

**SUPREME COURT, STATE OF COLORADO**  
**2 East 14<sup>th</sup> 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 #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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Case No.: 2020SA156

**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 2,481 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 #301 (the “Initiative” or “Measure”).

**STATEMENT OF ISSUES PRESENTED FOR REVIEW<sup>1</sup>**

1. 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 #301. Initiative #301 seeks to revise the Colorado Revised Statutes to require the Colorado Oil and Gas Conservation Commission (“COGCC”), before adopting a rule, to publish certain regulatory impact findings. The precise regulatory findings required are specified in the Initiative and include: the authority and need for the rule, whether it can be implemented, and estimated 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.

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<sup>1</sup> These 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 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) 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 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.<sup>2</sup>

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

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<sup>2</sup> An audio recording of the Title Board's April 23, 2020, hearing can be found at the following web address: [https://csos.granicus.com/MediaPlayer.php?view\\_id=1&clip\\_id=172](https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=172); the rehearing for Initiative #301 begins at the recording's 3:08:59 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](https://www.sos.state.co.us/pubs/info_center/audioBroadcasts.html).)

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.

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

Shall there be 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?

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 clear title requirement.

### **SUMMARY OF ARGUMENT**

The Titles for Initiative #301 correctly and fairly express the true intent and meaning of the proposed Initiative—a statutory amendment requiring the COGCC to publish a regulatory impact finding prior to adopting new rules. The Titles are short, straightforward and not misleading. Although the Titles do not include a verbatim recitation of every single provision of the Initiative, this Court has repeatedly held that the Title Board is not required to include every nuance of an

initiative. Any omissions from the Titles are not material and in no way mislead voters as to its central purpose.

Because the Titles at issue here are clear, accurate, and complete, and any omissions from the Titles are neither material nor significant, this Court should defer to and affirm the Title Board's actions.

### **LEGAL ARGUMENT**

#### **I. The Titles for Initiative #301 Correctly and Fairly Express the Initiative's True Intent and Meaning and are not 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 867, 869 (Colo. 2019). 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 136, 144 (Colo. 2014). 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 P.3d 172, 179 (Colo. 2014).<sup>3</sup>

**B. The Titles are not Misleading.**

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 136, 143 (Colo. 2014). “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 “[b]allot titles shall be brief” and “shall correctly and fairly express the true intent and meaning” of the ballot initiative. *Id.* But “[t]itles need not contain every feature of the proposed measure.” *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179 (Colo. 2014).

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<sup>3</sup> Respondents agree that Petitioner preserved the arguments asserted here by raising them in his Motion for Rehearing. Because Opening Briefs are being filed simultaneously, Respondents do not take a position on whether there is agreement with Petitioners’ standard of review.

The Titles for Initiative #301 correctly and fairly express the intent and meaning of the Initiative and will not mislead potential voters as to the effect of their yes/for or no/against vote. The Titles capture the single, central focus of the Initiative: requiring the COGCC to publish regulatory impact findings prior to adopting new rules. The Titles then list some of the considerations the COGCC must include in its regulatory impact findings.

Although the Titles do not list verbatim every consideration the COGCC must address, this does not render the Titles misleading. As recognized by this Court:

The Board need not and often cannot describe every feature of a proposed initiative in a title or ballot title and submission clause and simultaneously heed the mandate that such documents be concise. To require such would be to transform what the General Assembly intended—a relatively brief and plain statement by the Board setting forth the central features of the initiative for the voters—into an item-by-item paraphrase of the proposed constitutional amendment or statutory provision.

*In re Title, Ballot Title & Submission Clause, & Summary for 1997-98 # 62, 961 P.2d 1077, 1083 (Colo. 1998) (internal citation omitted).* This holding from the 1998 case is directly relevant and demands the same outcome here.

Petitioner argues that the Titles are legally flawed because they fail to inform voters that the regulatory impact findings must (1) include any direct or indirect impact to employment; (2) include the cumulative cost of each proposed

rule; and (3) identify if the proposed rule requires the acquisition or use of any product, technology or equipment and, if so, that such product, technology or equipment is commercially available. *See* Pet. for Review of Final Action Ballot Title Setting Bd. Concerning Proposed Initiative 2019-2020 #301 at ¶¶ 1-4. Petitioner also asserts that the Initiative fails to inform voters of a multi-step process, which includes the opportunity for public comment prior to rule promulgation. *Id.*

These arguments are each without merit. Adding any or all of these to the Titles would do nothing to enhance its clarity—as worded, it states that COGCC publish regulatory impact findings prior to promulgating a rule. The language employed by the Title Board is straightforward, clear, and would not mislead voters.

**1. The omission of the phrase “direct or indirect” is not misleading.**

The Titles appropriately inform voters that the COGCC’s regulatory impact findings must “estimate certain impacts of the rule on . . . employment.” Although, the Initiative, itself, uses the language “[a]ny direct or indirect impact to employment,” the Title Board’s exclusion of the words, “direct or indirect,” does not render the Titles misleading. The Titles still indicate the need to assess impacts to “employment.” *See In re Title, Ballot Title & Submission Clause for 2007–2008*

*No. 62*, 184 P.3d 52, 60 (Colo.2008) (“While titles must be fair, clear, accurate and complete, the Title Board is not required to set out every detail of an initiative.”). Furthermore, omission of the phrase “direct or indirect” before “employment” is neither “material” to the Initiative’s main purpose (to require regulatory impact findings) nor constitutes a “significant omission” (the Titles still reference “employment”). *See In re Title, Ballot Title & Submission Clause, & Summary for 1997–98 No. 62*, 961 P.2d 1077, 1082 (Colo.1998) (“[W]e will not rewrite the titles or submission clause for the Board, and we will reverse the Board’s action in preparing them only if they contain a material and significant omission, misstatement, or misrepresentation.”). In sum, the Titles sufficiently indicate that impacts to employment will be assessed.

**2. The omission of the phrase “cumulative cost” is not misleading.**

The same reasoning applies to Petitioner’s second argument. Although the Titles do not track word for word all of the information that must be included in the regulatory impact findings, including the “cumulative cost of the proposed action,” the Title Board is under no obligation to do so. *See In re Title, Ballot Title & Submission Clause for 2007–2008 No. 62, supra*.

Moreover, the Initiative defines “cumulative cost” to mean, in part, “for an average oil and gas operator, the total cost of compliance with the rules of the

Commission.” (emphasis added). The Titles include the words “compliance costs” and, therefore, adequately inform voters that the regulatory impact findings will include an assessment of compliance costs. The Title Board’s decision to use “compliance cost” instead of “cumulative cost” in the Titles is reasonable and within its discretion, especially where the definition of “cumulative costs” includes the term “compliance costs.”

**3. The Title Board properly paraphrased the language of the Initiative.**

Petitioner’s third argument is equally unpersuasive. Petitioner’s logic would require the Titles to specify that the COGCC’s regulatory impact finding must identify all eight categories of information, including “[i]f the proposed rule requires the acquisition or use of any product, technology or equipment, that such product, technology or equipment is commercially available.” Although the Titles set by the Title Board do not include all eight criteria or the language of each verbatim, again, they are not required to do so. *See In re Title, Ballot Title & Submission Clause, & Summary for 1997–98 No. 62, 961 P.2d 1077, 1082* (Colo.1998) (“[W]e will not rewrite the titles or submission clause for the Board, and we will reverse the Board's action in preparing them only if they contain a material and significant omission, misstatement, or misrepresentation.”). Instead, the Titles appropriately inform voters that the COGCC’s assessment must include

several elements, each related to “regulatory impacts,” including whether the proposed rule “can be implemented.” The Title Board’s decision to paraphrase the elements follows from the Title Board’s duty to keep titles brief and accurately capture the Initiative’s concept. *See* C.R.S. § 1-40-106(3)(b) (“Ballot titles shall be brief ... and ... shall unambiguously state the principle of the provision sought to be added, amended, or repealed”). Further, this language is not misleading because it logically flows from the language used in the Initiative and adequately informs voters that the COGCC must discuss the feasibility of implementing the proposed rule in its regulatory impact findings.

**4. The Titles adequately inform voters of the Initiative’s procedural requirements.**

Finally, Petitioner argues that the Titles are misleading because they do not inform voters that the Initiative creates a multi-step process where the COGCC must publish a preliminary regulatory impact analysis, allow for public comment, and then publish a final regulatory impact analysis at least fourteen days prior to the public hearing. Again, this argument ignores well-settled law that the Titles need not describe “every nuance or feature of the proposed measure.” *In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund*, 823 P.2d at 1355. Here, the Titles adequately inform voters that

COGCC must allow for public comment on the regulatory impact findings prior to adopting a final rule.

The language regarding public comment in the Titles also informs the electorate of a multi-step process. A public comment period, by its nature, requires an agency to first publish a draft, take public comment on it, and only after the public comment period closes finalize the draft. This is familiar, standard rulemaking procedure contemplated by, among other statutes, the Colorado Administrative Procedure Act. The language also properly informs the electorate that the regulatory impact finding must occur prior to adopting the final rule. The number of days the COGCC must publish the final regulatory impact finding prior to holding a public hearing is neither a “material” aspect of the Initiative’s main purpose nor a “significant omission” in the Titles. In short, there is nothing misleading or unclear about the Title’s reference to a “public comment” period without specifying the precise steps of such process.

### **CONCLUSION**

Respondents/Proponents respectfully request that the Court affirm the Title Board’s determination that Initiative #301 satisfies the single subject and clear title requirements.

Respectfully submitted this 15<sup>th</sup> 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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