

COLORADO SUPREME COURT 2 East 14th Avenue, Denver, Colorado 80203	
Original Proceeding Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
Petitioners: Timothy Steven Howard v. Respondents/Proponents: Diane Schwenke and David Davia and Title Board: Theresa Conley, David Powell, and Jason Gelender	▲ COURT USE ONLY ▲
Attorneys for Respondents: Sarah M. Mercer (#39367) BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202 Phone: 303.223.1100 Email: smercer@bhfs.com Gwendolyn A. Benevento (#34190) MAVEN LAW GROUP 1800 Glenarm Place, Suite 950 Denver, Colorado 80202 Phone: 303.218.7150 Email: gbenevento@mavenlawgroup.com	Case No.: 20SA159
Respondents' Opening Brief	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 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 Colorado Appellate Rule 28(g).

It contains 1,878 words (opening brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A).

For each issue raised by 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.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 28 and 32.

s/ Sarah M. Mercer

Sarah M. Mercer

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUES PRESENTED FOR REVIEW	1
STATEMENT OF THE CASE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. INITIATIVE #312 MEETS THE SINGLE SUBJECT REQUIREMENT	4
A. Standard of Review	4
B. Provisions Must be Related to One Object or Purpose.....	5
II. THE TITLE CLEARLY AND ACCURATELY DESCRIBES THE CENTRAL FEATURES.....	6
A. Standard of Review	6
B. The Title Informs Voters of the Central Features of Initiative #312, and It Need Not Try to Explain its Meaning or Potential Effects	7
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Initiative on Parental Notification of Abortions for Minors,</i> 794 P.2d 238 (Colo. 1990)	7
<i>In re Initiative on “Trespass-Streams with Flowing Water,</i> 910 P.2d 21 (Colo. 1996)	7
<i>In re Matter of Title, Ballot Title and Submission Clause for 2013–2014 #90,</i> 328 P.3d 155 (Colo. 2014)	4, 8
<i>In re Title, Ballot Title & Submission Clause for 1999-2000 #29,</i> 972 P.2d 257 (Colo. 1999)	7, 8
<i>In re Title, Ballot Title & Submission Clause for 2015-2016 #156,</i> 415 P.3d 151 (Colo. 2016)	6
<i>In re Title, Ballot Title and Submission Clause for 2009-2010 #24,</i> 218 P.3d 350 (Colo. 2009)	4, 7
<i>In re Title, Ballot Title, and Submission Clause for 2009-2010 #45,</i> 234 P.3d 642 (Colo. 2010)	4, 6, 8
<i>In re Title, Ballot Title, and Submission Clause for 2011-2012 #3,</i> 274 P.3d 562 (Colo. 2012)	4

In re Title, Ballot Title, and Submission Clause for 2013-2014 #89,
328 P.3d 172 (Colo. 2014) 4, 6

In re Title, Ballot Title, and Submission Clause for Proposed Initiative 1996 #6,
917 P.2d 1277 (Colo. 1996) 4

In re Title, Ballot Title, Submission Clause, & Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rights in Waters II,
898 P.2d 1076 (Colo.1995) 5

Statutes

Colo. Rev. Stat. § 1-40-106. 1

Colo. Rev. Stat. § 1-40-107(2). 1, 3

Other Authorities

Colo. Const. art. V, §1(5.5.) 1

Respondents Diane Schwenke and David Davia, registered electors of the State of Colorado and the designated representatives of the proponents of Initiative 2019-2020 #312 (“Initiative #312”), through counsel respectfully submit their Opening Brief in support of the title, ballot title, and submission clause (the “Title”) set by the Title Board for Initiative #312.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Title Board err in finding that Initiative #312 properly contains a single subject in conformance with Colo. Const. art. V, §1(5.5.) and Colo. Rev. Stat. § 1-40-106.5?

2. Did the Title Board err in setting a clear Title that fully informs voters of certain central elements of Initiative #312?

STATEMENT OF THE CASE

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. Respondents filed Initiative #312 concerning oil and gas development rules with the Secretary of State on April 3, 2020. Initiative #312 would prohibit the oil and gas conservation commission

or its successor from repealing or making less stringent specified oil and gas conservation commission rules related to oil and gas safety, aesthetic and noise control, spills, reclamation, and flowlines, and, if otherwise given such authority, specified air quality control commission rules related to air emission reductions and inventory.

The Title Board conducted its initial public hearing and set the title for Initiative #312 on April 15, 2020. Petitioner filed a motion for rehearing on April 22, 2020. The Title Board considered the motion at its April 23, 2020, hearing where the Title Board denied the motion in its entirety.

Accordingly, the Title Board set the final ballot title for the Initiative #312 as:

Shall there be an amendment to the Colorado Constitution prohibiting the oil and gas conservation commission from repealing or amending to make less stringent: 1) specified oil and gas conservation commission rules related to oil and gas safety, aesthetic and noise control, spills, reclamation, and flowlines, and, 2) if otherwise given such authority, specified air quality control commission rules related to air emission reductions and inventory?

Petitioner now seeks review under Colo. Rev. Stat. § 1-40-107(2) of the Title Board's action on Initiative #312.

SUMMARY OF THE ARGUMENT

The Title Board was correct in its determination that Initiative #312 contains a single subject. Initiative #312 has the simple, single purpose of ensuring certain rules will not be repealed or weakened by the state's oil and gas regulatory body. The provisions of Initiative #312 are straightforward and properly related.

The Title Board appropriately exercised its broad discretion drafting the title for Initiative #312. Initiative #312 specifies certain rules that cannot be repealed or weakened by the oil and gas commission or its successor. The Title fairly and accurately sets forth the central feature of Initiative #312.

The decision of the Title Board should be affirmed.

ARGUMENT

I. Initiative #312 Meets the Single Subject Requirement

A. Standard of Review

In reviewing the Title Board’s decision on single subject, the Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions.” *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014) (citing *In re Title, Ballot Title, and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645 (Colo. 2010)). The Court will “also liberally construe the single subject requirement to ‘avoid unduly restricting the initiative process.’” *In re Matter of Title, Ballot Title and Submission Clause for 2013–2014 #90*, 328 P.3d 155, 160 (Colo. 2014), quoting *In re Title, Ballot Title and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009). Therefore, the Court “only overturn[s] the Title Board’s finding that an initiative contains a single subject in a clear case.” *In re 2013-2014 #89*, 328 P.3d at 176 (quoting *In re Title, Ballot Title, and Submission Clause for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012) and *In re Title,*

Ballot Title, and Submission Clause for Proposed Initiative 1996 #6, 917 P.2d 1277, 1280 (Colo. 1996)).

B. Provisions Must be Related to One Object or Purpose

“[I]f the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law.” *In re Title, Ballot Title, Submission Clause, & Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative Pub. Rights in Waters II*, 898 P.2d 1076, 1080 (Colo.1995).

Initiative #312 prohibits the oil and gas commission or its successor from repealing or weakening certain oil and gas related safety rules as they existed on January 1, 2020. The Respondents intend Initiative #312 to be run in tandem with proposed 2019-2020 Initiative #311, and, if both initiatives pass, the independent oil and gas board would have authority to approve the repeal or making less stringent of any of the specified rules, and Initiative #312 would prohibit the new independent oil and gas board from repealing or making less stringent any of the specified rules.

The provisions of Initiative #312 carry out the one general object or purpose of prohibiting the repeal or weakening of certain oil and gas operations rules by the state's oil and gas regulatory body.

II. The Title Clearly and Accurately Describes the Central Features

A. Standard of Review

“The Title Board is vested with considerable discretion in setting the title and the ballot title and submission clause.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 415 P.3d 151, 153 (Colo. 2016). When reviewing a title for clarity and accuracy, the Court will only reverse the Title Board's decision if the titles is "insufficient, unfair, or misleading." *In re Initiative for 2009-2010 #45*, 234 P.3d at 648. Accordingly, the Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s actions.” *In re 2015-2016 #156*, 415 P.3d at 153 (quoting *In re 2013–2014 #89*, 328 P.3d at 176 and *In re 2009–2010 #45*, 234 P.3d at 645).

B. The Title Informs Voters of the Central Features of Initiative #312, and It Need Not Try to Explain its Meaning or Potential Effects.

The Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water,"* 910 P.2d 21, 24 (Colo. 1996). The Title Board is "to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice in pursuit of the initiative rights of Colorado citizens." *In re Title, Ballot Title & Submission Clause for 1999-2000 #29,* 972 P.2d 257, 266 (Colo. 1999). A title 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 2009-2010 #24,* 218 P.3d at 356 (quoting *In re Initiative on Parental Notification of Abortions for Minors,* 794 P.2d 238, 242 (Colo. 1990)).

The Title Board's duty in setting a title is to summarize the central features of a proposed initiative; in so doing, the Title Board is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme.” *In re 2013-2014 #90*, 328 P.3d at 162.

The Court “will reverse the Title Board's decision only if a title is insufficient, unfair, or misleading.” *In re Initiative for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010); *see also In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999) (observing that this court will reverse a title only if it contains a "material omission, misstatement, or misrepresentation").

The Petitioner is likely to claim that the Title is deficient because it should explain the extent of the rulemaking authority of other state agencies notwithstanding the passage of Initiative #312. The Title need not delve into this level of detail. It is sufficient that the Title clearly explains how the law would be changed should voters pass Initiative

#312.

Petitioner is also likely to claim that the Title should describe in greater detail all the rules that cannot be repealed or weakened and the potential effect of such establishing such a regulatory floor. Initiative #312 specifies an exact date after which certain rules shall not be repealed or amended to make them less stringent. The Title accurately summarizes these rules as being: “specified oil and gas conservation commission rules related to oil and gas safety, aesthetic and noise control, spills, reclamation, and flowlines” and “specified air quality control commission rules related to air emission reductions and inventory.” It cannot be expected or required that the Title would further explain the detail of all these rules. Nor is the Title required to opine on the potential effects of creating a regulatory floor such as this. As such, the Title sufficiently describes the rules that Initiative #312 seeks to preserve if passed.

Last, Petitioner will likely contend that the Title is confusing as to whether the oil and gas commission or its successor is prohibited

from repealing or weakening certain oil and gas regulations passed by the air quality control commission. The Title is clear, however, that this provision would take effect only if oversight authority is otherwise given to the oil and gas commission or its successor.

There is no prohibition on referencing a contingency in a title and, in fact, interrelated ballot measures have appeared on the ballot before. In 2005, for instance, Referendums C and D contained provisions that stood alone and also that worked together. The title for Referendum D even referenced Referendum C:

WITHOUT INCREASING ANY TAX RATES OR IMPOSING ANY NEW TAXES, SHALL THE STATE BE AUTHORIZED TO ADDRESS CRITICAL STATE NEEDS BY ISSUING NOTES IN TOTAL AMOUNTS OF UP TO \$2,072,000,000, WITH A MAXIMUM TOTAL REPAYMENT COST OF UP TO \$3,225,000,000, AND WITH MAXIMUM TOTAL ANNUAL PRINCIPAL AND INTEREST PAYMENTS OF \$55,000,000 IN STATE FISCAL YEAR 2005-06, \$95,000,000 IN STATE FISCAL YEAR 2006-07, AND \$125,000,000 IN EACH SUBSEQUENT STATE FISCAL YEAR, OF WHICH A MAXIMUM OF \$25,000,000 PER STATE FISCAL YEAR MAY BE USED TO PAY NOTE ISSUED FOR NONTRANSPORTATION PURPOSES, ONLY IF VOTERS OF THE STATE APPROVE REFERENDUM C AT THE

NOVEMBER 2005 STATEWIDE ELECTION¹

Here, as with the title to Referendum D, the Title is clear and there is no confusion that if Initiative #312 is approved, that the oil and gas conservation commission's rules related to oil and gas safety, aesthetic and noise control, spills, reclamation, and flowlines cannot be repealed or made less stringent, and, if the oil and gas conservation commission or its successor were to be given oversight authority pursuant to Initiative #311, then it would also be prohibited from repealing or making less stringent the air quality control commission rules related to oil and gas air emission reductions and inventory.

Accordingly, the Title Board properly set the Title to clearly, accurately and fairly describe Initiative #312, there is no material omission, misstatement, or misrepresentation, and voters can understand the meaning of a "yes" or "no" vote.

¹ 2005 Colorado State Ballot Information Booklet (emphasis added), available at: https://web.archive.org/web/20051120212342/http://www.state.co.us/gov_dir/leg_dir/lcsstaff/bluebook/BlueBook2005.pdf. Voters in that election approved Referendum C and rejected Referendum D.

CONCLUSION

For all these reasons, the Respondents respectfully request that the Court affirm the actions of the Title Board for Initiative #312.

Dated: May 15, 2020

Respectfully submitted,

s/Sarah M. Mercer _____

Sarah M. Mercer (#39367)

BROWNSTEIN HYATT FARBER SCHRECK,
LLP

s/Gwendolyn A. Benevento _____

Gwendolyn A. Benevento (#34190)

MAVEN LAW GROUP, LLP

*Attorneys for Respondents Diane
Schwenke and David Davia*

CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2020, I electronically filed a true and correct copy of this **Respondents' Opening Brief** with the Clerk of Court via the Colorado Courts E-Filing System which will send notification of such filing upon counsel of record:

Matt Samelson, Atty. Reg. #44085
Matt Sura, Atty. Reg. #44089
Western Environmental Law Partners
7354 Cardinal Lane
Longmont, CO 80503
(720) 563-1866
matthewsamelson@gmail.com
mattsura.law@gmail.com

Attorneys for Petitioner

Michael Kotlarczyk (#43250)
Assistant Attorney General
Public Officials Unit
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
mike.kotlarczyk@coag.gov

Attorneys for Title Board

s/Paulette M. Chesson
Paulette M. Chesson, Paralegal