

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 #301 Petitioner: TIMOTHY STEVEN HOWARD v. Respondents: GREG BROPHY and SAM BRADLEY and Title Board: THERESA CONLEY; DAVID POWELL; and JASON GELENDER	▲ COURT USE ONLY ▲
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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 2033 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 #301.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the title is misleading because the title fails to inform voters of how Initiative #301 will alter current law, and includes only a partial list of the key features of the measure and omitting the following: (1) the regulatory impact findings must include any direct or indirect impact to employment; (2) the regulatory impact findings must include the cumulative cost of each proposed rule; (3) the regulatory impact findings must identify if the proposed rule is capable of implementation by oil and gas operators; and (4) the regulatory impact findings must identify if the proposed rule requires the acquisition or use of any product, technology or equipment and that such product, technology or equipment is commercially available; and (5) the measure creates a two-step process whereby first the regulatory impact analysis must be published and interested parties will have the opportunity to comment on the analysis as though it were a proposed rule, and then there is the requirement that the final regulatory impact analysis be published at least 14 days prior to the public hearing.

STATEMENT OF THE CASE

This is an appeal from the Title Board's setting of the Title for proposed Initiative 2019-2020 #301. 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 #301 pursuant to C.R.S. §1-40-107(2) on April 30, 2020.

STATEMENT OF FACTS

Initiative #301 amends the Colorado Revised Statutes by adding a new section 34-60-108.1 requiring the Colorado Oil and Gas Conservation Commission ("COGCC"), prior to or simultaneously with issuing a notice of proposed rule-making, adopt and publish on their website and make part of the administrative record, extensive regulatory impact findings on a whole host of issues regarding the proposed rule, including the regulatory impact for the first, fifth, and tenth year following the effective date of the rule. The regulatory impact findings must identify the following:

- (a) The cumulative cost of the proposed rule;

(b) Any direct or indirect impact to employment expected as a result of the proposed rule;

(c) The expected impact of the proposed rule on State and local, including municipal, tax revenue;

(d) The expected impact of the proposed rule on all royalty payments for oil and gas development in the State;

(e) The projected impacts on the growth or retraction of the oil and gas industry in the State as a result of the proposed rule;

(f) That the proposed rule is capable of implementation by oil and gas operators;

(g) If the proposed rule requires the acquisition or use of any product, technology or equipment, that such product, technology or equipment is commercially available; and

(h) The provision(s) of Article 60 authorizing the proposed rule and, where applicable, the deficiency in existing rules that the proposed rule improves or corrects.

The COGCC must allow public comment on the regulatory impact findings and adopt and publish a final written regulatory impact finding at least 14 days prior to the public hearing required by C.R.S. §24-4-103(4).

The Title set for Initiative #301 at the rehearing on April 23, 2020 reads:

A change to the Colorado Revised Statutes requiring the oil and gas conservation commission, before adopting a rule, to publish regulatory impact findings, after allowing public comment, that specify the authority and need for the rule and whether it can be implemented and estimate certain impacts of the rule on: the oil and gas industry, including compliance costs; employment; state and local tax revenue; and oil and gas royalty payments.

SUMMARY OF ARGUMENT

The title of Initiative #301 misleads the voters by including only a partial list of the key features of the measure and omitting the following: (1) the regulatory impact findings must include any direct or indirect impact to employment; (2) the regulatory impact findings must include the cumulative cost of each proposed rule; (3) the regulatory impact findings must identify if the proposed rule is capable of implementation by oil and gas operators; and (4) the regulatory impact findings must identify if the proposed rule requires the acquisition or use of any product, technology or equipment and that such product, technology or equipment is commercially available; and (5) the measure creates a two-step process whereby first the regulatory impact analysis must be published and interested parties will have the opportunity to comment on the analysis as though it were a proposed rule, and then there is the requirement that the final regulatory impact analysis be

published at least 14 days prior to the public hearing. Only by listing these details would the title satisfy the clear title requirement.

Voters must be informed of these changes to the COGCC's rulemaking process in the title for #301 so that they do only sign petitions to put them on the ballot or vote to adopt them with sufficient and fair notice.

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 #301 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear.

Initiative #301 should be set aside because the title as set is misleading, therefore, the decision of the Title Board should be overturned.

ARGUMENT

1. 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 v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90)*, 328 P.3d 136, 141 (Colo. 2014). "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 v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129)*, 333 P.3d 101, 105 (Colo. 2014). 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 v. Mason (In re Title, Ballot Title & Submission Clause for 2015-2016 #63)*, 370 P.3d 628, 634 (Colo. 2016), 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. 1-2.

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 #301's title, as set, the information necessary to make an informed decision as to the meaning of a "yes" or "no" vote.

Here, the title of Initiative #301 misleads the voters by including only a partial list of the key features of the measure and omitting the following: (1) the regulatory impact findings must include any direct or indirect impact to employment; (2) the regulatory impact findings must include the cumulative cost of each proposed rule; (3) the regulatory impact findings must identify if the proposed rule is capable of implementation by oil and gas operators; and (4) the regulatory impact findings must identify if the proposed rule requires the acquisition or use of any product, technology or equipment and that such product, technology or equipment is commercially available; and (5) the measure creates a two-step process whereby first the regulatory impact analysis must be published and interested parties will have the opportunity to comment on the analysis as

though it were a proposed rule, and then there is the requirement that the final regulatory impact analysis be published at least 14 days prior to the public hearing. Only by listing these details would the title “satisfy the clear title requirement.” *Hayes*, 369 P.3d at 570, (citing C.R.S. 1-40-106(3)(b)).

The effect of the omission from the title of any one, but certainly all five, of the central features identified above is to render the titles, like the titles in *Hayes*, “so general” that they do not “contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative.” *Hayes*, 369 P.3d at 570, *citing Garcia v. Montero (In re Ballot Titles 2001-2002 #21 & #22)*, 44 P.3d 213, 222 (Colo. 2002) (“[t]he titles, standing alone...should be capable of...informing the voter of the major import of the proposal”).

While the title is not inconsistent with the Initiative, it is so general that voters will not understand the measure. *See Garcia*, 44 P.3d at 222 (“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 the COGCC conducts rulemaking

proceedings presently, 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 #301 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 Title, Submission Clause & Summary Pertaining to a Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850-51 (Colo. 1994).

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).

Voters must be informed of these changes to the COGCC's rulemaking process in the title for #301 so that they do only sign petitions to put them on the ballot or vote to adopt them with sufficient and fair notice.

CONCLUSION

The Petitioner respectfully requests that the Court overturn the actions of the Title Board with regard to Proposed Initiative 2019-2020 #301.

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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