

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 7, 2024 1:37 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2024) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #291 (“Local Control Over Land Use”)</p>	
<p>Petitioners: Kevin Grantham and Cheri Jahn,</p> <p>v.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Respondent: Jessica Goad,</p> <p>and</p> <p>Title Board: Theresa Conley, Jason Gelender, and Kurt Morrison.</p>	<p>Case No. 2024SA127</p>
<p>PHILIP J. WEISER, Attorney General JOSEPH G. MICHAELS, 40403 Assistant Solicitor General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6460 E-Mail: joseph.michaels@coag.gov *Counsel of Record <i>Attorney for the Title Board</i></p>	
<p>THE TITLE BOARD’S OPENING BRIEF</p>	

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 2,637 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.

/s/ Joseph G. Michaels

Joseph G. Michaels, #40403
Assistant Solicitor General

TABLE OF CONTENTS

ISSUES ON REVIEW 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

 I. The Title Board correctly determined it did not have jurisdiction
 because Initiative 291 contains more than a single subject. 4

 A. Standard of review and preservation. 4

 B. Initiative 291 contains multiple subjects. 4

 C. Because the Title Board correctly determined it did not have
 jurisdiction due to Initiative 291 violating the single-subject
 requirement, it correctly denied Proponents’ motion for a
 rehearing to clarify title. 14

CONCLUSION 16

TABLE OF AUTHORITIES

PAGE(S)

CASES

<i>Arapahoe Cnty. Sch. Dist. No. 6 v. Dir., Div. of Labor, Dep't of Labor & Emp't</i> , 543 P.2d 700 (1975).....	16
<i>Calderon v. Moore</i> , 518 U.S. 149 (1996).....	15
<i>Decker v. Nw. Env't Def. Ctr.</i> , 568 U.S. 597 (2013).....	15
<i>In re Title, Ballot Title & Submission Clause for 2009-2010 #91</i> , 235 P.3d 1071 (Colo. 2010)	7, 11, 12
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #76</i> , 2014 CO 52.....	4, 5, 6, 7, 11, 12
<i>In re Title, Ballot Title, & Submission Clause for 2013- 2014 #90</i> , 2014 CO 63.....	5
<i>In re Title, Ballot Title & Submission Clause for 2015-2016 #73</i> , 2016 CO 24.....	6
<i>In re Title, Ballot Title, & Submission Clause for 2019-2020 #3</i> , 2019 CO 57.....	5, 11
<i>In re Title, Ballot Title & Submission Clause for 2021-2022 #16</i> , 2021 CO 55.....	4, 8, 10, 14
<i>In re Titles, Ballot Titles & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128</i> , 2022 CO 37.....	7
<i>People v. DeBorde</i> , 2016 COA 185.....	15
<i>Valdez v. People</i> , 966 P.2d 587 (Colo. 1998).....	15

STATUTES

§ 1-40-107, C.R.S 2
§ 1-40-106.5, C.R.S. 5, 6

CONSTITUTION

COLO. CONST. art. V, § 1(5.5) 5

OTHER AUTHORITIES

Hearing Before Title Board on Proposed Initiatives 2023-2024 ##291-293 (Apr. 27, 2024), <http://bit.ly/4a43pEY> 9, 10, 12, 13, 14, 15

ISSUES ON REVIEW

Whether the Title Board lacked jurisdiction to set title for Proposed Initiative 2023-2024 #291 because it contained more than a single subject.

Whether the Title Board erred in denying Petitioners' motion for a rehearing.

STATEMENT OF THE CASE

Proposed Initiative #291 (“Initiative 291”)¹ seeks to provide plenary and exclusive control over land use regulations and decisions with local governments.² Record at 3(1). Initiative 291 also seeks to prevent state government from specifying more or less restrictive land use requirements than those specified by the local government; if the state government does so, Initiative 291 provides that the state regulations would have no effect. *Id.* Additionally, Initiative 291 provides that local land use regulations or decisions are “categorically a

¹ Initiative 291 is similar to proposed Initiatives 2023-2024 #292 and #293, which Petitioners appealed and the Title Board responds to simultaneously. In all three initiatives, the Title Board determined it did not have jurisdiction to set title.

² Initiative 291 is unofficially captioned “Local Control Over Land Use.” Record at 5 n.1.

matter of local concern” and that local governments “have the ability to make evidence-based determinations without interference by state government” and without regard to conflict with state laws. *Id.*

Initiative 291 further provides that if a local government approves a land use regulation or decision, no state government entity can withhold permits or approvals necessary to that parcel or property. Record at 4(4). Finally, the state government “shall take no action adverse to a local government in response to a local government’s decision or authority” under this Initiative. *Id.* at 4(3).

Kevin Grantham and Cheri Jahn (“Proponents”) filed Initiative 291 to the Title Board on April 5, 2024. *See* Petition for Review at 2 (Colo. Apr. 29, 2024). After the initial public hearing on April 17, 2024, the Title Board determined that Initiative 291 had a single subject and set title. Record at 5.

Objector Jessica Goad filed a timely motion for rehearing pursuant to section 1-40-107, C.R.S., asserting that Initiative 291 failed the single subject requirement, Record at 9-11, and that the ballot title

and submission clause were misleading, Record at 12. Proponents also timely sought rehearing, arguing that the Title Board had to amend Initiative 291's set title to comply with the clear title requirements. Record at 15-19.

On rehearing on April 25, 2024, the Title Board granted Objector Goad's petition for a rehearing, finding—by a 2-1 vote—that the Title Board lacked jurisdiction to set title because Initiative 291 had multiple subjects. Record at 7. It unanimously denied the Proponents' motion for rehearing. *Id.*

This appeal follows.

SUMMARY OF THE ARGUMENT

The Title Board correctly determined that it did not have jurisdiction because Initiative 291 violated the Colorado Constitution's single subject requirement. The Title Board, having determined it did not have jurisdiction, rightly resolved that Petitioner's rehearing concerning clear title was moot.

ARGUMENT

I. The Title Board correctly determined it did not have jurisdiction because Initiative 291 contains more than a single subject.

A. Standard of review and preservation.

This Court overturns the Title Board’s finding concerning whether 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). This Court gives great deference to the Title Board’s determination; “[i]n reviewing a challenge to the Title Board’s single subject determination, [this 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 Title Board agrees this issue is preserved. Record at 9-13.

B. Initiative 291 contains multiple subjects.

“No measure shall be proposed by petition containing more than one subject,” and “[i]f a measure contains more than one subject . . . no

title shall be set.” COLO. CONST. art. V, § 1(5.5); *see also* § 1-40-106.5(1)(a), C.R.S. (“Section 1(5.5) of article V . . . require[s] that every constitutional amendment or law proposed by initiative . . . be limited to a single subject, which shall be clearly expressed in its title[.]”). 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.

In conducting its limited review, this 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, this Court “must examine the initiative’s wording to determine whether it comports with the constitutional single-subject requirement.” *Id.* 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).

On the other hand, an “initiative will be held to violate the single subject requirement when it relates to more than one subject and has at least two distinct and separate purposes.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶ 14. This single-subject requirement seeks “[t]o prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.” § 1-40-106.5(1)(e)(II), C.R.S. It exists to avoid “log rolling,” where a measure would attempt to gain support from various factions by combining unrelated subjects into a single initiative for consideration. *In re 2013-2014 #76*, 2014 CO 52, ¶ 32. This requirement thus “prevents the proponents from combining multiple subjects to attract a ‘yes’ vote from voters who might vote ‘no’ on one or more of the subjects if they were proposed separately.” *Id.* at ¶ 8. Consequently, a “proponent’s attempt to characterize an initiative under some general theme will not save the

initiative from violating the single-subject rule if the initiative contains multiple subjects.” *In re Title, Ballot Title & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010).

Here, the Title Board did not clearly err by finding that there was more than one general objective or purpose at issue, not just incidental effects. In *In re Titles, Ballot Titles & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 2022 CO 37, ¶ 23, this Court explained that the seemingly similar topics concerning purchase of alcohol by authorizing the sale of wine in grocery stores, on the one hand, and the home delivery of alcoholic beverages on the other were sufficiently “two different subjects” that warranted separate initiative because some voters might support one but not the other, yet feel compelled to vote in favor of the initiative to provide the affirmative support to their desired subject. Here, too, the multi-part Initiative 291 contains hidden aspects “coiled up in the folds of a complex proposal.” *See In re 2013-2014 #76*, 2014 CO 52, ¶ 32.

While implementation details “that are directly tied to the initiative’s central focus do not constitute a separate subject,” *In re 2021-2022 #16*, 2021 CO 55, ¶ 29 (quotations omitted), here the multiple provisions go much further than simple implementation details. Initiative 291 has multiple discrete components:

- *First*, it would broadly house control over land use regulations and decisions with local governments. Record at 3(1).

- *Second*, it would prevent the state from imposing conflicting requirements and provides that should the state do so, they would be null and void. Record at 3(1).

- *Third*, it would empower local governments to make land-use regulations without regard to state laws. Record at 3(1).

- *Fourth*, and wholly separate, Initiative 291 provides that state governments and governmental entities such as regulatory agencies could not withhold permits or approvals once a local government approves land use regulations. Record at 4(4). This is a breathtakingly separate authorization of power—full refusal of state governmental

permitting—separate and apart from simply authorizing local governments to have control over local land use regulations.

It is also breathtakingly broad, as the Title Board repeatedly highlighted. For example, Initiative 291 would not just apply to one type of land use regulation, but to regulations ranging from siting of oil wells to granting and denying use permits to approving developments.

Hearing Before Title Board on Proposed Initiatives 2023-2024 ##291-293 (Apr. 27, 2024), <http://bit.ly/4a43pEY> (“Hearing”), at 34:45-36:45. As Objector Goad explained, Initiative 291 provided a broad “general theme” (local control over land use regulations) that encompassed multiple distinct subjects within its scope—many of which were not clear or evident from the subject, text, or title of the Initiative. Record at 10.

Further, this provision would authorize local governments to wholesale reject state regulatory oversight, which would vastly undercut existing state laws and regulations. For example, state regulatory agencies would be unable to enforce their statutory

obligations related to the regulation of air, land, and water quality, or of solid wastes, or of wastewater if the local government enacts a conflicting regulation. *Cf.* Hearing at 03:00-4:40 (Objector Goad listing multiple impacts on different state regulatory functions, including mining, oil and gas, roads, highways, and bridges, airports, administration of federal lands, etc.), 29:30-32:50 (Proponents admitting Initiative 291 is not just zoning, but more broadly land use including oil and gas siting, permits, remediation, placement of wells, number of wells), 33:20-33:40 (Board member highlighting that Initiative 291 was not a simple narrow measure), 20:00-20:20 (noting that reach is pretty far). These are not just “implementation details,” *In re 2021-2022 #16*, 2021 CO 55, ¶ 29, but rather is a fully separate authority granted by the Initiative.

“[E]xamin[ing] the initiative’s wording to determine whether it comports with the constitutional single-subject requirement” makes clear that this denuding of state regulatory oversight is a significantly different requirement than the authorization of local land use

regulation authority. *In re 2019-2020 #3*, 2019 CO 57, ¶ 8. The Title Board rightly found these discrete authorizations violated the constitutional single-subject requirement.

●*Fifth*, Initiative 291 prohibits the state government from taking an adverse action in response to the local government’s decision or authority. Record at 4(3). Like the prior provision, this provision essentially prevents the state government from regulatory oversight and police power oversight whenever a local government will have issued a regulation or exercised its local authority. Here, too, the Title Board correctly concluded that this local shield was essentially an additional concept apart from—and not “necessarily and properly connected” to, *In re 2013-2014 #76*, 2014 CO 52, ¶ 8—the general requirement that would allow local governments to make land use regulations, further violating the single-subject requirement.

In *In re 2009-2010 #91*, 235 P.3d at 1076, the challenged initiative would have both created a new tax and prohibited the legislature from exercise legislative authority over basin roundtables and the interbasin

compact committee. This Court found that the distinct authorizations would have yielded the “kind of log rolling” prohibited by the constitution’s single-subject requirement. *Id.* at 1079. Here, too, Initiative 291 sets up a system both of expansive land use regulations and, inter alia, a prohibition on the state from taking action in the event it disagrees with the local government regulation. The Initiative creates a series of zoning and use regulations buried in the initiative’s text and a proposal with numerous layers and hidden impacts. *See id.*; *see also In re 2013-2014 #76*, 2014 CO 52, ¶ 32 (prohibiting measure containing hidden aspects “coiled up in the folds of a complex proposal”).

●*Finally*, as the Title Board explained, the scope of regulations Initiative 291 would include was far-ranging, including development regulations, energy regulations, housing regulations, zoning, approving plans and permitting, siting, and development agreements, as well as being exclusively rooted in the local government’s plenary authority. Hearing at 37:50-38:45; *see also* Record at 10-11 (Objector Goad providing non-exhaustive list of potential impacts, including oil and gas

exploration and operations such as set-backs, road construction, number and placement of wells, operational bans; mining operations; location and operating restrictions on sale of alcohol; location and operating restrictions on marijuana businesses; location and operating restrictions on natural medicine centers; water operations, including well locations, irrigation ditches, reservoir location and management, drainage, wastewater disposal, flood control; use of state lands; state buildings; state roads, highways, and bridges; hospitals zoning; airport location and construction; administration of federal lands; administration of tax-credit-backed conservation easements).

As the Title Board highlighted, Initiative 291's sheer breadth made it hard to figure out what the full scope of plenary control would do. Hearing at 39:00-39:30. The Title Board did not clearly err by finding it had no jurisdiction because Initiative 291 violated the single-subject requirement. Nor did the Title Board clearly err in determining that this breadth of subjects encompassed in Initiative 291 were not "directly tied to the initiative's central focus" such that they wouldn't

constitute a separate subject. *See In re 2021-2022 #16*, 2021 CO 55, ¶ 29 (quotations omitted). This Court should affirm that decision.

C. Because the Title Board correctly determined it did not have jurisdiction due to Initiative 291 violating the single-subject requirement, it correctly denied Proponents' motion for a rehearing to clarify title.

The Title Board agrees this issue is preserved. Record at 15-18.

Objector Goad further objected that the title did not explain how the measure changed the status quo, and given the lack of a single subject, the title and scope itself would not be clear to voters. Record at 12. The Proponents likewise argued that Initiative 291's title did not comply with clear title requirements, arguing both that the title should not include a list of examples, which may seem exhaustive but almost by definition could not be, and that, at minimum, the title would need additional language to clarify and correct the scope of control for local governments. Record at 15-18; Hearing at 13:00-14:20.

Members of the Title board further highlighted how the title was misleading as to the Initiative's substance and scope and there was

essentially no way to do justice to what the initiative would do. Hearing at 15:45-16:45, 20:40-21:30. Ultimately, the Title Board unanimously denied Proponents' motion for a rehearing concerning Initiative 291's title as moot, having first determined the board had no jurisdiction as Initiative 291 violated the single-subject requirement. Hearing at 42:15-43:00. This Court reviews mootness de novo. *Valdez v. People*, 966 P.2d 587, 593 (Colo. 1998).

With no jurisdiction to act, the question of resolving or clarifying title was indeed moot. *Cf. Calderon v. Moore*, 518 U.S. 149, 150 (1996) (courts lack jurisdiction where question is moot and any opinion would be advisory); *accord 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.”).

Here, the Title Board rightly determined the clear-title question was moot because it did not have jurisdiction to act given its finding that Initiative 291 violated the single subject requirement; thus, it was impossible to grant relief. *See Decker v. Nw. Env't Def. Ctr.*, 568 U.S.

597, 609 (2013) (case moot where impossible to grant relief); *see also* *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). Further, were this Court to disagree on the single-subject requirement, the issue would necessarily be returned to the Title Board, at which point it then consider the substantive arguments concerning clear title.

CONCLUSION

The Title Board's rightly determined it did not have jurisdiction because Initiative 291 contained more than one subject. This Court should affirm.

Respectfully submitted,

PHILIP J. WEISER
Attorney General

/s/ Joseph G. Michaels

JOSEPH G. MICHAELS, 40403*

Assistant Solicitor General
Public Officials Unit
State Services Section
Attorney for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 7th day of May 2024, addressed as follows:

Jason R. Dunn
David B. Meschke
Neil S. Sandhu
Denver Donchez
Brownstein Hyatt Farber
Schreck LLP
675 15th St, Ste 2900
Denver, CO 80202
jdunn@bhfs.com;
dmeschke@bhfs.com;
nsandhu@bhfs.com;
ddonchez@bhfs.com
Attorneys for Petitioners

Edward T. Ramey
Martha Moore Tierney
Tierney Lawrence Stiles LLC
225 E 16th Ave, Ste 350
Denver, CO 80203
eramey@tls.legal
mtierney@tls.legal

/s/ Carmen Van Pelt
