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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** ▲
Attorneys for Petitioner: Jason R. Dunn, #33011 David B. Meschke, #47728 Neil S. Sandhu, #56600 BROWNSTEIN HYATT FARBER SCHRECK LLP 675 15th Street, Suite 2700 Denver, CO 80202 Tel: 303.223.1100; Fax: 303.223.1111 jdunn@bhfs.com; dmeschke@bhfs.com; nsandhu@bhfs.com	Case Number: 2023SA294

PETITIONER'S OPENING 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 7,076 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 Opening Brief in this original proceeding challenging the actions of Title Board on Proposed Initiative 2023-2024 #91 (unofficially captioned "Prohibit Trophy Hunting").

ISSUES PRESENTED FOR REVIEW

A. Whether Title Board erred in deciding that it had jurisdiction to set a title because the measure is so broad and confusing that it is impossible for the Title Board to set an accurate title.

B. Whether Title Board erred in deciding that it had jurisdiction to set a title because the proponents substantially changed the measure after the review and comment hearing.

C. Whether Title Board erred in ruling that the measure contains a single subject.

D. Whether Title Board erred by setting a title that is misleading and does not accurately reflect the purpose or effect of the measure.

STATEMENT OF THE CASE

This original proceeding is brought pursuant to section 1-40-107(2), C.R.S., as an appeal from a decision of the Ballot Title Setting Board ("Title Board") to set a title on Proposed Initiative 2023-2024 #91 ("Proposed Initiative #91" or "the Initiative").

Proposed Initiative #91 purports to ban the "trophy hunting" of three distinct animals. Indeed, "Prohibit Trophy Hunting" is the measure's informal title and how its proponents characterized its single subject. But the true nature of the Initiative is far more convoluted. Trophy hunting is the hunting of an animal for sport and not for food. That practice is already illegal under Colorado law. *See* C.R.S. § 33-6-117(1) (making it a class 2 misdemeanor to take wildlife and abandon the carcass). The Initiative cannot be accurately described as a "ban" on trophy hunting when that practice is already unlawful.

The Initiative's text reveals its true purpose: to ban the hunting of mountain lions, bobcats, and lynx for *any* purpose, including for food. The Initiative defines "trophy hunting" as the taking of these animals regardless of whether the meat is harvested. (Pet. for Review, Ex. 1, at 7.) Having misleadingly defined the term "trophy hunting," the Initiative proceeds to criminalize the taking of these animals, even if the meat is harvested, with limited "exceptions." (*Id.* at 7–8.) The measure's true purpose, then, is not to ban the already unlawful practice of trophy hunting; it is to garner public support by invoking the

phrase "trophy hunting," only to ban an entirely distinct practice—hunting of these animals.

The Initiative's flaws only continue from there. The Initiative would impose a host of largely duplicative penalties. (*Id.* at 7–8.) It would eliminate the power of landowners to hunt bobcats without a license when the bobcats are causing harm to crops, real or personal property, or livestock, even though that activity is entirely unrelated to "trophy hunting." (*Id.* at 8–9.) And, more troubling, the Initiative would remove mountain lions from the definition of "big game," thereby eliminating the authority of Colorado Parks and Wildlife to regulate mountain lions. (*Id.* at 9–10 (removing mountain lions from the definition of Big game)); *see also* C.R.S. § 33-1-106(4)(a)(IV) (granting Colorado Parks and Wildlife the authority to propose rules concerning perimeter fencing to prevent ingress of big game).

Ostensibly with the goal of permanently banning any form of hunting mountain lions, bobcats, and lynx in Colorado, Respondents filed Proposed Initiative #91 on September 22, 2023. Following the required review and comment hearing pursuant to section 1-40-105(1),

Respondents filed an amended version of the measure with Title Board on October 6, 2023. Title Board first considered the measure on October 18, 2023, and approved the measure—albeit with some trepidation—and set title. Petitioner filed a motion for rehearing on October 25, 2023, arguing that Title Board lacked jurisdiction because (1) significant and substantive changes were made after the review and comment hearing, (2) the proposed measure was so vague and confusing that it would be impossible to set an adequate title, and (3) the measure implicated multiple distinct subjects. (*See* Pet. for Review, Ex. 1, at 11-16.) Petitioner further argued that even if Title Board had jurisdiction to set title, it erred in setting a title that was misleading and inaccurate. (*See id.* at 16–17.)

Title Board held a public hearing on November 1, 2023, where it granted Petitioners' motion to the extent it sought to remove the phrase

"trophy hunting" from the title, but denied the motion as to the other respects. (*See id*. at 5.)[1]

Petitioner Gates subsequently filed a timely petition for review in this Court on November 8, 2023.

SUMMARY OF THE ARGUMENT

Title Board erred in its treatment of Proposed Initiative #91, and its determination that is has jurisdiction to set a title and aspects of the title itself must be set aside. First, Title Board lacks jurisdiction to set a title because the proposed measure is so vague and confusing that its substance cannot be ascertained or described as a single subject. Second, Title Board lacks jurisdiction to set a title because the proponents made changes after the review and comment hearing that were so substantial that the subsequent final draft constitutes an entirely new measure. Third, Title Board lacks jurisdiction to set title because Initiative #91 contains Title Board Rehearing Audio multiple

[1] Audio recording of Title Board's November 1, 2023 rehearing can be found at https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html (hereinafter "").

separate and distinct subjects in violation of the single-subject requirement. Fourth, the title set by Title Board fails to accurately describe the measure because it incorrectly represents the nature of the so-called "exceptions" to proponents' proposed hunting ban. Given these flaws, the measure, and the title as adopted, cannot be presented to the voters.

Therefore, Petitioner requests that this Court determine that Title Board lacked jurisdiction to set a title for Initiative #91. If this Court decides to affirm Title Board's determination on jurisdiction, then Petitioner requests that this Court remand the measure back to Title Board to amend the title so that voters are not misled.

STANDARD OF REVIEW

When reviewing a challenge to Title Board's decision, this Court "employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board's action." *Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014) (alteration in original) (quotation omitted). 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, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 57 (Colo. 2008) (quotation omitted).

ARGUMENT

I. PROPOSED INITIATIVE #91 IS SO VAGUE, CONFUSING, AND REDUNDANT THAT TITLE BOARD LACKS JURISDICTION TO SET A TITLE.

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.[2] "The Colorado Constitution mandates that an initiative's single subject shall be clearly expressed in its title." *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016). The clear title standard requires that titles "allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or

[2] Petitioner Gates preserved this argument 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).

oppose the proposal." *Id.* The Board must consider the confusion that may arise from a misleading title and set titles that "correctly and fairly express the true intent and meaning" of a measure. *Id.* (quoting C.R.S. § 1-40-106(3)(b)). Based on these principles, if an initiative is so vague or confusing that its true purpose cannot be understood, then Title Board lacks jurisdiction to set a title. That is the case here.

Why Title Board lacks jurisdiction becomes immediately apparent when comparing how Respondents characterized the measure's single subject and the ultimate single-subject clause adopted by Title Board. Respondents initially attempted to characterize the single subject of the Initiative as a measure "to make unlawful the trophy hunting of mountain lions, lynx, and bobcats." (Legislative Council Review and Comment Audio 10:02:50.)[3] But, as Title Board recognized at the rehearing, the Initiative cannot be accurately described as prohibiting "trophy hunting" because the Initiative would actually prohibit *all*

[3] Audio recording Legislative Council's October 6, 2023 review and comment can be found at https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20231006/-1/14895 (hereinafter "Legislative Council Review and Comment Audio").

hunting of these three animals. (Pet. for Review, Ex. 1, at 5 (eliminating the phrase "trophy hunting" from the title).) In other words, there is an inherent and irreconcilable conflict between the purported single subject (trophy hunting) and the substance of the Initiative itself. Either Respondents do not understand how their proposed revisions to statute would actually operate or they are intending to mislead voters. Therefore, the fact that the Initiative's purported single subject does not accurately describe the effect of the measure is evidence that the Initiative is irreconcilably confusing and contradictory, and demonstrates why Title Board erred in assuming jurisdiction.

The Initiative's confusing nature and incomprehensibility only continue from there. The phrase "trophy hunting" is commonly understood as the "hunting of wild animals for sport, not for food."[4] But the Initiative confusingly defines "trophy hunting" to mean the hunting of certain animals for *any purpose*. (Pet. for Review, Ex. 1, at 7.) Thus, the measure cannot be described as a ban on all hunting because it

[4] *Trophy Hunting Defined*, SPCAI, https://www.spcai.org/take-action/trophy-hunting/trophy-hunting-defined (last visited Nov. 20, 2023).

claims to be targeted toward the more limited practice of trophy hunting. Conversely, the measure cannot be characterized as a ban on trophy hunting because it bans all types of hunting for these three animals. This misuse of a common phrase renders the Initiative incomprehensible.

Moreover, the Initiative purports to create "exceptions" for the protection of human life, livestock, and real or personal property, even though none of them are exceptions at all. (Pet. for Review, Ex. 1, at 7.) Acts taken "in the defense of human life, livestock, real or personal property, or a motor vehicle," cannot be properly characterized as "hunting," much less "trophy hunting." (*Id.*) As a result, the measure's texts falsely communicates that it is creating exceptions, when this activity would have been lawful regardless.

The Initiative's flaws continue. Section 1, subsection 2(a)(II)(A), provides an exception for the defense of life, livestock, and property. (*Id.*) But elsewhere, the measure *removes* protections for those who kill bobcats to prevent "damage to crops, real or personal property, or livestock." (*See id.* at 8–9.) The measure is thus substantively unclear

as to whether it is or is not lawful to kill bobcats in protection of certain property. Because it is unclear on this issue, it is impossible for Title Board to set a title that fairly characterizes the measure.

Legislative Council itself had concerns about another aspect of the Initiative. In its Review and Comment Memorandum, Legislative Council expressed that the Initiative was unclear as to "how the prohibition on trophy hunting affects the activities permitted by section 35-40-101 (2), C.R.S.," and suggested that the Initiative clarify this interaction.[5] Legislative Council's comments are not unfounded. The Initiative eliminates the ability to take bobcats for depredation purposes under Title 33. (Pet. for Review, Ex. 1, at 8.) But the Initiative was never amended to explain how it would affect the provisions governing the taking of bobcats for depredation purposes under Title 35. (*See generally id.*) The Initiative's impact on Title 35's depredation scheme remains unclear.

[5] *See Review and Comment Memorandum*, LEGISLATIVE COUNCIL, p.6 (Oct. 4, 2023) https://leg.colorado.gov/sites/default/files/initiatives/2023-2024%2520%252391.002.pdf.

Finally, the Initiative is unclear about its impact on the Department of Agriculture's ability to regulate mountain lions. Currently, Colorado Parks and Wildlife has the authority to regulate mountain lions as "big game." C.R.S. § 33-1-102(2). Because mountain lions fall under Colorado Parks and Wildlife's authority, the Department of Agriculture consults Colorado Parks and Wildlife before issuing regulations to control mountain lions as depredating animals. *See* C.R.S. § 35-40-101(2)(a) (the commissioner of the Department of Agriculture may consult with Colorado Parks and Wildlife as necessary before adopting rules for the control of the depredation of animals). But because the Initiative would remove mountain lions from the definition of "big game," (Pet. for Review, Ex. 1, at 9), it is unclear whether this change would restrict Colorado Parks and Wildlife's authority to regulate mountain lions, the Department of Agriculture's similar authority, or both. Given this lack of clarity, the Initiative is poised to push mountain lions into a gray area potentially outside the regulatory reach of both Colorado Parks and Wildlife and the Department of

Agriculture. It is impossible, then, to understand the effect of the Initiative on these agency's powers.

These shortcomings present significant vagaries, redundancies, contradictions, and misuses in the substance of Proposed Initiative #91. Given those flaws in the substance of Proposed Initiative #91, it is impossible to fix a title that clearly expresses the intent of the Initiative and allows voters to intelligently answer "yes" or "no" to the measure. Accordingly, the Board erred in finding it has jurisdiction to set a title.

II. PROPOSED INITIATIVE #91 WAS IMPERMISSIBLY ALTERED AFTER THE REVIEW AND COMMENT HEARING.

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 lacks jurisdiction to set title and should have rejected the Initiative.[6]

Section 1-40-105(1), C.R.S., mandates that proponents submit the original draft of their proposed measure to Legislative Council for

[6] Petitioner Gates preserved this argument in his motion for rehearing. (Pet. for Review, Ex. 1, at 13–14.)

review and comment. C.R.S. § 1-40-105(1). The purpose of this review and comment period is to "permit[] proponents of initiatives to benefit from the experience of independent experts in the important process of drafting language that may become part of this state's constitutional or statutory jurisprudence," and to permit "the public to understand the implication of a proposed . . . amendment at an early stage of the initiative process." *In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs*, 830 P.2d 963, 966 (Colo. 1992); *see also id.* at 968 (discussing the dangers of proponents altering their initiatives without resubmitting those initiatives for review and comment). To guard against such end runs, this Court has interpreted the review and comment provisions to mean that when proponents "substantially alter[] the intent and meaning of central features of the initial proposal" such that "the revised document

in effect constitutes an entirely different proposal," the proposal "must be [re]submitted to the legislative offices for comment." *Id.* at 968.[7]

While acknowledging at Initiative #91's rehearing before Title Board that Respondent had made numerous substantive changes in the measure's text after the review and comment hearing, members of the board intimated that section 1-40-105(2) excused Respondents from resubmitting *any* change to Legislative Council, no matter how substantial, so long as the change was in response to comments from Legislative Council. (Title Board Rehearing Audio 48:39.) This interpretation of section 1-40-105(2) is flawed.

Title Board's interpretation violates the purposes of review and comment. The required review and comment hearing ensures that language "that may become part of this state's constitutional or statutory jurisprudence" benefits from review by legislative experts. *In*

[7] Following the Supreme Court's lead, the legislature subsequently codified a protection against end runs. *See* C.R.S. § 1-40-105(2) ("If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the [Legislative Council], the amended petition must be resubmitted" for review and comment).

re Ltd. Gaming, 830 P.2d at 966. When proponents (who are often not legislative experts) make a substantial change to a proposal, there arises the possibility that the amended language creates new unintended conflicts or vagaries in our law. Such is the case here. For example, the proponents decided after review and comment to revise the Initiative to remove mountain lions from the Colorado Revised Statute's definition of "big game." (Pet. for Review, Ex. 1, at 9.) While that change was in response to one of Legislative Council's comments,[8] because Legislative Council has not rereviewed the Initiative, it has not had an opportunity to consider any unintended consequences that might flow from eliminating Colorado Parks and Wildlife's ability to regulate mountain lions as "big game." In order to ensure that initiatives benefit from review by legislative experts before the initiatives are sent to the voters, it is imperative that all substantial changes to initiatives be resubmitted for review by Legislative Council.

[8] *Review and Comment Memorandum*, LEGISLATIVE COUNCIL, p.6 (Oct. 4, 2023) https://leg.colorado.gov/sites/default/files/initiatives/2023-2024%2520%252391.002.pdf.

Here, the proponents made substantial changes to the Initiative without resubmitting the proposal for another review and comment hearing. First, the proponents added five new "exceptions" to the definition of "trophy hunting" that were not in the original version submitted to Legislative Council:

1. Bona fide research activities;
2. Actions authorized by the Commissioner of Agriculture to control depredating animals;
3. Euthanasia of ill animals for humane reasons by licensed veterinarians;
4. Actions authorized by the Division of Parks and Wildlife conducted by special license; and
5. Actions conducted by governmental employees or contractors for the purpose of protecting human health and safety.

These changes substantially alter the scope of Proposed Initiative #91's prohibition. Indeed, Respondents themselves admit that these exceptions are substantial. (*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).)

More concerning, though, is the fact that these amendments reach into an already complicated web of interconnected laws, and Legislative Council has not had an opportunity to review these amendments to investigate whether the proponent's chosen language creates undesirable conflicts in our laws.

Second, as already mentioned above, proponents amended Proposed Initiative #91 after the review and comment hearing to remove mountain lions from the definition of "big game" in section 33-1-102. That change may at first appear small, but it has far-reaching consequences that Legislative Council has not had a chance to contemplate. Colorado Parks and Wildlife currently has broad authority to regulate "big game," including:

- the authority to propose rules designed to protect big game, C.R.S. § 35-1-106(2);
- the authority to propose rules related to establishing wildlife crossing zones for big game, C.R.S. § 42-4-118(6); and
- the authority to propose rules concerning perimeter fencing to prevent ingress of big game, C.R.S. § 33-1-106(4)(a)(IV).

By removing mountain lions from the definition of "big game," Proposed Initiative #91 strips Colorado Parks and Wildlife of much of its

authority to regulate mountain lions. Because that jurisdictional strip was not in the original proposal, Legislative Council has not had an opportunity to review it for unintended consequences.

Therefore, to avoid unintended damage to the state's complex regulatory scheme, and maintain faith with the purposes and text of section 1-40-101 *et seq*., the Court should hold that Title Board lacks jurisdiction to set title on Proposed Initiative #91 because the Respondents impermissibly and substantially altered the text of the Initiative after the review and comment hearing, and vacate Title Board's title determination.

III. PROPOSED INITIATIVE #91 INCLUDES MULTIPLE DISTINCT SUBJECTS.

Title Board also lacks jurisdiction to set a title because Proposed Initiative #91 contains multiple distinct subjects.[9] Article V, § 1(5.5), of the Colorado Constitution requires that "[n]o measure shall be proposed by petition containing more than one subject . . . ." "If a measure contains more than one subject, such that a ballot title cannot be fixed

[9] Petitioner Gates preserved this issue in his motion for rehearing. (Pet. for Review, Ex. 1, at 15–16.)

that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls." Colo. Const., art. V, § 1(5.5); *see also* § 1-40-106.5 (statutory single-subject requirement). Under this requirement, there must be a "'necessary or proper' connection between the component parts of a proposed initiative." *See, e.g.*, *In re Title, Ballot Title and Submission Clause, for 2007-2008, #17,* 172 P.3d 871, 878 (Colo. 2007) (Eid, J., dissenting). An initiative violates the single-subject requirement when it has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title, Submission Clause, Summary for 2005-2006 # 73,* 135 P.3d 736, 738 (Colo. 2006) (quoting *In re Petition Procedures*, 900 P.2d 104, 109 (Colo. 1995)).

The single-subject requirement protects against proponents that may seek to secure an initiative's passage by joining together unrelated or conflicting purposes and pushing voters into an all-or-nothing decision. *See In re Initiative "Public Rights in Waters II*," 898 P.2d 1076, 1079 (Colo. 1995). Only when an initiative "tends to effect or to carry

out one general object or purpose, [is it] a single subject under the law." *Id.* Proposed Initiative #91 implicates multiple subjects.

A. Lumping mountain lions, bobcats, and lynx together creates a single-subject issue.

Proposed Initiative #91 groups together three distinct animals, which cannot be classified as a single subject.

The proposed initiative's most obvious feature is to define "[t]rophy hunting" to mean the intentional killing or shooting, for *any purpose*, of a mountain lion, bobcat, or lynx. (Pet. for Review, Ex. 1, at 7.) It then creates so-called "exceptions" from that definition, (*id.* at 7–8,) renders trophy hunting unlawful, (*id.* at 8,) and attaches penalties to trophy hunting, (*id.* at 8–9.)[10]

[10] Proposed Initiative #91 then presents a litany of duplicative changes to state law. It eliminates the availability of permits to hunt mountain lions. (*Id.* at 8.) It eliminates the ability of homeowners to kill bobcats when bobcats are causing harm to crops, even though that would be permitted under Section 1. (*Id.* at 8–9 .) It attaches further penalties to the hunting of these animals. (*Id.* at 9.) And it again attaches further penalties to the hunting of these animals. (*Id.*) These duplicative features further indicate that the measure is an unrefined, scatter-shot change to regulations, not a targeted adjustment to a single subject.

This regulatory scheme is premised on the idea that mountain lions, bobcats, and lynx can be understood as a single subject. But Colorado law elsewhere recognizes that these species are distinct animals in need of distinct treatment. Colorado law currently classifies mountain lions as "big game." C.R.S. § 33-1-102. In contrast, Colorado law classifies bobcats as "furbearers," and subjects them to an entirely different regulatory regime. 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). The disparate treatment indicates that these animals are distinct and separate, and regulating the hunting of them does not constitute a single subject.

Likewise, the scientific community treats mountain lions, bobcats, and lynx as separate and distinct subjects. Living organism are classified under the eight-level taxonomy: domain, kingdom, phylum, class, order, family, genus, species.[11] Mountain lions, bobcats, and lynx

[11] *Taxonomy*, BIOLOGY DICTIONARY (April 28, 2017) https://biologydictionary.net/taxonomy/.

diverge after the "family" level. Mountain lions belong to the "puma" genus.[12] Sharing a family, but not a genus, with the other animals renders it as similar to those animals as humans are to the rest of the great apes.[13] Bobcats and Lynx are more closely related to each other than they are to mountain lions—both belong to the same genus.[14] But bobcats and lynx are still distinct species. The two species diverged over 2.5 million years ago, during an ice age when there was still a land bridge between Eurasia and North America.[15] And by sharing a genus,

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[12] *A Revised Taxonomy of the Felidae*, SMITHSONIAN, p. 33, https://repository.si.edu/bitstream/handle/10088/32616/A_revised_Felidae_Taxonomy_CatNews.pdf?sequence=1&isAllowed=y (last visited Nov. 17, 2023).

[13] Phil Myers, *Hominidae*, ANIMAL DIVERSITY WEB, https://animaldiversity.org/accounts/Hominidae/ (last visited Nov. 17, 2023).

[14] *A Revised Taxonomy of the Felidae*, SMITHSONIAN, pp. 38, 41 https://repository.si.edu/bitstream/handle/10088/32616/A_revised_Felidae_Taxonomy_CatNews.pdf?sequence=1&isAllowed=y (last visited Nov. 17, 2023).

[15] *Bobcat*, NEW WORLD ENCYCLOPEDIA, https://www.newworldencyclopedia.org/entry/Bobcat#Taxonomy (last visited Nov. 17, 2023).

but not a species, with each other makes them as similar as wolves and chihuahuas.[16]

Notably, Respondents' counsel admitted at the rehearing that regulating the hunting of different animals cannot be reduced to a single subject, positing that "black bears, elk, and rattlesnake" would not be part of a single subject. (Title Board Rehearing Audio 46:08.) But Respondents fail to explain how while those animals are sufficiently distinct to constitute multiple subjects, mountain lions, bobcats, and lynx constitute a single subject. Four legs and cat-like facial features does not a single subject make.

Colorado law and scientific practice confirm that mountain lions, bobcats, and lynx are indeed separate and distinct animals. Therefore, Title Board erred in setting a title on a measure that lumped these animals together.

[16] *Canis*, iNATURALIST, https://www.inaturalist.org/taxa/42044-Canis (last visited Nov. 17, 2023) (noting that wolves and domesticated dogs share a family).

B. Alterations to the "big game" regime implicate a distinct subject from hunting.

Entirely apart from its attempts to collapse three different species into one umbrella, the Initiative takes a swing at an unrelated scheme: Colorado Parks and Wildlife's ability to regulate mountain lions as "big game."

Proposed Initiative #91 would strike mountain lions from the existing definition of "[b]ig game" that includes such species. (Pet. for Review, Ex. 1, at 9 (removing mountain lions from the definition of big game).) That seemingly small change would produce an avalanche of effects extending well-beyond hunting.

For instance, it would drastically limit—if not eliminate—Colorado Parks and Wildlife's ability to regulate mountain lions. Currently, Colorado Parks and Wildlife has the authority to regulate big game, including but not limited to the authority to:

- Propose rules concerning perimeter fencing to prevent ingress of big game. C.R.S. § 33-1-106(4)(a)(IV).
- Propose rules designed to protect native big game wildlife. C.R.S. § 35-1-106(2).
- Propose rules related to wildlife crossing zones for big game. C.R.S. § 42-4-118(6).

By striking mountain lions from the definition of big game, Proposed Initiative #91 would hamper the ability of Colorado Parks and Wildlife to produce sensible rules relating to the exclusion of mountain lions from private property, protection of mountain lions by public officials, and efficacious means by which mountain lions can cross roads. Even if Respondents are permitted to invoke a single subject as broad as "anything related to the hunting of certain cats," that subject would not begin to cover the aforementioned activities of Colorado Parks and Wildlife.

C. Severing collaboration between Colorado Parks and Wildlife and the Department of Agriculture implicates a distinct subject from hunting.

Other modifications proposed by the Initiative reveal yet another subject that is distinct from banning hunting: significant modification of Colorado's interagency collaboration on depredation regulations.

Under current law, the Department of Agriculture consults with Colorado Parks and Wildlife before issuing regulations to control depredating animals. *See* C.R.S. § 35-40-101(2)(a) (the commissioner of the Department of Agriculture may consult with Colorado Parks and

Wildlife as necessary before adopting rules for the control of depredation). The Initiative, however, would remove mountain lions from the definition of "big game," which, in turn, would remove mountain lions from Colorado Parks and Wildlife's regulatory purview. (*See* Pet. for Review, Ex. 1, at 9.) By doing so, the Initiative signals that the Department of Agriculture should cease to consult Colorado Parks and Wildlife on the issue of mountain lions once those animals are removed from Colorado Parks and Wildlife's reach. One of the effects of the Initiative, then, is to sever the collaborative relationship between the Department of Agriculture and Colorado Parks and Wildlife as to

mountain lions.[17] The termination of interagency collaboration is a distinct subject from the purported subject of hunting.

D. The "dangers" that underlie the single-subject doctrine are present.

Proposed Initiative #91's separate subjects lack a necessary or proper connection and present the very dangers the single-subject rule is designed to prevent.

First, the Initiative "combin[es] subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions—that may have different or even conflicting interests . . . ." *In Re Title, Ballot Title, Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012) (internal citations omitted).

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[17] The Initiative is also unclear as to whether it is amending the Department of Agriculture's depredation laws in Title 35. While the Initiative would eliminate bobcats from Colorado Parks and Wildlife's depredation scheme, (Pet. for Review, Ex. 1, at 8), the Initiative fails to explain whether or how this change would affect the Department of Agriculture's bobcat depredation laws. (*See Review and Comment Memorandum*, LEGISLATIVE COUNCIL, p.6 (Oct. 4, 2023) https://leg.colorado.gov/sites/default/files/initiatives/2023-2024%2520%252391.002.pdf (noting that it is unclear whether the Initiative would alter the Department of Agriculture's depredation scheme).) If the Initiative does alter Title 35's depredation scheme, the impact to said regulatory scheme implicates yet another subject.

This could lead to the Initiative's enactment where the individual separate subjects might fail. *See id.*

Some voters may oppose the hunting ban, but support the Initiative's provisions that would allow veterinarians to euthanize terminally-ill animals. Similarly, some voters may support a ban on the hunting of lynx given their endangered status, but oppose a ban on the hunting of mountain lions or bobcats. Under Proposed Initiative #91, such voters would be forced to vote against their interests, regardless of which side they supported or how they voted.

Thus, it is likely that Initiative #91 could be a measure "incapable of being enacted on [its] own merits" that nevertheless passes because it "join[s] multiple subjects . . . [that] will secure the support of various factions that may have different or even conflicting interests." *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002) (citation omitted).

Second, Proposed Initiative #91 also triggers the second danger of omnibus measures because voters will be surprised by, or fraudulently led to vote for, a "surreptitious provision 'coiled up in the folds' of a

complex bill." *In re Initiative 2001-2002 #43*, 46 P.3d at 442. Voters, who will undoubtedly focus on the hunting provisions, may never realize that the Initiative fundamentally changes the powers of Colorado Parks and Wildlife to regulate mountain lions.

Therefore, the Initiative violates the single-subject rule by "enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits," § 1-40-106.5(1)(e), and by causing "voter surprise and fraud." *In re Initiative 2001-2002 #43*, 46 P.3d at 442.

In sum, Proposed Initiative #91's disparate subjects are major provisions that lack a necessary and proper connection and present the very dangers at voters' expense that the single-subject requirement was designed to prevent.

IV. THE TITLE FAILS TO ACCURATELY DESCRIBE THE MOST IMPORTANT ASPECT OF THE MEASURE AND INCLUDES MISLEADING STATEMENTS.

Even if Title Board did have jurisdiction to set a title, its determination should be vacated because the title it set is inaccurate and misleading.[18]

A. The proposed title does not sufficiently inform voters on the scope and purpose of Proposed Initiative #91.

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.

At its first hearing, Title Board set the title as a " . . . change to the Colorado Revised Statutes concerning a prohibition on the trophy

[18] 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 generally* Title Board Rehearing Audio.

hunting of mountain lions, lynx, and bobcats . . .” (Pet. for Review, Ex. 1, at 3.) After a rehearing, Title Board removed the reference to “trophy hunting” in response to Petitioner’s comments. (*Id.* at 5.) Title Board then set the following ballot title and submission clause for Proposed Initiative #91:

> Shall there be a change to the Colorado Revised Statutes concerning a prohibition on the hunting of mountain lions, lynx, and bobcats, and, in connection therewith, prohibiting the intentional killing, wounding, pursuing, entrapping, or discharging or releasing of a deadly weapon at a mountain lion, lynx, or bobcat; creating eight exceptions to this prohibition including for the protection of human life, property, and livestock; establishing a violation of this prohibition as a class 1 misdemeanor; and increasing fines and limiting wildlife license privileges for persons convicted of this crime?

(*Id*. at 5.)

While Title Board was correct to remove the phrase “trophy hunting” from the title, the revised title still suffers from two independently fatal flaws. First, the title’s clause announcing “exceptions” would mislead voters about the purpose and effect of the Initiative. Second, the title fails to mention that the Initiative would

drastically limit the ability of Colorado Parks and Wildlife to regulate mountain lions as "big game."

1. The "exceptions" clause is misleading.

The title presents the following clause on "exceptions": "creating eight exceptions to this prohibition including for the protection of human life, property, and livestock." (*Id.* at 5.) That clause would mislead voters about the purpose and effect of the proposal.

To start, the title's "exceptions" clause inaccurately characterizes the carve-outs as "exceptions." An "exception" is a "case to which a rule does not apply."[19] For instance, the Colorado Rules of Evidence prohibit the admission of out of court statements offered to prove the truth of the matter asserted. Colo. R. Evid. 801, 802. But there is an exception to this rule if the statement was an "[e]xcited utterance." Colo. R. Evid. 803(2). In that case, a proponent can offer the excited utterance for the truth of the matter asserted—even though that would generally be prohibited by the hearsay prohibition—because the utterance meets an

[19]*Exception*, Meriam-Webster, https://www.merriam-webster.com/dictionary/exception (last visited Nov. 27, 2023).

exception. *See id.* "Exceptions" to prohibitions, then, are actions which would otherwise be unlawful, but are carved out.

The word "exception" gives the false impression that these activities would otherwise be banned by the prohibition. The title represents that the measure is creating "exceptions" to the "prohibition on the hunting of mountain lions, lynx, and bobcats," including the killing of the animals for self-defense and euthanasia by veterinarians. (*Id.* at 5.) But those excepted activities were themselves not hunting, (*id.* at 7,)[20] so they never would have fallen into the general prohibition on trophy hunting. (*Id.* at 7.) So it is inaccurate to describe them as "exceptions."

Further, the title represents that the proposal is "*creating* eight exceptions" to the prohibition. Based on the title, then, a voter might believe that unless Proposed Initiative #91 passes, killing these animals for the protection of human life, property, and livestock would remain unlawful. But the activities listed in Proposed Initiative #91's Section 1,

[20] *Hunt*, MERRIAM-WEBSTER ("To pursue for food or in sport") https://www.merriam-webster.com/dictionary/hunts (last visited Nov. 21, 2023).

2(a)(II) are already protected by law. So it is misleading to characterize the law as "*creating* . . . exceptions" to protect the right of people to protect themselves, their property, and their livestock from mountain lions, bobcats, and lynx. That activity is already lawful.

Third, the title does not accurately summarize the "exceptions" for voters. The title indicates that the proposal would create "exceptions" for "the protection of human life, property, and livestock," among other exceptions. Because the title specifically mentions exceptions related to the protection of life and property, and refers to the other exceptions in general terms, a reader would believe that the other exceptions fall within the scope of protections for life and property. *See Winter v. People*, 126 P.3d 192, 195 (Colo. 2006) (employing the interpretive canon of *ejusdem generis*). But the unnamed exceptions cover subjects entirely unrelated to the protection of life and property, such as authorized government actions, accidents, scientific research, depredation, and euthanasia by a veterinarian. (Pet. for Review, Ex. 1, at 7–8.) A reasonable reader of the title set by Title Board would be surprised to learn that the Initiative would permit the killing of these

animals for purposes that are not related to the protection of life or property.

And that surprise is unfair to voters who oppose hunting. A voter might generally oppose the killing of animals, but support the right of Coloradans kill animals *if and only if* it is necessary to defend their life and property. Such a voter would, based on the title set by Title Board, support the Initiative. But that same voter would be surprised to know that it would be lawful to kill a mountain lion, bobcat, or lynx under the Initiative for myriad reasons, including for scientific research. Because the title, as set, would mislead such a voter, it not sufficiently clear.

The "exceptions" clause mischaracterizes certain actions as "exceptions," misrepresents the current state of the law, and does not accurately preview the Initiative's carve-outs. Therefore, the title is not "sufficiently clear and brief for the voters to understand the principal features of what is being proposed." *In re Title, Ballot and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d at 1098.

2. The title fails to mention the removal of mountain lions from the definition of big game.

Independent of the flaws in the "exceptions" clause, the title entirely fails to mention a key feature of the proposal: the removal of mountain lions from the definition of "big game." As discussed above, the proposal would remove mountain lions from the definition of "big game," thereby limiting the ability of Colorado Parks and Wildlife regulate the animal. *See supra*, Section III.B. In turn, this removal may substantially limit the ability of the Department of Agriculture to collaborate with Colorado Parks and Wildlife on depredation issues. *See supra*, Section III.C. But the title entirely fails to mention that substantial regulatory shift. The failure to mention this "key feature of the initiative [in] the title[] is a fatal defect" because "that omission may cause confusion and mislead voters about what the initiative actually proposes." *Id.* at 1099.

B. The Court should remand the title with direction to Title Board to cure its defects.

As discussed above, *see supra* Section IV.A., the proposed title suffers from two core defects: (1) the "exceptions" clause does not

accurately describe the purpose and effect of the proposal, and (2) the title fails to disclose that the proposal would limit the ability of Colorado Parks and Wildlife to regulate mountain lions as "big game." The Court should remand the Initiative to Title Board so it can cure these defects.

1. The title should be returned to Title Board to cure the "exceptions" clause.

Title Board has at least two options to remedy the flawed "exceptions" clause. It could strike the "exceptions" clause so the title read:

> Shall there be a change to the Colorado Revised Statutes concerning a prohibition on the hunting of mountain lions, lynx, and bobcats, and, in connection therewith, prohibiting the intentional killing, wounding, pursuing, entrapping, or discharging or releasing of a deadly weapon at a mountain lion, lynx, or bobcat; ~~creating eight exceptions to this prohibition including for the protection of human life, property, and livestock;~~ establishing a violation of this prohibition as a class 1 misdemeanor; and increasing fines and limiting wildlife license privileges for persons convicted of this crime?

Alternatively, Title Board could modify the exceptions clause to eliminate the concerns raised above:

> Shall there be a change to the Colorado Revised Statutes concerning a prohibition on the hunting of mountain lions, lynx, and bobcats, and, in connection therewith, prohibiting the intentional killing, wounding, pursuing, entrapping, or discharging or releasing of a deadly weapon at a mountain lion, lynx, or bobcat; ~~creating~~ reaffirming eight already existing practices that are not hunting that would be exempt from ~~exceptions to~~ this prohibition including for the protection of human life, property, and livestock, accidents caused by vehicles, and actions that would allow for researchers, veterinarians, and government employees to perform their jobs; establishing a violation of this prohibition as a class 1 misdemeanor; and increasing fines and limiting wildlife license privileges for persons convicted of this crime?

Either of these changes would ameliorate the three flaws of the exceptions clause: (1) the misuse of the phrase "exceptions," (2) the false impression that these activities would be unlawful if the proposal did not pass, and (3) the failure to accurately describe the unnamed exceptions.

2. Title Board must insert a reference of the limitation on the authority of Colorado Parks and Wildlife.

On the failure to mention the change to "big game," Title Board could append an explanatory phrase to the last clause of the title. The title would then read:

> . . . ~~and~~ increasing fines and limiting wildlife license privileges for persons convicted of this crime; and eliminating the ability of Colorado Parks and Wildlife to regulate mountain lions as "big game" and collaborate with the Department of Agriculture on the regulation of mountain lions?

That change would ameliorate the current title's failure to convey to voters that the proposal would drastically alter the regulatory powers of Colorado Parks and Wildlife and the Department of Agriculture.

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 28th day of November, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2023, I electronically filed a true and correct copy of the foregoing PETITIONER'S OPENING BRIEF via the Colorado Courts E-Filing system and was served via electronic mail to the following:

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