

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	
Petitioner: Timothy Steven Howard a/k/a Tim 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.: 20SA160
Respondents' Answer 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 1,349 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

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Respondents Diane Schwenke and David Davia, registered electors of the State of Colorado and the designated representatives of the proponents of Initiative 2019-2020 #311 (“Initiative #311”), through counsel respectfully submit their Answer Brief in support of the title, ballot title, and submission clause (“Title”) set by the Title Board for Initiative #311 and in response to the Opening Brief submitted by Petitioner Tim Howard (“Petitioner”).

SUMMARY OF THE ARGUMENT

The Title Board was correct in its determination that Initiative #311 contains a single subject and drafted a clear title. First, Initiative #311’s provision requiring the new independent oil and gas board’s final approval of other agency oil and gas rulemakings is critical to the cohesive functioning of the comprehensive and impartial regulatory regime Initiative #311 seeks to create. Second, there is no “balancing” requirement or standard related to that authority and, therefore, nothing is missing from the Title set for Initiative #311. For these reasons, the decision of the Title Board should be affirmed.

ARGUMENT

I. Initiative #311's Provision Giving the Independent Board Veto Power Over Certain Oil and Gas Rulemakings Is Critical to the Cohesive Functioning of the Impartial Regulatory Regime Initiative #311 Seeks to Create.

A. Requiring Approval of Rules That Affect Oil and Gas Operations to Achieve an Unbiased Regulatory Framework is Part of the Same Object or Purpose.

As explained in Respondents' opening brief, the reason for Initiative #311 is to develop a legal framework that allows decisions about oil and gas development to be made free from partisan political bias and interest group pressure by establishing a new regulatory body and regulatory regime. Resp. Op. Br. pp. 7-14. Petitioner alleges that granting the independent board veto authority over other agency oil and gas rulemaking creates an impermissible second subject. Pet. Op. Br. at pp. 8-11. But, as previously described, other agency oil and gas rulemakings are necessarily "part of the legal framework" that fulfils the one general purpose of Initiative #311, and is, therefore, "properly connected to the subject." *See In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 177 (Colo. 2014).

Petitioner erroneously contends that the independent board would “regulate air pollution emissions, wastewater discharge into rivers and streams as well as solid and hazardous waste disposal.” Pet. Op. Br. at p. 10. In reality, the authority granted to the independent board by Initiative #311 is a means to fit other agency oil and gas rulemakings within the impartial regulatory framework established by Initiative #311 by preventing other agencies—which may be more politically motivated than the independent board—from thwarting independent and unbiased regulation of oil and gas development throughout the state.

Initiative #311 allows agencies to continue to use their expertise to enact regulations over oil and gas operations, with an additional check required from the independent board. It is precisely out of respect for the expertise of the other agencies that the independent board is tasked with ensuring that rules that affect oil and gas operations are appropriate within the comprehensive and impartial regulatory regime, but is not tasked with developing those rules itself. *See Matter of Title,*

Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution of State of Colo. Adding Section 2 to Article VII (Petitions), 907 P.2d 586, 591 (Colo. 1995) (noting that where an initiative’s “numerous parts all relate to the subject . . . the Initiative does not combine unrelated, incongruous subjects in an effort to defraud the public and cause voters to inadvertently adopt measures they do not support in the process of voting for measures they do support”).

This provision is not “surreptitious,” and is in no way disguised, implied, or otherwise ‘coiled up in the folds’ of Initiative #311. This is in contrast to the case cited by Petitioner, in which the court found that a provision was “coiled up in the folds” when the initiative required state action that was neither explicit in the initiative itself nor represented in the title. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 442 (Colo. 2002). Here, none of those circumstances are present.

In sum, because the objective of Initiative #311 is to consolidate decisions about oil and gas operations in an independent board, any shift of authority from the COGCC and other agencies is consistent with Initiative #311's single subject.

B. Initiative #311 Does Not Change or Violate the Administrative Procedure Act.

Contrary to Petitioner's argument, Colorado's Administrative Procedure Act ("APA") remains fully intact. Pet. Op. Br. at pp. 11-12. Requiring the independent board to approve certain state agency oil and gas rulemakings is an effect of Initiative #311 on the law but does not in any way change or violate the APA. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000) ("[T]he mere fact that a constitutional amendment may affect the powers exercised by government under pre-existing constitutional provisions does not, taken alone, demonstrate that a proposal embraces more than one subject.").

Initiative #311 does not present a novel or unworkable idea; interagency coordination in the form of joint rulemaking is common at

the federal level where many areas of regulation and administration have overlapping delegations of power. Even if Initiative #311 conflicted with the APA, conflicting laws do not present a single subject issue and the Title Board is not required to explain the relationship between the initiative and other statutes. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 255*, 4 P.3d 485, 499 (Colo. 2000), citing *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1137, 1132 (Colo. 1996). Moreover, it is not “unusual for legislative acts to trigger changes to administrative practices.” *Vagneur v. City of Aspen*, 295 P.3d 493, 509 (Colo. 2013).¹

Because all aspects of Initiative #311 are interrelated and properly connected, the Title Board’s determination that Initiative #311 contains a single subject should be affirmed.

¹ Petitioner also expresses concern about requiring a rulemaking process outside of the APA and identifies the change as “unnecessary,” but such concern is an improper objection to the merits of the measure. *Cordero v. Leahy (In re Initiative for 2013-2014 #85)*, 328 P.3d 136, 141 (Colo. 2014).

II. There is No Requirement in Initiative #311 to “Balance” Public Health and Safety with Responsible Oil and Gas Development, and the Title Need Not Include a Nonbinding Provision.

Petitioner argues the Title set by the Title board fails to notify voters of a requirement or standard that other agency oil and gas rulemakings must “balance” public health and safety with responsible oil and gas development. Pet. Op. Br. pp. 14-15. Initiative #311 contains no such requirement. In support of this spurious argument, Petitioner cites *Colorado Oil and Gas Conservation Commission v. Martinez*, 433 P.3d 22 (Colo. 2019), to support an interpretation that Initiative #311’s background language is somehow a binding “balancing” requirement or standard. Pet. Op. Br. at pp. 14-15. In that case, however, the court expressly did not “perceive the statutory language as creating a balancing test.” *Martinez*, 433 P.3d at 30.

Furthermore, the “balancing” language of Initiative #311 merely provides background for the independent board’s approval authority of other agency oil and gas rulemakings:

[B]ecause 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 . . . such rules shall only become effective upon approval of the independent board.

The plain language of this provision is not to impose a “balancing” requirement or standard, but instead to provide justification for the independent board to have this approval authority.

Because there is no “balancing” requirement or standard in Initiative #311, the Title appropriately does not identify one. Therefore, the Title clearly and accurately describes the central features of Initiative #311, and the Title set by the Title Board should be affirmed.

CONCLUSION

Respondents respectfully request that the Court affirm the Title Board’s actions in determining single subject and setting title for Initiative #311.

Dated: May 29, 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 29, 2020, I electronically filed a true and correct copy of this **Respondents' Answer Brief** with the Clerk of Court via the Colorado Courts E-Filing System which will send notification of such filing upon counsel of record:

Matthew Sura (#44089)
Matthew Samelson (#44085)
Western Environmental Law Partners
7354 Cardinal Lane
Longmont, CO 80503
720.563.1866
mattsura.law@gmail.com
matthewsamelson@gmail.com

Attorneys for Petitioner

Grant Sullivan (#40151)
Assistant Solicitor General
Michael Kotlarczyk (#43250)
Assistant Attorney General
Colorado Attorney General's Office
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
grant.sullivan@coag.gov
mike.kotlarczyk@coag.gov

Attorneys for Title Board

s/Paulette M. Chesson

Paulette M. Chesson, Paralegal