

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: May 15, 2020 4:00 PM
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019- 2020 #300 Petitioner: TIMOTHY STEVEN HOWARD v. Respondents: GREG BROPHY and SAM BRADLEY and Title Board: THERESA CONLEY; DAVID POWELL; and JASON GELENDER	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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PETITIONER'S OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 3207 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

X 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 (R. __, p. __), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent'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 and C.A.R. 32.

By: s/Martha M. Tierney

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Pursuant to Colo. Rev. Stat. § 1-40-107(2), registered Colorado elector Timothy Steven Howard (“Petitioner”) respectfully submits this Opening Brief in opposition to the title, ballot title, and submission clause set by the Ballot Title Setting Board for Proposed Initiative 2019-2020 #300.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board lacked jurisdiction to set a title for Initiative #300 for violating the single subject requirement by granting some or all control over oil and gas activities to local governments but also restricting a local government’s authority to enact moratoria?
2. Whether the title is misleading because the title fails to inform voters of how Initiative #300 will alter current law, including the title makes no mention of how the measure will significantly alter present law if a local government only assumes “some” and not “all” of the Colorado Oil and Gas Conservation Commission’s regulatory authority; or how a local government’s “control” will alter state law or regulations if the local government’s requirements are more stringent or less stringent than the COGCC’s; or how the Initiative defines “local government” to mean a county, county and city or municipality regardless of home

rule status – and the title does not alert the voter to these specific changes in the home rule doctrine.

STATEMENT OF THE CASE

This is an appeal from the Title Board’s setting of the Title for proposed Initiative 2019-2020 #300. The Title Board conducted its initial public hearing and set the title for the Initiative on April 15, 2020. Petitioner timely filed his motion for rehearing on April 22, 2020. The Title Board considered the motion at its April 23, 2020 hearing and denied the motion for rehearing in full. Petitioner Timothy Steven Howard filed a Petition for Review for Initiative #300 pursuant to C.R.S. §1-40-107(2) on April 30, 2020.

STATEMENT OF FACTS

Initiative #300 amends the Colorado Constitution by creating a new article XXX titled Local Control of Oil and Gas Activities. The measure grants any local government which chooses to do so, the right to assume within its boundaries all or part of the authority over oil and natural gas operations currently covered by article 60 of title 34 of the Colorado Revised Statutes. The Initiative allows local governments to enter into intergovernmental agreements for regional coordination of control of oil and gas activities. The measure defines “local government” to mean a county, county and city or municipality regardless of home rule status.

Finally, the measure states that “nothing in this article conveys the right for a local government to enact a moratorium.”

The Title set for Initiative #300 at the hearing on April 15, 2020 reads:

An amendment to the Colorado constitution allowing counties and municipalities to assume some or all of the Oil and Gas Conservation Commission’s regulatory authority over oil and natural gas operations within their boundaries, and, in connection therewith, authorizing counties and municipalities to regionally coordinate control of such operations and specifying that counties and municipalities are not granted the right to enact moratoriums on such operations.

SUMMARY OF ARGUMENT

The Title Board erred in determining that Initiative #300 contains a single subject. The Initiative purports to amend the Colorado Constitution by adding a new article XXX titled “Local Control of Oil and Gas Activities.” The new article grants local governments the authority to assume “all or part of the of the authority over oil and natural gas operations currently covered by article 60 of Title 34 of the Colorado Revised Statutes” within the geographic boundary of the local government. The measure also allows local governments to enter into intergovernmental agreements for regional coordination of control of oil and gas activities and defines the term “local government. Finally, the measure states that nothing in the article conveys the right for a local government to enact a moratorium.

This last provision creates the danger of logrolling because the Proponents attempted to garner support for their initiative from various factions which may have different or even conflicting interests. The Initiative may attract a "yes" vote from voters who are unhappy with the current state level control of oil and gas activities and would support granting some or all of that authority to local governments, but who might oppose restricting the authority to enact moratoria, or vice versa.

The Initiative violates the single subject rule because, by authorizing broad local control of oil and gas operations and restricting that authority by clarifying that the measure does not convey the right for a local government to enact a moratorium, the Initiative seeks to garner support from differing factions of voters.

The title is unclear and misleading because it makes no mention of how the measure will significantly alter present law if a local government only assumes "some" and not "all" of the COGCC's regulatory authority; or how a local government's "control" will alter state law or regulations if the local government's requirements are more stringent or less stringent than the COGCC's. Finally, the measure defines "local government" to mean a county, county and city or municipality regardless of home rule status – and the title does not alert the voter to that specific change in the home rule doctrine.

Titles and submission clauses should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal. Here, the title for Initiative #300 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear.

Initiative #300 should be set aside because the measure violates the single subject requirement and the title as set is misleading, therefore, the decision of the Title Board should be overturned.

ARGUMENT

I. THE INITIATIVE VIOLATES THE SINGLE SUBJECT REQUIREMENT.

A. Standard of Review.

In reviewing Title Board decisions, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *Smith v. Hayes (In re Title, Ballot Title and Submission Clause for 2017-2018 #4)*, 395 P.3d 318, 320 (Colo. 2017), quoting *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90)*, 328 P.3d 136, 141 (Colo. 2014). "We will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.*, quoting *Cordero, supra*. Though neither addressing the merits nor potential applications of a proposed initiative, "we must examine their wording to

determine whether the initiatives and their titles comport with the single subject and clear title requirements.” *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016). “In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning.” *Id.*

This court must “sufficiently examine an initiative to determine whether a measure violates the single subject rule[.]” and, “when necessary, characterize a proposal sufficiently to enable review of the Board's actions.” *In re Title & Ballot Title & Submission Clause for 2005-2006 # 55*, 138 P.3d 273, 278 (Colo. 2006) (Coats, J., dissenting) (collecting cases).

Petitioner preserved this argument in his Motion for Rehearing at pp. 1-2.

B. The Single Subject Requirement.

Colo. Const. art. V, §1(5.5)’s requirement that a proposed initiative contain only a single subject serves two functions. “First, the single subject requirement ‘is intended to ensure that each proposal depends upon its own merits for passage.’” *Johnson*, 374 P.3d at 465, quoting *In re Proposed Initiative on Public Rights in Waters II*, 898 P.2d 1076, 1078 (Colo. 1995). As with the similar requirement applicable to bills passed by the General Assembly, this “prevents proponents from engaging in ‘log rolling’ tactics, that is, combining multiple subjects into a single

initiative in the hope of attracting support from various factions that may have different or even conflicting interests.” *Johnson, id., citing* §1-40-106.5(e)(I), C.R.S. (2019).

Second, “the single subject requirement is intended ‘to prevent surprise and fraud from being practiced upon voters’ caused by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *Johnson, id., quoting In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002). As noted in *In re 2001-2002 #43*, 46 P.3d at 442-43, the purpose is to “obviate the risk of ‘uninformed voting caused by items concealed within a lengthy or complex proposal’” (quoting *Public Rights in Waters II*, 898 P.2d at 1079). As is clear from the Court’s words, a measure can be “complex” without necessarily being “lengthy” – indeed a short and seemingly simple initiative, directed to a large and moderately complex body of law, can harbor the most pernicious surprises “coiled up in [its] folds.”

C. The Initiative Violates the Single Subject Requirement Because the Proponents Engaged in Logrolling Tactics.

The Initiative proposes to amend the Colorado Constitution by adding a new article XXX, titled Local Control of Oil and Gas Activities:

- (1) Any local government which chooses to do so may assume within its boundaries all or part of the authority over oil and natural gas

operations currently covered by article 60 of title 34 of the Colorado Revised Statutes, or any successor statutes.

(2) Local governments may enter into intergovernmental agreements for regional coordination of control of oil and gas activities granted under this article XXX

(3) For purposes of this article XXX, “local government” means a county, county & city or municipality regardless of home rule status.

(4) Nothing in this article conveys the right for a local government to enact a moratorium.

The text of the measure, while short, contains more than a single subject in the hope of attracting support from various factions that may have different or even conflicting interests.

In subsection 1, Initiative #300 purports to amend the Colorado constitution by adding a new article that grants local governments the authority to assume “all or part of the of the authority over oil and natural gas operations currently covered by article 60 of Title 34 of the Colorado Revised Statutes” within the geographic boundary of the local government. This would appear to be the Initiative’s principal purpose and subject.

In subsections 2 and 3, the measure allows local governments to enter into intergovernmental agreements for regional coordination of control of oil and gas activities and defines the term “local government.” These would appear to be implementation details that flow from the measure’s single subject.

In subsection 4, however, the measure states that nothing in the article conveys the right for a local government to enact a moratorium. Subsection 4 is not an enforcement or implementation detail and instead does the complete opposite of what the single subject of the measure purports to do – give local control of oil and gas operations to local governments. Additionally, article 60 of title 34 of Colorado Revised Statutes does not give local governments the right to enact moratoria. Moratoria, therefore, has no connection to the Oil and Gas Conservation Commission’s (“COGCC”) regulatory authority over oil and natural gas operations. Instead, it appears that Respondents included this provision for the purpose of garnering support for their measure from particular voters.

This second subject in proposed Initiative #300 does what the Supreme Court has said that the single subject requirement is designed to prevent: “engaging in 'log rolling' or 'Christmas tree' tactics in which proponents attempt to garner support for their initiative from "various factions which may have different or even conflicting interests." *Waters II*, 898 P.2d at 1079. It is entirely likely that supporters of local control over oil and gas development would not support denying all rights for a local government to adopt a moratorium on such oil and gas development. Similarly, supporters of prohibiting moratoria by local governments

on oil and gas development may not be the same voters who support granting local control of oil and gas development to local governments.

Here, the initiative's central theme of local control of oil and gas activities bundles incongruous provisions under a broad theme. *See In re Initiative for 2005-2006 # 55*, 138 P.3d at 279. On the one hand, the breadth of a measure does not necessarily indicate a multiplicity of purposes. *Milo v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129)*, 333 P.3d 101, 105 (Colo. 2014). Nor must a measure provide “a full accounting of potential effects” to avoid the risk of voter surprise. *Bentley v. Mason (In re Title, Ballot Title & Submission Clause for 2015-2016 #63)*, 370 P.3d 628, 632 (Colo. 2016). Yet, this Court has never countenanced the deliberate embedding of disconnected purposes in a single measure to gather support from separate sectors of the voting public. *See Johnson*, 374 P.3d at 468.

Importantly, Initiative #300 creates a danger of log rolling because the Initiative may attract a "yes" vote from voters who are unhappy with the current state level control of oil and gas activities and would support granting some or all of that authority to local governments, but who might oppose restricting the authority to enact moratoria, or vice versa. *See In re Initiative for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014).

While Initiative #300 is not long, a measure can be “complex” without necessarily being “lengthy” – indeed a short and seemingly simple initiative, directed to a large and moderately complex body of law, can still combine multiple subjects into a single initiative in the hope of attracting support from various factions. Here, Initiative #300 brings just this danger.

II. THE TITLE DOES NOT CORRECTLY AND FAIRLY EXPRESS THE TRUE INTENT AND MEANING OF THE MEASURE.

A. Standard of Review.

In reviewing Title Board decisions, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *Cordero*, 328 P.3d at 141. “The Title Board is vested with considerable discretion in setting the title and ballot title and submission clause. [citations omitted] We will reverse the Title Board's decision only if a title is insufficient, unfair, or misleading.” *Id.* “In our limited review of the Title Board's actions, we do not address the merits of the proposed initiatives nor suggest how they might be applied if enacted.” *Id.* at 142.

“In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning.” *Id.* “The title should enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to intelligently determine whether to support or oppose such a proposal.” *Milo*, 333 P.3d at 105. While every detail of a

proposal need not be spelled out, “[t]he Title Board must ‘set fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation.’” *Bentley*, 370 P.3d at 634, quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #256*, 12 P.3d 246, 256 (Colo. 2000). “[O]ur role is to ensure that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.” *Hayes v. Spalding (In re Title, Ballot Title and Submission Clause for 2015-2016 #73)*, 369 P.3d 565, 569 (Colo. 2016). Petitioner preserved this argument in his Motion for Rehearing at pp. 2-3.

B. The Title and Submission Clauses Are Misleading.

A typical voter, with little time to swim through the details and subtleties of existing state and local laws restricting or limiting natural gas installation and use, would have no way to garner from Initiative #300’s title, as set, the information necessary to make an informed decision as to the meaning of a “yes” or “no” vote.

Even were the Court to conclude that the Initiative is confined to a single subject, that does not resolve the issue of whether its true intent and meaning is clearly and fairly expressed in the title. *Cf., Hayes*, 369 P.3d at 568-71. The fact that the title tracks the wording used in the measure is not enough to ensure that voters have adequate information “to determine intelligently whether to support or

oppose such a proposal.” *Id.* at 570, citing *In re Title, Ballot Title, Submission Clause & Summary Pertaining to a Proposed Initiative on “Obscenity,”* 877 P.2d 848, 850 (Colo. 1994). It is particularly important to ensure that the titles “alert voters to the fact that some of the proposed changes would significantly alter” present law. *Hayes*, 369 P.3d at 570.

Here, the title makes no mention of how the measure will significantly alter present law if a local government only assumes “some” and not “all” of the COGCC’s regulatory authority; or how a local government’s “control” will alter state law or regulations if the local government’s requirements are more stringent or less stringent than the COGCC’s. Finally, the measure defines “local government” to mean a county, county and city or municipality regardless of home rule status – and the title does not alert the voter to that specific change in the home rule doctrine.

While the title is not inconsistent with the Initiative, it is so general that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative. *Hayes*, 369 P.3d at 570, quoting *Garcia v. Montero (In re Ballot Titles 2001-2002 #21 & #22)*, 44 P.3d 213, 222 (Colo. 2002) (“The titles, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal,

but need not include every detail. They must allow the voter to understand the effect of a yes or no vote on the measure. When they do not, both the title board and this court fail in our respective functions."). Here, it is dubious whether a significant portion of the electorate, be they familiar or unfamiliar with how oil and gas operations are regulated presently by the COGCC pursuant to article 60 of title 34 of the Colorado Revised Statutes, would ascertain how the Initiative would "significantly alter current law." *See Hayes*, 369 P.3d at 570.

Titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Title, Ballot Title & Submission Clause for Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). Here, the title for Initiative #300 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear. *See generally* 1-40-106(3)(b); *see also In re Proposed Initiative on "Obscenity,"* 877 P.2d at 850-51.

Even if the title substantially tracks the language found in the Initiative itself, "the source of a title's language does not rule out the possibility that the title could cause voter confusion." *Id.* at 851; *Robinson v. Dierking (In re Title, Ballot Title & Submission Clause for 2015-2016 #156)*, 413 P.3d 151, 153 (Colo. 2016);

see also In re Title, Ballot Title & Submission Clause & Summary for 1999-2000
#44, 977 P.2d 856, 858 (Colo. 1999).

CONCLUSION

The Petitioner respectfully requests that the Court overturn the actions of the Title Board with regard to Proposed Initiative 2019-2020 #300.

Respectfully submitted this 15th day of May 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of May 2020 a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

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