearing was set for September 18, 2019. When one of the Proponents failed to appear on that date, the Title Board continued rehearing until its next meeting, scheduled on October 2, 2019. Rehearing was held on October 2, 2019, at which time the Title Board denied Mr. Smith's Motion and granted Mr. Hayes' Motion in part, to the extent that the Title Board made changes to the title.

The title set by the Board at rehearing follows:

*A change to the Colorado Revised Statutes concerning limitations on the growth of privately owned residential housing, and, in connection therewith, permitting the electors of every city, town, city and county, or county to limit privately owned residential housing growth by initiative and referendum; permitting county voters by initiative and referendum to limit privately owned residential housing growth uniformly within the county, including all or parts of local governments within the county; for the cities and counties of Broomfield and Denver and for the counties of Adams, Arapahoe, Boulder, Douglas, Elbert, El Paso, Jefferson, Larimer, and Weld: (1) limiting 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; and (2) requiring said counties and cities and counties to allot permits to build new privately owned residential housing units to ensure that the annual growth rate in the total number of such units does not exceed one percent in the years 2021 and 2022; permitting an additional fifteen hundredths of one percent growth each for affordable and senior privately owned residential*

*housing in said counties and cities and counties; and establishing procedural requirements for initiatives and referenda concerning proposals for local governments to regulate the growth of privately owned residential housing.*

## SUMMARY OF ARGUMENT

The Title Board set a title for Initiative #122, which contains multiple subjects, contrary to Colo. Const. art. V, § 1(5.5). Initiative #122 is the latest in a series of several filed by one of the Proponents, Mr. Hayes, that would make numerous statutory changes designed to limit the growth of privately owned residential housing in Colorado. This Court considered and rejected a single subject challenge to a predecessor of Initiative #122, initiative 2017-2018 #4. This brief does not challenge or ask the Court to revisit its holding in the 2017-2018 #4 case. Instead, it focuses on two provisions of Initiative #122 that were not present in 2017-2018 #4. It is these additional provisions that violate the single subject requirement. These new provisions would alter Initiative #122's one percent growth limit in eleven Front Range counties to 1) allow additional growth (by fifteen hundredths of one percent) of privately owned residential housing that meets the measure's definition of "affordable housing"; and 2) allow additional growth (by fifteen hundredths of one percent) of privately owned residential housing that meets the measure's definition of "senior housing". These two

provisions fall outside of the most generous statement of the single subject of Initiative #122, limiting the growth of privately owned residential housing in Colorado. Instead, they are intended to cater to supporters of more affordable or senior housing, even if those supporters might oppose Initiative #122's general limit on privately owned residential housing growth. This is exactly the kind of logrolling—combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions--Colorado law prohibits.

Additionally, the Title Board set a ballot title for Initiative #122 that fails to accurately describe the measure in two regards. First, the title fails to inform the voter that there is no right of initiative or referendum on growth limits in the 11 named counties for two years (2021-2022). The voters should be told in the title that a vote for the measure is a vote to temporarily surrender these important rights. Second, the title fails to inform the voter how the measure rewrites the initiative and referendum procedures applicable to any measure that would enact, repeal or amend any housing growth proposal in every county and local government in Colorado. The title's reference to "establishing procedural requirements" falls far short of the mark in that it does not inform the voter that the measure would

override the signature requirements in every county and municipal charter and ordinance.

## LEGAL ARGUMENT

### A. Standards of Review and Preservation of Issue Below.

#### 1. Standard of review for single subject.

Without interpreting the merits of proposed initiatives or analyzing how they will be applied, the Court must engage in a limited analysis of the meaning of each initiative to identify its subject or subjects. This limited inquiry is essential to determine whether the single subject requirement found in Colo. Const., art. V, §1(5.5), has been violated. *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 order to be determined a single subject, the Court must find 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).*

**2. Standard of review for defects in title.**

The Title Board must set titles that "correctly and fairly express the true intent and meaning" of the proposed initiative and 'unambiguouly state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1-40-106(3)(b). This Court's duty is to ensure that the titles "fairly reflect" the proposed initiative so petition signers and voters will not be misled into supporting or opposing a measure due to the words employed by the Title Board. *In re Proposd Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Burlington*, 830 P. 2d 1023, 1026 (Colo. 1992).

If the title clearly and concisely summarizes the measure's "central features," the Title Board will be deemed to have done its job, and the title will be upheld. *In re Title, Ballot Title and Submission Clause for 2007-2008 Initiative #61*, 184 P.3d 747, 752 (Colo. 2008). Where, however, the Board has omitted reference to, or mischaracterized, a central element of the measure, the title is legally deficient because voters will be misled, and the title must be sent back to the Board to be corrected. *See Matter of Proposed Election Reform Amendment*, 852 P.2d 28, 34-35 (Colo. 1993).

> The titles, standing alone, should be capable of being read and understood, capable of informing the voter of the major import of the proposal, but need not include every detail. They must allow the voter to understand the effect

> of a yes or no vote on the measure. When they do not, both the title board and this court fail in our respective functions.

*In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 217 (Colo. 2002).

**3. Preservation of Issues Below.**

These issues, both single subject and defects in the title, were presented to the Title Board at the rehearing and preserved for review. See *Motion for Rehearing on Initiative 2019-2020 #122 ("Limits on Local Housing Growth")* at 1-2.

B. The Initiative Contains Multiple Subjects.

The Title Board set a title for Initiative #122, which contains multiple subjects, contrary to Colo. Const. art. V, § 1(5.5). *In re Title for Initiaitve 2001-2002 #43*, 46 P.3d 438, 448 (Colo. 2002) (changing both petitioning procedures and substantive rights addressing matters of local concern violates single subject requirement).

Initiative #122 would: 1) enable the electors of various local governments to limit privately owned residential housing growth by initiative and referendum; 2) enable the electors of counties to limit privately owned residential housing growth uniformly in all local governments within such county by initiative and referendum; 3) limit privately owned residential housing growth to one percent

annually for the years 2021 and 2022 in eleven designated Front Range counties; 4) continue that annual growth limitation after 2022 unless amended or repealed by initiative or referendum; and 5) implement signature, form and content requirements for initiative and referendum proposals regulating the growth of privately owned residential housing. Initiative #122, §§ 1(2), (3) and (6).

This court considered and rejected a single subject challenge to a prececessor of Initiative #122 that contained very similar provisions in *In the Matter of the Title, Ballot Title and Submission Clause for 2017-2018 #4,* 395 P.3d 318 (Colo. 2017). In that matter, the Court held that the subject of Initiative 2017-2018 #4 was "limiting housing growth in Colorado". *Id.* at 321. This brief does not challenge or ask the Court to revisit its holding in the *2017-2018 #4* case. Instead, it focuses on two provisions of Initiative #122 that were not present in 2017-2018 #4. It is these additional provisions that violate the single subject requirement. These new provisions would alter Initiative #122's one percent growth limit in eleven Front Range counties to 1) allow additional growth (by fifteen hundredths of one percent) of privately owned residential housing that meets the measure's definition of "affordable housing"; and 2) allow additional growth (by fifteen hundredths of one percent) of privately owned residential

housing that meets the measure's definition of "senior housing". Initiative #122, §§ 1(4) and (5).

These two provisions fall outside of the most generous statement of the single subject of Initiative #122, limiting the growth of privately owned residential housing in Colorado. Instead, they are intended to cater to supporters of more affordable or senior housing, even if those supporters might oppose Initiative #122's general limit on privately owned residential housing growth. This is exactly the kind of logrolling—combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions--Colorado law prohibits. *See In the Matter of 2017-2018 #4*, 395 P.3d at 321.

Mr. Hayes, one of the Proponents of #122, in effect conceded that the measure's higher limit on affordable housing will not limit or reduce affordable housing, but instead will lead to an "increase in this type of construction." Mr. Hayes Motion for Rehearing, p. 1. Indeed, in his Motion for Rehearing, Mr. Hayes sought to have this "fact" included in the Initial Fiscal Impact Statement for the measure. For what reason? Likely so that he and the campaign for the passage of Initiative #122 could point to the authoritative and neutral Legislative Council Staff's Financial Impact Statement as evidence that Initiative #122 would lead to

an increase in the construction of affordable housing. Not only is an increase in affordable housing a subject not necessarily or properly connected to the subject of Initiative #122 (limiting the growth of privately owned residential housing), it is included to appeal to supporters of affordable housing. The same argument applies to the higher limit for senior housing. This kind of gamesmanship—including a provision to obtain a "yes" vote from those who might otherwise oppose the measure—violates the single subject requirement. *Johnson v. Curry*, P. 374 P. 460, 468 (Colo. 2016)(holding that measure violated single subject requirement where it included a second subject that might attract a "yes" vote from voters who might oppose the initiative's other provisions).

Adding to Initiative #122 provisions that are appealing to proponents of affordable and senior housing would provide an important benefit to the campaign in support of the measure as these constituencies would otherwise tend to oppose it. Initiative #122 would limit privately owned residential housing growth. Under the fundamental economic concept of supply and demand, when supply is constricted, prices increase. The upward pressure on housing prices Initiative #122 would likely cause would be at odds with the interests of affordable and senior housing proponents who are concerned with keeping housing prices as low as possible for those who need less expensive (affordable) housing and seniors who

typically have less income as retirees. *See Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 38 (Colo. 2000)(observing that under dynamics of supply and demand, rent control could negatively impact quality and quantity of affordable housing). The affordable and senior housing provisions of Initiative #122 violate the single subject requirement because they are not necessarily or properly connected to the subject of limiting housing growth and because they put "voters in the position of voting for some matter they do not support to enact that which they do support." *Howes v. Brown*, 235 P.3d 1071, 1079 (Colo. 2010)(*quoting Gonzalez-Estay v. Lamm*, 138 P.3d 273, 282 (Colo. 2006)).

Initiative #122 does not meet the single subject requirement of Colo. Const. art. V, § 1(5.5) and the Title Board did not have jurisdiction to set a title for the measure.

C. The Measure Contains Important Elements that are not Accurately Described in the Title.

**1. The title fails to sufficiently alert voters that the measure would temporarily deprive voters in 11 Front Range counties of their rights of initiative and referendum on certain measures.**

The title fails to state that, for two years (2021-2022), there is no right of initiative or referendum on growth limits in the 11 named Front Range counties. This failure is fatal to the title.

The Colorado Constitution reserves initiative and referendum powers "to the registered electors of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities." Colo. Const., art. V, § 1(9). These are important rights that should not be given up, even temporarily, lightly. Yet, the title for #122 only makes oblique reference to the fact that the measure would deprive Front Range voters of the right to any local initiative varying from the requirements of #122 for two years when it notes that the measure's limits will continue beyond 2022 "unless amended or repealed by initiative and referendum starting in 2023."

This deficiency could have been addressed through a short, affirmative statement along the lines that under the measure, Front Range voters could not exercise their local initiative rights during 2021 or 2022. Failure to include such language renders the title deficient and requires remand to the Title Board. The "title, standing alone, should be capable of being read and understood, capable of informing the voter of the major import of the proposal." *In the Matter of the Title,*

*Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, *supra* at 217.

**2. The title fails to alert voters that the measure would rewrite initiative and referendum requirements in every county and local government in Colorado.**

The title fails to inform the voter that the measure would rewrite the initiative and referendum procedures applicable to any measure that would enact, repeal or amend any housing growth proposal in every county and local government in the state. The title's reference to "establishing procedural requirements" for such measures is simply inadequate.

As noted above, the Colorado Constitution reserves initiative and referendum powers "to the registered electors of every city, town and municipality as to all local, special and municipal legislation of every character in or for their respective municipalities." Colo. Const., art. V, § 1(9). Municipalities are empowered to "provide for the manner of exercising the initiative and referendum powers as to their municipal legislation." Id. State statute provides default procedures for initiatives and referenda, but consistent with the cited constitutional provision, permits municipalities to establish "alternative procedures" through "charter, ordinance, or resolution." C.R.S. § 31-11-102.

Many Colorado municipalities have adopted alternative procedures. *E.g. Charter for the City of Pueblo, Colorado*, Art. 18 – Initiative and Referendum; *Charter of the City and County of Denver*, Art. VIII, Pt. 3 – Initiative, Referendum and Recall; *Charter of the City of Colorado Springs*, Art. XII – Recall, Initiative, and Referendum.

Typically, local procedures establish the number of valid signatures that must be collected to place an initiated measure on the local ballot, and the number required varies from municipality to municipality. *E.g. Charter for the City of Greeley*, Art. IX, § 9-2 (requiring valid signatures equal in number to ten percent of the total vote cast in the last general city election to submit a proposed ordinance to the voters); *Charter of the City and County of Denver*, Art. VIII, § 8.3.1(B) (requiring valid signatures equal in number to two percent of the total number of active registered voters to submit a proposed ordinance to the voters); *Charter of the City of Ft. Collins*, Article X, § 1(c) (requiring valid signatures equal in number to ten percent of the total ballots cast in the last regular city election to submit a proposed ordinance to the voters).

Initiative #122 would interfere with this constitutionally-mandated process by establishing a uniform state-wide signature requirement "for initiatives and referendums for enacting, repealing or amending proposals to regulate the growth

of privately-owned residential housing for local governments" and county governments. Initiative #122, § 1(5). For municipal elections, the requirement would be set at "five percent of the voters participating in the most recent general election" in the municipality. *Id.* For county elections, the requirement would be "five percent of the voters participating in the most recent election for secretary of state" in the county. *Id.* The measure would also mandate how challenges to petition form, content and signature sufficiency may be made in municipal and county elections. *Id.*

The title for #122 notes that the measure would "establish[] procedural requirements" for covered local elections, but it does not specify what the requirements are or even that they concern the number of signatures required to get a measure on the ballot. The title certainly does not tell the voters that the measure will supplant inconsistent local, voter-approved charter provisions setting the number of signatures required. The innocuous-sounding language concerning the establishment of procedural requirements is insufficient to put voters on notice of the substantial change the meaure would make to every inconsistent county and municipal charter and ordinance in Colorado. This failure renders the title deficient. *See Matter of Proposed Election Reform Amendment*, *supra* at 34-35.

The title for #122 suffers from the same defect as the title in *In re Matter of the Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565, 569 (Colo. 2016). There, the Court held that a title "specifying recall and successor election procedures for state and local elective officials" was defective in that it did "not advise voters what those procedures are." By way of example of the deficiency of the title there, the Court noted that failing to "advise voters that the number of signatures required to trigger a recall would drop from 25% of the votes cast as the last preceding election" to only "5% of active registered electors in the recall area." A second deficiency was the title's failure to notify the voter that the measure would reduce the number of signatures required on the petitions of potential successors in a recall election. *Id* at 569-570. By the same token, the failure of the #122 title to specify the "procedural requirements" that the measure would create is fatal to that title. The application of this authority is clear – changes in signature requirements may be material to voters and should be described in the title.

A few additional words could have avoided this problem. The title could have been written to note that the measure would set a consistent state-wide signature requirement for covered initiatives and referenda and that that

requirement would replace inconsistent provisions of local law. The Court should remand the title to the Title Board with instructions to add language to this effect.

## CONCLUSION

The title for Initiative #122 contains multiple subjects and fails to accurately describe the measure. The Court should reverse the decisions of the Title Board, declare the title deficient, and remand with directions to the Title Board to revise the title for #122 accordingly.

Respectfully submitted this 29th day of October, 2019.

*s/ Thomas M. Rogers III*
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## CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF ON PROPOSED INITIATIVE 2019-2020 #122 ("LIMITS ON LOCAL HOUSING GROWTH")** was sent this day, October 29, 2019, electronically via Colorado Courts E-Filing to counsel for the Title Board and via Federal Express overnight to the proponents at:

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