

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 #297

Petitioner: JANETTE SUSAN ROSE
v.

Respondents: GREG KISHIYAMA and NED
SOUTHWICK

and

Title Board: THERESA CONLEY; DAVID
POWELL; and JASON GELENDER

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Case No.: 2020SA0138

PETITIONER’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 C.A.R. 28(g). It contains 3583 words.

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

For the party raising the issue:

X 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:

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 Opening Brief in opposition to the title, ballot title, and submission clause set by the Ballot Title Setting Board for Proposed Initiative 2019-2020 #297.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board lacked jurisdiction to set a title for Initiative #297 for violating the single subject requirement due to its broad scope?
2. Whether the Title Board lacked jurisdiction to set a title for Initiative #297 for violating the single subject requirement because its plain language prohibits inhibiting consumer choice through restrictions on the installation of natural gas use, and it also constrains developers, builders, apartment building owners and state and local governments?
3. Whether the title is misleading because the title fails to inform voters of certain central elements of Initiative #297, including how the measure will restrict or limit a consumer’s ability to use or install natural gas, how the measure interplays with home rule jurisdictions; by containing a non-exclusive list: “cooking, hot water systems,

generators and heating systems” that may mislead rather than educate the voter, and by omitting that the measure specifies that it only modifies, limits and supersedes conflicting state statute or regulation and not local government laws?

STATEMENT OF THE CASE

This is an appeal from the Title Board’s setting of the Title for proposed Initiative 2019-2020 #297.¹ The Title Board conducted its initial public hearing and set the title for the Initiative on April 1, 2020. Petitioner timely filed her motion for rehearing on April 8, 2020. The Title Board considered the motion at its April 15, 2020 hearing and denied the motion for rehearing in full. Petitioner Janette Susan Rose filed a Petition for Review for Initiative #297 pursuant to C.R.S. §1-40-107(2) on April 22, 2020.

STATEMENT OF FACTS

Initiative #297 prohibits state statutes and regulations and local governments from inhibiting consumer choice through restrictions or other limitations on the installation and use of natural gas in homes and businesses, except as required for

¹ The Respondents also filed proposed Initiative 2019-2020 #284, which is before this Court in Case Number 2020SA0137. These two initiatives are identical except that #284 is a statutory change and #297 is a constitutional change. The legal arguments are identical.

safety measures. The measures provides a non-exclusive list of the focus of any such restrictions and limitations as: cooking, hot water systems, generators and heating systems in new construction or renovation. The Initiative also states that it shall modify, limit and supersede any conflicting state statute or regulation, but does not mention local government laws or regulations in this provision.

The Title set for Initiative #297 at the rehearing on April 15, 2020 reads:

An amendment to the Colorado constitution prohibiting state and local government restrictions or other limitations on the installation and use of natural gas except as required for safety purposes, including restrictions on the installation and use of natural gas in homes and businesses for cooking, hot water systems, generators, and heating systems.

SUMMARY OF ARGUMENT

The Title Board erred in determining that Initiative #297 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 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 the list goes on.

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. 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 #297 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear.

Initiative #297 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.

In reviewing Title Board decisions, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *Smith v. Hayes (In re Title, Ballot Title and Submission Clause for 2017-2018 #4)*, 395 P.3d 318, 320 (Colo. 2017), quoting *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90)*, 328 P.3d 136, 141 (Colo. 2014). "We will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.*, quoting *Cordero, supra*. Though neither addressing the merits nor potential applications of a proposed initiative, "we must examine their wording to determine whether the initiatives and their titles comport with the single subject and clear title requirements." *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016). "In

conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning.” *Id.*

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).

Petitioner preserved this argument in her Motion for Rehearing at pp. 1-2.

B. The Single Subject Requirement.

Colo. Const. art. V, §1(5.5)’s requirement that a proposed initiative contain only a single subject serves two functions. “First, the single subject requirement ‘is intended to ensure that each proposal depends upon its own merits for passage.’” *Johnson*, 374 P.3d at 465, quoting *In re Proposed Initiative on Public Rights in Waters II*, 898 P.2d 1076, 1078 (Colo. 1995). As with the similar requirement applicable to bills passed by the General Assembly, this “prevents proponents from engaging in ‘log rolling’ tactics, that is, combining multiple subjects into a single initiative in the hope of attracting support from various factions that may have different or even conflicting interests.” *Johnson, id., citing* §1-40-106.5(e)(I), C.R.S. (2019).

Second – and equally important – “the 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, id.*, quoting *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002). As noted in *In re 2001-2002 #43*, 46 P.3d at 442-43, the purpose is to “obviate the risk of ‘uninformed voting caused by items concealed within a lengthy or complex proposal’” (quoting *Public Rights in Waters II*, 898 P.2d at 1079). As is clear from the Court’s words, a measure can be “complex” without necessarily being “lengthy” – indeed a short and seemingly simple initiative, directed to a large and moderately complex body of law, can harbor the most pernicious surprises “coiled up in [its] folds.”

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

The Initiative proposes to amend the Colorado Constitution by adding the following language to article XVIII:

No state statute, regulation, municipality, county or local government shall inhibit consumer choice through restrictions on the installation of natural gas utilization in homes and businesses for cooking, hot water systems, generators and heating systems in new construction or renovation or otherwise limit a consumer’s ability to use or install natural gas, except as required for safety purposes. This section shall modify, limit and supersede any conflicting state statute or regulation.

The text of the measure, while short, contains multiple subjects coiled up in its folds. The theme of the measure appears to be the prohibition of state or local laws placing restrictions or limits on 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 imposed for safety purposes cover a wide field of topics. Indeed, a comprehensive list of such laws or regulations is too broad to list. A mere sampling of such laws includes the following: (1) C.R.S. §4-2-101 *et seq.* (Uniform Commercial Code); (2) C.R.S. §6-7-101 *et seq.*, (Residential Building Energy Conservation Act of 1977); (3) C.R.S. §40-3-101 *et seq.* (Regulations of Rates and Charges for Public Utilities); (4) C.R.S. §40-2-122 (Natural Gas – Deregulation of Supply – Voluntary Separation of Service Offerings- Consumer Protection); (5) C.R.S. §7-70-101 *et seq.* (Regulation of Trademarks); (6) C.R.S. §39-27-101 *et seq.* (Gasoline and Special Fuel Tax); (6) §6-4-101 *et seq.* (Colorado Antitrust Act of 1992); (8)

C.R.S. §20-20-101 *et seq.* (Local Government Land Use Control Enabling Act of 1974); (9) §40-5-101 (New Construction – extension – compliance with local zoning rules); and (10) §6-7.5-101 *et seq.* (Water and Energy Efficiency Standards)

This sampling contains a broad array of laws that could be deemed to place “restrictions” or “limits” on natural gas installation and use in homes and business.

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 the list goes on.

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. *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.

Here, the initiative's central theme, as expressed, contains incongruous or hidden purposes and bundles incongruous measures under a broad theme. *See id. at 279*. On the one hand, the breadth of a measure does not necessarily indicate a multiplicity of purposes. *Milo v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129)*, 333 P.3d 101, 105 (Colo. 2014). Nor must a measure provide “a full accounting of potential effects” to avoid the risk of voter surprise. *Bentley v. Mason (In re Title, Ballot Title & Submission Clause for 2015-2016 #63)*, 370 P.3d 628, 632 (Colo. 2016). Yet, this Court has never countenanced the deliberate embedding of unrelated purposes in a single measure in a manner likely to deceive or confuse the voting public. *Cf., Howes v. Brown (In re Title, Ballot Title & Submission Clause for 2009-2010 #91)*, 235 P.3d 1071, 1088 (Colo. 2010) (Coats, J., dissenting). Nor would this Court be expected to approve the embedding of disconnected purposes in a single measure to precisely the same effect (confusion or surprise) from the perspective of the voting public. The Initiative here presents that problem.

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

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, to name just a few, 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. *See, e.g., In re Title & Ballot Title & Submission Clause for Initiative 2001-2002 #43*, 46 P.3d 438, 446 (Colo. 2002).

The purpose of the single subject requirement is to “obviate the risk of ‘uninformed voting caused by items concealed within a lengthy or complex proposal’” *Id.* While the Initiative is not long, a measure can be “complex” without necessarily being “lengthy” – indeed a short and seemingly simple initiative, directed to a large and moderately complex body of law, can harbor the

most pernicious surprises “coiled up in [its] folds.” Here, Initiative #297 brings all these dangers.

Although the right of initiative is to be liberally construed, “[i]t merits emphasis that the proponents of an initiative bear the ultimate responsibility for formulating a clear and understandable proposal for the voters to consider.” *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 57 (Colo. 2008) (citation omitted).

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

A. Standard of Review.

In reviewing Title Board decisions, the Court “employ[s] all legitimate presumptions in favor of the propriety of the Board's actions.” *Cordero*, 328 P.3d at 141. “The Title Board is vested with considerable discretion in setting the title and ballot title and submission clause. [citations omitted] We will reverse the Title Board's decision only if a title is insufficient, unfair, or misleading.” *Id.* “In our limited review of the Title Board's actions, we do not address the merits of the proposed initiatives nor suggest how they might be applied if enacted.” *Id.* at 142.

“In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning.” *Id.* “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*, 333 P.3d at 105. While every detail of a proposal need not be spelled out, “[t]he Title Board must ‘set fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation.’” *Bentley*, 370 P.3d at 634, quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #256*, 12 P.3d 246, 256 (Colo. 2000). “[O]ur 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). Petitioner preserved this argument in his Motion for Rehearing at pp. 3-4.

B. The Title and Submission Clauses Are Misleading.

As discussed in Part I, above, Petitioner submits that the Initiative contains two or more separate and distinct purposes and subjects “coiled up in the folds” of the wording of the measure. These distinct purposes matter greatly and are not readily apparent from either the wording of the measure itself nor from the title (that faithfully replicates the wording of the measure). 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.

Even were the Court to conclude that the Initiative is confined to a single subject, that does not resolve the issue of whether its true intent and meaning is clearly and fairly expressed in the title. *Cf., Hayes*, 369 P.3d at 568-71. The fact that the title tracks the wording used in the measure is not enough to ensure that voters have adequate information “to determine intelligently whether to support or oppose such a proposal.” *Id.* at 570, citing *In re Title, Ballot Title, Submission Clause & Summary Pertaining to a Proposed Initiative on “Obscenity,”* 877 P.2d 848 (Colo. 1994). It is particularly important to ensure that the titles “alert voters to the fact that some of the proposed changes would significantly alter” present law. *Hayes*, 369 P.3d at 570.

Here, the title makes no mention of how the measure will restrict or limit a consumer’s ability to use or install natural gas. 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." *In re Title, Ballot Title & Submission Clause for Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). Here, the title for Initiative #297 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 Proposed Initiative on "Obscenity,"* 877 P.2d at 850-51.

Even if the title substantially tracks the language found in the Initiative itself, "the source of a title's language does not rule out the possibility that the title could cause voter confusion." *Id.* at 851; *Robinson v. Dierking (In re Title, Ballot Title & Submission Clause for 2015-2016 #156)*, 413 P.3d 151, 153 (Colo. 2016); *see also In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #44*, 977 P.2d 856, 858 (Colo. 1999) ("Here, perhaps because the . . . proposed initiative [itself] is difficult to comprehend, the titles . . . are not clear.").

CONCLUSION

The Petitioner respectfully requests that the Court overturn the actions of the Title Board with regard to Proposed Initiative 2019-2020 #297.

Respectfully submitted this 6th day of May 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2020 a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

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