

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2), C.R.S. (2019) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #311 (“Establish the Independent Oil and Gas Board”)</p> <p>Petitioner: TIMOTHY STEVEN HOWARD a/k/a TIM HOWARD</p> <p>v.</p> <p>Respondents: DIANE SCHWENKE and DAVID DAVIA</p> <p>and</p> <p>Title Board: THERESA CONLEY, DAVID POWELL, and JASON GELENDER.</p>	<p>COURT USE ONLY</p>
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<p>PETITIONER’S OPENING BRIEF</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 3,159 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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Petitioner Timothy Steven Howard (“Petitioner”), a registered elector of the State of Colorado, through undersigned counsel, respectfully submits this Opening 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 #311 (“Proposed Initiative”).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board lacked jurisdiction to set a Title for the Proposed Initiative because it contains more than a single subject?
2. Whether the Title is misleading because it fails to inform voters of certain central elements of the Proposed Initiative.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings before the Title Board.

This is an appeal of the Title Board’s setting of the Proposed Initiative. On April 3, 2020, the last day to file for measures to appear on the November 2020 General Election Ballot, Respondents Diane Schwenke and David Davia submitted the Proposed Initiative to the Title Board for the setting of a title, ballot title, and submission clause pursuant to section 1-40-106, C.R.S. (2019). The Title Board held a hearing on April 15, 2020, determined that the Proposed initiative contained a single subject, and set the title, ballot title, and submission clause (the “Title(s”).

Petitioner filed a timely Motion for Rehearing on April 22, 2020, contending that the Proposed Initiative contained multiple subjects and that the Titles were incomplete and misleading. The Title Board conducted a rehearing on April 23, 2020, at which time the Title Board denied the motion for rehearing on single subject concerns and granted the Petitioner's Motion, in part, to the extent that the Title Board made changes to the Title. Petitioner filed a Petition for Review with this Court pursuant to section 1-40-107(2), C.R.S. (2019) on April 30, 2020.

B. Statement of Facts

The Proposed Initiative would amend the Colorado Constitution and Colorado Revised Statutes to, among other things:

- Create a new, constitutionally required, nine-member oil and gas board, proposed Colo. Const. art. XVIII, §17(3)(a);
- Strip the power for appointing the board members from any elected officials (either Governor or Legislature) and instead place that authority in a panel of retired justices or judges, §17(1)(b) and (5)(a).
- Require the Chief Justice of the Colorado Supreme Court to designate a panel of retired justices or judges, from different political parties, to select oil and gas commission members, §17(5)(a);

- Define minimum qualifications for the board members and require the board to be comprised of three members who are unaffiliated and three members from each of the state’s largest two parties, §§17(3)(a), (b);
- Allow the Governor and the highest-ranking member of the State House of Representatives from a different party and the State Senate Majority leader and Minority leader, if they are able to reach agreement, to nominate a slate of candidates for open board positions, §17(6)(c); and
- Give the new oil and gas board regulatory veto authority over four executive agencies – Air Quality Control Commission, Water Quality Control Commission, State Board of Health, and Solid and Hazardous Waste Commission, §17(12).

SUMMARY OF THE ARGUMENT

The Title Board set a title for the Proposed Initiative, which contains multiple subjects, contrary to Colo. Const. art. V, § 1(5.5). The Title Board incorrectly determined that the Proposed Initiative contained a single subject and did not sufficiently clarify the title to avoid misleading voters.

The initiative proposes the creation of a new oil and gas board that will achieve “political independence” by stripping the power to appoint the board members from the Governor and instead placing that power with a panel of retired justices or judges, who do not have to stand for election and are ostensibly immune from political influence. As described above, the lengthy initiative requires the Chief Justice of the Colorado Supreme Court to designate an appointment panel of three recently retired justices or judges that cannot be members of the same political party.

Creating a new board with a new mission, duties, powers, and an entire regulatory framework is already a broad title. The Proposed Initiative creates a second subject by also requiring this new board to approve any new rules promulgated by four separate state agencies that could affect oil and gas operations. This granting of regulatory veto authority to the independent oil and gas board over rules promulgated by the Air Quality Control Commission, Water Quality Control Commission, State Board of Health, and Solid and Hazardous Waste Commission is incongruous, not necessarily or properly connected to the central theme of the initiative, and a second subject.

The Title set by the Title Board will also mislead voters because it fails to state that the independent board will be evaluating these other agencies’ rules to

ensure they “balance public health, safety, and welfare of citizens with responsible [oil and gas] development.” Proposed Colo. Const. art. XVIII, §17(12).

The Proposed Initiative should be set aside because the measure violates the single subject requirement, and the Title, as set, is misleading. Therefore, we respectfully ask this Court to overturn the decision of the Title Board.

ARGUMENT

I. The Proposed Initiative violates the single-subject requirement

A. Standard of review and preservation of issue

In reviewing Title Board decisions, the Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012) (quoting *In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645 (Colo. 2010)). The Court will “only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.*

Though neither addressing the merits nor potential applications of a proposed initiative, the Court “must examine their wording to determine whether the initiatives and their titles comport with the single subject and clear title requirements.” *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016). To do so, the Court will

“examine sufficiently an initiative’s central theme to determine whether it contains a hidden purpose under a broad theme.” *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007). “In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning.” *Id.* at 874.

Petitioner preserved this issue in his Motion for Rehearing, § I.

B. The Proposed Initiative contains more than a single subject

Article V, §1(5.5) of the Colorado Constitution requires that a proposed initiative only contain one subject. Further codifying the single-subject rule, Colorado statute prevents the Board from setting a title for a measure that contains “incongruous subjects ... having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits.” Section 1-40-106.5(1)(e)(I), C.R.S. (2019).

The requirement that a proposed initiative contain only a single subject serves two functions. “First, the single subject requirement ‘is intended to ensure that each proposal depends upon its own merits for passage.’” *Johnson*, 374 P.3d at 465, quoting *In re Proposed Initiative on Public Rights in Waters II*, 898 P.2d 1076, 1078 (Colo. 1995). This requirement “prevents proponents from engaging in

‘log rolling’ tactics, that is, combining multiple subjects into a single initiative in the hope of attracting support from various factions that may have different or even conflicting interests.” *Id.*

Second, “the single subject requirement is intended ‘to prevent surprise and fraud from being practiced upon voters’ caused by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *Id.* quoting *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002). As noted in *In re Proposed Initiative 2001-2002 #43*, 46 P.3d at 442-43, the purpose is to “obviate the risk of ‘uninformed voting caused by items concealed within a lengthy or complex proposal’” (quoting *Public Rights in Waters II*, 898 P.2d at 1079).

The subject matter of an initiative must be “necessarily and properly connected” rather than “disconnected or incongruous.” *Public Rights in Waters II*, 898 P.2d at 1079. A proponent’s attempt to characterize a proposed initiative under “some overarching theme” will not save the measure if it contains separate and unconnected purposes. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442. An initiative violates the single subject rule when it proposes a shift 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) (citations omitted)

1. Granting the new board veto authority over certain rules promulgated by four other state agencies is a second subject.

The Proposed Initiative attempts to use an overarching theme of “concerning the conduct of oil and gas operation” to fuse together separate and unconnected purposes. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442. The central purpose of the initiative is disbanding the Colorado Oil and Gas Conservation Commission (“COGCC”) and replacing it with a constitutionally mandated, politically independent oil and gas board that is not appointed by the Governor. The Proposed Initiative usurps even more authority from the Governor by requiring the independent board to “approve” all new rules promulgated by four executive agencies that could affect oil and gas operations. Granting the independent board veto authority over four unrelated executive agencies, whose members are appointed by the Governor, is a shift in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. *In re Title for 2009-2010 No. 91*, 235 P.3d at 1077.

The Proposed Initiative grants the independent board veto authority over the rulemaking of the Air Quality Control Commission (“AQCC”), Water Quality

Control Commission, State Board of Health, and the Solid and Hazardous Waste Commission.

Initiative #311, at proposed COLO. CONST. Art. XVIII, Sec. 17(12) states:

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:****

- (a) THE AIR QUALITY CONTROL COMMISSION FOR RULES REGARDING ARTICLE 7 OF TITLE 25, COLORADO REVISED STATUTES, THE EMISSION OF AIR POLLUTANTS FROM OIL AND GAS OPERATIONS;
- (b) THE WATER QUALITY CONTROL COMMISSION FOR RULES REGARDING ARTICLE 8 OF TITLE 25, COLORADO REVISED STATUTES, THE DISCHARGE OF WATER POLLUTANTS FROM OIL AND GAS OPERATIONS;
- (c) THE STATE BOARD OF HEALTH FOR RULES REGARDING SECTION 25-11-104, COLORADO REVISED STATUTES, THE DISPOSAL OF NATURALLY OCCURRING RADIOACTIVE MATERIALS AND TECHNOLOGICALLY ENHANCED NATURALLY OCCURRING RADIOACTIVE MATERIALS FROM OIL AND GAS OPERATIONS; AND
- (d) THE SOLID AND HAZARDOUS WASTE COMMISSION FOR RULES REGARDING:
 - (I) ARTICLE 15 OF TITLE 25, COLORADO REVISED STATUTES, THE DISPOSAL OF HAZARDOUS WASTE FROM OIL AND GAS OPERATIONS; OR
 - (II) SECTION 30-20-109(1.5), COLORADO REVISED STATUTES, THE DISPOSAL OF EXPLORATION AND PRODUCTION WASTE FROM OIL AND GAS OPERATIONS. (*Emphasis added.*)

The initiative language does not state what form the “approval of the Independent Board” must take. Whether the independent board must take formal action to affirm the agencies’ rules or if it must undertake a separate independent rulemaking, the result is the same: No rule affecting oil and gas development passed by these four agencies may go into effect without the approval of the independent board.

Allowing the independent board to exercise unprecedented control over four unrelated executive agencies is a “surreptitious provision ‘coiled up in the folds’ of a complex initiative,” *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442; section 1-40-106.5(1)(e)(II), C.R.S. (2019), and is unrelated to eliminating the COGCC and replacing it with the independent board. Voters may very well agree to an “independent oil and gas board” to regulate oil and gas operations but would be surprised to find that the independent board is also regulating air pollution emissions, wastewater discharge into rivers and streams as well as solid and hazardous waste disposal. This effort to group distinct purposes under a broad theme will not satisfy the single subject requirement. *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006).

As written, the independent board’s authority over the rulemaking of the AQCC, Water Quality Control Commission, State Board of Health, and the Solid

and Hazardous Waste Commission occurs despite the fact that the other state agencies have different missions and expertise. For example, the AQCC, acting on its authority pursuant to Article 7 of Title 25 of the Colorado Revised Statutes, would not be permitted to enact new oil and gas operation rules to address compliance with federal ozone standards without the explicit approval of the independent board. The considered judgment and expertise of the AQCC to accomplish its mission of achieving “the maximum practical degree of air purity in every portion of the state, to attain and maintain the national ambient air quality standards, and to prevent the significant deterioration of air quality in those portions of the state where the air quality is better than the national ambient air quality standards,” section 25-7-102(1), C.R.S. (2019), and its mandate to meet federal and state legislative air quality requirements are made subservient to the judgment of the independent board.

The wholesale shift of authority from state agencies charged with protecting public health, air quality, drinking water quality, and radioactive and hazardous waste disposal to the independent board is an unlawful second subject.

- 2. Changes to the state Administrative Procedures Act wrought by the Proposed Initiative is a second subject.**

Granting veto authority to the independent board for rules promulgated by four separate executive branch agencies runs counter to the rulemaking procedures of all four agencies and conflicts with the Colorado Administrative Procedures Act (“APA”). This surreptitious and unnecessary change to the APA is “coiled up in the folds’ of a complex initiative.” *In re Proposed Initiative 2001-2002 #43*, 46 P.3d at 442. The Colorado APA process for adopting rules does not contemplate another agency also having to adopt the same rule. The Colorado APA grants the General Assembly the legal authority to determine if a new or amended rule complies with statutes via the annual rule review bill, and the Governor has the power to veto the annual rule review bill. Sections 24-4-103(8)(c) & (d), C.R.S. (2019). Requiring a rulemaking process outside of the APA and counter to the rulemaking procedures of all four affected state agencies is a second subject.

II. If the Title Board had jurisdiction to set a title for the Proposed Initiative, the Title it set is legally flawed because the Title fails to inform voters of certain central elements of the Proposed Initiative.

A. Standard of review and preservation of the issue.

The Title must “correctly and fairly express the true intent and meaning” of the initiative. Section 1-40-106(3)(b), C.R.S. (2019). 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 Initiative for 2013-2014*

#85), 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 § II.

B. The Title fails to notify voters of requirement to “balance” public health and safety with responsible oil and gas development.

Section 12 of the Proposed Initiative sets out the role of the independent board in reviewing the rulemaking of other agencies is the “importance in balancing the public health, safety and welfare with responsible [oil and gas] development...” The failure of the proposed title language to reference this framework for how the independent board views its decision-making in reviewing the rules of the AQCC, Water Quality Control Commission, State Board of Health, and the Solid and Hazardous Waste Commission is a “material omission or misrepresentation.” *Bentley*, 370 P.3d at 634.

Until recently, the current COGCC had a similar balancing requirement in its statute. In *Colorado Oil and Gas Conservation Commission v. Martinez*, 433 P.3d 22 (Colo. 2019), the Court addressed this exact balancing question. The Court determined that the legislative intent of the statute was “to promote multiple

policy objectives, including the continued development of oil and gas resources...”

Id. at 30.

The imposition of the independent board using this balancing approach in its decision about whether to approve or disapprove of any new rules promulgated by the AQCC, Water Quality Control Commission, State Board of Health, and the Solid and Hazardous Waste Commission is a material issue. Without some reference to this “balancing requirement” in the title, voters cannot “intelligently determine whether to support or oppose such a proposal.” *Milo*, 333 P.3d at 105. As written, the Title violates the clear title requirement.

CONCLUSION

The Petitioner respectfully requests the Court overturn the actions of the Title Board with regard to Proposed Initiative 2019-2020 #311 because it contains multiple subjects. Alternatively, Petitioner respectfully requests that the Court reverse the actions of the Title Board and remand the Proposed Initiative to the Title Board for redrafting to clarify title to include the balancing requirement.

Respectfully submitted this 15th day of May, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing OPENING BRIEF was served via US Mail or email to the proponents on 15th day of May, 2020 to the following:

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