SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: May 7, 2024 10:18 PM
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #292 ("Local Control Over Land Use") **Petitioners** Kevin Grantham and Cheri Jahn, v. **Respondent:** Jessica Goad and **Colorado Ballot Title Setting Board:** Theresa Conley, Jason Gelender, and Kurt Morrison.	▲ **COURT USE ONLY** ▲
Attorneys for Petitioner: Jason R. Dunn, #33011 David B. Meschke, #47728 Denver Donchez, #56761 Neil S. Sandhu, #56600 BROWNSTEIN HYATT FARBER SCHRECK LLP 675 15th St, Suite 2900 Denver, CO 80202 Tel: 303.223.1100 Fax: 303.223.1111 jdunn@bhfs.com; dmeschke@bhfs.com; nsandhu@bhfs.com; and ddonchez@bhfs.com	Case Number: 2024SA128

PETITIONERS' OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

It contains 5,863 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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 or 28.1, and C.A.R. 32.

/s/ Jason R. Dunn

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Petitioners Kevin Grantham and Cheri Jahn, through undersigned counsel, submit their Opening Brief in this original proceeding challenging the actions of the Colorado Ballot Title Setting Board on Proposed Initiative 2023-2024 #292 ("Local Control Over Land Use").

ISSUES PRESENTED FOR REVIEW

A. Whether the Title Board erred in finding that Initiative #292 contains multiple subjects.

B. Whether the Title Board erred in denying Petitioners' motion for rehearing because the title set at the initial hearing for Initiative #292 contained several flaws that prevented the setting of a clear title.

STATEMENT OF THE CASE

Petitioners bring this original proceeding pursuant to section 1-40-107(2), C.R.S., as an appeal from the Title Board's decision on rehearing that it lacked jurisdiction to set a title on Initiative #292. After first finding that Initiative #292 had a single subject by a vote of 3-0, the Title Board determined on rehearing by a vote of 2-1 that Initiative #292 necessarily embraced more than one subject because local governments might later use the Initiative to enact various regulations and decisions on land use. But this Court has held that the Title Board cannot base its

single-subject determinations on the potential effects of a measure. The Title Board's decision must therefore be reversed.

It is axiomatic that both the state and local governments currently have authority to enact regulations and decisions on land use. Those existing regulations and decisions often conflict. To resolve this conflict, Petitioners proposed Initiative #292, along with two other measures (#291 and #293, which are identical except that Initiative #292 carves out both land use decisions related to water projects and state regulations necessitated by federal law, while Initiative #291 contains no such carve-outs). Initiative #292's central—and single—purpose is to simply provide that when there is such a conflict between state and local land use regulations or decisions, the local action controls.

At its initial April 17, 2024 hearing ("Initial Hearing"), Respondent Goad argued that because local governments might rely on the Initiative to support regulations and decisions that have broad effects, the Initiative essentially embraced more than one subject. The Title Board nevertheless determined by a *unanimous* vote that Initiative #292 had a single subject, and it set a title.

Petitioners and Respondent Goad each filed a motion for rehearing, challenging different Title Board actions. Petitioners' motion for rehearing argued that the Title Board correctly found that the measure embraced a single subject, but that the Title Board erred in setting an inaccurate and misleading title. (Pet. for Review, Ex. 1, at 15). Respondent Goad disagreed, reiterating the same argument she made at the Initial Hearing that the measure embraces more than one subject because it might result in broad effects later in time.

A rehearing was held on April 25, 2024, where Respondent Goad once again raised the very same, generic concerns over the measure's potential downstream effects. (Rehearing Audio 2:20).[1] Despite no new argument being raised, Chair Conley (who represents the Secretary of State) and Title Board member Kurt Morrison (who represents the Attorney General) expressed that they were persuaded by Respondent Goad's argument. But when pressed by Petitioners to explain what the second (or third, or fourth, etc.) subject was that apparently served as the

[1] Title Board Rehearing Audio 2:20, *available at* https://csos.granicus.com/player/clip/456?view_id=1&redirect=true (hereinafter "Rehearing Audio").

basis for their change of heart, the Title Board members gave no response. (Rehearing Audio 34:10). Title Board member Jason Gelender (who represents the nonpartisan Office of Legislative Legal Services) maintained that the Initiative embraced a single subject.

Despite its inability to identify a second subject, the Title Board reversed its initial decision and found by a vote of 2-1 that Initiative #292 contained multiple subjects. (Pet. for Review, Ex. 1, at 7). The Title Board then denied Petitioners' motion for rehearing as moot and declined to consider it. (*Id*.)

Petitioners now ask this Court to reverse the Title Board's decision and find that Initiative #292 has a single subject. In addition, Petitioners ask the Court to remand the measure with specific instructions to the Title Board to correct the title as detailed by Petitioners here.

SUMMARY OF THE ARGUMENT

The Title Board erred in determining that it lacked jurisdiction to set a title and in failing to set a title that accurately and fairly reflects the measure. Proposed Initiative #292 embraces the single subject of providing that conflicts between local and state governments on specific

issues of land use shall be resolved in favor of the local government, with the exception of land use decisions related to water projects. Despite this narrow purpose, the Title Board held that the measure violated the single subject requirement because "land use" is a broad topic and thus the measure might have broad effects. But this Court has repeatedly held that a measure does not fail the single subject mandate just because it addresses a broad area of law. The Title Board's reasoning is flawed, and its ruling erroneous.

Moreover, if the Court finds that the measure encompasses a single subject, it should also address the flaws in the title set by the Title Board. Petitioners thus request that this Court remand the measure to the Title Board and, in light of the quickly approaching election, provide clear direction to set an accurate title as proposed by Petitioners.

STANDARD OF REVIEW

This Court is vested with the authority to review Title Board decisions. C.R.S. § 1-40-107(2). Although the Court "employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board's action," *Matter of Title, Ballot Title, and Submission Clause for 2013-*

2014 #89, 328 P.3d 172, 176 (Colo. 2014) (quoting *In re Title, Ballot Title, & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010)) (alteration in original), the statutory single-subject requirement must be "liberally construed." C.R.S. § 1-40-106.5(2). Maintaining this liberal approach to the requirement is critical "so as not to impose undue restrictions on the initiative process." *Matter of Title, Ballot Title and Submission Clause, Summary Clause for 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998). Therefore, this Court has "held repeatedly that where a proposed initiative 'tends to effect or to carry out one general objective or purpose,' it presents only one subject." *Matter of Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 489 P.3d 1217, 1221 (Colo. 2021) (quoting *In re Title, Ballot Title & Submission Clause for 2017–2018 #4*, 395 P.3d 318, 321 (Colo. 2017)).

ARGUMENT

I. Title Board erred in holding that Initiative #292 embraced more than one subject.

Initiative #292 covers a single subject. Except for a carve-out for land use decisions related to water projects, it provides that when there is a conflict between state and local land use regulations or decisions, the

local action controls. Although the measure itself is limited, the Title Board erred in mistaking the potential *effects* of a proposed initiative for the initiative's *subject*. Under this Court's precedent, however, those are distinct inquiries. This Court has routinely held that a measure embraces a single subject so long as its provisions are necessarily or properly connected and it carries out one general objective or purpose, regardless of whether the measure could have broad effects. The Court should therefore reverse the Title Board's determination that Initiative #292 contains multiple subjects.

A. Initiative #292 embraces a single subject.

There are three primary ways an initiative can fail the single-subject requirement: (1) "if its text relates to more than one subject," (2) "if the measure has at least two distinct and separate purposes which are not dependent upon or connected with each other," *Matter of Title, Ballot Title, and Submission Clause (Petitions)*, 907 P.2d 586, 590 (Colo. 1995), and (3) if the purported subject is an impermissible umbrella topic. *In re 2021-2022 #16*, 489 P.3d at 1222. Initiative #292 does not invoke any of these concerns.

First, the text of the measure does not relate to more than one subject. Initiative #292 has six interrelated parts, all of which would be added to a new Section 17 in Article XVIII of the Colorado Constitution.

- Section 17(1) states that the purpose of the measure is to ensure that when there is a conflict between a state and local land use regulation or decision, the local action controls. (Pet. for Review, Ex. 1, at 3).
- Sections 17(2)(a–c) define "land use regulation or decision," "local government," "statement government," and "state agency" for purposes of the sections. (*Id*. at 3–4). It also provides that this definition does not include matters covered by Title 37 of the Colorado Revised Statutes.
- Section 17(3) carries out the measure's purpose, establishing that when there is a conflict between state and local land use regulations or decisions, the local action controls. (*Id*. at 4)
- Section 17(4) provides that the state cannot interfere with a local government's land use decision by denying permits necessary for the use, ensuring the state cannot stifle local government land use decisions by denying permits when there is a conflict. (*Id*.)
- Section 17(5) provides that the section is self-executing. (*Id*.)
- Section 2 provides that the measure is not retroactive. (*Id*.)

The text of each of these sections relates to the measure's single subject of ensuring local government land use regulations and decisions control over conflicting state regulations and decisions.

Second, the measure does not have distinct and separate purposes that are independent of, or unconnected from each other. Each section serves the measure's aim of providing local governments control over land use decisions. For instance, Section 17(3) provides that in a conflict between state and local land use regulations and decisions—excluding those matters covered by Title 37 (water and irrigation)—the local action controls. Section 17(4) ensures that state governments cannot end-run the Initiative's goals by denying the permits that are required to carry out a local government's land use regulation and decision. And Section 17(5) provides that local governments do not need to file suit to establish the supremacy of their land use regulations and decisions—those decisions have primacy without further action. Because the measure's text and purpose all relate to giving local governments control over land use decisions, Initiative #292 embraces a single subject.

Third, the measure does not embrace an impermissible umbrella topic. A subject is an impermissible "umbrella" subject when a theme is used to bind together separate and distinct subjects. *Id.* at ¶ 22. Indeed, "umbrella" topics are not in-and-of themselves impermissible. Rather, a

topic becomes an impermissible umbrella only when used to try and connect disparate topics that otherwise have no necessary or proper connection. *See In re Title, Ballot Title & Submission Clause, for 2007-2008, #17,* 172 P.3d 871, 875-76 (Colo. 2007) (noting how "environmental conservation" and "conservation stewardship" "unite multiple subjects into a single subject"). Thus, umbrella topics fail the single-subject requirement because they combine multiple topics under a broad category where the components are not necessarily or properly connected.

For example, in *Waters II,* 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. *Matter of Title, Ballot Title, Submission Clause, & Summary Adopted Apr. 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rts. in Waters II*, 898 P.2d 1076, 1077-78 (Colo. 1995). The 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. The Court thus held that because there was no unifying or

common objective between the measure's components, it lacked a single subject. *Id.*

As explained above, each of Initiative #292's provisions relate to a single theme: addressing conflicts between state and local land use regulations and decisions. Proponents are not binding together disparate provisions under a banner as broad as "water" or "environmental conservation." *Id.* The Initiative is narrow and focused on one singular, connected matter. Indeed, as Title Board member Jason Gelender noted at the rehearing on the related Initiative #291, "looking at the definition of land use regulation or decision . . . it all seems to be basically about zoning, siting, things of that nature." (Rehearing Audio 23:30). Because the measure's provisions all relate to the same purpose of resolving conflicting land use decisions, the measure does not contain distinct subjects bound together by an impermissible umbrella topic.

B. Title Board erred in fixating on the potential effects of the measure.

The Title Board's chief concern seemed to be that the effects of the measure might be felt across various industries. But this Court's caselaw forbids the Title Board from rejecting a measure on this basis.

This Court addressed concerns over breadth in *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, where it expressly rejected the notion that an initiative with multiple *effects* "necessarily violates the single-subject requirement." 12 P.3d 246, 254 (Colo. 2000). That measure—dubbed "Citizen Management of Growth"—sought to put greater control over building and development in the hands of local citizens *Id*. at 250. On appeal, the objectors argued that the measure violated the constitutional single-subject requirement because it would "giv[e] the voters the power of making land use decisions previously made by local government officials," and would touch industries as unrelated as water storage and animal feeding. *Id*. at 254. They specifically argued that the measure contained the following subjects:

> (1) the exclusions from the definition of "development" that have disparate impacts on facilities for the diversion, storage, transportation, or use of water within and without Colorado; (2) alteration of the power and authority of home rule cities to make land use decisions; (3) the transfer of land use authority to outside local government entities by requiring that growth area maps be made in cooperation with those entities; (4) its referendum requirement, which is restricted to one day a year, requires voters to approve growth maps, thus giving the voters the power of making land use decisions previously made by local government officials and cutting off the appeal rights of citizens adversely affected by the voters' decisions; (5) the Initiative would impair vested property rights; (6) it takes away the right of a landowner to petition the government for redress of grievances; (7) the proposal contains a ten-year time limitation on borrowing, taxing, and spending to construct and to service a new growth area with central water and sewer systems and with roads; (8) it limits voters' choice by requiring central water and sewer service in areas that may be approved; and (9) it restricts certain agricultural uses of the land, specifically, confined animal feeding operations.

Id. In assessing single subject, the Court acknowledged that the measure might have sweeping effects, and the subject might be a "broad one." *Id.* But this Court rejected that such provisions constitute separate subjects, noting that "[w]e have never held that just because a proposal may have different effects or that it makes policy choices that are not inevitably interconnected that it necessarily violates the single-subject requirement." *Id.* In other words, the Title Board was supposed to put

aside concerns over breadth and effects, and find a single subject so long as "the provisions of a proposal are connected." *Id.*

In re #256 is not alone in this regard. This Court has repeatedly held that an initiative will not "be deemed to violate the single subject requirement because it may have different effects." *Matter of 2019-2020 #315*, 500 P.3d 363, 367 (Colo. 2020). The Court recently reviewed a measure that would create and administer a Colorado preschool program funded by state taxes on nicotine and tobacco products. *Id.* at 368. Objectors argued that the effect of the measure would be to expand preschool programs and penalize local policy makers who ban any form of tobacco or nicotine products. *Id.* at 367. Rather than focusing on the effects of a measure, the Court walked through the measure, provision by provision, and evaluated whether the provisions relate to the same purpose. *See id.* at 367–68. The Court then held that even though the measure would have broad effects on tobacco and local government, the measure passed single-subject review because its provisions all related to its goal of funding a preschool program. *See id.* In rejecting the objectors' effects-based arguments, the Court noted that "such effects are

not relevant to whether the proposed initiative contains a single subject." *Id.* at 367.

Another relevant case, which was cited to during the Initiative's rehearing, is *Matter of Title, Ballot Title & Submission Clause for 2015-2016 #63.* In this case, the objectors argued that an initiative seeking to establish a right to a healthy environment violated the single-subject requirement because its various effects constituted separate subjects. 370 P.3d 628, 632 (Colo. 2016). Specifically, the objectors argued that the measure: (1) redefined the legal status of local governments; (2) prioritized and subordinated rights under the Colorado Bill of Rights; (3) modified preemption law; and (4) created a cause of action to enforce the right to a healthy environment. *Id.* at ¶ 13. In determining whether the proposed measure contained a single subject, the Court first noted that its inquiry was not to assess the effects and must "avoid[] interpretation beyond that necessary to determine whether there is a single subject and clear title." *Id.* at ¶ 14. The Court found that the measure had a single subject related to a right to a healthy environment and that the measure's component assigning the protection of a healthy environment

to state and local governments was necessary to ensure that the right created by the initiative "is accorded the respect it is due . . . ." *Id.* at ¶ 20. Notably, the Court reasoned that the various components of the initiative creating the right, standing to enforce the right, and punitive damages for violating the right were all "tool[s] for its implementation" rather than separate subjects. *Id.* at ¶ 21.

Similarly, in *In re Proposed Ballot Initiative on Parental Rights*, this Court reviewed an initiative that would provide parents with the "natural, essential and inalienable right[]" "to direct and control the upbringing, education, values, and discipline of their children." 913 P.2d 1127, 1129 (Colo. 1996). The opponent argued that the measure encompassed multiple subjects insofar as it affected "upbringing; education; values; and discipline." *Id.* at 1131. But this Court disagreed and held that although the initiative touched on several different areas, it nonetheless had a singular purpose of establishing inalienable rights of parents. *Id.* Specifically, the Court held that each component of the measure was "connected to each other rather than disconnected or incongruous." *Id.*

Initiative #292 is even less broad and more connected than the measures this Court has previously approved. Just like the objectors in *In re Initiative #256*, members of the Title Board expressed concern that a change to how conflicts between state and local laws regarding land use are resolved had the potential to touch a broad range of regulations and industries. (Rehearing Audio 17:15–18:00, 32:00–33:00 (expressing concerns that the measure would affect oil and gas permitting and water)). Those are the same concerns the challengers raised, and the Court rejected, in *In re Initiative #256*. *See* 12 P.3d at 254 (noting challengers' concern that a change to local governments' land use authority would affect permitting and water storage). Initiative #292 might empower local governments to make land use decisions that would otherwise be preempted by state law or regulation. But a measure does not embrace more than one subject just because it empowers local governments to make impactful policy decisions. *See id.* at 254 (holding that an initiative that changed zoning laws was not impermissibly broad, even though changes to zoning laws will necessarily have broad effects). Nor does an initiative embrace more than one subject merely because its

component parts impact different areas, as was the case in *In re Initiative #63*.

Title Board member Jason Gelender emphasized these points at the rehearing on the related Initiative #291, noting that every provision of the measure relates to local control over "zoning, siting, and things of that nature." (Rehearing Audio 24:00). He further noted that initiatives and the legislature regularly amend the law on zoning, and those laws have not been found to violate single subject, regardless of their "effects." (*Id.* 24:45).

Initiative #292 is similar to the initiatives under review cited above, including *In re Initiative #256*. Both initiatives concern local government control over land use. And in both cases, challengers expressed similar concerns over the breadth and effects of the measures. (Rehearing Audio 24:45 (Title Board member Gelender noting that "[o]verall, a lot of the discussion was on effects")). Just as the Court rejected those concerns in *In re Initiative #256*, *In re Initiative #63*, and the *Parental Rights* measure, it should reject them here.

C. The measure would not promote voter surprise.

During the rehearing, members of Title Board expressed concern that they would not have expected some of the measure's effects based on its text. (Rehearing Audio 35:20). But the Title Board's concerns are just repackaged concerns about breadth.

One ill the single-subject requirement is designed to cure is voter surprise. *In re Title, Ballot Title, And Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 440 (Colo. 2002). An initiative should not be placed on the ballot if it contains a "surreptitious provision coiled up in the folds" of the complex bill. *Id.*

This Court recently addressed a classic example of voter surprise addressing an animal cruelty case measure. *See In re 2021-22 #16*, 489 P.3d 1217 (Colo. 2021). The measure in that case would have removed a livestock exception from animal cruelty statutes, meaning livestock would get the same protections as other animals. *Id*. at 1221–22. But tacked onto the end of the measure was a provision that enlarged the prohibition on sexual acts with all animals. *Id*. The Court held that the bestiality provision embraced a different section than the humane

treatment of livestock, and voters would be surprised to learn that a livestock law also included provisions on bestiality for all animals. *Id*. at 1224.

This Court's analysis in *In re 2021-2022 #16* did not turn on the breadth of the measure or its potential effects. Instead, the Court walked through the measure, provision by provision, and evaluated whether a voter would be surprised to learn that the provision itself was a part of the measure. *Id.* at 1221–24. The Court held that the provisions related to livestock survived scrutiny. *Id*. at 1221–23. But when the Court arrived at the provision that addressed sexual conduct with all animals, the Court held that "this provision addresses a second subject" because it amended the standard of care for all animals, "regardless of whether that conduct is directed at livestock or other animals." *Id*. at 1224. *In re 2021-2022 #16* provides a roadmap for how this Court should evaluate arguments over voter surprise: rather than look at the potential effects of the measure, the Court should walk through the measure's provisions and evaluate whether a voter would be surprised to learn that the provision was part of the measure. That analysis reveals that Initiative

#292 promotes no concerns of voter surprise.

As explained above, each of the proposed provisions relate to Initiative #292's central purpose of, except for matters covered by Title 37 (water and irrigation), giving local governments control over land use decisions where there is conflict with the state. *See supra*, § I.A. Initiative #292 serves the limited purpose of addressing how to assess conflict between state and local government regulations and decisions on land use. "Land use" might, as a general matter, be a broad topic, but a measure does not promote voter surprise simply because it addresses a broad area of law. *See In re Initiative #256*, 12 P.3d at 254. Instead, the objectors must show that there is a provision tacked onto the measure that is itself unrelated (*i.e.*, not necessarily or properly connected) to the rest of the measure. The objectors did not and could not make such a showing. The Title Board erred in rejecting the title based on voter surprise.

* * *

Initiative #292 accomplishes a single goal: when there is a conflict between state and local action on an issue of land use, except for matters covered by Title 37, the local action controls. The effects of Initiative #292 might (or might not, depending on future state or local action) be wide reaching, but that is not a valid reason for the Title Board to decline jurisdiction or refuse to set title. This Court should reverse the Title Board's determination that Initiative #292 violates the single-subject requirement.

II. The title set for Initiative #292 does not accurately describe the measure.

In addition to reversing the Title Board's erroneous single-subject determination, this Court must also reverse the Title Board's denial of Petitioners' motion regarding Initiative #292's title, which the Title Board denied as moot. (Pet. for Review, Ex. 1, at 7). Given the late date in the initiative process, the time required to collect signatures on a constitutional measure, and the upcoming November election, Petitioners ask that this Court remand this case with specific instructions to the Title Board to amend the title as discussed below.

A. The timing of this appeal demands specific instructions from the Court to the Title Board.

The title of Initiative #292 does not clearly or accurately express the measure's purpose or function. The Court thus, must remand to the Title Board with specific instructions on how to fix the title.

This Court has authority to instruct the Title Board on remand. Under Colorado law, if a petition is filed with this Court pursuant to section 1-40-107, the Court may either affirm the action of Title Board or reverse it. C.R.S. § 1-40-107(2). The typical practice when the Court reverses the Title Board is to remand the measure to the Title Board for further consideration of the parties' arguments. *See id* (contemplating a remand to Title Board).

Colorado law provides that when the Court reverses a Title Board decision and remands, that remand should come with "instructions, pointing out where the title board is in error." C.R.S. § 1-40-107(2). This Court has exercised this authority to give the Title Board line-by-line instructions on how to amend the title. *See In re Proposed Initiated Constitutional Amendment of Education*, 682 P.2d 480, 483 (Colo. 1984). Here, those instructions should include revisions from this Court,

explaining to the Title Board how to remedy the errors in the title. *See infra*, § B.

B. The proposed title must be amended to address inaccuracies.

In reviewing a proposed initiative, the Court must ensure "that documents presented to the public fairly and succinctly advise voters what is being submitted, so that in the haste of an election, voter[s] will not be misled into voting for or against a proposition by reason of the words employed." *Dye v. Baker*, 354 P.2d 498, 500 (1960).

At the initial hearing, Title Board affixed the following submission clause and title to Initiative #292:

> An amendment to the Colorado constitution granting local governments primary regulatory authority over public and private land within their jurisdictions, and, in connection therewith, granting a local government complete and exclusive control over zoning laws, regulations, and land use decisions within its jurisdiction, including energy production, roads and bridges, and environmental regulations but excluding specified water and irrigation matters addressed by state law, providing that local laws, regulations, and decisions override any conflicting state land use law, regulation, or decision; and prohibiting the state from taking adverse action against a local government for its land use decisions or withholding any state required approval.

(Pet. for Review, Ex. 1, at 5).

As argued by Petitioners at the rehearing, the proposed title does not accurately reflect the measure because (1) the non-exhaustive list of land uses potentially implicated by the measure will lead to voter confusion; (2) the grammar creates internal inconsistencies with defined terms; and (3) the use of "exclusive control" is misleading.

1. The inclusion of a non-exhaustive list of potentially covered topics will sow confusion.

The Title Board's inclusion of a non-exhaustive and *ad hoc* list of example land uses in the title is inaccurate, misleading, and will likely lead to voter confusion. A title and submission clause must "allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal." *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016). Under Colorado law, titles should be brief, and need not "describe every feature of a proposed measure . . . ." *Matter of Title, Ballot Title & Submission Clause Approved Sept. 4, 1991.*, 826 P.2d 1241, 1244 (Colo. 1992). The title and submission clause "is not designed to fully educate the people on all aspects of the proposed law." *Id.* at 1244-45. Rather, it must "fairly

delineate or describe the . . . constitutional provision . . . without unduly expanding the title, ballot title and submission clause, and summary, and without jeopardizing the impartiality of the designations that ultimately will be placed before the electorate." *In the Matter of Proposed Constitutional Amendment Under the Designation "Pregnancy"*, 757 P.2d 132, 137 (Colo. 1988).

The title adopted at the Initial Hearing for Initiative #292 is not sufficiently clear or accurate to enable voters to understand its principal features. It highlights several categories covered by "zoning laws, regulations, and land use decisions," including "energy production, roads and bridges, and environmental regulations." (Pet. for Review, Ex. 1, at 5). While "zoning laws, regulations, and land use decisions" cover a range of land use activities, the topics highlighted in the title provide an unrepresentative and apparently random sampling that will undoubtedly lead to greater voter confusion and bias, not less, thereby undermining the fundamental purpose of setting a title in the first instance.

As drafted, this title will mislead voters that the initiative incudes only land use regulations and decisions related to those activities listed, or that for some unknown reason these topics are emphasized over other land use decisions. Rather than enumerate a non-exhaustive list of land uses, the title should simply state that the measure concerns "land use regulation or decision," which is descriptive enough to provide voters with a comprehensive idea of what categories may be implicated by the measure.

The Court should therefore amend the title to remove the non-exhaustive and *ad hoc* list of land use decisions discussing energy production, roads and bridges, and environmental regulations.

2. <u>The title should be clarified to correct the scope and control it would grant to local governments.</u>

In addition to removing the non-exhaustive list, the title and its grammar must be amended in several respects to avoid voter confusion.

First, Initiative #292 would not grant, as the title seems to erroneously say, local government control over, for example, *energy production*. Rather, Initiative #292's scope is narrowly tailored to cover only land use regulations and decisions, and thus would only grant local

governments control over the *siting or zoning* of such energy projects. A similar rationale applies to "roads and bridges" and "environmental regulations." To be sure, Initiative #292 does not grant local government control over everything related to these topics, and, unlike energy projects, obviously cannot grant control over the *siting* of environmental regulations (a non sequitur). As written, the grammatical error appears to grant local governments much broader control than what the measure actually contemplates by not accurately specifying how the measure would affect the activities listed.

Second, the phrasing is misleading because it takes a defined term in the measure—"land use regulation or decision"—and summarizes that phrase as "zoning laws, regulations, and land use decisions." Based on the measure's plain text, as well as zoning laws across the state, "land use regulation or decision" is the general category while "zoning laws" is an example of a type of land use decision. Initiative #292 does not grant control over "zoning laws" as separate from land use regulations and decisions. Nevertheless, by referencing "zoning laws" first, the title

erroneously suggests that "zoning laws" are separate from land use regulations and decisions.

3. <u>The use of "exclusive control" is misleading.</u>

Finally, the title does not accurately reflect the Initiative insofar as it states that local governments will get "exclusive" control over land use decisions. In the context of rights, "exclusive" is defined as "limited to a particular person, group, entity or thing."[2] However, that is not how Initiative #292 operates.

Contrary to the title set by the Title Board, Initiative #292 contemplates that state governments will retain power to regulate land use. The Initiative provides that "[l]ocal governments shall have plenary and exclusive control over land use regulations or decisions within their jurisdictions, including, without limitation, regulation of the siting, location of developments on and types of intensities of uses of land within their jurisdictions." The next sentence discusses the interplay of local and state law governing land use, specifying that local control "shall have primacy and presumptive effect *over a state government entity's*

[2] EXCLUSIVE, Black's Law Dictionary (11th ed. 2019).

conflicting determination, rule, approval, permit, or statute regarding the same siting . . . ." (Emphasis added). Initiative #292 therefore presumes that state governments will retain their current ability to regulate land use so long as there is not a conflict. The measure uses the word "exclusive" only to say that when there is a *conflict* between state and local action on land use, the local action controls. It is therefore inaccurate to say the measure gives local governments *exclusive* control over land use without the appropriate context of the measure itself.

Therefore, to provide necessary clarity on the type of control Initiative #292 grants to local governments, the Petitioners respectfully request that the word "exclusive" be removed from the title:

* * *

In sum, Petitioners request that the Court—either through direct amendment or clear instructions on remand—amend the title to reflect each of the arguments above:

> An amendment to the Colorado constitution granting local governments primary regulatory authority over public and private land within their jurisdictions, and, in connection therewith, granting ~~a~~ local governmentS complete ~~and exclusive~~ control over ~~zoning laws, regulations, and~~ land use REGULATIONS AND decisions within THEIR ~~its~~

> jurisdictionS~~, including energy production, roads and bridges, and environmental regulations~~ but excluding specified water and irrigation matters addressed by state law, providing that local laws, regulations, and decisions override any conflicting state land use law, regulation, or decision; and prohibiting the state from taking adverse action against a local government for its land use decisions or withholding any state required approval.

(Pet. for Review, Ex. 1, at 5).

CONCLUSION

Petitioners respectfully request the Court reverse the Title Board's decision that Initiative #292 does not meet the single-subject requirement, and remand the matter to the Title Board with instructions to amend the title in conformity with the suggested title above.

Respectfully submitted on May 7, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2024, I electronically filed a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** with the clerk of Court via the Colorado Courts E-Filing system which will send notification of such filing and service upon the following:

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