

SUPREME COURT, STATE OF  
COLORADO

2 East 14th Avenue  
Denver, Colorado 80203

In the Matter of the Title, Ballot Title,  
and Submission Clause for Proposed  
Initiative 2023-2024 #91

**Petitioner:**

Dan Gates,

v.

**Respondents:** Carol Monaco and  
Mark Surls,

and

**Title Board:**

Theresa Conley, Jeremiah Berry, and  
Kurt Morrison.

▲ COURT USE ONLY ▲

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Case No.: 2023SA294

**PETITIONER'S ANSWER BRIEF**

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

It contains 3863 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 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).**

**For each issue raised by the appellant**, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

**In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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 or 28.1, and C.A.R. 32.**

/s/ Jason R. Dunn

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Petitioner Dan Gates, registered elector of the State of Colorado, through his undersigned counsel, submits his Answer Brief in this original proceeding challenging the actions of Title Board on Proposed Initiative 2023-2024 #91 (unofficially captioned “Prohibit Trophy Hunting”) (hereinafter “Proposed Initiative #91” or the “Initiative”).

### **SUMMARY OF THE ARGUMENT**

Respondents proposed Initiative #91 in an attempt to impose a total ban on the hunting of three distinct wildcats: mountain lions, bobcats, and lynx. Perhaps recognizing that a total ban on hunting would be unpopular, Respondents tried to characterize the Initiative as a prohibition on “trophy hunting.” But that label was inaccurate, as Proposed Initiative #91 would ban hunting for *any* purpose. Despite this inaccuracy, and other flaws in the proceedings, Title Board held that it had jurisdiction and set a title.

In his Opening Brief, Petitioner Dan Gates explained that the Title Board lacked jurisdiction to set a title because (i) the proposed measure is so vague and confusing that its substance cannot be ascertained or described as a single subject, (ii) the proponents made

impermissible changes after the review and comment hearing, and (iii) Proposed Initiative #91 contains multiple separate and distinct subjects. Petitioner further argued that even if Title Board had jurisdiction to set title, it erred in choosing a title that misrepresented the true nature of the Initiative.

After months of obfuscating the true purpose of the Initiative, Respondents finally admit in their Opening Brief to this Court that the Initiative is a total ban on hunting. *See* Respondents' Opening Br. 12 (characterizing the Initiative as a "prohibit[ion on] the hunting of wildcats"); *see also* Title Board's Opening Br. 19 (characterizing the Initiative as a "[p]rohibit[ion on] the hunting" of mountain lions, lynx, and bobcats). Respondents' belated admission is welcome, but it does not cure the flaws with the Title Board's treatment of the Initiative or the measure's deceptive nature.

As for their response to Petitioner's remaining concerns, Respondents and Title Board use their Opening Briefs to invoke the deference that this Court owes to the Title Board, asking this Court to rubber stamp the Initiative and ignore Petitioner's concerns over the

Title Board's jurisdiction and the accuracy of the title. But even though this Court owes the Title Board some deference, it still must independently review the Title Board's decision to ensure an initiative is not sent to the voters that would wreak havoc and confusion upon our state's statutory scheme.

Reviewed under the proper scrutiny, the flaws with the Title Board's proceedings become apparent. Respondents and Title Board offer no law, fact, or argument that can cure those flaws.

## **ARGUMENT**

### **I. OPPONENTS' BRIEFING DOES NOT CURE THE INITIATIVE'S MURKY SUBSTANCE.**

Title Board lacks jurisdiction to set title because the substance of Proposed Initiative #91 is so vague, confusing, and redundant that it is simply impossible to set a title that accurately reflects the measure's true effect on Colorado law.<sup>1</sup>

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<sup>1</sup> For clarity's sake, Petitioner Gates again asserts that he preserved this argument, as demonstrated in his motion for rehearing, (Pet. for Review, Ex. 1, at 14–15), and at the rehearing, *see generally* Title Board Rehearing Audio (also adopting Objector Blake's argument). Petitioner Gates also made this argument in his Opening Brief, Petitioner's Opening Br. 7–13.

Respondents and Title Board agree with Petitioner that when an initiative is so confusing that it would be impossible to understand its substance, the Title Board lacks jurisdiction to set a title. Petitioner’s Opening Br. 7–8; Respondents’ Opening Br. 11; Title Board’s Opening Br. 10–11. But Respondents and Title Board summarily conclude that the measure’s confusing nature is of no concern. Petitioner’s Opening Brief reveals their error.

In his Opening Brief, Petitioner highlighted six defects in Proposed Initiative #91, each of which makes it impossible to understand its substance:

1. The conflict between the substance of the measure and single subject as understood by Title Board, which is a ban on *all* hunting, and the purported single-subject of prohibiting only “trophy” hunting. Petitioner’s Opening Br. 8–9.
2. Proposed Initiative #91 mis-defines “trophy hunting” to include all hunting, rendering the Initiative inaccurate and confusing. *Id.* at 9–10.
3. Proposed Initiative #91 purports to create “exceptions” to the prohibition, when those activities would not fall within the prohibition anyway. *Id.* at 10.
4. Proposed Initiative #91 renders it unclear as to whether it is still lawful to kill bobcats to protect crops. *Id.* at 10–11.



5. Proposed Initiative #91 has an unclear effect on depredation laws under Title 35. *Id.* at 11.
6. Proposed Initiative #91 has an unclear effect on the Department of Agriculture's ability to consult Colorado Parks and Wildlife on depredation issues. *Id.* at 12-13.

Respondents address none of these concerns. Instead, they argue that the Title Board decided it had jurisdiction, so the Title Board must have had jurisdiction. *See* Respondents' Br. 11. But that *ipse dixit* does nothing to clarify Petitioner's genuine concerns about clarity.

Title Board's brief falls similarly short. Title Board agrees that it cannot set title when "a measure is so incomprehensible that its subject cannot be determined." Title Board's Opening Br. 12. Still, Title Board insists that Proposed Initiative #91 is not fatally flawed because it can be understood as prohibiting the hunting of mountain lions, bobcats, and lynx, with exceptions. *Id.* at 12. But Title Board's argument relies on a 10,000-foot view of the measure, and therefore ignores the detailed concerns Petitioner presented at the Title Board rehearing and in his Opening Brief.

Title Board ignores the conflict between Proposed Initiative #91's single subject and its substance. Since they filed the Initiative,

Respondents have been adamant that the Initiative’s single subject is to ban “the trophy hunting of mountain lions, lynx, and bobcats.”

(Legislative Council Review and Comment Audio 10:02:50. (emphasis added))<sup>2</sup>. But as Title Board held at the rehearing, it was inaccurate to describe the Initiative as a prohibition on trophy hunting. (Pet. for Review, Ex. 1, at 5 (eliminating the phrase “trophy hunting” from the title); Petitioner’s Opening Br. 8–9.) This irreconcilable conflict between the substance of the measure the purported single subject shows why the Title Board lacked jurisdiction to set title. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999).

Relatedly, there is a conflict between the single subject expounded by Respondents throughout the process and the single subject adopted by the Title Board. Respondents have characterized the Initiative as a ban on trophy hunting. (Legislative Council Review and Comment

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<sup>2</sup> Audio recording Legislative Council’s October 6, 2023 review and comment hearing can be found at <https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20231006/-1/14895> (hereinafter “Legislative Council Review and Comment Audio”).

Audio 10:02:50 (emphasis added).) But Title Board itself rejected this characterization, noting that the single subject could not be described as a ban on trophy hunting because such characterization is inaccurate. (Title Board Rehearing Audio 1:08:40).<sup>3</sup> The irreconcilable conflict between the proponents' claimed single subject and the single subject adopted by the Title Board demonstrates the Initiative's fatal unclarity.

Title Board fails to address Petitioner's argument that the measure mis-defines "trophy hunting." As the Title Board agreed, the Initiative cannot be characterized as a ban on "trophy hunting" because it would in fact prohibit hunting for any purpose. (*See* Pet. for Review, Ex. 1, at 3–5 (removing the phrase "trophy hunting" from the title because it mischaracterized the purpose and effect of the measure).) But even though the Initiative has nothing to do with "trophy hunting," the substance of the Initiative still invokes the phrase "trophy hunting"

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<sup>3</sup> Audio recording Title Board's November 1, 2023 Rehearing can be found at [https://csos.granicus.com/player/clip/409?view\\_id=1&redirect=true&h=f5e3695a13f2d9dc7e0d7e59229b461](https://csos.granicus.com/player/clip/409?view_id=1&redirect=true&h=f5e3695a13f2d9dc7e0d7e59229b461) (hereinafter "Title Board Rehearing Audio").

seven times. (Pet. for Review, Ex. 1, at 7–10.) The misuse of the phrase “trophy hunting” in the substance of the measure renders it impossible to understand. *See* Petitioner’s Opening Br. 9–10.

Given the Title Board’s failure to address these conflicts—and the four other concerns Petitioner raised at the rehearing and in his Opening Brief—the Court should hold that the measure is so unclear that Title Board lacked jurisdiction to set title.

**II. SECTION 1-40-105(1) REQUIRES PROPONENTS TO RESUBMIT SUBSTANTIAL CHANGES FOR REVIEW AND COMMENT.**

Respondents made changes after the review and comment hearing that are so substantial that the draft ultimately submitted to Title Board constituted an entirely new measure. Therefore, Title Board lacked jurisdiction to set title and should have rejected the Initiative.

In his Opening Brief, Petitioner Gates explained that this Court has interpreted section 1-40-105(1), C.R.S., to mandate that proponents resubmit their initiatives to Legislative Council when significant changes are made after the review and comment period. Respondents agree that “[a] review and comment process is required” if significant

changes are made after the review and comment period. Respondents' Opening Br. 8. While Respondents state in their Opening Brief that the changes made are minor, their counsel represented during the Title Board rehearing differently. (*See* Title Board Rehearing Audio 43:35 (arguing that the exceptions in the measure transform the prohibition from a general prohibition on hunting to a more targeted prohibition on trophy hunting).)

Title Board disagrees that significant changes mandate that the Initiative be resubmitted to Legislative Council, but that is because the Title Board is focusing on the wrong subsection. Title Board argues that resubmission was unnecessary because section 1-40-105(2), C.R.S., requires resubmission only when the revisions are substantial and not in response to Legislative Council's comments. Title Board's Opening Br. 7–10. Title Board would be correct if Petitioner's argument were based on subsection 105(2). But Petitioner is not basing his argument on subsection 105(2)'s review and comment provisions. *See* Petitioner's Opening Br. 13-14; (Pet. for Review, Ex. 1, at 3 n.4 (explaining that this challenge was based on subsection 105(1), which is distinct from

challenges based on subsection 105(2).) Instead, Petitioner’s argument is that this Court’s caselaw interpreting subsection 105(1) survived the amendment to subsection 105(2). Therefore, subsection 105(1) continues to impose an independent duty to resubmit major changes to Legislative Council, no matter if those changes were in direct response to comments by Legislative Council.

As explained in his Opening Brief, Respondents made substantial changes to Proposed Initiative #91 without resubmitting the Initiative to Legislative Council. *See* Petitioner’s Opening Br. at 17–19; Title Board’s Opening Br. 7 (admitting that the measure was altered after review and comment). Therefore, Title Board lacked jurisdiction to set title.

### **III. PROPOSED INITIATIVE #91 INCLUDES MULTIPLE DISTINCT SUBJECTS.**

Title Board also lacked jurisdiction to set title because Proposed Initiative #91 contains multiple distinct subjects.<sup>4</sup> Article V, § 1(5.5), of

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<sup>4</sup> Petitioner Gates preserved this issue in his motion for rehearing. (Pet. for Review, Ex. 1, at 15–16). The argument is also in his opening brief. (*See* Petitioner’s Opening Br. 19–30).

the Colorado Constitution requires that “[n]o measure shall be proposed by petition containing more than one subject . . . .” *See also* Petitioner’s Opening Br. 19–21. Respondents and Title Board agree that if an initiative contains more than one subject, Title Board lacks jurisdiction to set title. *See* Respondents’ Opening Br. 5; Title Board’s Opening Br. 13–14. The parties disagree as to whether Proposed Initiative #91 in fact contains multiple subjects.<sup>5</sup>

In its Opening Brief, Title Board conflates the three distinct animals, despite the animals’ unique taxonomy and treatment under Colorado law. Mountain lions are currently classified as “big game.”

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<sup>5</sup> Respondents argue that they should not have to respond to this argument because Petitioner did not identify the multiple subjects in his Petition for Review. Respondents’ Opening Br. 12. But that argument is unavailing for two reasons. First, section 1-40-107(2), C.R.S., does not require the Petitioner to lay out his arguments in detail in his petition for review. And Respondents identify no statutory text or caselaw indicating that Petitioner was required to lay out such details in his petition for review. Second, Petitioner presented the details of his single subject argument to Title Board. (Pet. for Review, Ex. 1., at 15–16.) Because Petitioner’s arguments must be confined to those raised before the Title Board, Respondents in fact had fair warning of Petitioner’s arguments. Indeed, Respondents managed to predict and respond to Petitioner’s arguments, so they suffered no prejudice. *See* Respondents’ Opening Br. 12.

C.R.S. § 33-1-102. In contrast, bobcats are classified as “furbearers,” and subject to an entirely different regulatory scheme, with different certification tests, quotas, and bag limits. *See* 2 COLO. CODE REGS. § 406-3:300 (2020). And federal law defines lynx as an endangered species, making it unlawful to hunt them for any purpose. 50 C.F.R. § 17 (2014).

Despite these differences, Respondents argue that these animals can be lumped together under the phrase “wild cats.” But a group of animals are not necessarily a single subject just because they can be grouped together using a broad term. For example, black bears, elk, and rattlesnakes could be grouped under the term “wildlife.” But despite the ability to be grouped together under a blanket term, these animals would not constitute a single subject, which is exactly what Respondents’ counsel conceded at the Title Board Rehearing. *See* Petitioner’s Opening Br. 24 (Respondents’ counsel admitting that black bears, elk, and rattlesnakes constitute distinct subjects). So even though mountain lions, bobcats, and lynx can be broadly called “wild cats,” they are distinct animals, and they constitute multiple distinct



subjects. Indeed, nowhere is the term “wild cats” used in the Initiative’s text, and the term also is not found in the title adopted by Title Board. Although the three animals could be colloquial denoted as “wild cats,” the term lacks significance both in wildlife regulations and for single-subject purposes

Relatedly, Petitioner explained in his Opening Brief that the Initiative’s elimination of Colorado Parks and Wildlife’s authority to regulate mountain lions as “big game,” which would thereby eliminate its authority to regulate mountain lions for issues unrelated to hunting, also constitutes a second subject. *See* Petitioner’s Opening Br. 25–26 (explaining how this alteration would eliminate Colorado Parks and Wildlife’s ability to propose rules for perimeter fencing and wildlife crossing zones for mountain lions). In response, Respondents summarily assert that removing mountain lions from the definition of “big game” “falls within [the] single subject” of prohibiting the hunting of wildcats. Respondents’ Opening Br. 12–13. But Respondents cannot explain why it is necessary to remove mountain lions from the definition of “big game” in order to prohibit hunting. Respondents could have drafted a

more targeted measure that altered the definition of “big game” only for purposes of hunting, while maintaining Colorado Parks and Wildlife’s ability to regulate the animals for unrelated purposes. They chose instead to draft a more sweeping change that changes laws unrelated to hunting.

Respondents fail to address the unrelated consequences that would flow from removing mountain lions from “big game,” such as limiting the ability of Colorado Parks and Wildlife to propose rules relating to fencing and animal crossings. *Id.* (not addressing the secondary effects raised by Petitioner at the Title Board Rehearing and in Petitioner’s Opening Brief).

As for Title Board’s response to Petitioner’s concerns about the removal of mountain lions from “big game,” Title Board misstates Petitioner’s argument. According to Title Board, Petitioner’s concern is that the Initiative “may affect the powers exercised by government under preexisting [law].” Title Board’s Opening Br. 15. Title Board brushes away this concern, as “[a]ll proposed . . . laws would have the effect of changing the status quo in some respect.” Title Board’s

Opening Br. 15. But Petitioner is not arguing that the Initiative necessarily implicates multiple subjects simply because it would change multiple laws. Petitioner is arguing that the changes themselves would have effects that span multiple subjects.

The case Title Board relies on proves Petitioner's point. In *Matter of Title, Ballot Title and Submission Clause for 2013-2014 #90*, the petitioner argued that the initiative spanned multiple subjects because it would alter constitutional provisions, the preemption doctrine, and the takings provision. 328 P.3d 155, 160 (Colo. 2014). This Court rejected that argument, noting that an initiative does not span multiple subjects just because it changes multiple laws. *See id.* Rather than focus on the number of laws the initiative would change, this Court focused on the nature of the changes themselves. *See id.* There, because "the initiatives affect these [laws] only inasmuch as they directly relate to the subject matter of the Proposed Initiatives," the initiatives passed single subject. *Id.* Proposed Initiative #91 fails that test. The Initiative would remove mountain lions from the definition of "big game," but the Initiative has not cabined that change to the subject of hunting.

Instead, the Initiative would change the definition for *all* purposes, hampering Colorado Parks and Wildlife’s ability to regulate mountain lions for purposes unrelated to hunting. *See* Petitioner’s Opening Br. 25–26 (describing the changes unrelated to hunting). Petitioners cannot now argue that these blanket alterations are necessary to further their goals.

Unlike the initiatives in *Matter of Title, Ballot Title and Submission Clause for 2013-2014 #90*, Proposed Initiative #91 would change Colorado law beyond what is “directly relate[d] to the [purported] subject matter of the Proposed Initiative[.]” *Id.* So the Initiative spans multiple subjects.<sup>6</sup>

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<sup>6</sup> Proposed Initiative #91 would further implicate the distinct subject of severing the collaboration between Colorado Parks and Wildlife and the Department of Agriculture. Petitioner raised this argument to the Title Board, Title Board Rehearing Audio 18:40, and in his Opening Brief, Petitioner’s Opening Br. 26–28.

**IV. RESPONDENTS AND TITLE BOARD FAIL TO ENGAGE WITH PETITIONER’S CONCERNS ABOUT THE ACCURACY OF THE TITLE.**

Even if Title Board did have jurisdiction to set title, its determination should be vacated because the title it set is inaccurate and misleading.<sup>7</sup>

Title Board must set a title that is “sufficiently clear and brief for the voters to understand the principle features of what is being proposed.” *In re Title, Ballot and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). “Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes.” *Id.* at 1099.

In his Opening Brief, Petitioner explained that the title set by the Title Board is misleading and incomplete in at least two ways:

1. The “exceptions” clause of the title mischaracterized these activities as exceptions, misrepresented to voters that these activities would be unlawful *unless* the Initiative passed, and

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<sup>7</sup> Petitioner Gates preserved this issue in his motion for rehearing, (Pet. for Review, Ex. 1, at 16–17), and by arguing at the rehearing additional clear title arguments, *see* Title Board Rehearing Audio 1:16:40.

failed to adequately describe the “excepted” activities. Petitioner’s Opening Br. 33–36.<sup>8</sup>

2. The title did not include a reference to the fact that the Initiative would hamper Colorado Parks and Wildlife’s ability to regulate mountain lions for purposes unrelated to hunting. Petitioner’s Opening Br. 37.

Respondents assert, without explanation, that the Court should ignore these defects because the “title expresses the measure’s central features: it prohibits the hunting of wildcats, identifies several exceptions to the prohibition, establishes violation of the prohibition as a misdemeanor, and sets penalties for persons convicted of violating the prohibition.” Respondents’ Opening Br. 15–16.

Respondents do not explain how the title can capture the Initiative’s “central features” even though it mischaracterizes the “exceptions” and fails to mention the severe limitation on Colorado

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<sup>8</sup> Petitioner Gates did not raise this argument in his Motion for Rehearing. But that is because this argument is based upon the flaws in the title as set by the Title Board. Petitioner Gates could not have made this argument before the Title Board Rehearing because Title Board had not yet set the flawed title. Once the Title Board set title, Petitioner orally raised the argument at the Title Board Rehearing, Title Board Rehearing Audio 1:16:30, and in his Opening Brief, Petitioner’s Opening Br. 33–36.

Parks and Wildlife’s ability to regulate mountain lions as “big game.”

Instead, Respondents argue that this Court should abstain from meaningful review because it owes the Title Board deference.

Respondents’ Opening Br. 16. What Respondents ignore, however, is that this Court has consistently vacated titles when the title was misleading, including when it omitted a key feature of the title. *See In re Title, Ballot and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d at 1098–99 (reversing the action of the Title Board when the title failed to articulate “that school districts and schools cannot be required to offer bilingual programs,” because that omission could confuse voters). For the reasons set forth in Petitioner’s Opening Brief, the current title does just that and must be vacated.<sup>9</sup>

Title Board similarly fails to address Petitioner’s concerns. Title Board states simply that

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<sup>9</sup> Respondents again argue that they should not be forced to respond to the substance of this argument because Petitioner did not identify the specific title concerns in his Petition for Review. Respondents’ Opening Br. 15. Again, that argument is unavailing because section 1-40-107(2), C.R.S., does not require the Petitioner to lay out his arguments in detail in his petition for review, and Petitioner presented the details of his title concerns to Title Board. (Pet. for Review, Ex. 1., at 16–17.)

Prohibiting the hunting of [mountain lions, bobcats, and lynx]—including redefining them as not “game” and not huntable, even with a license—is the very purpose of #91, accurately summarized in the concise title set by the Board.

Title Board’s Opening Br. 19. Title Board does not explain why the “exceptions” clause is not misleading. Nor does it explain how voters would know, based on the current title, that the Initiative would hamper Colorado Parks and Wildlife’s ability to regulate mountain lions for purposes other than hunting. Title Board’s summary assertion that the title is not misleading did not cure the flawed title below, and it should not be enough to sustain the flaws on appeal. Therefore, even if the Court decides that Title Board had jurisdiction to set title, this Court should vacate the Title Board’s title and remand with directions to set an accurate title that addresses Petitioner’s concerns. *See* Petitioner’s Opening Br. 38–40 (proposing titles that would cure the flaws that plague the current title).

### **CONCLUSION**

Petitioner Gates asks this Court to reverse Title Board’s denial of his Motion for Rehearing and hold that Title Board lacked jurisdiction



to set a title for three, independently sufficient reasons: (1) Initiative #91 was so broad and confusing that it would be impossible for Title Board to set an accurate title; (2) Initiative #91 was substantially changed without additional review and comment by Legislative Council; and (3) Initiative #91 contained multiple subjects. For those reasons, the Court should vacate the decision of Title Board and remand the proposal to the Respondents.

Even if the Court holds that Title Board did have jurisdiction to set title, the Court should nonetheless vacate Title Board's title because it is inaccurate, and direct Title Board to modify the title to address the concerns raised herein.

Respectfully submitted this 18th day of December, 2023.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 18, 2023, I electronically filed a true and correct copy of the foregoing PETITIONER'S OPENING BRIEF via the Colorado Courts E-Filing system which will send notification of such filing and service upon the following:

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