

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 16, 2018 4:51 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #178, #179, #180, and #181 (“Regulation of Oil and Gas Development”)</p> <p>Petitioner: Janette Rose, v. Respondents: John Brackney and Guillermo DeHerrera,</p> <p>and Title Board: Suzanne Staiert, Jason Gelender, and Glenn Roper</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case Nos.: 2018SA113, 2018SA114, 2018SA115, & 2018SA116</p>
<p><i>Attorneys for the Title Board:</i> CYNTHIA H. COFFMAN, Colorado Attorney General MATTHEW D. GROVE, Assistant Solicitor General* 1300 Broadway, 6th Floor Denver, Colorado 80203 Phone: (720) 508-6157 Fax: (720) 508-6041 Email: matt.grove@coag.gov Registration Number: 34269 <i>*Counsel of Record</i></p>	
<p style="text-align: center;">TITLE BOARD’S OPENING BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I 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:

A. The brief complies with C.A.R. 28(g) because it contains 1,916 words.

B. The brief complies with C.A.R. 28(a)(7)(A) because each issue it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority and (2) a citation to the precise location in the record, and not to an entire document, where the issue was raised and ruled on.

/s/ Matthew D. Grove

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Proposed Initiatives 2017-2018 Nos. 78, 79, 80, and 81 each contain a single subject under Article V, § 1(5.5) of the Colorado Constitution.

2. Whether the titles for Nos. 78-81 are clear.

STATEMENT OF THE CASE

Respondents John Brackney and Guillermo DeHerrera seek to circulate Initiative Nos. 78-81 to obtain the required number of signatures to place the measures on the general election ballot in November 2018. Nos. 78-81 are proposed amendments to the Colorado Constitution that, if passed, would clarify the relationship between state and local government concerning certain aspects of oil and gas regulation. As the Office of Legislative Council concluded in its initial fiscal impact estimates, each of these initiatives “restate[] current law by placing similar language in the state constitution that exists currently in state statute[.]” *See, e.g.*, Pet. Ex. 1 at 13 (Case No. 18SA113).

The Title Board granted single-subject approval for Nos. 78-81 and set titles on April 18, 2018. *See Attachments to Petitions for Review.* Petitioners filed a timely motion for rehearing. *Id.* The Board considered the motion for rehearing on April 26, 2018, and denied the motion except to the extent that the Board made changes to the titles. *Id.* at 15. The final version of the ballot title reads:

An amendment to the Colorado Constitution concerning the scope of state and local governmental authority to regulation oil and natural gas development, and, in connection therewith, affirming the authority of local governments to regulate certain surface aspects of such development so long as the regulation does not conflict with state law and prohibiting state and local governments from unreasonably restricting a property owner's access to the owner's surface or mineral property or imposing technically or economically unfeasible conditions on access or development.

Id. After the title and submission clause were set, Petitioner filed her petition for review in this Court.

SUMMARY OF THE ARGUMENT

The Title Board correctly found that Nos. 78-81 each contain only a single subject: clarifying the rights, obligations, and limits of state and local governments with respect to oil and gas development.

Likewise, the titles set by the board accurately reflect the content of the proposed measures.

ARGUMENT

I. The Board correctly found that Nos. 178-181 each contain a single subject.

A. Standard of review.

When this Court reviews “the Title Board’s single subject decision, [it] employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions. [It] will only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *In re Title, Ballot Title, & Submission Clause for 2011-2012, #45*, 274 P.3d 576, 579 (Colo. 2012) (quotation omitted).

The Title Board agrees that Petitioners preserved the single-subject issue by raising it in the motion for rehearing.

B. Nos. 178-181 contain only one subject.

The Colorado Constitution provides that an initiative may relate to only one subject: “No measure shall be proposed by petition containing more than one subject” COLO. CONST., art. V, § 1(5.5). A proposed measure that “tends to effect or to carry out one general

objective or purpose presents only one subject.” *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). In contrast, “to constitute more than one subject, the text of the measure must relate to more than one subject and it must have at least two distinct and separate purposes which are not dependent upon or connected with each other.” *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002 No. 43*, 46 P.3d 438, 441 (Colo. 2002) (quotations omitted).

Petitioners claim that Nos. 178 and 180 contain three different subjects: (1) the limitation of constitutional home rule provisions with respect to oil and gas development; (2) the establishment of new standard for the imposition of fees by local governments in connection with oil and gas development; and (3) the imposition of new restrictions on both state and local governments with respect to oil and gas development. Nos. 179 and 181 do not include any standards concerning the imposition of fees; Petitioners thus argue that these initiatives contain two subjects each.

A proposed initiative violates the single-subject rule if its text “relate[s] to more than one subject, and [has] at least two distinct and

separate purposes not dependent upon or connected with each other.” *People ex rel. Elder v. Sours*, 74 P. 167, 177 (Colo. 1903); see *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d 438, 441 (Colo. 2002) (describing use of *Sours* test to analyze ballot initiatives). Thus, “the subject matter of an initiative must be ‘necessarily and properly connected’ rather than ‘disconnected or incongruous.” *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 2012 CO 25, ¶¶ 9 (quoting *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative “Pub. Rights in Waters II,”* 898 P.2d 1076, 1079 (Colo.1995)).

The existence of “some overarching theme” will not save a measure if it contains separate and unconnected purposes. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442. “Water” and “revenue changes” are two examples of “overarching themes” that do not form an adequate link between a proposed measure’s disconnected or incongruous provisions. See *Pub. Rights in Waters II*, 898 P.2d at 1080 (holding that “water” is too general and too broad to constitute a single subject); see also *In re Title, Ballot Title and Submission*

Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colo. Adding Subsection (10) to Section 20 of Article X (Amend TABOR 25), 900 P.2d 121, 125–26 (Colo.1995) (concluding that umbrella subject of “revenue changes” did not alter the fact that the measure contained two unrelated subjects—a tax credit and changes to the procedural requirements for ballot titles).

In their motion for rehearing before the Title Board, Petitioners argued that Nos. 178-181 violate the single subject rule because they may lead to “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442; see § 1–40–106.5(1)(e)(II), C.R.S. (2017). A review of the proposed measures, however, demonstrates that each has a narrow and clear focus: clarification of state and local authority over the regulation of oil and gas development. Petitioners have nonetheless expressed concern that the measures “at first read would appear to be granting or enhancing local government regulatory authority with regard to oil and

natural gas production—when in fact very much the opposite is true.”

Pet. (No. 178) Ex. 1 at 10.

Even if Petitioners’ reading of the measures’ language were correct, however, it does not follow that they contain multiple subjects. Clarifying the relationship between state and local government for the purpose of oil and gas regulation is not an “umbrella” that sweeps in subjects with no necessary or proper connection for logrolling purposes. Nor are Nos. 178-181 complex initiatives that have surreptitious provisions “coiled up in the folds.” *In re Proposed Initiative 2001-02 No. 43*, 46 P.3d at 442. To the contrary, each of the proposed initiatives is notably brief and straightforward. Because Nos. 178-181 relate to only a single subject, the Title Board’s decision should be affirmed.

II. The titles for Nos. 178-181 are not misleading.

A. Standard of review.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256*, 12 P.3d 246, 256 (Colo. 2000). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The

Court will reverse the Board's decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994). All legitimate presumptions will be resolved in favor of the Board. *Armstrong v. Davidson*, 10 P.3d 1278, 1282 (Colo. 2000).

Petitioners preserved their clear title arguments by raising them in their motion for rehearing before the Title Board.

B. The Titles Are Fair, Clear and Accurate.

Titles set by the Title Board must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256*, 12 P.3d at 256. However, the Board is not required to set out every detail. *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 222 (Colo. 2002) (#21). In setting titles, the Board may not ascertain the measure's efficacy, or its practical or legal effects. *In re Title, Ballot Title and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 60 (Colo. 2008). "The interplay of a ballot initiative with various provisions of existing law is an issue for post-election, no the basis for a ballot title

challenge.” *Id.* The titles are adequate if they properly repeat the operative language of the measure and express its true intent and meaning. *In the Matter of the Title, Ballot Title and Summary for Proposed Constitutional Amendment Concerning Suits Against Nongovernmental Employers Who Knowingly and Recklessly Maintain an Unsafe Workplace*, 898 P. 2d 1071, 1074 (Colo. 1995).

Based on the motions for rehearing on each of the four measures at issue here, Petitioners’ primary complaint appears to be that the titles are misleading because “the measure’s ‘affirmation’ of local governmental authority would in fact *constrict* that authority as currently recognized.” See Exhibits to Petitions for Review for Nos. 178-181 at 9 and 10 (emphasis in original) (citing *In re Title, Ballot Title, Submission Clause & Summary Pertaining to a Proposed Initiative on “Obscenity,”* 877 P.2d 848 (Colo. 1994). In *Proposed Initiative on “Obscenity,”* this Court reversed the Title Board’s decision because the title did not reflect the intent of the initiative—which was “to prevent the Colorado courts from construing the Colorado Constitution as more protective of free expression than the First Amendment in the area of

obscenity.” *Id.* at 850. And indeed, the title set in that case omitted this critical provision, instead merely stating that the amendment would allow the state and its political subdivisions to “control the promotion of obscenity to the full extent permitted by the First Amendment to the United States Constitution.” *Id.* at 849.

This case would be similar to *Proposed Initiative on “Obscenity”* if the titles for Nos. 178-181 simply “affirmed the authority of local governments” over oil and gas development, and stopped there. But each of the titles goes much further by referencing the specifics of the initiative at issue. Most importantly, and in contrast to the title in *Proposed Initiative on “Obscenity,”* the titles for Nos. 178-181 each acknowledge that local governments have authority over “surface aspects” of oil and gas development only to the extent that such “regulation does not conflict with state law, unreasonably restrict a property owner’s access to the owner’s surface or mineral property, or impose technically or economically unfeasible conditions on access or development.” Because the titles highlight the interrelationship of state and local governmental authority in several different ways, they

provide potential signers with the information that they need to evaluate the effect that the petition will have on efforts by local governments to regulate surface aspects of oil and gas production.

CONCLUSION

The titles for Nos. 178-181 should be affirmed.

Respectfully submitted on this 16th day of May, 2018.

ATTORNEY GENERAL
CYNTHIA H. COFFMAN

/s/ Matthew D. Grove

Matthew D. Grove, 34269*
Assistant Solicitor General
Attorney for Title Board
**Counsel of Record*

CERTIFICATE OF SERVICE

This is to certify that I served the **TITLE BOARD'S OPENING BRIEF** and related documents upon the following counsel of record and parties through either Colorado Courts E-Filing or FedEx overnight delivery this 16th day of May, 2018, addressed as follows:

Edward Ramey
Tierney Lawrence LLC
225 East 16th Ave, Ste. 350
Denver, CO 80203
Attorney for Petitioners

Jason Dunn
David Meschke
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, Ste. 2200
Denver, CO 80202
Attorneys for Respondents

/s/ Matthew D. Grove