

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
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 2019- 2020 #284 Petitioner: JANETTE SUSAN ROSE v. Respondents: GREG KISHIYAMA and KEITH VENABLE and Title Board: THERESA CONLEY; DAVID POWELL; and JASON GELENDER	▲ COURT USE ONLY ▲
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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). It contains 2460 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

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 (R.___, p.___), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

X 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.

By: s/Martha M. Tierney

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Pursuant to Colo. Rev. Stat. § 1-40-107(2), registered Colorado elector Janette Susan Rose (“Petitioner”) respectfully submits this Answer Brief in opposition to the title, ballot title, and submission clause set by the Ballot Title Setting Board for Proposed Initiative 2019-2020 #284.¹

SUMMARY OF ARGUMENT

The Title Board erred in determining that Initiative #284 contains a single subject. The Initiative purports to prohibit state or local laws placing restrictions or otherwise limiting natural gas installation and use in homes and businesses. However, the Initiative does not define “restrictions” or “limit,” or categorize the types of restrictions or limits that apply. While the Initiative contains a non-exclusive list of uses of natural gas that may not be restricted or limited (cooking, hot water systems, generators and heating systems), the only stated exemption to any restriction or limit is “as required for safety purposes.”

State or local laws and regulations that may be characterized as “restricting” or “limiting” installation of natural gas use in homes or businesses and that are not

¹ The Respondents also filed proposed Initiative 2019-2020 #297, which is before this Court in Case Number 2020SA0138. These two initiatives are identical except that #284 is a statutory change and #297 is a constitutional change. The legal arguments are identical.

imposed for safety purposes cover a wide field of topics. There are numerous unrelated purposes grouped under the broad theme of “prohibiting laws restricting or limiting natural gas installation and use in homes and businesses.” The Initiative would prohibit new, and upend existing, state and local laws and regulations implementing policies that restrict or limit the installation and use of natural gas in homes and businesses including the uniform commercial code, energy conservation, public utility rates, consumer protection, construction and zoning, trademark and patent requirements, taxation, land use, energy efficiency standards, antitrust regulation, and more.

The Initiative violates the single subject rule because, by failing to define the critical terms “restrictions” and “limit,” the Initiative’s complexity and omnibus proportions are hidden from the voters, and the measure fails to inform voters of the policies its passage would affect.

Additionally, while the initiative purports to ban laws that “inhibit consumer choice through restrictions on the installation of natural gas utilization in homes and businesses...,” it will primarily drive the choices of others, such as builders, and apartment building owners, and state and local governments, who may be incentivized to use natural gas instead of more energy efficient energy sources. That will inhibit consumer choice for most consumers who buy or lease a home or

business with the heating system and appliances already installed. Each of these subjects is couched in a measure that at first read would appear to be expanding consumer choice about natural gas use – when in fact very much the opposite is true. This is the classic “coiled up in the folds” scenario whereby the voting public will be affirmatively misled by the language of the measure.

The title is unclear and misleading because it makes no mention of how the measure will restrict or limit a consumer’s ability to use or install natural gas. Common definitions of “restrictions” do not resolve this confusion. Nor does the title alert the voter to the measure’s interplay with home rule jurisdictions. The title also contains a non-exclusive list: “cooking, hot water systems, generators and heating systems” that may mislead rather than educate the voter. Finally, the measure prohibits state statutes, regulations and local governments from restrictions on natural gas use but also specifies that it only modifies, limits and supersedes conflicting state statute or regulation and not local government laws.

Titles and submission clauses should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal. Here, the title for Initiative #284 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear.

Initiative #284 should be set aside because the measure violates the single subject requirement and the title as set is misleading, therefore, the decision of the Title Board should be overturned.

ARGUMENT

I. THE INITIATIVE VIOLATES THE SINGLE SUBJECT REQUIREMENT.

A. Standard of Review.

The Title Board and the Respondents partially state the correct standard of review but leave out that this Court must “sufficiently examine an initiative to determine whether a measure violates the single subject rule[.]” and, “when necessary, characterize a proposal sufficiently to enable review of the Board's actions.” *In re Title & Ballot Title & Submission Clause for 2005-2006 # 55*, 138 P.3d 273, 278 (Colo. 2006) (Coats, J., dissenting) (collecting cases).

Respondents and the Title Board agree that Petitioner preserved this argument for appeal.

B. The Initiative Violates the Single Subject Requirement.

1. The Initiative Violates the Single Subject Requirement Due to Its Broad Scope.

“[T]he single subject requirement is intended ‘to prevent surprise and fraud from being practiced upon voters’ caused by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *Johnson v.*

Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132), 374 P.3d 460, 464 (Colo. 2016), quoting *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002).

In their Opening Brief, Respondents deny that voters may be surprised by multiple purposes coiled up in the folds of their measure. *Respondents' Open. Brf. at 13*. They assert that voters would not be surprised to learn that by voting for the initiative, “they would be voting to limit the government’s regulatory authority over natural gas.” *Id. at 14*. But as Petitioner examined in her *Opening Brief at pp. 8-12*, the restrictions and limits that the Initiative imposes on state and local authority are extraordinarily broad. The theme of the Initiative is to ban state and local laws restricting or otherwise limiting natural gas installation and use in homes and businesses. However, the Initiative does not thereafter define what it means to “restrict” or “otherwise limit” natural gas installation and use, categorize the types of state and local laws to be barred, or set forth the purpose or purposes of barring such state and local laws. Indeed, the only stated check on the scope of this theme pertains to “safety purposes.”

Due to its breadth, the Initiative will prohibit new, and upend existing, state and local laws and regulations implementing policies that restrict or limit the installation and use of natural gas in homes and businesses including the uniform

commercial code, energy conservation, public utility rates, consumer protection, construction and zoning, state trademark and patent requirements, taxation, land use, energy efficiency standards, state antitrust regulation, and more. These complex and omnibus proportions are hidden from the voter. In failing to describe or define the terms “restrictions” or “otherwise limit,” the Initiative fails to inform voters of the policies it changes. *See In re Initiative for 2005-2006 # 55*, 138 P.3d at 280-82. Voters might find that they unwittingly voted to remove all laws and regulations of any kind related to natural gas use and installation in homes and businesses except as required for safety purposes, despite only wishing to reduce burdensome regulations intended to discourage natural gas usage. These purposes are insufficiently connected to be to be considered a single subject.

Respondents and the Title Board contend that Petitioner’s arguments are merely effects of the measure that the Court should not consider at this stage. *Respondents’ Open. Brf. at p. 15; Title Board Open. Brf. at pp. 6-7*. Both arguments, however, ignore the breadth of the Initiative and highlight how the measure’s multiple subjects could result in voter surprise or fraud. *See Outcalt v. Bruce*, 959 P.2d 822, 827 (Colo. 1998). For example, Respondents posit that Petitioner suggests that the only way to meet energy efficiency requirements in building codes and comply with state greenhouse gas emission targets is to forbid

consumers from using natural gas in their homes and businesses. *Respondents' Open. Brf. at 15.* But Petitioner does not make that claim nor need she make it to demonstrate that the Initiative violates the single subject requirement. A state or local law need only “restrict” or “limit” - in the smallest or most indirect way so long as it is unrelated to safety purposes - natural gas installation or use in homes and businesses to be covered by the Initiative. Where a measure, such as the Initiative here, proposes to ban a broad cross section of laws based on its text, then the Court’s analysis need not stray beyond a facial reading. *See Outcalt v. Bruce*, 961 P.2d 456, 460 n.5 (Colo. 1998).

Because the Initiative accomplishes more than one purpose, and the many purposes are not connected to each other, the Initiative violates the single subject provision of Article V, Section 1(5.5) of the Colorado Constitution. *See In re Proposed Initiative on Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995).

2. The Initiative Violates the Single Subject Requirement Because It Says It Prohibits Inhibiting Consumer Choice but Does the Opposite.

In her Opening Brief, Petitioner illustrates how the Initiative purports to ban laws that “inhibit consumer choice through restrictions on the installation of natural gas utilization in homes and businesses...,” it will primarily drive the choices of others, such as builders, and apartment building owners, and state and

local governments, to name just a few, who may be incentivized to use natural gas instead of more energy efficient energy sources. *Petitioner's Open. Brf. at p. 12.* This additional subject is the classic “coiled up in the folds” scenario whereby the voting public will be affirmatively misled by the language of the measure. *See, e.g., In re Initiative 2001-2002 #43*, 46 P.3d at 446.

When considering the Initiative, voters could be enticed to vote for the measure in order to protect consumer choice while not realizing that passage of the measure would simultaneously achieve a purpose inhibiting the choices of others, such as builders, and apartment building owners, and state and local governments, to name just a few. *See Outcelt*, 959 P.2d at 827, see C.R.S. §1-40-106.5(1)(e)((II) (single subject requirement intended to “prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters”).

Respondents and the Title Board here again point to the effects of the measure and ask this Court to decline to examine the measure. Nonetheless, the Court must engage in some substantive inquiry while declining to predict legal consequences. *See Outcelt v. Bruce*, 961 P.2d 456, 460 n.5 (Colo. 1998). Where a measure, such as the Initiative here, claims to do one thing based on its text but instead does the opposite, then the Court’s analysis need not stray beyond a facial

reading. *See In re Initiative for 2005-2006 # 55*, 138 P.3d at 282 (single subject requirement guards against voters who might “have unwittingly voted” based on a headline purpose of an initiative without being aware of its additional subjects). Therefore, the Initiative violates the single subject requirement and should be returned to Proponents.

II. THE TITLE DOES NOT CORRECTLY AND FAIRLY EXPRESS THE TRUE INTENT AND MEANING OF THE MEASURE.

A. Standard of Review.

The Title Board and the Respondents state the correct standard of review for review of a title, including that “the title should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to intelligently determine whether to support or oppose such a proposal.” *Milo v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129)*, 333 P.3d 101, 105 (Colo. 2014). The Title Board and the Respondents leave out that this Court’s “role is to ensure that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.” *Hayes v. Spalding (In re Title, Ballot Title and Submission Clause for 2015-2016 #73)*, 369 P.3d 565, 569 (Colo. 2016).

The Title Board and the Respondents agree that Petitioner preserved this argument for appeal.

B. The Title and Submission Clauses Are Misleading.

“The title and submission clause should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re Title, Ballot Title & Submission Clause 2013-2014 #90*, 328 P.3d 155, 162 (Colo. 2014).

Petitioner submits that a typical voter, with little time to swim through the details and subtleties of existing state and local laws restricting or limiting natural gas installation and use, would have no way to garner from the titles, as set, the information necessary to make an informed decision as to the meaning of a “yes” or “no” vote.

Here, the title makes no mention of how the measure will restrict or limit a consumer’s ability to use or install natural gas. While Respondents seek to rescue their measure by pointing to dictionary definitions of “restriction,” *Respondents’ Open. Brf. at p. 20*, these definitions do not solve their misleading title problem. If restriction commonly means “to confine within bounds” or a “limitation or qualification,” *see id.*, then the common understanding of that term in no way “alert[s] voters to the fact that some of the proposed changes would significantly

alter” present law. *Hayes*, 369 P.3d at 570. Here, the title for Initiative #284 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear. See generally §1-40-106(3)(b); see also *In re Title, Ballot Title, Submission Clause & Summary Pertaining to a Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850-51 (Colo. 1994).

The Title Board must avoid setting a title using such overarching generalities about procedural changes that it does “not provide sufficient information to allow voters to determine intelligently whether to support or oppose the proposal.” *Hayes*, 369 P.3d at 570. The key details omitted from the titles include the measure’s interplay with home rule jurisdictions, and the important distinction that the measure prohibits state statutes, regulations and local governments from restrictions on natural gas use but only modifies, limits and supersedes conflicting state statute or regulation and not local government laws. Additionally, the title contains only a non-exclusive list: “cooking, hot water systems, generators and heating systems” that may mislead rather than educate the voter. Only by listing these details would the title “satisfy the clear title requirement.” *Id.* (citing C.R.S. §1-40- 106(3)(b)).

The Court should return the Initiative to the Title Board to meet this need.

CONCLUSION

The Petitioner respectfully requests that the Court overturn the actions of the Title Board with regard to Proposed Initiative 2019-2020 #284.

Respectfully submitted this 20th day of May 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May 2020 a true and correct copy of the foregoing **PETITIONER'S ANSWER BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

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