

<b>SUPREME COURT, STATE OF COLORADO</b> <b>2 East 14th Avenue</b> <b>Denver, Colorado 80203</b>	
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2), (2019) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #311 (“Establish the Independent Oil and Gas Board”)  <b>Petitioner:</b> TIMOTHY STEVEN HOWARD a/k/a TIM HOWARD  v.  <b>Respondents:</b> DIANE SCHWENKE and DAVID DAVIA  <b>and</b>  <b>Title Board:</b> THERESA CONLEY, DAVID POWELL, and JASON GELENDER.	COURT USE ONLY
<i>Attorneys for Petitioner:</i> Matt Samelson, #44085 Matt Sura, #44089 Western Environmental Law Partners 7354 Cardinal Lane Longmont, CO 80503 (720) 563-1866 matthewsamelson@gmail.com mattsura.law@gmail.com	Supreme Court Case No. 2020SA160
<b>PETITIONER’S ANSWER BRIEF</b>	

## 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 2,850 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 Sura  
Matt Sura, #44089

**TABLE OF CONTENTS**

Page(s)

SUMMARY OF THE ARGUMENT ..... 1

ARGUMENT ..... 1

    I.    Granting independent board veto authority over four executive agencies  
          is a second subject unrelated to the central theme of the initiative..... 1

        A.    Whether or not Senate Bill 19-181 contained multiple subjects is  
              irrelevant..... 9

        B.    Initiative does implicate dangers to be prevented by single  
              subject requirement ..... 10

    II.   Failure to describe the requirement to balance public health, safety and  
          welfare with responsible oil and gas development was a material  
          omission..... 11

CONCLUSION ..... 13

## TABLE OF AUTHORITIES

Page(s)

### CASES

<i>In re Proposed Initiative on Public Rights in Waters II</i> , 898 P.2d 1076 (Colo. 1995).....	1, 6
<i>In re Title &amp; Ballot Title &amp; Submission Clause for 2005-2006 #55</i> , 138 P.3d 273 (Colo. 2006).....	2
<i>In re Title, Ballot Title &amp; Submission Clause for 2013-2014 #90 &amp; #93</i> , 328 P.3d 155 (Colo. 2014).....	6, 7
<i>Matter of Title, Ballot Title &amp; Submission Clause, &amp; Summary for 1997-1998 No. 64</i> , 960 P.2d 1192 (Colo. 1998).....	7, 8
<i>In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91</i> , 235 P.3d 1071 (Colo. 2010).....	8
<i>In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No.29</i> , 972 P.2d 257 (Colo. 1999). ....	8
<i>Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)</i> , 374 P.3d 460 (Colo. 2016). ....	10
<i>Bentley v. Mason (In re Title, Ballot Title &amp; Submission Clause for 2015-2016 #63)</i> , 370 P.3d 628 (Colo. 2016) .....	13

### OTHER AUTHORITIES

42 U.S.C. §7511a; 42 U.S.C. §7511c(2)(A).....	6
Colorado Senate Bill 19-181 .....	9
Black's Law Dictionary (11th ed. 2019).....	13

## SUMMARY OF THE ARGUMENT

The Title Board erred in setting title for Proposed Initiative 2019-2020 #311 (“Proposed Initiative”) because it contains multiple subjects and the title language fails to accurately describe the initiative.

### ARGUMENT

#### **I. Granting independent board veto authority over four executive agencies is a second subject unrelated to the central theme of the initiative.**

In their opening briefs, the Title Board and Respondents mischaracterize the Proposed Initiative’s mandate that the new independent oil and gas board must review and approve all oil and gas related rules passed by four separate state agencies before those rules can take effect. Despite their efforts to dismiss the gravity of this proposed requirement, granting mandatory review and veto authority to the independent oil and gas board to rules passed by the Air Quality Control Commission (“AQCC”), the Water Quality Control Commission, the State Board of Health, and the Solid and Hazardous Waste Commission fundamentally shifts the power between the agencies and is “disconnected or incongruous” rather than “necessarily and properly connected” to the central theme of the initiative. *In re Proposed Initiative on Public Rights in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995).

In its opening brief, the Title Board mischaracterizes the new authority that would be granted to the independent oil and gas board. The Title Board claims that the proposed initiative gives the “new Colorado Independent Oil and Gas Board rulemaking oversight over existing states agencies that currently hold rulemaking power for *discrete oil and gas issues*, including the AQCC, the Water Quality Control Commission, the State Board of Health, and the Solid and Hazardous Waste Commission.” Title Board Op. Br. p. 7. (Emphasis added). This is an unsupported and inaccurate characterization of the Proposed Initiative.

This Court may not address the merits of a proposed initiative or construe the future legal effects of an initiative. *In re Title & Ballot Title & Submission Clause for 2005-2006 # 55*, 138 P.3d 273, 278 (Colo. 2006) (Coats, J., dissenting). However, the Court must “sufficiently examine an initiative to determine whether a measure violates the single subject rule” and, “when necessary, *characterize a proposal sufficiently* to enable review of the Board's actions." *Id.* (Emphasis added).

In order to properly characterize the Proposed Initiative, the Court should carefully consider the language that allows the independent oil and gas board to have veto authority over AQCC “rules regarding... emission of air pollutants from

oil and gas operations.”<sup>1</sup> Regulation of oil and gas air pollution by the AQCC is “air pollution regulation” not “regulation of a discrete oil and gas issues.” If passed by voters, the new oil and gas board would not just regulate emission of air pollutants from oil and gas operations – it would be required to regulate general air pollution emissions as well. By having veto authority over AQCC regulations that affect “the emission of air pollutants from oil and gas operations,” the independent oil and gas board would regulate hazardous air pollutants, greenhouse gas emissions, and compliance with federal ozone standards to name a few of the air quality regulations that are addressed by the AQCC and may involve oil and gas operations.

The most recent AQCC rulemaking is a case in point. On May 21, 2020, the AQCC adopted a new Regulation Number 22 as proposed by the Air Pollution Control Division to:

“satisfy requirements the General Assembly set forth in the Colorado Air Pollution and Control Act (the Act), Section 25-7-140(2)(a)(I), C.R.S., directing adoption of reporting requirements for greenhouse gas (GHG) emitting entities; and an additional GHG reduction strategy toward addressing statewide reduction goals as set forth in Sections 25-7-102(g), 105(e)(1), and 140(2)(a)(III), C.R.S., through the phase-out of

---

<sup>1</sup> Proposed Initiative #311, Art XVIII, Section 17 (12)

hydrofluorocarbons (HFCs) in manufacturing and end-uses involving aerosol propellants, chillers, foam, and stationary refrigeration.<sup>2</sup>

Although the rulemaking was undoubtedly related to “emission of air pollutants from oil and gas operations” and, under the Proposed Initiative, would therefore have to be adopted by the independent oil and gas board, the diverse stakeholders that were parties to this rulemaking are evidence that the impacts of this rulemaking were felt far beyond the oil and gas industry. Parties included electric utilities, local governments, community organizations, a steel manufacturer, a wastewater district, diverse business associations, environmental groups, as well as the oil and gas industry.<sup>3</sup>

---

<sup>2</sup> AQCC, Notice of Rulemaking Regarding proposed revisions to: Regulation Number 22, February 21, 2020. Available at: <https://drive.google.com/drive/folders/1okSgivrHVWMB7fPrxnHk4J8uofPSgl3p>

<sup>3</sup> AQCC, In the Matter of the Proposed Adoption of Regulations Number 22, Prehearing order, April 17, 2020. Available at: <https://drive.google.com/drive/folders/1aKAmDxbzemltPKxclvrFnQyx1B7IZu7W> The 35 parties to May 20, 2020 rulemaking included Air Conditioning Heating and Refrigeration Institute; American Petroleum Institute; Arkema Inc.; Be The Change; Black Hills; Call to Action Colorado; City of Colorado Springs & Colorado Springs Utilities; Colorado Coalition for Livable Climate; Colorado Communities for Climate Action; Colorado Energy Office; Colorado Oil & Gas Association; Colorado Rural Electric Association; Conservation Coalition; DJ Basin Operator Group; Environmental Defense Fund; EVRAZ Rocky Mountain Steel; GCC Energy; Household & Commercial Products Association; Kinder Morgan CO2 Company, LP; Local Government Coalition; Metro Wastewater Reclamation District; MillerCoors USA, LLC; National Aerosol Association; Platte River Power Authority; Public Service Company of Colorado dba Xcel Energy; Raymond Regulatory Resources; Small Operator Society; Together Colorado Climate Justice; Trane Technologies; Tri-State Generation & Transmission Association, Inc.; Weld County BOCC; Western & Rural Local Government Coalition; Western Midstream Partners LP; Western Resource Advocates; and WildEarth Guardians.

Like most AQCC rulemakings, this was an “air quality” rulemaking that affected various emission sources and a broad variety of stakeholders. It was not a rulemaking addressing “discrete oil and gas issues.”

On May 21, 2020, the AQCC also set a hearing to approve the Marginal Area State Implementation Plan for 2015 Ozone National Ambient Air Quality Standard. In order to address Colorado’s “Marginal”<sup>4</sup> non-attainment of federal ozone standards, emissions from Mobile Sources (on-road and non-road); Oil and Gas Sources (point sources, area sources, and storage tanks); Point Sources (power plants and non-oil and gas stationary sources); and Area Sources (non-oil and gas sources such as agriculture, coatings, pesticides, and consumer products)<sup>5</sup> must be addressed in future AQCC rulemakings. In order to prepare a State Implementation Plan that is acceptable to the United States Environmental Protection Agency, air quality regulations designed to reduce pollution from the oil

---

<sup>4</sup> This year, the Front Range was downgraded to “Serious” non-attainment of Federal Ozone Standards. *See* Blue Parish, PERMITTING SECTION MEMO 20-01, APCD, January 24, 2020. Available at: <https://environmentalrecords.colorado.gov/HPRMWebDrawer/RecordView/1530858> . The Front Range has been out of attainment with Federal Ozone standards for over 15 years. *See* CDPHE website visited on 5/27/2020:

<https://www.colorado.gov/pacific/cdphe/ozone-planning-chronology>

<sup>5</sup> CDPHE, DRAFT DENVER METRO AREA/NORTH FRONT RANGE NONATTAINMENT AREA 2017 EMISSION INVENTORY, April 27, 2020. Available at: <https://drive.google.com/drive/folders/1jNyyk3ZV1HGTHDYfppNRyxEronwEv057>

and gas sector will be combined with other air quality regulations of other sectors such as power plants and automobile standards. 42 U.S.C. §7511a. A State Implementation Plan for an area in “serious nonattainment” needs to model how the combined reductions will reduce ozone levels. 42 U.S.C. §7511c(2)(A). If the AQCC is unable to pass rules that affect the oil and gas industry, it will be required to find additional reductions in ozone-producing constituents from other areas such as automobiles or power plants.

The Proposed Initiative’s efforts to grant the independent oil and gas board broad authority over AQCC regulations is a second subject. Similarly, regulation of water pollution through the Water Quality Control Commission or waste from oil and gas development through the Solid and Hazardous Waste Commission are not “discrete oil and gas issues.” They are “water quality regulations” and “hazardous waste regulations” that are regulated by appropriate state agencies. For the new independent oil and gas board to reach outside of what is currently regulated by the COGCC and into these completely different agencies with different rules, rulemaking procedures, and missions, is “disconnected or incongruous” rather than “necessarily and properly connected” to the central theme of the initiative. *Public Rights in Waters II*, 898 P.2d at 1079.

The Title Board relies on *In re Title, Ballot Title and Submission Clause for 2013-2014 #90 & #93*, 328 P.3d 155 (Colo. 2014) for the proposition that a second subject is not created simply because the proposed initiative “may have different effects on other provisions of Colorado law.” *Id.* at 160-161. That case involved a proposal that would have expanded local government authority over oil and gas and, in so doing, clarify that the local governments were not preempted from going beyond state rules and those local regulations would not amount to a taking. In that case, the Court rightfully determined that the affect the initiative had on the preemption doctrine, and on takings provisions, was directly related to the expansion of local governments’ authority to enact laws regulating oil and gas development that are more restrictive than state law. *Id.*

However, this case is dissimilar to proposed initiatives #90 & 93 because Respondents are proposing the creation of an entirely new board, outside of the executive branch, that not only controls oil and gas regulations but also other areas of regulation: air quality regulations, water quality regulations, health regulations, and hazardous waste management regulations. These other areas of regulation are second subjects.

This case is far more analogous to *Matter of Title, Ballot Title & Submission Clause, & Summary for 1997-1998 No. 64*, 960 P.2d 1192 (Colo. 1998). In that

case, the central theme was changing the qualifications of judicial officers.

However, the proposed initiative also: divested the Judicial Discipline Commission of regulatory authority; and eliminated the ability of the City of Denver to select and appoint judges. *Id.* at 1195

The Court found that the proposed reallocation of governmental authority and control was not essential to the objective of changing the qualifications of judicial officers. In fact, the Court declared that even if the “entire judicial branch” were the single subject, the initiative provisions proposing to change the composition, manner of selection, powers and procedures of the Commission further a distinct purpose and therefore there were multiple subjects. *Id.* at 1200.

Later decisions refined and upheld the proposition that an initiative violates the single-subject rule if it contains provisions seeking to accomplish one purpose that are coupled with provisions proposing a change in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1077 (Colo. 2010) (citing *In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No.29*, 972 P.2d 257, 262–65 (Colo. 1999); *In re # 64*, 960 P.2d at 1197–1200).

In this case, the Proposed Initiative establishes the independent oil and gas board, cedes COGCC's authority to the independent board, and sets new qualifications and appointment procedures for the board. However, the proposed initiative veers into a second subject by then granting the independent oil and gas board authority over the rulemaking of four executive branch agencies. Shifting power from the AQCC over air quality regulations, from the Water Quality Control Commission for water quality regulations, from the State Board of Health for health regulations, and from the Solid and Hazardous Waste Commission for hazardous waste regulations to this new independent oil and gas board is a shift in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. As such, it is a separate subject.

**A. Whether or not Senate Bill 19-181 contained multiple subjects is irrelevant.**

Respondents' reliance on measures that went legally unchallenged in regard to the single subject requirement is misplaced. Rather than cite to caselaw, the Respondents cite to an initiated measure, a referred measure, and to successful legislation that they claim was equally broad as the Proposed Initiative.

Respondents claim that the initiated Independent Ethics Commission, the referred Independent Redistricting Commission, and Colorado Senate Bill 19-181 were at

least as broad as the Proposed Initiative and therefore this initiative should be considered a single subject as well. However, none of those measures were legally challenged as violating single subject laws. The fact that the unchallenged measures eventually passed is neither an indication that they contained a single subject nor do they constitute legal precedent.

As the Respondents admit, “The purpose of this provision is to continue to allow reliance on the expertise of the other agencies, while at the same time charging the independent board with the responsibility to ensure such agencies do not succumb to political bias and industry pressure.” Resp. Op. Br. p. 11. It is this new mandate for the independent board to serve as a check on the decisions of other agencies that is a second subject. See *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 466 (Colo. 2016) (changing the role and mission of the Supreme Court Nominating Commission is a second subject.)

**B. Initiative does implicate dangers to be prevented by single subject requirement**

The Respondents’ claim that the Proposed Initiative does not trigger the dangers of multi-subject initiatives such as log-rolling or voter surprise is incorrect. As was stated in Petitioner’s Opening Brief, voters would be surprised to learn that

the independent oil and gas board would be granted veto authority over diverse and seemingly unconnected regulations such as hazardous air pollutants, rules to address climate change, compliance with federal ozone standards, hazardous waste fees, stream classifications, and water quality standards. Petitioner Op. Br. p. 10.

Diminishing the authority of the AQCC over air quality and ceding some of that authority to the independent oil and gas board is a text-book example of logrolling. Voters may very well support an independent oil and gas agency to regulate oil and gas operations but may feel very differently about giving that board authority over air quality, water quality, public health, and management of solid and hazardous wastes.

**II. Failure to describe the requirement to balance public health, safety and welfare with responsible oil and gas development was a material omission.**

Both the Title Board and Respondents argue that the following language amounts to something similar to a legislative declaration and not a new substantive legal standard for the independent oil and gas board to use when deciding whether to approve or veto a rule passed by the four listed agencies. Title Board Op. Br. p. 12; Resp. Op. Br. pp. 17-18.

...BECAUSE THE FOLLOWING AREAS OF REGULATION ARE OF SUCH IMPORTANCE IN BALANCING THE PUBLIC HEALTH, SAFETY AND WELFARE OF CITIZENS WITH RESPONSIBLE

DEVELOPMENT THAT REVIEW AND OVERSIGHT BY MORE THAN ONE AUTHORITY IS WARRANTED, THE FOLLOWING ENTITIES OR ANY SUCCESSOR ENTITIES HAVE THE AUTHORITY TO ADOPT RULES PURSUANT TO THE FOLLOWING STATUTES OR SUCCESSOR STATUTES, BUT SUCH RULES SHALL ONLY BECOME EFFECTIVE UPON APPROVAL OF THE INDEPENDENT BOARD:...

Proposed Art XVIII, Section 17 (12)

But Section 17(12) is not a declaration. The Respondents' wrote a declaration section into their Proposed Initiative; it is Section 17(1). The declarations for this new section of the state constitution very clearly put forward an expectation that the independent oil and gas board must balance public health with the development needs of the oil and gas industry in the "Declaration" of Section 17(1):

**Section 17. Colorado independent oil and gas board. (1) Declaration of the people.** THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT: (a) OIL AND GAS DEVELOPMENT SHOULD BE RIGOROUSLY AND COMPREHENSIVELY REGULATED BY AN INDEPENDENT BOARD, AS FAR REMOVED FROM PARTISAN, POLITICAL, AND INTEREST GROUP PRESSURE AS IS PRACTICABLE, *IN A MANNER THAT PROTECTS THE PUBLIC HEALTH, SAFETY, AND WELFARE OF CITIZENS IN BALANCE WITH THE RESPONSIBLE DEVELOPMENT OF OIL AND GAS RESOURCES;*

The Title Board argues that, if the balancing provision is a standard, it is not important enough for voters to form an opinion about whether to vote for or against the initiative. Title Board Op. Br. pp. 13-15. On this we simply disagree. Petitioner believes that voters would be very concerned to know that certain

regulations of the AQCC, Water Quality Control Commission, State Board of Health, Solid and Hazardous Waste Commission must “balance” public health and safety with responsible oil and gas development.

In this context, “balance” means “**3.** To measure competing interests and offset them appropriately <the judge balanced the equities before granting the motion>.” BALANCE, Black's Law Dictionary (11th ed. 2019).

The requirement to balance public health safety welfare with responsible oil and gas development would therefore mean the possibility of some diminishment of public health, safety, and welfare within air quality regulations, water quality regulations, health regulations, and the regulation of hazardous waste to allow for responsible oil and gas development. Failure to discuss the “balancing requirement” in the title is a material omission that could mislead voters. *Bentley v. Mason (In re Title, Ballot Title & Submission Clause for 2015-2016 #63)*, 370 P.3d 628, 634 (Colo. 2016).

## 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 29<sup>th</sup> day of May, 2020.

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

### **CERTIFICATE OF SERVICE**

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

Gwendolyn Benevento, #34190  
Maven Law Group  
1800 Glenarm Place, Suite 950  
Denver, CO 80202  
[gbenevento@mavenlawgroup.com](mailto:gbenevento@mavenlawgroup.com)

Sarah Mercer, #39367  
Brownstein Hyatt Farber Schreck  
410 17th St., Suite 2200  
Denver, CO 80202  
[smercer@bhfs.com](mailto:smercer@bhfs.com)  
*Attorneys for Respondents/Proponents Schwenke and Davia*

Philip J. Weiser, Attorney General  
Grant T. Sullivan, #40151  
Assistant Solicitor General  
State Services Section  
Public Officials Unit

Colorado Attorney General's Office  
Ralph L. Carr Colorado Judicial Center  
1300 Broadway, 6th Floor  
Denver, CO 80203  
[grant.sullivan@coag.gov](mailto:grant.sullivan@coag.gov)  
*Attorneys for Title Board*

/s/ Matt Sura  
Western Environmental Law Partners  
Matt Sura, Atty. Reg. #44089