

<p><b>SUPREME COURT, STATE OF COLORADO</b>  <b>2 East 14th Avenue</b>  <b>Denver, Colorado 80203</b></p>	<p>DATE FILED: May 30, 2020 11:26 PM</p>
<p>Original Proceeding  Pursuant to Colo. Rev. Stat. §1-40-107(2)  Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and  Submission Clause for Proposed Initiative 2019-2020  #313 (“Oil and Gas Development Rules”)</p> <p><b>Petitioner:</b> TIMOTHY STEVEN HOWARD a/k/a  TIM HOWARD,</p> <p>v.</p> <p><b>Respondents:</b> DIANE SCHWENKE AND DAVID  DAVIA,</p> <p><b>and</b></p> <p><b>Title Board:</b> THERESA CONLEY, DAVID  POWELL, AND JASON GELENDER.</p>	<p>COURT USE ONLY</p>
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<p><b>PETITIONER’S ANSWER BRIEF</b></p>	

## 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 the applicable word limits set forth in C.A.R. 28(g) because it contains **1,571 words**.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, as applicable, 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.

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/ Matt Samelson  
Matt Samelson, #44085

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Respondent Timothy Howard, through undersigned counsel, respectfully submits this Answer Brief in opposition to the title, ballot title, and submission clause set by the Ballot Title Setting Board (“Title Board”) for Proposed Initiative 2019-2020 #313 (“Proposed Initiative”).

## **SUMMARY**

The Title Board erred when setting a Title for the Proposed Initiative because the measure contains more than a single subject in violation of Colo. Const. art. V, §1(5.5) and section 1-40-106.5(1)(e), C.R.S. (2019). Furthermore, the Title fails to comply with the constitution’s clear title requirement.

## **ARGUMENT**

### **I. The Proposed Initiative’s violates the single subject requirement because the subject matter is disconnected and incompatible unless a second, separate initiative is approved.**

The Proposed Initiative violates the single subject requirement because the measure’s second provision is only connected to its first provision if voters approve a second, separate initiative. The subject matter of an initiative must be “necessarily and properly connected” rather than “disconnected or incongruous.” *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative “Pub. Rights in Waters II,”* 898 P.2d 1076, 1079 (Colo. 1995).

Adding the subject that the COGCC cannot repeal or amend certain AQCC rules is disconnected and incongruous to prohibiting the COGCC from repealing or amending certain regulations of its own. Respondents attempt to paint over this disconnection by stating that if a separate measure, Proposed Initiative 2019-2020 #311, which is unmentioned and undefined in the Proposed Initiative, is approved by the voters, then the COGCC will not be able to repeal or amend certain AQCC rules. Resp. Op. Br. p. 5. The connection between the prohibition of repealing or amending certain COGCC and certain AQCC rules by the COGCC is only created through voter-approval of a second, separate initiative.

Prohibiting the COGCC from repealing or amending AQCC rules is not properly connected to prohibiting the COGCC from repealing or amending its own rules because the COGCC has no authority to alter AQCC rules unless a second, separate initiative is also approved.

**II. The Title fails to comply with the constitution’s clear title requirement.**

A. The Title is incomplete and therefore misleading because it fails to accurately describe a crucial time element of the Proposed Initiative.

The Title for the Proposed Initiative fails to meet the constitutional requirement that the single subject be “clearly expressed in its title.” Colo. Const. art. V, § 1(5.5). The clear title requirement has two goals: prevent voter confusion and ensure that the title adequately expresses the initiative’s intended purpose.

When a title accomplishes these goals, voters, “whether or not they are familiar

with the subject matter of a particular proposal,” should be able to “determine intelligently whether to support or oppose the proposal.” *Matter of Title, Ballot Title & Submission Clause for 2015-2016 #73*, 369 P.3d 565, 568 (Colo. 2016).

Because the Proposed Initiative is retroactive and this crucial feature is omitted from the Title, the Title Board erred in setting the Title. The Proposed Initiative reaches back and states that only certain COGCC and AQCC rules as of January 1, 2020 receive statutory protection. Backdating the statutory protections is a central feature of the initiative. The date – January 1, 2020 – needs to be in the Title. Without the date in the Title, voters could be misled into believing that the current oil and gas rules are protected. *See In re Title, Ballot Title & Submission Clause for Proposed Initiatives 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.”).

Petitioner is not addressing the merits of the proposed date. *In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 159 (Colo. 2014). But the date is a central feature to this initiative because the statutory protections for certain rules are backdated, and voter are not so informed.

*Matter of Title, Ballot Title & Submission Clause for 2015-2016 #73, 369*

P.3d 565 (Colo. 2016) is informative to this matter. That case involved an initiative specifying recall and successor election procedures for state and local elected officials, but it did not “advise voters what those procedures are. Nor [did] it alert voters to the fact that some of the proposed changes would significantly alter how recall elections are currently conducted.” *Id.* at 569. The Court found that the title did not satisfy the clear title requirement. *Id.* at 571.

Here, the Proposed Initiative’s Title is not inconsistent with the initiative, but by omitting that the Proposed Initiative is backdated to January 1, 2020, it fails to contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative. As written, the Title contains “a material and significant omission, misstatement, or misrepresentation,” *In the Matter of Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #62, 961 P.2d 1077, 1082* (Colo. 1998), and will not enable the electorate to intelligently determine whether to support or oppose such a proposal. *In re Title, Ballot Title, Submission Clause for 2009-2010 #45, 234 P.3d 642, 648* (Colo. 2010).

Furthermore, while the Proposed Initiative’s Title nearly tracks the words used in the initiative doing so does not protect the Title from being misleading. *In re Title, Ballot Title, Submission Clause & Summary by the Title Board Pertaining to a Proposed Initiative on “Obscenity”, 877 P.2d 848, 850* (Colo. 1994) (“While

it is true that the title and submission clause read, virtually word for word, the same as the Initiative, this fact does not establish that the title and submission clause fairly and accurately set forth the major tenets of the Initiative.”). The relevant question is whether the “general understanding of the effect of a ‘yes’ or ‘no’ vote will be unclear” from reading the Title. Section 1-40-106(3)(b), C.R.S. (2019). The Court concluded that the *Proposed Initiative on “Obscenity”* title language was virtually the same as the initiative, yet it still failed to contain sufficient information to enable voters to determine intelligently whether to support or oppose such a proposal. *See In re 2013–2014 # 90*, 328 P.3d at 162. The Proposed Initiative suffers from the same fatal flaw.

Because the Title fails to adequately express a central feature of the Proposed Initiative – backdating statutory protections to certain rules – voters will be confused, and the clear title requirement is not met.

**B. Title is confusing because no matter if the Proposed Initiative passes or fails the COGCC will still not have the authority to repeal or weaken rules promulgated by the AQCC.**

The COGCC does not have the authority to alter AQCC rules, which will remain true no matter the outcome of the Proposed Initiative. “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.”

Section 1-40-106(3)(b), C.R.S. (2019).

This portion of the Title is unclear because the underlying initiative language is meaningless. “(P)erhaps because the original text of the proposed initiative is difficult to comprehend, the titles and summary are not clear.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 44*, 977 P.2d 856, 858 (Colo. 1999). The Proposed Initiative is asking the Colorado electorate to take away powers from a state agency that already does not have such powers. The Title causes confusion because the effect of voting “yes/for,” voting “no/against,” or not even bothering to vote at all has the same outcome: nothing.

Proponents have stated they would only run the Proposed Initiative accompanied by Proposed Initiative 2019-2020 #311. Resp. Op. Br. p. 5. And they state that there is no prohibition to interrelated ballot measures such as Referendums C and D in 2005. Resp. Op. Br. pp. 10-11. There is no prohibition, but comparing the Proposed Initiative and #311 to Referendums C and D is misleading. Unlike Referendum D in 2005, which expressly mentions Referendum C in its title, this Proposed Initiative is silent on its interconnectedness with #311. A voter reading the Title is not informed that enactment of the Proposed Initiative is predicated on the passage of #311.

Furthermore, even if the Proposed Initiative is interrelated to #311, it still must meet the constitutional and statutory requirements of all initiatives. The Title “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.” *In re Proposed Initiatives 2001–2002 # 21 & # 22*, 44 P.3d at 222. Voters knew Referendum D was interrelated with Referendum C because it said so in the title and ballot title. The Proposed Initiative lacks this connection because #311 is absent from the Title.

### CONCLUSION

The Petitioner respectfully submits that the Title Board erred in denying his Motion for Rehearing on April 23, 2020. Therefore, the Petitioner respectfully requests that the Court reverse the Title Board’s decisions in considering and setting titles for the Proposed Initiative.

Respectfully submitted this 29th day of May, 2020.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing PETITIONER'S ANSWER BRIEF was served electronically via CCE and/or via U.S. Mail at Denver, Colorado this 29<sup>th</sup> day of May, 2020 to the following parties or their counsel:

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