

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

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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

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Case No.: 2020SA155

RESPONDENTS' 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 those rules. Specifically, the undersigned certifies that:

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

x It contains **3,330** words (opening brief does not exceed 9,500 words).

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

For each issue raised by the petitioner, 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.

x In response to each issue raised, the respondent 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 and C.A.R. 32.

By: /s/ Eric P. Waeckerlin

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Greg Brophy and Sam Bradley (jointly, “Proponents” or “Respondents”), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Opening Brief in support of the title, ballot title and submission clause (jointly, the “Titles”) that the Title Board set for Proposed Initiative 2019-2020 #300 (the “Initiative” or “Measure”) at a hearing on April 15, 2020.

STATEMENT OF ISSUES PRESENTED FOR REVIEW¹

1. Whether the Title Board erred in ruling that the Initiative contains a single subject as required by Article V, §1(5.5) of the Colorado Constitution and C.R.S. §1-40-105(4).
2. Whether the Title Board erred in ruling that the Initiative satisfies the clear title requirement in Colo. Rev. Stat. § 1-40-106(3)(b).

STATEMENT OF THE CASE

This is an appeal from the Title Board’s setting of the Titles for Initiative #300. Initiative #300 seeks to amend the Colorado Constitution to allow counties and municipalities to assume some or all of the Colorado Oil and Gas Conservation Commission’s (“COGCC”) regulatory authority over oil and natural gas operations within their boundaries and sets forth related implementation details.

¹These issues are drawn, as best as Respondents are able to discern, from Petitioner’s “Issues Presented for Review” in his Petition for Review and from the positions asserted by Petitioner in his Motion for Rehearing.

On March 11, 2020, Proponents, Mr. Brophy and Mr. Bradley, filed the Initiative with the directors of the Legislative Council and the Office of Legislative Legal Services. Pursuant to C.R.S. §1-40-105(2), the Offices of Legislative Council and Legislative Legal Services conducted a review and comment hearing on the Initiative as required by C.R.S. §1-40-105(1), and advanced the Initiative on March 25, 2020.

Proponents then filed the Initiative with the Secretary of State's office on March 27, 2020. At the Title Board hearing on April 15, 2020, the Title Board found that the Initiative contains a single subject and satisfies the clear title requirement as required pursuant to article V, section 1(5.5) of the Colorado Constitution, C.R.S. §1-40-106.5, and C.R.S. § 1-40-106(3)(b), respectively, and set the Titles for the Initiative.

On April 22, 2020, Petitioner Timothy Steven Howard filed a Motion for Rehearing on the Initiative, arguing that the Titles set by the Title Board (1) violate the single subject requirement in Article V, §1(5.5) of the Colorado Constitution and C.R.S. §1-40-105(4) and (2) violate the clear title requirement in Colo. Rev. Stat. § 1-40-106(3)(b). On April 23, 2020, the Title Board denied the Motion for Rehearing in its entirety.²

²An audio recording of the Title Board's April 23, 2020, hearing can be found at the following web address:

The title as designated and fixed by the Title Board is as follows:

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.

The ballot title and submission clause as designated and fixed by the Title Board is as follows:

Shall there be 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?

Notwithstanding the Title Board's findings, Petitioner Timothy Steven Howard filed a Petition for Review for the Initiative pursuant to C.R.S. § 1-40-107(2) on April 30, 2020, again asserting that the Titles set by the Title Board violate the single subject and clear title requirements.

https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=172; the rehearing for Initiative #300 begins at the recording's 2:48:17 time stamp (*see also* Colo. Sec. of State website, Audio Broadcasts, Available Archives, Title Board, https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html.)

SUMMARY OF ARGUMENT

The Title Board properly found that Initiative #300 contains a single subject as required by the Colorado Constitution. The Initiative accomplishes one purpose: it allows local governments to assume all or part of the authority over oil and gas operations currently afforded to the COGCC under C.R.S. §§ 34-60-101 to -301. The Initiative does not, as the Petitioner claims, create a sweeping Constitutional prohibition on local governments from enacting moratoria on oil and gas operations, and any such interpretation would impermissibly require reading into the Initiative language which is not there. Rather, the sentence at issue merely clarifies that the new authority being granted does not also include the power for local governments to enact moratoria on oil and gas activities. This clarification to the scope of the Initiative is dependent upon and connected with its single purpose.

The Titles for Initiative #300 also satisfy the clear title requirement. The Titles set by the Title Board correctly and fairly express the true intent and meaning of the proposed Initiative, are concise and straightforward, and will not mislead voters. Among other things, the Petitioner ignores well-established case law holding that the Title Board may not opine on or interpret the propriety or effect of an Initiative, consider how the Initiative might be applied if adopted, or estimate how the Initiative would interact with other laws. Petitioner also asks this

Court to ignore the plain language of the Titles and set aside the presumption in favor of the Title Board's decision.

Petitioner's arguments challenging the Titles are without merit, and this Court should defer to and affirm the Title Board's actions.

LEGAL ARGUMENT

I. Ballot Initiative #300 Complies with the Single Subject Requirement.

A. Standard of Review and Preservation.

When reviewing a challenge to the Title Board's decision, a court must "employ all legitimate presumptions in favor of the propriety of the [Title] Board's actions." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014). Because the Title Board is vested with considerable discretion in setting the title, ballot title, and submission clause, a reviewing court "must liberally construe the single-subject requirements for initiatives" to "avoid unduly restricting the initiative process." *In re Title, Ballot Title & Submission Clause for 2013-2014 #85*, 328 P.3d at 142 (Colo. 2014). The court "will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 328 P.3d 155, 158 (Colo. 2014).³

³Respondents agree that Petitioner preserved the arguments asserted here by raising them in his Motion for Rehearing. Because Opening Briefs are being filed

B. Initiative #300 Contains a Single Subject.

Article V, section 1(5.5) of the Colorado Constitution provides that “[n]o measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title.” *See also* C.R.S. § 1-40-106.5(1)(a) (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[.]”). The single-subject requirement serves two functions. First, it:

[f]orbids the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits[.]

C.R.S. § 1-40-106.5(1)(e)(I). Second, the 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.” C.R.S. § 1-40-106.5(1)(e)(II).

The court “must examine the initiative’s wording to determine whether it comports with the constitutional single-subject requirement. In conducting this

simultaneously, Respondents do not take a position on whether there is agreement with Petitioners’ standard of review.

limited inquiry, [the court] employs the general rules of statutory construction and gives words and phrases their plain and ordinary meanings.” *In re Title, Ballot Title and Submission Clause for 2019-2020 #3*, 442 P.3d 867, 869 (Colo. 2019).

Where a proposed initiative “tends to affect or carry out one general objective or purpose, then the initiative presents only one subject,” and the “provisions necessary to effectuate the purpose of the measure are properly included within its text.” *In re Title, Ballot Title & Submission Clause for 2013-2014 #85*, 328 P.3d at 142.

Here, the single subject of Initiative #300 is an amendment to the Colorado Constitution allowing local governments to assume all or part of the authority over oil and gas operations afforded to the COGCC by the Oil and Gas Conservation Act, C.R.S. §§ 34-60-101 to -301. The entirety of Initiative #300 (albeit short) relates to this single subject, including a sentence clarifying that the adoption of new authority granted via the Initiative does not also convey authority for a local government to enact a moratorium on oil and gas activities. This clarification is properly connected to the scope of local control of oil and gas operations, does not surreptitiously include incongruous subjects, nor would it allow surprise or fraud from being practiced upon voters.

Petitioner contends that Initiative #300 violates the single subject requirement because it contains two separate subjects: (1) granting local governments the right to assume all or part of the authority of regulation of oil and gas operations and (2) placing a constitutional prohibition on conveying to a local government the right to enact a moratorium on oil and gas operations. Petitioner's argument strays from the Initiative's express language and would require this Court to read language into the Initiative that is simply not there. *See* Pet. for Review of Final Action Ballot Title Setting Bd. Concerning Proposed Initiative 2019-2020 #300 at ¶¶ 1-2.

Petitioner's contention that Initiative #300 would create a constitutional prohibition on conveying to a local government the right to enact a moratorium on oil and gas operations is based on subsection (4) of the Initiative, which states "[n]othing in this article conveys the right for a local government to enact a moratorium." *Id.* Petitioner's argument is belied by the plain language of the Initiative, which does not include the words "prohibit" or "prohibition." Rather, the actual language, "nothing in this article conveys the right," clarifies the scope of the new authority being conveyed. It reaches no more broadly than that.

Moreover, Petitioner's argument would require this Court to ascribe meaning to the Initiative that is not present (*i.e.*, that it somehow creates a

sweeping new Constitutional prohibition). *See Spahmer v. Gullette*, 113 P.3d 158, 162 (Colo. 2005) (“We will not create an addition to a statute that the plain language does not suggest or demand.”); *Mook v. Bd. of Cnty. Comm’rs*, 457 P.3d 568, 576 (Colo. 2020) (recognizing courts “must refrain from adding words to the statute”). In fact, this provision does not speak one way or the other as to a local government’s ability to enact moratoriums. It simply cabins the scope of the Initiative itself. Because the Initiative grants new authority, this sentence makes clear that such authority does not include the ability of a local government to enact a moratorium on oil and gas activities. Such clarification is entirely appropriate, related to the single subject, and consistent with this Court’s precedent. *See, e.g., Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 # 45)*, 234 P.3d 642, 646 (Colo. 2010) (“An initiative may contain several purposes, but they must be interrelated Implementing provisions that are directly tied to the initiative's central focus are not separate subjects.”) (Internal citation omitted).

In short, the Initiative contains a single subject—local governments’ power to assume all or part of the authority over oil and gas operations currently afforded to the COGCC under C.R.S. §§ 34-60-101 to -301. This Court should reject Petitioner’s objection because it is not based on a plain reading of the Initiative’s

express language and would require the Court to read into the Initiative language and effect that simply are not there. *See In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 720 (Colo.1994) (rejecting a challenge to a ballot title because “petitioners' argument is based on their interpretation of the proposed initiative, not on its express language”).

II. The Titles for Initiative #300 are not Insufficient, Unfair, or Misleading.

A. Standard of Review and Preservation.

“The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause[,]’ and [the court] will reverse the Board’s decision only when a title is insufficient, unfair, or misleading.” *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 442 P.3d at 869. When reviewing titles, the court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions.” *Id.* The relevant question is not whether the Title Board set the best possible title, but rather, whether the title “fairly reflect[s] a proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words employed by the Title Board.” *In re Title, Ballot Title & Submission Clause for 2013-2014 #85*, 328 P.3d at 144. When reviewing titles, the court grants “great deference to the Title Board’s decisions” and will

“only reverse the Titles where the language is ‘clearly misleading.’” *In re Title, Ballot Title, & Submission Clause for 2013-2014 # 89*, 328 at 179.⁴

B. The Titles Fairly Express the True Intent and Meaning of Initiative #300.

Article V, section 1(5.5) of the Colorado Constitution requires that an initiative’s single subject be clearly expressed in its title. *In re Title, Ballot Title & Submission Clause for 2013-2014 #85*, 328 P.3d at 143. “The title and submission clause 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.” *Id.* “In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a ‘yes/for’ or ‘no/against’ vote will be unclear.” C.R.S. § 1-40-106(3)(b). The title “shall correctly and fairly express the true intent and meaning” of the ballot initiative. *Id.*

The Titles for Initiative #300 correctly and fairly express the true intent of the Initiative and will allow voters to determine intelligently whether they would like to support the Initiative. The Titles properly describe all four related

⁴Respondents agree that Petitioner preserved the arguments asserted here by raising them in the Motion for Rehearing.

subsections of the Initiative by (1) authorizing counties and municipalities, *i.e.*, local governments to assume some or all of the COGCC’s authority to regulate oil and gas operations within their boundaries, (2) clarifying that local governments may regionally coordinate control of such operations, (3) defining “local governments,” and (4) clarifying that the Initiative does not also grant local governments additional authority to enact moratoriums on such operations. This description tracks the language of the Initiative in all material respects and fairly expresses its intent and content. *See In re Title, Ballot Title & Submission Clause, & Summary With Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colorado Adding Paragraph (d) Subsection (8) of Section 20 of Article X (Amend Tabor No. 32)*, 908 P.2d 125, 129 (Colo. 1995) (holding that a title and ballot title and submission clause that “track[ed] the text of the Initiative almost verbatim” was not misleading).

C. Petitioner’s Arguments that the Titles are Misleading are Outside the Scope of this Court’s Review.

Petitioner argues that the Titles are legally flawed because they fail to inform voters (1) how local governments and the COGCC will share control over oil and gas operations if a local government only assumes “some” and not “all” of the COGCC’s regulatory authority, (2) how a local government’s “control” will operate when its requirements are more stringent than the COGCC’s, (3) how a

local government's “control” would operate when its requirements are less stringent than the COGCC’s, and (4) how enacting moratoria or not enacting moratoria on oil and gas operations is within the current regulatory authority of the COGCC.

None of these arguments address whether the Titles fairly reflect the central focus of Initiative #300. Rather, each argument solely concerns interpretation of the Initiative’s effect, *i.e.*, how the Initiative will or could be applied if adopted and how the Initiative would or could interact with other laws. These are classic issues of future construction and application outside this Court’s purview and improper in this challenge. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000) (finding that it is not the role of the Title Board or the reviewing court to determine “the initiative's efficacy, construction, or future application—that is a matter for judicial determination in a proper case should the voters approve the initiative.”); *see also In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d at 179 (“[T]he Title Board may not speculate on the potential effects of the initiative if enacted.”); *In re Title, Ballot Title, Submission Clause, Summary for No. 26 Concerning Sch. Impact Fees*, 954 P.2d 586, 592 (Colo. 1998) (recognizing that the Title Board is prohibited from “address[ing] the merits of the proposed initiative and ...

interpret[ing] the meaning of proposed language or suggest[ing] how it will be applied if adopted by the electorate”).

Here, each of Petitioner’s arguments concern how the Initiative would be applied or implemented, not whether the Titles fairly reflect the central elements of the Initiative. Petitioner’s first argument relates only to how the Initiative will be applied upon uncertain future events, *i.e.*, a local government electing to assume “some” of the authority of the COGCC. Likewise, Petitioner’s second argument—that the Initiative does not describe how it might operate if a local government’s requirements are more or less stringent than COGCC regulations—also relates only to the Initiative’s prospective implementation and effect.

Taken to its logical extreme, Petitioner’s argument would result in every Initiative needing to forecast all possible permutations and effects if adopted. Such a result would render the initiative process and the Title Board’s job unworkable. Fortunately, this Court does not require such speculation. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 200A, 992 P.2d at 30; see also In re Title, Ballot Title & Submission Clause, and Summary Approved on April 6, 1994, for Proposed Initiated Constitutional Amendment Concerning “Fair Fishing,” 877 P.2d 1355, 1362 (Colo. 1994)* (“Although detailed information regarding the state of the law and the effect of the proposed amendment on current

law is not set forth in the summary, the Board is not required to state the effect that the measure will have on other constitutional or statutory provisions.”).

And Petitioner’s third argument that the ballot title is unlawful because it does not opine on whether enacting a moratoria on oil and gas operations is within the current regulatory authority of the COGCC must also fail. “The electorate . . . must be presumed to know the existing law at the time they amend or clarify that law.” *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000). Moreover, whether current statute allows the COGCC to enact a moratorium is irrelevant to this Court’s review and ignores the clarifying purpose of this provision as discussed above.

The only relevant question for this Court’s review is whether the Titles fairly reflect the contents and purposes of the Initiative. Because a plain reading of the Initiative’s language shows that the answer to that question is yes, this Court should affirm the Title Board’s actions.

CONCLUSION

Respondents/Proponents respectfully request that the Court affirm the Title Board’s determination that Initiative #300 satisfies the single subject and clear title requirements.

Respectfully submitted this 15th day of May 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 15 day of May, 2020, I electronically filed a true and correct copy of the foregoing **Opening Brief** with the Clerk via the Colorado Courts E-Filing System which will send notification of such filing to the following:

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