

<p>COLORADO SUPREME COURT 2 East 14<sup>th</sup> Ave. Denver, Colorado 80203</p> <hr/> <p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2019-2020) Appeal from the Ballot Title Board</p> <hr/> <p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019- 2020 #300 (“Local Government Authority Pertaining to Oil and Natural Gas Development”)</p> <p><b>Petitioner:</b> Timothy Steven Howard,</p> <p><b>v.</b></p> <p><b>Respondents:</b> Greg Brophy and Sam Bradley,</p> <p><b>and</b></p> <p><b>Title Board:</b> Theresa Conley, David Powell, and Jason Gelender.</p>	<p><b>^ COURT USE ONLY ^</b></p>
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<p><b>THE TITLE BOARD’S OPENING BRIEF</b></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 the word limits set forth in C.A.R. 28(g) because it contains 1,798 words.
- B. The brief complies with C.A.R. 28(a)(7) because for each issue it contains, under a separate heading, a statement of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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/ Anne M. Mangiardi*

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The Colorado Title Board (“Board”), by and through undersigned counsel, hereby submits its Opening Brief.

### **STATEMENT OF THE ISSUES**

1. Whether the Board correctly concluded that the ballot title for Proposed Initiative 2019-2020 #300 (“#300”) contains a single subject.

2. Whether the ballot title is misleading in violation of Section 1-40-106(3)(b), C.R.S. (2019).

### **STATEMENT OF THE CASE AND FACTS**

Proponents Greg Brophy and Sam Bradley seek to circulate #300 to obtain the requisite number of signatures to place a measure on the ballot to enact a new article, Article XXX, in the constitution of the State of Colorado. The proposed initiative seeks to amend the state constitution to allow local governments to assume “all or part of the authority over” oil and gas operations. Record for Initiative #300, p. 2, filed April 30, 2020 (“Record”).

The initiative contains just four paragraphs. The first allows local governments to assume authority over oil and gas operations within

their boundaries (that regulatory authority is currently held by the Colorado Oil and Gas Conservation Commission (“COGCC”) pursuant to § 34-60-104, C.R.S.); the second allows local governments to enter into intergovernmental agreements; the third defines “local government”; and the fourth states “nothing in this article conveys the right for a local government to enact a moratorium.” *Id.*

The Board conducted an initial public hearing on April 15, 2020 and set a title for #300. Record, p. 3. Petitioner filed a timely motion for rehearing on April 22, 2020, *id.*, pp. 4-7, and the Board denied that motion after holding a rehearing on April 23, 2020, *id.*, p. 8. Petitioner then filed a timely petition of review with this Court on April 30, 2020.

### **SUMMARY OF THE ARGUMENT**

Petitioner first alleges that the measure contains two subjects—one overt subject, and a second subject Petitioner alleges “does the complete opposite of what the single subject of the measure purports to do.” Record, p. 5. The proposed amendment would grant local governments the right to assume regulatory authority currently in the

hands of the COGCC. Record, p. 2. Petitioner argues that the primary subject of the measure, local control of oil and gas, is inconsistent with the final paragraph, which states “nothing in this article conveys the right for a local government to enact a moratorium.” Record, p. 2.

Petitioner characterizes this paragraph as improper “log rolling.” Record, p. 5. But paragraph four simply clarifies that *transfer* of regulatory authority is not a substantive change to the *scope* of that authority. The single subject of the measure is the enhancement of local control over oil and gas. Local control is a value shared by many Coloradans, and is not limited to any region or political affiliation. It is inherent in the concept of local control that different areas of the state may use that local control very differently. The inclusion of paragraph four only serves to clarify that the proposed amendment does not *also* grant new authority to local governments to ban oil and gas development.

As Petitioner acknowledges, “article 60 of title 34 of Colorado Revised Statutes does not give local governments the right to enact

moratoria.” Record, p. 5. Paragraph four, far from “do[ing] the complete opposite” of the initiative’s stated purpose, simply clarifies that this initiative does not change the status quo. The proposed amendment contains a single subject.

Second, Petitioner alleges the title is misleading because it does not address four questions Petitioner has raised about the implementation of the proposed constitutional amendment. The title set by the Board accurately summarizes the substance of the initiative and is not misleading.

The Board’s action in setting the title for #300 should be affirmed.

## **ARGUMENT**

### **I. The Board’s action in setting the title should be affirmed because the measure contains a single subject.**

#### **A. Standard of Review and Preservation**

This Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title, & Submission Clause for 2009–2010 #45*, 234 P.3d 642, 648 (Colo. 2010). This 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, Submission Clause for 2011-2012 #45*, 274 P.3d 576, 579 (Colo. 2012).

The single subject requirement prohibits joining “distinct and separate” purposes. *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1097 (Colo. 2000).

“Implementing provisions that are directly tied to the initiative’s central focus are not separate subjects.” *Id.*

One purpose of the single subject requirement is the prevention of “logrolling,” or the practice of ‘combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions—that may have different or even conflicting interests—in order to lead to the enactment of measures that would fail on their own merits.’” *In re Matter of Title, Ballot Title & Submission Clause for 2017-2018 #4*, 395 P.3d 318, 321 (Colo. 2017) quoting *In re Title, Ballot Title, and Submission Clause for 2011–2012 #3*, 274 P.3d 562, 566 (Colo. 2012).

Petitioner preserved this argument by raising it in his motion for rehearing, Record, pp. 4-5, and at the rehearing itself.<sup>1</sup>

**B. The initiative contains a single subject.**

Petitioner does not dispute that the purpose of #300 is to transfer regulatory authority over oil and gas projects from the COGCC to local governments. Record, p. 5. Petitioner also does not dispute that the measure’s second and third paragraphs are implementation measures that do not raise a single subject concern. *Id.*

Petitioner argues that the measure’s fourth paragraph creates a second subject, and raises a risk of improper “log rolling.” But that paragraph states only what the proposed initiative does not do: “Nothing in this article conveys the right for a local government to enact a moratorium.” Record, p. 2. This paragraph is consistent with the single purpose of #300—the transfer of regulatory authority from

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<sup>1</sup> *Hearing Before Title Board on Proposed Initiatives 2019-2020 #300, #301* (April 23, 2020), available at <https://tinyurl.com/yctt99fp> (statement at timestamp 2:52:22-2:54:50).

COGCC to local governments. The paragraph simply clarifies that *transfer* of authority does not change the *scope* of that authority. A local government excising the regulatory authority currently vested in COGCC cannot excise greater power than is granted to COGCC by statute. (And the proposed measure would not prevent the legislature from later altering the scope of that authority by statute).

There is no danger of “log rolling” here. In applying the single subject requirement, this Court “look[s] to whether the purposes of the amendment are ‘distinct,’ ‘separate,’ or ‘unconnected.’ *In re No. 258(A)*, 4 P.3d at 1098. The central purpose of the proposed initiative is local control. Local control is a value that is not limited to any region of the state or political affiliation. Paragraph four is not designed to garner support from voters who would not otherwise support the measure, and it is necessarily and properly connected to the purpose of transferring current regulatory authority to local governments. *See In re #4*, 395 P.3d at 322. There is no risk that voters who generally oppose local control would vote for the measure because it does not also grant local

governments authority to ban oil and gas development. The ballot title should be affirmed.

**II. The ballot title is not misleading.**

**A. Standard of Review and Preservation**

A ballot initiative title must be fair, clear, accurate, and complete.

*In re Title, Ballot Title & Submission Clause, & Summary for 2007-2008 No. 62*, 184 P.3d 52, 60 (Colo. 2008). The Board’s task is to set a fair and accurate title, not to ascertain the measure’s efficacy, construction, or future application. *In re #45*, 234 P.3d at 645, 649. This Court does not demand that the Board draft the best possible title. *Id.* at 648. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.*

The Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for 2001-02 #21 and #22*, 44 P.3d 213, 222 (Colo. 2002). Title-setting is about distilling the proposed initiative down to a “reasonably ascertainable expression of the initiative’s purpose.” *In re #45*, 234 P.3d at 648, *citing*

*In re Title, Ballot Title, and Submission Clause for 2009-10 #24*, 218 P.3d 350, 356 (Colo. 2009).

“The Board need not consider and resolve potential or theoretical disputes or determine the meaning or application of the proposed amendment.” *In re Title, Ballot Title & Submission Clause for a Petition on Sch. Fin.*, 875 P.2d 207, 210 (Colo. 1994). The Board “may not speculate on the potential effects of the initiative if enacted.” *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014). This Court does not “review the initiative’s ‘efficacy, construction, or future application,’ as those issues do not come up unless and until the voters approve the amendment.” *Id.* at 176, quoting *In re Title, Ballot Title, Submission Clause, & Summary for 1999–2000 No. 200A*, 992 P.2d 27, 30 (Colo. 2000).

Petitioner preserved this argument by raising it in his motion for rehearing, Record, pp. 5-6, and at the rehearing itself.<sup>2</sup>

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<sup>2</sup> *Hearing Before Title Board on Proposed Initiatives 2019-2020 #300, #301* (April 23, 2020), available at <https://tinyurl.com/yctt99fp> (statement at timestamp 2:55:12-2:57:01).

**B. The ballot title accurately and plainly summarizes the initiative.**

Petitioner identifies four elements that he maintains should be included in the ballot title: (1) how local governments would share authority with the COGCC; (2 and 3) how local control would operate when local standards are more (or less) strict than COGCC standards; and (4) how enacting (or not) “moratoria on oil and gas operations is within the current regulatory of the COGCC.” Petition, pp. 2-3.

Each of these objections raises questions about how the proposed initiative might be implemented, if approved by voters. Hypothetical questions about future implementation are outside the scope of the Board’s role in setting title. *In re #89*, 328 P.3d at 176.

The Board is not required to set out every detail of the measure in the title. *In re #21 and #22*, 44 P.3d at 222. Nor is it the role of the Board (or this Court) to predict how a proposed initiative may be applied, if enacted by voters. *In re #89*, 328 P.3d at 178 n.4, 179. Each of the alleged deficiencies in the title set by the Board is really a legal question about how the proposed constitutional amendment would be

interpreted and applied, if the amendment is approved by voters. The title set by the Board should be affirmed.

## CONCLUSION

For the foregoing reasons, the Court should affirm the Board's actions in setting the title for Initiative #300.

Respectfully submitted this 15th day of May, 2020.

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## CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via Colorado Courts E-Filing, at Arvada, Colorado, this 15th day of May, 2020, addressed as follows:

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