SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, Colorado 80203	DATE FILED: November 28, 2023 4:00 PM
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 2023-2024 #91 ("Prohibit Trophy Hunting") **Petitioner: Dan Gates** **v.** **Respondents: Mark Surls and Carol Monaco** **and** **Title Board: Theresa Conley, Jeremiah Barry, and Kurt Morrison**	▲ COURT USE ONLY ▲
Attorneys for Respondents: Mark G. Grueskin, #14621 Thomas M. Rogers III, #28809 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com trey@rklawpc.com	**Case No. 2023SA294**

RESPONDENTS' OPENING BRIEF ON PROPOSED INITIATIVE 2023-2024 #91 ("PROHIBIT TROPHY HUNTING")

CERTIFICATE OF COMPLIANCE

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

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

Choose one:

X It contains 3,428 words.

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☐ For the party raising the issue:

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

X For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s Thomas M. Rogers III
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STATEMENT OF ISSUES PRESENTED

1) Were changes made by proponents to a ballot measure in response to questions raised in the review and comment process so substantial that a second round of review and comment is required?
2) Is the measure so broad and confusing that the Colorado Ballot Title Setting Board (the "Title Board" or "Board") could not set an accurate title?
3) Did the Title Board have jurisdiction to set a title for a ballot measure that addresses the single subject of prohibiting the hunting of wildcats?
4) Did the Title Board correctly comprehend the limited nature of this measure and thus set an accurate, clear, and fair ballot title?

STATEMENT OF THE CASE

A. Statement of Facts

Initiative #91 is a simple measure. It prohibits the hunting of the three wildcats found in Colorado (mountain lions, bobcats, and lynx), identifies several exceptions to the prohibition, establishes violation of the prohibition as a misdemeanor, and sets penalties for persons convicted of violating the prohibition. *See* Final Text of Initiative, Record for Initiative #91 ("R." or "Record") at 7-10 (appended to Petitioner's Petition for Review).

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

Mark Surls and Carol Monaco ("Proponents") proposed initiative 2023-2024 #91 ("#91" or the "Initiative"). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legal Services (the "Legislative Offices"). Thereafter, the Proponents submitted a final version of the Initiative to the Secretary of State for consideration by the Title Board. R. at 7-10.

A Title Board hearing was held on October 18, 2023 to establish the Initiative's single subject and set a title. On October 25, 2023, Dan Gates ("Petitioner") filed a Motion for Rehearing, alleging that the Board did not have jurisdiction to set a title for several reasons and that the title was misleading and did not fairly and correctly express the true meaning of the Initiative. Motion for Rehearing, R. at 11. Several other objectors filed similar motions for rehearing. Rehearing was held on November 1, 2023 at which time the Title Board made certain changes to the title for the Initiative and otherwise denied the Motions for Rehearing. The Board set this title for the Initiative:

> *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 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?

See R. at 5.

SUMMARY OF ARGUMENT

Petitioner argues that the Initiative has multiple subjects, presumably the same alleged subjects identified in his Motion for Rehearing, including: 1) prohibiting poaching (which Petitioner noted is already unlawful); 2) prohibiting hunting mountain lions as "big game"; 3) prohibiting hunting bobcats as "small game"; and 4) removing mountain lions from the category of "big game". Motion for Rehearing, p. 6, R. at 16. His argument fails on its face. All four of Proponent's alleged subjects fall within the stated single subject of the Initiative: to prohibit the hunting of wildcats.

Petitioner argues that the Initiative is "so broad and confusing that it would be impossible for the Title Board to set an accurate title." Petition for Rehearing of Final Action of the Ballot Title Setting Board Concerning Proposed Initiative 2023-2024 #91 ("Petition) at 3. On the contrary, the Initiative deals with a topic on which legislation is often crafted – a policy for protecting identified wildlife. Here, the

Board set a clear and concise title because it understood, as will voters, that the measure simply prohibits the hunting of wildcats.

Before submitting the Initiative for title setting Proponents made changes to the Initiative in direct response to issues raised in the review and comment process. While Petitioner conceded in his Motion for Rehearing that Proponents' changes were responsive to issues raised in the review and comment process, he argues that the changes altered the intent and meaning of central features of the Initiative so much that the review and comment process must be repeated. Motion for Rehearing, p. 3, R. at 13. This is not so. The pre-review and comment measure prohibits the hunting of wildcats unless an enumerated exception applies. The post-review and comment measure would do the same but, based on the memorandum from and on-the-record discussion with, legislative staff, proponents added certain exceptions. The intent, meaning and central features of the measure remain the same and a repeat of the review and comment process is not required.

Finally, contrary to Petitioner's argument, the Title Board correctly identified a single subject of the measure and set a clear and accurate title, expressing its central features.

The Title Board's decision should be affirmed.

LEGAL ARGUMENT

I. The Title Board had jurisdiction to set a title for #91.

a. Standard of review.

i. For single subject challenge.

A proposed initiative must contain no more than one subject. Colo. Const. art. V, § 1(5.5). To violate this requirement, a measure must contain at least two distinct and separate purposes that are not dependent upon or connected with each other. *In re Title, Ballot Title, Submission Clause for Initiative 2011-2012 No. 3*, 274 P.3d 562, 565 (Colo. 2012) (internal citations omitted). The topics included in such an initiative will be incongruous rather than properly connected. *Id.*

In reviewing a challenge to the Title Board's decision, the Court will employ all legitimate presumptions in favor of the propriety of the Board's actions. *Id.* Further, the Board's finding that an initiative contains a single subject is overturned only "in a clear case." *Id.* The single subject rule must be liberally construed to facilitate the fundamental right of Initiative. *In re Proposed Initiative 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998).

The single subject analysis is not one that stretches a measure beyond its express wording or guesses about the way in which it may be applied. The problem with an unbounded single subject review is clear:

> Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required by the single subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's constitution.

Id.

ii. For other jurisdictional challenges.

Petitioner makes two additional challenges to the Title Board's jurisdiction to set a title for the Initiative. First, Petitioner argues that changes made to the Initiative after review and comment and before submission for title setting altered "the intent and meaning of central features of the initial proposal" such that "the revised document in effect constitutes an entirely different proposal" thus requiring a second round of review and comment. Petitioner's Motion for Rehearing, p. 3, R. at 13, *citing In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs*, 830 P. 2d 963, 968 (Colo. 1992). The Court there offers "[s]everal basic principles" that govern its review of final determinations of the Title Board. *Id.* at 966. Most of those principles apply only to the Court's review of the title set by the Board, but one is broader and applies to the argument Petitioner

advances, namely that the Court "must indulge every legitimate presumption in favor of the Board's action." *Id.* (internal citations omitted).

Second, Petitioner argues that the Initiative is so broad and confusing that it would be impossible for the Board to set an accurate title. Petition at 3. On the rare occasion that the Court has entertained such a challenged, it applies the standard cited above, noting that "the actions of the Board are presumptively valid" (*In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999) (internal citations omitted)) and later "extending all presumptions in favor of the Board's determination" to set a title before holding that "where the Board has acknowledged that it cannot comprehend the initiatives well enough to state their single subject in the titles…the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent." *Id.* at 467.

b. A repeat of the review and comment process is not required, and the Board had jurisdiction to set a title for the Initiative.

Article V, § 1(5) of the Colorado Constitution and C.R.S. § 1-40-105(1) require that each measure proposed for the state-wide ballot must be submitted to the Legislative Offices for review and comment. C.R.S. § 1-40-105(2) permits proponents to amend their measure in response to comments made by the Legislative Offices in the review and comment process.

Here, before submitting the Initiative for title setting Proponents made changes to the Initiative in direct response to issues raised in the review and comment process. While Petitioner conceded in his Motion for Rehearing that Proponents' changes were responsive to issues raised in the review and comment memorandum (Petitioner's Motion for Rehearing, p. 3, n. 4, R. at 13), he argues that the changes were so substantial that the review and comment process must be repeated.

In other words, Petitioner admits that the Proponents followed the statutory process and stayed within the parameters of the interchange during the review and comment hearing. Thus, Petitioner argues that because Proponents followed the law, they cannot advance this initiative. That argument is flawed on its face and, if adopted by the Court, would lead to absurd results.

A repeat of the review and comment process is required only if the amended language "substantially alters the intent and meaning of central features of the initial proposal" such that "the revised document in effect constitutes an entirely different proposal" *Idaho Springs*, *supra*, 830 P. 2d at 968. This is not the case here.

The pre-review and comment measure prohibits the killing of wildcats unless one of several enumerated exceptions applies. The post-review and comment

measure would do the same but added four additional, minor exceptions in response to issues raised in the review and comment process. *See* Final Text of Initiative, Section 1, proposed C.R.S. § 33-4-101.4(2)(a) (II)(E), (F), (G) and (H), R. at p. 7-8. The intent, meaning and central features of the measure remain the same.

The additional exceptions simply exclude from the measure's prohibition circumstances that may result in the injury or killing of a wildcat other than hunting them for sport, taking into account other provisions in Colorado statute. For instance, subsections of C.R.S. § 33-4-102 permit the Colorado Division of Wildlife to issue special licenses for scientific research, to wildlife sanctuaries, and to zoos that may allow a wildcat to be captured or killed. C.R.S. § 33-6-205 empowers agents of departments of health to take actions that may include the capture or killing of a wildcat for the protection of human health or safety. C.R.S. § 35-40-101(2) empowers the Colorado Commissioner of Agriculture to authorize individuals to take certain actions to control depredating animals, which may include the capture or killing of a wildcat. Finally, the original version of the Initiative created an exception for the capture of a sick or injured wildcat for the purpose of providing it medical treatment pursuant to C.R.S. § 33-6-206(1)(d). The final version expanded this exception to permit a licensed veterinarian to euthanize an ill or injured animal for humane reasons.

The added exceptions are similar to the exceptions included in the original, pre-review and comment version of the Initiative. For instance, the original Initiative included an exclusion for the killing of a wildcat in the defense of human life, livestock, real or personal property, or a motor vehicle pursuant to C.R.S. § 33-3-106. *See* Final Text of Initiative, Section 1, proposed C.R.S. § 33-4-101.4(2)(a)(II)(A), R. at 7. This exception is very similar to the later-added exception for killing a wildcat pursuant to C.R.S. § 35-40-101(2) which empowers the Colorado Commissioner of Agriculture to authorize individuals to take certain actions to control depredating animals. The original Initiative included an exclusion for the capture of a wildcat for purposes of scientific research pursuant to C.R.S. § 33-6-206(a). This exception is very similar to the later-added exception for actions taken under C.R.S. § 33-4-102(2)(a) which permits the Colorado Division of Wildlife to issue a special scientific collecting license for the collection of wildlife species outside of established seasons and bag limits. In other words, instead of substantially altering the intent and meaning of central features of the initial proposal, the added exceptions are extensions of the original draft of this initiative.

These relatively minor changes merely harmonize the Initiative with existing law. Where current law permits a wildcat to be captured or killed for reasons other than hunting for sport, that activity may continue without violating the Initiative's

prohibition. The addition of exceptions that are consistent with the original draft of the measure and/or existing law did not substantially alter the intent and meaning of central features of the Initiative or render it an entirely different proposal.

The decision of the Board to set a title for the measure should be affirmed.

c. The Initiative is clear and easily understood and thus it was appropriate for the Board to set its title.

Petitioner argues that the Initiative is "so broad and confusing that it would be impossible for the Title Board to set an accurate title." Petition at 3. On the contrary, the Initiative is clear and straight forward. The Title Board was able to set a clear and concise title for the Initiative because it understood, as will voters, that the measure prohibits the hunting of wildcats in all but a few circumstances.

In one of the few cases in which the Court has found a measure so confusing that a title could not be set, the Title Board itself acknowledged that it could not "comprehend the initiatives well enough to state their single subject in the titles." *#25*, *supra*, 974 P.2d at 469. In this case, the Title Board expressed no such difficulty. It rejected Petitioner's jurisdictional arguments on a 3-0 vote and proceeded to set a title for the measure.

d. The Initiative contains only a single subject.

The Petition for Review alleges that the Initiative contains multiple subjects but offers no detail. Petition at 3. Presumably, Petitioner will offer the same list of alleged subjects identified in his Motion for Rehearing to the Title Board, including: 1) prohibiting poaching (which Petitioner noted is already unlawful); 2) prohibiting hunting mountain lions as "big game"; 3) prohibiting hunting bobcats as "small game"; and 4) removing mountain lions from the category of "big game". Motion for Rehearing, p. 6, R. at 16.

As an initial matter, Petitioner had an obligation to identify the specific single subject issues to be raised in this appeal. Instead, the single subject appeal was filed with only a general rubric: "the measure concerns multiple subjects." Petition at 3. Proponents should not be forced to guess about which single subject arguments are to be raised before this Court or needlessly brief arguments that will not be raised. Given the expedited briefing schedules for these matters, this specificity is necessary so counsel for Proponents and for the Title Board can materially advance legal argumentation before filing answer briefs.

Regardless, the various claims raised before the Title Board are not multiple subjects. They are not incongruous. Instead, they are connected by the single subject of the Initiative: to prohibit the hunting of wildcats. Prohibiting the hunting of

mountain lions falls within this single subject. Prohibiting the hunting of bobcats falls within this single subject. Removing mountain lions from the definition of animals which can be hunted as "big game" at C.R.S. § 33-1-102(2) falls within this single subject. All of these changes are necessarily and properly connected to the subject of prohibiting the hunting of wildcats.

If Petitioner's argument was accurate, the General Assembly could never regulate "wildlife" as a general category. But it does. *See* C.R.S. § 33-1-102(51) (defining "wildlife" as "wild vertebrates, mollusks, and crustaceans, whether alive or dead, including any part, product, egg, or offspring thereof, that exist as a species in a natural wild state in their place of origin, presently or historically…."); *see also* C.R.S. § 33-1-102(28.5-29.5) (defining "native wildlife," "nongame wildlife," and "nonnative wildlife" or "exotic wildlife" as various, unnamed species and subspecies of animals); *cf. Colo. Div. of Wildlife v. Cox*, 843 P.2d 662, 664 (Colo. App. 1992) (holding that red deer, Barbary sheep, ibex, and hybrids thereof all qualified as "non-native wildlife" or "exotic wildlife," subject to the Division's regulation). Therefore, Petitioner's single subject objection to three wildcats being addressed in one measure is legally incorrect and, if accepted here, would have dramatic and problematic ramifications for this entire statutory scheme.

The argument that the Initiative would prohibit poaching, which Petitioner argues is already unlawful, is inaccurate. Poaching is not a term used in Colorado statutes but is presumably a reference to laws and regulations prohibiting taking game in a time, place, or manner not permitted by law. Instead of duplicating existing prohibitions on such practices, the Initiative would prohibit the hunting of wildcats, even to the extent hunting these animals is lawful today. In any event, even if the argument were accurate, it is not clear how prohibiting poaching would constitute a separate subject.

The Title Board correctly found initiative #91 to have a single subject and its decision should be affirmed.

II. The titles set for #91 are clear and fair.

a. Standard of review.

The Title Board has considerable discretion in setting titles for ballot initiatives. *No. 3*, *supra*, 274 P.3d at 555 (internal citations omitted). This Court will only reverse the Board's designation if the titles are "insufficient, unfair, or misleading." *Id.* To make that determination, the Court examines the titles as a whole to determine if they are fair, clear, accurate, and complete. *Id.* The Court accords the language of the proposed initiative and the titles set by the Board their plain meaning. *Id.*

b. The titles set for #91 accurately and adequately describe the measure.

Again, the Petitioners do not specify which clear title issues they are appealing here. They force Proponents' and Board counsel to brief arguments that may never be raised.

Below, Petitioner raised certain arguments that the Board took into account in reframing the titles. What appears to be left are the arguments that the titles should state: (1) Initiative #91 removes mountain lions from the existing statutory definition of "big game;" and (2) bobcats are removed from C.R.S. § 33-6-107(9), so that it would no longer be legal to hunt them if they cause damage to crops, real or personal property. R. at 17.

Contrary to Petitioner's allegation, the Title Board set clear and accurate titles for the measure. The titles express 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.

As to the two changes to existing law identified above, Petitioner effectively seeks a broadening of the Court's review of ballot titles. This request ignores a long-held tenet in the review of Title Board decisions. "The board is not required to

describe every nuance and feature of the proposed measure." *In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991). "In setting a title, the Title Board is 'only obligated to fairly summarize the central points of a proposed measure, and **need not refer to every effect that the measure may have on the current statutory scheme**.'" *In re Title, Ballot Title & Submission Clause, for Proposed Initiative2013-2014 #90*, 2014 CO 63, ¶36; 328 P.3d 155, 164 (citation omitted) (emphasis added). Thus, the Board correctly focused on the key elements of the measure and did not weigh down the title with the details identified by Petitioner.[1]

The Title Board's decision should be affirmed.

CONCLUSION

The Title Board's decision should be upheld as it is consistent with the constitutional single subject requirement, the statutory clear title requirement, and the statutory review and comment process.

[1] Proponents respectfully reserve the right to respond to any single subject or clear title argument that was not identified in the Petition for Review but is raised in Petitioner's opening brief.

Respectfully submitted this 28th day of November, 2023.

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CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of the **RESPONDENTS' OPENING BRIEF ON PROPOSED INITIATIVE 2023-2024 #91** was sent electronically via Colo. Courts E-Filing System this day, November 28, 2023, to the following:

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