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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. (2024)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #291 ("Local Control Over Land Use")

Petitioners: Kevin Grantham and Cheri Jahn,

v.

Respondent: Jessica Goad,

and

Title Board: Theresa Conley, Jason Gelender, and Kurt Morrison.

▲ **COURT USE ONLY** ▲

Case No. 2024SA127

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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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/s/ Joseph G. Michaels

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INTRODUCTION

Proponents contend the Title Board erred in determining that Proposed Initiative #291 ("Initiative 291") violated the constitutional single-subject requirement. Proponents further assert that this Court should (i) reverse the Title Board's decision that the question of setting clear title was rendered moot once the Title Board determined it did not have jurisdiction because there was no single subject, and (ii) remand with directions to the Title Board to instate Proponents' proposed title.

But packed within Initiative 291 are multiple discrete areas of land use control, ranging from energy and gas permitting, energy and gas siting, and housing density to alcohol regulations, water operations, and administration of federal lands, to name but a few. Further coiled within Initiative 291 are distinctly separate regulatory provisions—one housing land use control with local governments; another affirmatively providing that local governments can reject state regulatory and permitting oversight.

Given these multiple subjects, the Title Board did not clearly err.

SUMMARY OF THE ARGUMENT

The Title Board did not err, let alone clearly err, in determining that Initiative 291 violated the single-subject requirement. Having made that determination, the Title Board rightly found it neither had jurisdiction to act nor jurisdiction to set title, rendering moot Proponents' rehearing request to clarify title.

GOVERNING PRINCIPLES

This Court employs "all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title & Submission Clause for 2009-2010 #91,* 235 P.3d 1071, 1076 (Colo. 2010). The "Board's actions are presumptively valid[,] and this presumption precludes this court from second-guessing every decision the Board makes in setting titles." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 ##245(b), 245(c), 245(d) & 245(e)*, 1 P.3d 720, 723 (Colo. 2000). Only in a clear case does the Court reverse a decision of the Title Board. *In re Title, Ballot Title & Submission Clause, &*

Summary Pertaining to Casino Gambling Initiative, 649 P.2d 303, 306 (Colo. 1982).

ARGUMENT

I. The Title Board did not clearly err in determining that Initiative 291 violated the single-subject requirement.

The single-subject rule serves to prevent both the joinder of multiple subjects to secure the support of various factions, and voter fraud and surprise. *In re Title, Ballot Title & Submission Clause for 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002). A proposed measure violates the single-subject requirement if it relates to more than one subject, having "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 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006); *accord In re Title, Ballot Title & Submission Clause for 2001-2002 #21 & #22*, 44 P.3d 213, 215 (Colo. 2002).

Proponents rightly provide there are three core methods of violating the single-subject requirement: (1) if the text relates to more

than one subject; (2) if the Initiative has two or more distinct and separate purposes that are not dependent on or corrected to each other; and (3) if the Initiative is an impermissible umbrella topic. Pet. Opening Br. 7 (quoting *Matter of Title, Ballot Title & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 22, and *In the Matter of Title, Ballot Title, & Submission Clause (Petitions)*, 907 P.2d 586, 590 (Colo. 1995)). Initiative 291 is afflicted by each of these impermissible considerations.[1]

First, the text relates to more than one subject. Proponents' primary argument is that the Title Board improperly focused on potential effects, but that there was only one subject—local control of land use—at issue. But the Title Board did not focus just on the potential effects. Rather, it recognized that there was a myriad of

[1] Initiative 291 is virtually identical to Initiatives 292 and 293, for which the Title Board has simultaneously filed answer briefs. Initiative 292 has an additional provision excluding water projects covered by Title 37 of the C.R.S. from the initiative's definition of land use regulations; and Initiative 293 excludes state regulations related to implementing federal law. They are otherwise identical in scope, breadth, and multiple subject matters.

regulatory controls encompassed within the Initiative. Those regulations include:

- siting and regulating oil and gas wells
- permitting exploration for wells
- wastewater disposal
- flood control
- use of state lands
- state buildings
- state roads, highways, and bridges
- water operations (including well locations, irrigation ditches, reservoir locations and management, etc.)
- administration of federal lands
- administration of tax-credit-backed conservation easements
- location and operating restrictions on sale of alcohol
- location and operating restrictions for marijuana dispensaries
- location and operating restrictions on natural medicine centers
- airport location and construction
- hospital zoning

This list is, by definition, non-exhaustive. Title Board's Opening Br. 12-13; *see also* Record at 10-11 (Objector Goad providing non-exhaustive list of potential impacts). And each of these areas is, in essence, a separate subject. While perhaps broadly cabined under "land use regulations," there are different concerns, permitting, and regulations at issue, including use of taxpayer dollars, state government oversight (e.g., by way of state regulatory agencies), and state regulatory framework for sale of age-restricted products. As in *In re 2021-2022 #16*, 2021 CO 55, ¶¶ 25, 41, voters here would be quite surprised to learn the full number and different types of regulations Initiative 291 encompasses.

Second, the Initiative has at least two distinct and separate purposes. Even assuming all the various types of discrete regulations listed above properly fall under a single-subject umbrella, the Initiative still contains distinct and separate clauses reflecting separate purposes. The Initiative broadly purports to vest local governments with control

over land decisions, while simultaneously preventing the state from imposing conflicting requirements. Record at 3(1).

However, the Initiative also prevents state regulatory agencies from actually executing their regulatory oversight authority—and responsibility—over local governments once the local government approves land use regulations. This is not just a self-executing or enabling clause; on the contrary, this provision would affirmatively prevent state agencies from performing their statutory obligations to ensure statutory compliance enacted for the health and safety of Colorado citizens. This second subject (preventing state regulatory compliance) has a "distinct and separate purpose[]" from the first subject—broadly housing land use control with local government—and the two subjects are "not dependent upon or connected with each other." *In re 2005-2006 #55*, 138 P.3d at 277.

Land use control is very different from rejecting regulatory compliance with duly enacted state statutes ensuring uniform state-wide application. Additionally, voters would be surprised to learn that

not only is land control housed in local governments, but that local governments can affirmatively reject regulatory and permitting oversight. *See In re 2021-2022 #16*, 2021 CO 55, ¶¶ 25, 41.

Third, at least as presented here, Initiative 291's general "local control of land" use topic is an impermissible umbrella topic. Characterizing an initiative "under some general theme" does not save it "from violating the single-subject rule if the initiative contains multiple subjects." *In re Titles, Ballot Titles & Submission Clauses for 2021-2022 ##67, 115, & 128*, 2022 CO 37, ¶ 14 (quotations omitted). This Court has previously found similar types of "umbrella proposals" unconstitutional when there is a broad common theme such as "water," *In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995), or "revenue changes," *In re Amend TABOR 25*, 900 P.2d 121, 125-26 (Colo. 1995), that encompasses multiple issues.

In *Waters II*, for example, this Court considered a measure that would amend the Colorado constitution to (a) adopt a "strong public trust doctrine" regarding Colorado waters and (b) alter elections in

water conservancy and water conservation districts. 898 P.2d at 1077. This Court determined that the only connection between the measure's provisions impacting elections and the public trust on water rights was the "general and too broad" subject of "water." *Id.* at 1080. Consequently, this Court held that because there was no unifying or common objective, it lacked a single subject. *Id.*

Here, too, the "general" umbrella of "land use" is far too "general and too broad" a subject, as evidenced by the litany of regulations the topic covers. Nor is Initiative 291 restricted to a single theme, with its topics ranging from different local land use provisions, to providing plenary authority to local governments, to imposing a requirement on state government that state governmental regulatory agencies cannot withhold permits or approvals. *See* Title Board's Opening Br. 8-11; Record at 3-4.

Proponents cite *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #256*, 12 P.3d 246, 254 (Colo. 2000), for the proposition that an initiative with multiple effects does not necessarily

violate the single-subject requirement. *See* Pet. Opening Br. 12-14. If anything, this case reinforces that Initiative 291 violates the single-subject requirement. In *In re 1999-2000 #256*, the measure addressed giving building and development control to voters instead of to local government officials. *Id*. at 254. The objectors there focused on a variety of powers and clauses tailored to building and control. *See id*. This Court found there was no single-subject violation because, while broad, they were related. *See id.* In contrast here, Initiative 291 *not only* implicates building and development control, but also zoning, setbacks, regulation on alcohol, marijuana, and natural medicine, and more—as listed above.

In re 1999-2000 #256 underscores just how disparate and distinct Initiative 291 is in its scope and multiple subjects. Initiative 291 is not just about different effects; it is about a slew of different empowerments to local governments that cover a multitude of different subjects. In that way, it exhibits the core logrolling concerns this Court has repeatedly cautioned against. *See In re Title, Ballot Title & Submission Clause for*

2011-2012 #3, 2012 CO 25, ¶ 11 (explaining how combining multiple subjects without proper connection simply to garner support for the initiative is impermissible logrolling).

Proponents further argue that Initiative 291 does not embrace more than one subject just because it empowers local governments "to make impactful policy decisions." Pet. Opening Br. 17. But Initiative 291 goes far beyond just "impactful policy decisions"; it creates a litany of substantive, discrete regulatory areas ostensibly cabined under one umbrella. This one umbrella cannot bear the weight of the varied regulations Proponents seeks to house under it. On the contrary, a more-proper single-subject requirement would be if the initiative addressed only, e.g., oil well siting; then another initiative could address housing density; yet another for alcohol distribution; another still for state administration of federal land regulations, and so on. Instead, all these disparate regulatory arenas are condensed together in one initiative—an initiative so logrolled that no voter would recognize

the full scope of subjects included. That's precisely what the single-subject requirement seeks to avoid.

Finally, Proponents cite a series of cases suggesting that this Court rejected finding multiple subjects with initiatives with, Proponents assert, analogously broad provisions. Pet. Opening Br. 11-18) (arguing *In re Title, Ballot Title & Submission Clause for 2019-2020 #315*, 2020 CO 61; *In re Title, Ballot Title & Submission Clause for 2015-2016 #63*, 2016 CO 34; *In re 1999-2000 #256*, 12 P.3d 246; *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127 (Colo. 1996), all rejected objectors' assertions that initiatives were overbroad). But there's one fundamental problem with Proponents suggesting that this Court "rejected" the broad single-subject concerns there. In each of those cases, this Court *upheld* the Title Board's determinations below, determination that had rejected the objectors' assertions and *found* a single subject had existed. So this Court was affirming—with attendant deference—the Title Board's ruling below.

The opposite is true here. Here, in contrast, Proponents are asking to *overturn* the Title Board's finding that there was *not* a single subject. The framing is very different, the importance of which cannot be overstated, as this Court employs all presumptions in favor of the Title Board's actions, giving it great deference and reversing only where the error is clear. *In re 2021-2022 #16*, 2021 CO 55, ¶ 9; *In re Title, Ballot Title & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8. Indeed, because in each of those cases this Court reviewed the Title Board's decision in *finding* single subject in the first instance, the Board benefited from the deferential standard of review requiring that "[a]ll legitimate presumptions must be indulged in favor of the propriety of the Board's action." *In re Casino Gambling Initiative*, 649 P.2d at 306.

For all these reasons, the Title Board did not err, and this Court should defer to the Title Board's analysis and affirm.

II. Because Initiative 291 violated the single-subject requirement, the Title Board could not set title and Proponents' petition for rehearing was moot.

Colorado law prevents the Title Board from setting a title for a measure that contains "incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of 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)(I), C.R.S. Likewise, the Board cannot set a measure that would cause surprise and fraud to be practiced upon the voters. § 1-40-106.5(1)(e)(II), C.R.S.

Here, had the Title Board set title, both statutory considerations would have been violated. Because the Title Board determined it did not have jurisdiction to set title because Initiative 291 violated the single-subject requirement, it denied Proponents' motion for rehearing on title as moot. Proponents now ask this Court to set title itself, bypassing the Title Board. But the question at issue is whether the Title Board

correctly determined the question was moot, *not* whether this Court should usurp the Title Board's role and set title itself (or direct the Title Board to set a particular title). And this question remains moot, as the Title Board cannot set a title on an initiative that fails the single-subject requirement. *E.g.*, *Brown v. Dep't of Corr.*, 915 P.2d 1312, 1313 (Colo. 1996) ("A case becomes moot when relief, if granted, would have no practical legal effect upon the existing controversy."); *Arapahoe Cnty. Sch. Dist. No. 6 v. Dir., Div. of Labor, Dep't of Labor & Emp't*, 543 P.2d 700, 700-01 (1975) (order terminating jurisdiction renders question moot); *accord Calderon v. Moore*, 518 U.S. 149, 150 (1996) (courts lack jurisdiction where question is moot and any opinion would be advisory); *People v. DeBorde*, 2016 COA 185, ¶ 32 ("An appeal is moot if granting relief would have no practical effect on an actual or existing controversy.").

Further, Proponents' suggestion that this Court set title in lieu of the Title Board is a significant overreach. This is because it is the Board's duty to set title based on its assessment of the initiative's

subject. *See In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 24 ("Board's duty in setting a title is to summarize the central features of a proposed initiative."). And the Board has significant discretion and responsibility to set title—including as to clarity in designating a title, ballot title, and submission clause. *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 23; *see also In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645, 648 (Colo. 2010) (This Court provides great deference to Title Board in exercise of Title Board's drafting authority.).

This is because the Board's title-setting responsibility is about distilling the proposed initiative down to a "reasonably ascertainable expression of the initiative's purpose." *In re 2009-2010 #45,* 234 P.3d at 648 (citing *In re Title, Ballot Title & Submission Clause for 2009-2010, #24,* 218 P.3d 350, 356 (Colo. 2009)). Even if this Court reverses on the single-subject claim, the proper action concerning clear title is not to direct the Title Board to adopt a specific title; rather, it is to remand for

the Title Board to consider the merits of the rehearings and set title in the first instance.

In setting title, the Title Board's role is to create a "connection [that] must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal" the matter covered by the initiative. *In re 2009-2010 #45,* 234 P.3d at 647-48 (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #25*, 974 P.2d 458, 462 (Colo. 1999) (internal quotation and citation omitted)). Here, had the Title Board set title for Initiative 291, the measure's inclusion of at least two subjects would have caused surprise and/or confusion to the voters in violation of section 1-40-106.5(1)(e)(II), C.R.S. Accordingly, in addition to not having jurisdiction to set title, it was proper for the Board to prevent this confusion by declining to set title for Initiative 291 as moot.

CONCLUSION

This Court should affirm the Title Board.

Respectfully submitted,

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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 the following parties electronically via CCEF, at Denver, Colorado, this 14th day of May 2024, addressed as follows:

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