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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021-2022) Appeal from the Ballot Title Board	
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** ▲ Case No. 2023SA294
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THE TITLE BOARD'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

REPLY ARGUMENT

Proposed Initiative 2023-2024 #91 ("#91") is an easily understood measure that contains one subject: prohibiting the hunting of mountain lions, lynx, and bobcats. Minor changes to the initiative made in direct response to comments from the directors of the Legislative Council (the "directors") do not require resubmission, and none of Petitioner Gates's objections merit reversal of title.

I. Changes to 2023-2024 #91 made in direct response to comments from the directors of the Legislative Council do not require resubmission.

Gates argues changes made to #91 by the initiative's proponents were "substantial" and required resubmission because "it is imperative that all substantial changes to initiatives be resubmitted" to insure that "initiatives benefit from review by legislative experts before the initiatives are sent to the voters." Pet'r's Opening Br. at 16. This argument contradicts the plain text of the statute and three decades of precedent.

§ 1-40-105(2) is clear: amendments to initiatives require resubmission only if they are both (a) substantial and (b) not made "in direct response to the comments of the [directors]." *Id.* Precedent abundantly confirms this reading of the statute. *See In re Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 61 (Colo. 2008) (holding substantial changes made to an initiative "in direct response to comments" from the directors did not require resubmission); *In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 #256*, 12 P.3d 246, 251–53 (Colo. 2000) (holding changes were "made either in direct response to the directors' comments, or were not substantial, and thus section 1-40-105(2) did not require the amended petition to be resubmitted to the directors"); *In re Title, Ballot Title & Submission Clause, & Summary for 1997–98 #10*, 943 P.2d 897, 901 (Colo. 1997) ("[W]e hold that because the amendments to the Initiative made by the proponents after the legislative hearing were made in direct response to the comments of the directors . . . it was not necessary to resubmit the amended Initiative to the directors.").

All changes to #91 were made in direct response to the directors' comments, and Gates waived any argument to the contrary. Record, p 13 n.4 ("[Gates] is not arguing that these changes are not in direct response to comments made at the Review & Comment Hearing."). The only case cited by Gates, *In re Proposed Initiated Constitutional Amend. Concerning Ltd. Gaming in the Town of Idaho Springs,* (*"In re Ltd. Gaming"*), 830 P.2d 963 (Colo. 1992), offers no support for his position because it was decided before the General Assembly amended § 1-40-105(2) to clarify the circumstances requiring resubmission of a changed initiative.

Gates's argument from the "purposes of review and comment" is misplaced. Pet'r's Opening Br. at 15. "Where statutory language is clear and unambiguous, our analysis begins and ends with its plain meaning." *Kirkmeyer v. Dep't of Loc. Affs.*, 313 P.3d 562, 568 (Colo. App. 2011) (citing *Wells Fargo Bank, Nat'l Ass'n v. Kopfman*, 226 P.3d 1068, 1072 (Colo. 2010)). Gates made no argument—before the Title Board or in his opening brief—that § 1-40-105(2) is ambiguous. It is not. But even if

Gates had preserved such an argument, his interpretation would "thwart the intent of the constitution and implementing statutes" because "[p]roponents of an initiative [would be] extremely reluctant to amend their proposal to respond to meritorious comments of the legislative offices if such an amendment can be seized upon by their opponents as a way to derail the initiative." *In re Ltd. Gaming*, 830 P.2d at 974 (Mullarkey, J., dissenting). Gates attempts to seize on precisely such changes to prevent the Board from setting title on #91. As the safe harbor in § 1-40-105(2) now makes clear, however, "[s]uch clarifying amendments to initial drafts of initiatives are to be encouraged." *Id.* at 968.

Changes to #91 did not require resubmission, and the Board had jurisdiction to set title.

II. 2023-2024 #91 is clear enough for title to be set.

Gates argues the initiative is too unclear for the Board to set title because the text of #91 refers to "trophy hunting" while, in fact, it would

prohibit all hunting. This distinction is irrelevant to the Board's jurisdiction to set title.

"Trophy hunting," in #91, is a defined term meaning "killing, wounding, pursuing or entrapping" a mountain lion, lynx, or bobcat or "discharging or releasing any deadly weapon" at the same. Record, p 7. The title set by the Board defines "hunting" in exactly the same way: "prohibiting the intentional killing, wounding, pursuing, entrapping, and discharging or releasing of a deadly weapon at a mountain lion, lynx, or bobcat." *Id.* at 5. Under *Hayes v. Ottke*, an initiative is too broad and confusing for the Board to set title only if "the Board cannot comprehend a proposed initiative to state its single-subject clearly in the title." 2013 CO 1, ¶ 15 (quotation omitted). Here, the title set by the Board recites, verbatim, the actions that would be prohibited under #91, and summarizes the exceptions from those prohibitions. That the title describes the measure's effects accurately demonstrates that #91 is not so incomprehensible to prevent the Board from setting title.

Gates's remaining arguments—that the measure is unclear as to "whether it is or is not lawful to kill bobcats in protection of certain property," "how it would affect the provisions governing the taking of bobcats for depredation purposes," and its "impact on the Department of Agriculture's ability to regulate mountain lions,"—all concern #91's "efficacy, construction or future application." Pet'r's Opening Br. at 10–12; *see In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 10 (quotation omitted). They are not subject to review in this appeal and have no bearing on the Board's ability to set title. *See In re Title, Ballot Title, Submission Clause, & Summary for 1999–2000 #200A*, 992 P.2d 27, 30 (Colo. 2000) ("[T]he initiative's efficacy, construction, or future application . . . is a matter for judicial determination in a proper case should the voters approve the initiative.").

III. Gates's single subject arguments fail.

Gates's opening brief identifies two single subject objections, neither of which merit reversal of title.

First, Gates argues mountain lions, lynx, and bobcats are different animals and, ipso facto, separate subjects. Such a hairsplitting rule would caricaturize the single subject inquiry. *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 17 (explaining the Court "liberally construe[s] the single subject requirement both because of the Title Board's considerable discretion in setting the title . . . and in order to avoid unduly restricting the initiative process"). This Court routinely holds that an initiative satisfies single subject despite addressing a group of related nouns. *See, e.g.*, *id.* ¶ 2 (holding an initiative presents a "single subject, namely, the creation and administration of a Colorado preschool program funded by state taxes on nicotine and tobacco products (emphasis added)). Mountain lions, lynx, and bobcats are the three wild cats native to Colorado: nothing about their grouping is incongruous or surprising. *Id.* (explaining "an initiative's subject matter must be necessarily and properly connected rather than disconnected or incongruous").

Second, Gates argues that removing mountain from the definition of "big game" constitutes a distinct subject. Not so. An initiative is not "deemed to violate the single subject requirement because it may have different effects on other provisions of Colorado law." *In re Title, Ballot Title & Submission Clause for 2013–2014 #90*, 2014 CO 63, ¶ 8.

Preventing mountain lions from being treated or regulated as "game," (i.e., huntable) is the central purpose of #91. Gates's closely related argument, that removing mountain lions from the definition of "big game" will "in turn . . . remove mountain lions from Colorado Parks and Wildlife's regulatory purview," fails for the same reason. Pet'r's. Opening Br. at 27; *see In re 2013-2014 #90*, 2014 CO 63, ¶ 17 (explaining proposed initiatives' impact on disparate constitutional provisions did not amount to separate subjects because those impacts "directly relate to the subject matter of the . . . Initiatives"). Nor does Gates's unfounded speculation that #91 "signals" the Department of Agriculture and Colorado Parks and Wildlife should no longer collaborate have any bearing on the single subject inquiry. Pet'r's. Opening Br. at 27*; see In re*

Title, Ballot Title, & Submission Clause for 2019-2020 #3, 2019 CO 57, ¶ 8 (explaining the Court does not "suggest how [an initiative] might be applied if enacted" in analyzing single subject).

IV. Gates's clear title objections lack merit.

Gates objects that title is unclear because the term "exceptions" is misleading and the title does not reference the removal of mountain lions from the statutory definition of "big game." The latter objection fails for reasons addressed above. *See Matter of Title, Ballot Title & Submission Clause, & Summary for a Petition on Campaign & Pol. Fin.*, 877 P.2d 311, 315 (Colo. 1994) ("The 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.").

The former objection—drawing a distinction between "carve-outs" and "exceptions"—is not well taken. Pet'r's Opening Br. at 33 (claiming the title's "'exceptions' clause inaccurately characterizes the carve-outs as 'exceptions.'") These two terms are widely understood to be interchangeable. *See, e.g.*, *Larimer Cnty. Bd. of Equalization v. 1303*

Frontage Holdings LLC, 2023 CO 28, ¶ 49 ("[I]f the legislature had intended to except unusual conditions in this manner, it would have expressly carved out that exception . . . ." (emphases added)); *Est. of Brookoff v. Clark*, 2018 CO 80, ¶ 6 ("[T]his court is not at liberty to carve out an exception that is absent from a statute." (quotation omitted)). Gates himself uses "exception" to describe the pertinent provisions of #91 without qualification or apparent confusion. *See* Record, p 13 (Gates arguing "The final draft of Initiative #91 adds ***five*** exceptions to the measure's definition of 'trophy hunting' . . . ."); *see also* Title Board Rehearing Audio 53:40.

More importantly, #91's exceptions are clearly exceptions to the proposed prohibition[1] on "hunting," as defined in the title and the initiative, to include the "intentional killing" of a mountain lion, lynx, or

[1] Gates argues #91's title may confuse voters by suggesting it creates a self-defense exception that does not already exist. This argument willfully misreads the title, which proposes a "prohibition on hunting" and "in connection therewith . . . creating eight exceptions to this prohibition." *See* Record at 5 (emphasis added). In other words, the proposed exceptions apply to the proposed prohibition, not to current law.

bobcat. Gates's argument to the contrary—that killing animals for self-defense and euthanasia by veterinarians fall outside the dictionary definition of "hunting," and therefore they are not technically "exceptions" from dictionary-defined "hunting"—ignores this obvious point. Pet'r's. Opening Br. at 34. Such actions may not fall within Gates's preferred definition of hunting, but the title does not mislead voters by clarifying they would not be prohibited by #91.

Nor must the Board exhaustively list each of the eight individual exceptions to the proposed prohibition to satisfy the clear title standard. *See In re Title, Ballot Title & Submission Clause & Summary for Proposed Initiative Concerning Auto. Ins. Coverage*, 877 P.2d 853, 857 (Colo. 1994) (explaining the Board must "navigate the straits between brevity and unambiguously stating the central features of the provision."). The Board's summary of #91's central features—a prohibition on hunting Colorado's three wild cats and the exceptions to that prohibition—falls squarely within the Board's broad discretion to set a clear, brief title. *See In re 2019-2020 #315*, 2020 CO 6, ¶ 26 ("The Title

Board is given discretion in resolving interrelated problems of length, complexity, and clarity . . . ").

CONCLUSION

The Court should affirm the title set by the Title Board.

Respectfully submitted on this 18th day of December, 2023.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon all counsel of record for the parties electronically via the Colorado Courts e-Filing system on December 18, 2023.

/s/ Carmen Van Pelt