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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 OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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

It contains 3,451 words.

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.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Pages

Cases

Statutes

Constitution

Regulations

Other Authorities

ISSUES ON REVIEW

I. Whether the Title Board lacked jurisdiction to set a title for Initiative 2023-2024 #91 after the proponents made changes to the measure in direct response to comments from the directors of the Legislative Council.

II. Whether Initiative 2023-2024 #91 is so broad and confusing it would be impossible for the Title Board to set a title.

III. Whether Initiative 2023-2024 #91 contains a single subject.

IV. Whether the Title Board set a clear title for Initiative 2023-2024 #91.[1]

STATEMENT OF THE CASE

Proposed Initiative 2023-2024 #91 ("#91") seeks to prohibit the hunting of Colorado's three native wild cat species: the mountain lion, lynx, and bobcat. The measure creates eight exceptions to the prohibition, including for the protection of human life, property, or livestock, for the

[1] The Title Board's numbering of the Issues on Review I–IV corresponds to Petitioner Gates's designation of the Issues A–D. *See* Pet. for Review, p. 3.

accidental killing by motor vehicle, and for the use of nonlethal methods in connection with scientific research. Violation of the prohibition would be a class 1 misdemeanor.

The Title Board set a title on the measure at its October 18, 2023 hearing. *See* Record for #91, p 3, filed November 8, 2023 ("Record"). Petitioner Dan Gates filed a timely motion for rehearing under § 1-40-107. *Id.* at 11. Gates argued that (1) despite the title's reference to "trophy hunting," its true purpose was to ban all hunting of mountain lions, lynx, and bobcats, *id.* at 11–12, (2) changes made to #91 in response to comments after a review and comment hearing before the Legislative Council fundamentally changed the measure, *id.* at 13–14, (3) the measure is so vague and confusing it cannot be understood, *id.* at 14–15, (4) the measure contains multiple subjects, *id.* at 15–16, and (5) the title set by the Title Board is misleading, *id.* at 16–17.

The Board held rehearing on November 1, 2023, and amended the title of #91 to, among other things, remove the phrase "trophy hunting."

Id. at 5. It denied all motions for rehearing except to the extent that the Title Board amended the title for #91. *Id.* The title is set as follows:

> 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. Gates timely appealed.

SUMMARY OF THE ARGUMENT

The Title Board set an appropriate title for 2023-2024 #91. Gates first argues the Board lacked jurisdiction to set a title because the proponents of #91 substantially changed the measure following review and comment from the directors of the legislative council and the office of legislative legal services (the "directors") pursuant to § 1-40-105(2),

C.R.S. (2023).[2] Yet Gates concedes that those changes made were in "direct response" to the directors' comments, which this Court has repeatedly held does not require resubmission of an initiative prior to title setting.

Second, Gates argues that #91 is so confusing that the Board could not set a title. The Court has found that the Board cannot set titles when measures are so incomprehensible even the single subject cannot be determined. Here, however, the Board set a title accurately reciting the measure's single subject. Gates's concerns about the measure's future application go to the initiative's merits, not the Board's jurisdiction.

Third, Gates contends that #91 violates the single-subject requirement because it proposes to treat as similar three animals currently treated differently under state and federal laws. But treating mountain lions, lynx, and bobcats the same—i.e., as not huntable—is the initiative's central purpose. While #91's provisions would amend multiple

[2] Except where otherwise noted, all citations to the C.R.S. refer to the 2023 Colorado Revised Statutes.

sections of the C.R.S. to accomplish this purpose, that is irrelevant to the single subject analysis.

Finally, Gates argues the title of #91 is misleading. On rehearing, the Title Board addressed Gates's primary argument under this heading by removing reference to the phrase "trophy hunting" from the title and setting a title making clear #91 would prohibit all hunting of mountain lions, lynx, and bobcats. Gates's remaining arguments cannot overcome the deference this Court must extend to the title set by the Board.

ARGUMENT

I. The Title Board had jurisdiction to set title for #91 after the proponents made changes to the measure in direct response to comments from the directors.

A. Standard of review and preservation.

Pursuant to § 1-40-105(1), C.R.S., initiative petitions "shall be submitted . . . to the directors . . . for review and comment." The directors then "shall render their comments . . . concerning the format or contents of the petition at a review and comment meeting." *Id.* "After the review and comment meeting but before submission to the secretary of state for

title setting, the proponents may amend the petition in response to some or all of the comments of the [directors]. If any substantial amendment is made to the petition, *other than an amendment in direct response to the comments of the [directors]*, the amended petition must be resubmitted . . . ." § 1-40-105(2), C.R.S. (emphasis added). Therefore, where changes made to an initiative after notice and comment are either "in direct response to [the directors'] comments, or [are] not substantial . . . section 1-40-105(2) [does] not require the amended petition to be resubmitted." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 #256*, 12 P.3d 246, 251 (Colo. 2000).

The Title Board agrees that Gates argued in his motion for rehearing that changes to #91 "fundamentally and drastically alter[ed] the measure." Record, p 14. Gates waived any argument that such changes were not made in direct response to comments by the directors. *See id.*, p 13 n.4 ("[Gates] is not arguing that these changes are not in direct response to comments made at the Review & Comment Hearing.").

B. Changes made to #91 do not require resubmission.

Gates argues changes made to #91 in direct response to comments from the directors were so substantial that the measure must be resubmitted for review and comment, relying on *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). *See* Record, pp 13–14. Gates is wrong, and his reliance on *In re Ltd. Gaming* is misplaced, because section 1-4-105 was amended after *In re Ltd. Gaming* to provide that only substantial changes other than those in direct response to the directors' comments need be resubmitted for review and comment.

The proponents of #91 changed the initiative in response to comments from the directors, including by providing exceptions for euthanasia of ill animals, bona fide scientific research activities, and actions conducted by government employees for the protection of human health and safety, and by removing mountain lions from the definition of "big game" in section 33-1-102. *Compare* Record, pp 7–10 *with*

Memorandum re Proposed initiative measure 2023-2024 # 91, pp 2–8 (attached hereto as Exhibit A). Gates has conceded that such changes were made "in response to comments by [the directors]." Record, p 14. This concession ends the argument. Initiatives changed, substantially or otherwise, in direct response to comments from the directors need not be resubmitted prior to title setting. *See* § 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 [directors], the amended petition must be resubmitted to the [directors]. . . .").

Gates's argument to the contrary—that section 1-40-105(1)'s review and comment requirement is somehow "different" from section 1-40-105(2) and that *In re Ltd. Gaming* forbids "substantial" changes—fails a cite check. *See* Record, pp 13–14. Although *In re Ltd. Gaming*, in 1992, held that the "substantial alteration of the intent and meaning of a central feature of the [initiative] in effect creates a new proposal that must be submitted to the [directors]," 830 P.2d at 968, the General Assembly, in 1993, amended section 1-40-105. *See* S.B. 93-135, 59th Gen.

Assemb., 1st Reg. Sess. (Colo. 1993). The 1993 amendment added precisely the safe harbor Gates ignores: "If any substantial amendment is made to the petition, *other than an amendment in direct response to the comments of the [directors]*, the amended petition must be resubmitted to the [directors] . . . ." *Id.* (emphasis added). *Id.* In other words, if changes are (a) insubstantial or (b) made in direct response to the directors' comments, resubmission is unnecessary.

Post-1993 decisions of this Court confirm this reading. *See In re Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 61 (Colo. 2008) (finding it "clear" that changes "were made in direct response to comments" from the directors and "[t]hus, no resubmission to the directors was necessary"); *In re 1999-2000 #256*, 12 P.3d at 251–53 (holding changes "in direct response to the comments of the directors" did not require resubmission, regardless of whether such changes were substantive or merely clarifications); *In re Title, Ballot Title & Submission Clause, & Summary for 1997–98 #10*, 943 P.2d 897, 901 (Colo. 1997) (concluding that the "amended portions of the proposed

Initiative were made in response to [the directors' comments" so "no resubmission was required by section 1-40-105(2)").

Because all changes to #91 were made in direct response to the directors' comments, #91 did not need to be resubmitted to the directors.

II. The initiative is not so broad and confusing that the Board cannot set a title.

A. Standard of review and preservation.

"[I]f the Board cannot comprehend a proposed initiative sufficiently to state its single-subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *Hayes v. Ottke*, 2013 CO 1, ¶ 15 (quotation omitted). At the same time, the "constitutional and statutory provisions governing the initiative process should be liberally construed so that the constitutional right reserved to the people may be facilitated and not hampered . . . further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #255*, 4 P.3d 485, 492 (Colo. 2000) (quotation omitted).

The Board agrees that Gates preserved a challenge to whether #91 is so broad and confusing that the Board cannot set a title. Record, pp 14–15.

B. The initiative's treatment of the single-subject requirement is not so broad and confusing that the Board was unable to set a title.

The Board cannot set a title on a measure that is so unclear the Board cannot even clearly state the single subject of the measure in the title. *See Hayes*, 2013 CO 1, ¶ 15. But here, the Board stated the single subject as "[a] change to the Colorado Revised Statutes concerning a prohibition on the hunting of mountain lions, lynx, and bobcats." Record, p 5. This accurately and concisely recites the subject of #91, and therefore Gates's argument that it would be impossible for the Board to set an accurate title is wrong.

Gates contends that "unresolved issues" with #91 prevent the Title Board from setting a title that reasonably describes the measure's effects. Record, p 15. This argument is unavailing for two reasons. First, it finds no support in caselaw. Gates claims that certain aspects of the measure's

future application lack clarity, but neither the Board nor the Court can "review the initiative's efficacy, construction or future application." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 10 (quotation omitted). Instead, the Board can decline to set a title only when a measure is so incomprehensible that its subject cannot be determined. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999). Even if Gates were correct that the measure's application would be uncertain in specific scenarios—as when a bobcat is "causing damage to crops . . . property, or livestock," Record, p 15—that uncertainty would not suffice to deny proponents or voters of their right to seek to enact the measure.

Second, even if such an inquiry were appropriate, #91 is not unclear. It would prohibit hunting —i.e., intentionally killing, wounding, pursuing, entrapping, or discharging a deadly weapon at—mountain lions, lynx, and bobcats. Record, p 7. It creates exceptions for acts in defense of life or property, for government employees, certain accidental acts, euthanasia by veterinarians, scientific research, or when specially

authorized or licensed by the Commissioner of Agriculture or Division of Parks and Wildlife. *Id.* at 7–8. Even if the Court were inclined, as Gates urges, to review the specific provisions of the exceptions for clarity in their application, #91 is not so unclear that the voters should be denied the opportunity to decide whether to enact the measure.

III. The proposed initiative contains a single subject.

A. Standard of review and preservation.

The Title Board has jurisdiction to set a title only when a measure contains a single subject. *See* Colo. Const. art. V, § 1(5.5). The Court will "overturn the Board's finding that an initiative contains a single subject only in a clear case." *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (quotations omitted). "In reviewing a challenge to the Title Board's single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board's actions." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8. The Court does "not address the merits of the proposed initiative" or "suggest how it might be applied if enacted." *In re Title,*

Ballot Title, & Submission Clause for 2019-2020 #3, 2019 CO 57, ¶ 8. Instead, the Court "must examine the initiative's wording to determine whether it comports with the constitutional single-subject requirement." *Id*. To satisfy the single-subject requirement, the "subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Where an initiative "tends to . . . carry out one general objective" or central purpose, "provisions necessary to effectuate [that] purpose . . . are properly included within its text," and the "effects th[e] measure could have on Colorado . . . law if adopted by voters are irrelevant" to the single subject inquiry. *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶¶ 11, 17 (quotations omitted).

The Title Board agrees that Gates preserved single-subject objections in his motion for rehearing. Record, pp 15–16.

B. #91's prohibition on hunting mountain lions, lynx, and bobcats is a single subject.

The single subject of #91 is prohibiting the hunting of mountain lions, lynx, and bobcats. To accomplish this, the measure defines the acts

prohibited: "killing, wounding, pursuing, or entrapping" or "discharging or releasing any deadly weapon" at a mountain lion, lynx, or bobcat; and it creates exceptions, including for the defense of life or property and for scientific research. Record, pp 7–8. The title set by the Board concisely and accurately recites this subject.

Gates argues that #91 contains multiple subjects because, if enacted, it would treat mountain lions, bobcats, and lynx—animals currently treated differently under state and federal laws and regulations—the same. Record, p 16. This argument is misplaced. "The mere fact that a proposed [initiative] may affect the powers exercised by government under preexisting [law] does not by itself demonstrate that the proposal embraces more than one subject." *In re Title, Ballot Title, & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1077 (Colo. 2010). This is because "[a]ll proposed . . . laws would have the effect of changing the status quo in some respects if adopted by the voters." *In re Title, Ballot Title, & Submission Clause, & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000).

The same reasoning applies here. While the hunting of mountain lions as "big game" is currently legal under state law, § 33-1-102, C.R.S., the hunting of bobcats as "small game" is currently legal under state law, *see* 2 Colo. Code Regs. § 406-3:300, and the hunting of wild lynx is currently prohibited under the federal Endangered Species Act, *see* 50 C.F.R. § 17.11; 50 C.F.R. § 17.40(k), treating these animals the same—i.e., prohibiting their hunting—is the central theme of #91.[3] *See In re 2013-2014 #90*, 2014 CO 63, ¶ 17 ("[W]e have never held that just because a proposal may have different effects ... it necessarily violates the single-

[3] Gates presented argument at the rehearing that including these three animals in one initiative constitutes multiple subjects because mountain lions, bobcats, and lynx are no more related than "mountain lions, squirrels, and ducks" for purposes of the single subject analysis. *See Rehearing Before Title Board on Proposed Initiative #91*, (November 1, 2023 (statement at 13:20). This position defies common sense: mountain lions, bobcats, and lynx are the three species of "wild cat" or feline native to Colorado. Amy Zimmer, *Two Decades of Lynx Reintroduction in Colorado*, Colorado State Publications Blog, Feb. 6, 2020, https://tinyurl.com/3h7raxce. Bobcats and lynx are so closely related they can be difficult to tell apart. *Id.* This Court routinely finds initiatives to have a single subject despite addressing more than one noun, as #91 does. *See, e.g.*, *In re 2013-2014 # 90*, 2014 CO 63, ¶ 14 (holding an initiative satisfied single subject despite addressing "Colorado's oil, gas, other gaseous and liquid hydrocarbons, and carbon dioxide").

subject requirement.") (quotation omitted). Like the measure in *In re 2013-2014 #90*, #91's effect on different areas of Colorado law is "irrelevant" to this Court's review of whether it contains a single subject. *See* 2014 CO 63, ¶¶ 17, 22 (holding a measure constituted a single subject despite its effect on "constitutional home rule provisions, the preemption doctrine, or the taking provisions" of the Colorado constitution).

#91 seeks to prohibit the hunting of three similar animals, Colorado's native wild cats. That it must amend more than one statute or regulation to do so has no bearing on a single subject analysis.

IV. #91 satisfies the clear title standard.

A. Standard of review and preservation.

"The Title Board's duty in setting a title is to summarize the central features of a proposed initiative." *In re 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board "is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause." *Id.* The Court will reverse the title set by the Board "only if a title is insufficient, unfair, or misleading." *Id.* ¶ 8. The Court

does not "consider whether the Title Board set the best possible title." *In re 2019-2020 #3*, 2019 CO 57, ¶ 17.

The Board agrees that Gates preserved his challenges to the clear title set by the Board. Record, pp 16–17.

B. The title is not misleading.

On rehearing, Gates primarily argued that the title was misleading because it proposed to ban "trophy hunting" of mountain lions, bobcats, and lynx, while #91's true purpose is to prohibit the hunting of these animals "regardless of whether they are hunted for trophies, meat or otherwise." *Id.*, pp 11–12, 16–17. The Title Board removed all reference to "trophy hunting" from the title, mooting this argument. *Compare id.*, p 3 *with id.*, p 5. The title, as set, makes clear that #91 prohibits "the hunting of mountain lions, lynx, and bobcats" for any purpose, subject to eight enumerated exceptions. *Id.*, p 5.

The remaining arguments presented by Gates on rehearing have no bearing on #91's clear title. *See id.*, p 17 (arguing title should address that #91 "would remove mountain lions from the definition of 'big game'" and

"would prohibit the currently legal practices of hunting, trapping, and taking of a bobcat without a license" pursuant to § 33-6-107(9), C.R.S.). Prohibiting the hunting of these animals—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.

CONCLUSION

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

Respectfully submitted on this 28th day of November, 2023.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon all counsel of record for the parties electronically via the Colorado Courts e-Filing system on November 28, 2023.

/s/ Carmen Van Pelt