

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 v. Respondents/Proponents: Diane Schwenke and David Davia and Title Board: Theresa Conley, David Powell, and Jason Gelender	▲ COURT USE ONLY ▲
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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 3,143 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 Opening Brief in support of the title, ballot title, and submission clause (the “Title”) set by the Title Board for Initiative #311.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Title Board err in finding that Initiative #311 properly contains a single subject in conformance with of 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 the central elements of Initiative #311?

STATEMENT OF THE CASE

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. Respondents filed Initiative #311 concerning the regulation of oil and gas operations with the Secretary of State on April 3, 2020. Initiative #311 would create an independent oil and gas board, grant

that board with a defined scope of authority to regulate oil and gas development in the state, and delineate other governmental authority under that same regulatory regime.

The Title Board conducted its initial public hearing and set the title for Initiative #311 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 granted the motion only to the extent that it made a change to the title and ballot title as requested by Petitioner and denied the remainder of the motion.

Accordingly, the Title Board set the final ballot title for the Initiative #311 as:

Shall there be an amendment to the Colorado constitution and Colorado revised statutes concerning the regulation of oil and gas operations, and, in connection therewith, replacing the oil and gas conservation commission with a new independent oil and gas board; specifying the appointment process for and qualifications of board members with the intent of ensuring the political independence of the board; vesting all regulatory power and jurisdiction over oil and gas development in the board except as otherwise specified; specifying a requirement that rules pertaining to oil and gas operations promulgated by the air quality control commission, water quality control commission, state board of health, and solid and hazardous waste commission take effect only

upon approval of the board; and specifying that nothing in the amendment alters, impairs, or negates local governments' authority to regulate oil and gas development in accordance with existing statutory law?

Petitioner sought review of the Title Board's action under Colo. Rev. Stat. § 1-40-107(2) seeking review of Initiative #311 based on single subject and clear title issues.

SUMMARY OF THE ARGUMENT

The Title Board was correct in its determination that Initiative #311 contains a single subject. Initiative #311 creates a regulatory framework freeing decisions about oil and gas development from partisan political bias and interest group pressure. To this end, the initiative establishes an independent regulatory board to replace the Colorado Oil and Gas Conservation Commission, provides regulatory authority to the independent board, and defines the scope of authority other agencies have over oil and gas operations. The provisions of Initiative #311 are properly related and the Title Board correctly found single subject in accordance with the law.

The Title Board appropriately exercised its broad discretion drafting the title for Initiative #311. Petitioner will contend that Initiative #311 requires the independent board to evaluate other agency rules based on whether they balance protection of the public health, safety, and welfare of citizens and the protection of the environment with the responsible development of oil and gas resources. Initiative #311 does not impose any such requirement and, in any event, this declaration is not a central feature of Initiative #311. Accordingly, the Title set by the Title Board fairly and accurately sets forth the central features of Initiative #311 as required by statute.

For these reasons, the decision of the Title Board should be affirmed.

ARGUMENT

I. Initiative #311 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.'" *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). The Title Board need only determine that the initiative “encompasses *related* matters” to establish a single subject. *In re 2013-2014 #89*, 328 P.3d at 177, citing *In re Title, Ballot Title, Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to the Constitution of the State of Colo. Adding Section 2 to Article VII*, 900 P.2d 104, 113 (Colo.1995) (Scott, J., concurring). The Title Board’s determination that the provisions appear to be connected to the Initiative's central focus establishes a single subject. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 2000, 4 P.3d 1094, 1099 (Colo. 2000).

Provisions that describe “part of the legal framework” necessary to achieve the purposes of the Initiative are “properly connected to the subject.” *In re 2013-2014 #89*, 328 P.3d at 177. Provisions that address the scope of governmental authority are “sufficiently narrow and sufficiently connected’ ... to satisfy the single subject rule.” *In re Title*,

Ballot Title, Submission Clause for 2011-2012 No. 45, 274 P.3d 576, 581 (Colo. 2012), citing *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d 438 (Colo. 2002).

“[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. All proposed constitutional amendments or laws would have the effect of changing the status quo in some respect if adopted by the voters.” *In re 1999-2000 No. 258(A)*, 4 P.3d at 1098. Altering the power of another agency or government follows directly and logically from the central focus of the Initiative and does not constitute a separate subject. *Id.*

The intention behind Initiative #311 is to ensure that decisions about oil and gas development are made free from partisan political bias and interest group pressure by establishing a new regulatory body and regulatory regime to ensure the industry is regulated reasonably

and without bias. Decisions concerning the regulation of oil and gas development necessarily involve competing priorities, which are asserted by different interest group advocates and which often invoke partisan politics. Current regulators are political appointees of either party that may be swayed by these political loyalties and interest groups.

By contrast, Initiative #311 establishes an independent regulatory body and provides for the appointment of impartial regulators with expertise in a related professional field, who are free from conflicts of interest and who rely on science, unbiased information, and collaborative decision making to enact reasonable regulations. Initiative #311's scope aligns with that of the ballot initiatives that established other independent boards, including the independent redistricting commission and the independent ethics commission.

In the same way that Initiative #311 includes provisions related to creation of the independent board, the ballot measure creating the

independent redistricting commission also included related provisions concerning the criteria for determination of the districts and the process and standard for Colorado Supreme Court review. Likewise, the ballot measure creating the independent ethics commission also included related provisions prohibiting gifts to elected officials and government employees and imposed a lobbying timeout for elected officials leaving office.

These previous ballot measures removed authority from the legislature and governor over redistricting and ethics and then gave authority to newly created independent commissions over these areas, establishing the rules, requirements, procedures, mandates and also providing standards of review and other requirements to guide the deliberations and decisions of these newly created independent commissions. Initiative #311 does this as well, except with respect to the conduct of oil and gas operations. None of the provisions in Initiative #311 extend beyond the scope of the types of provisions

contained in either of these previous ballot measures, neither of which were ever found to have improperly had multiple subjects.

Similarly, the concepts contained in Initiative #311 mirror the concepts contained in Colorado Senate Bill 19-181 (“SB 181”), which was signed into law on April 16, 2019, and which was also required to have a single subject under Colo. Const art. V, §21.¹ Assuming SB 181 properly contained a single subject, Initiative #311 also properly contains one. SB 181 revamped the Colorado Oil and Gas Conservation Commission, redefined its scope of authority, and specifically addressed how its authority relates to that of other state agencies. Initiative #311 does exactly the same. SB 181 went further and addressed even more topics and was never found to have violated single subject.²

¹ Both the General Assembly and citizens filing ballot measures operate under an equal requirement for single subject. This measure, in fact, touches notably fewer areas of the law than did SB 181, which was a major overhaul of oil and gas regulation enacted by the General Assembly last year.

² A finding by this Court that Initiative #311 violates the single subject requirement would strongly suggest that SB 181 also violates single subject and is itself unconstitutional. This unintended consequence is unnecessary because all of the provisions of Initiative #311 are properly related and form a single subject.

Initiative #311's proposed art. XVIII §17(12) provides that the independent board's authority supersedes prior grants of authority, thus, replacing the Colorado Oil and Gas Conservation Commission. Initiative #311 also specifies that although other state agencies³ with regulatory authority over oil and gas operations retain their authority, any regulations promulgated by them affecting oil and gas operations are subject to approval of the independent board.

Undoubtedly, Petitioner will object that this provision is unrelated to creation of the independent board. Yet, this provision is critical to the cohesive functioning of the comprehensive and impartial regulatory regime Initiative #311 seeks to create. 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.

³ The Air Quality Control Commission, Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission.

For example, rather than giving the independent board regulatory authority over hazardous waste regulation related to oil and gas operations, Initiative #311 preserves the rulemaking authority of the solid and hazardous waste commission. However, Initiative #311 also requires the independent board's final approval over such regulations. This check by the independent board over other agency rulemakings is essential to the central objective of Initiative #311 with respect to oil and gas development.

As with the ballot measures creating the redistricting commission and the independent ethics commission, as well as SB 181, all aspects of Initiative #311 are interrelated and properly connected. Authorizing the independent board to serve as a check on the oil and gas regulations passed by other state agencies flows logically from Initiative #311's central focus and does not frustrate single subject. Furthermore, because the interrelated parts of Initiative #311 are exactly the same as the components of SB 181, none of the provisions of Initiative #311 "alter the long-recognized scope of the subject." *In re*

2011-2012 No. 45, 274 P.3d at 581. Establishing the scope of authority of the independent board vis-a-vis other state agencies is not a second subject, but instead these provisions carry out the one general object or purpose of Initiative #311: to regulate the conduct of oil and gas operations throughout the state by the independent board.

**C. Initiative Does Not Implicate Dangers to be Prevented
by Single Subject Requirement**

As set forth in the Colorado Constitution and affirmed by state statute, the express purpose of the single-subject requirement for proposed voter initiatives is to prevent two “dangers” of multi-subject initiatives: first, it prevents the enactment of combined measures that would fail on their individual merits; second, it protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. Colo. Const. art. 5, § 1(5.5); Colo. Rev. Stat. Ann. § 1-40-106.5.

Initiative #311 does not trigger either of the two “dangers” of multiple-subject initiatives. Initiative #311 is a cohesive proposal to regulate the conduct of oil and gas operations, and “its discrete subsections are necessarily and properly connected, rather than disconnected or incongruous, because they all relate to the same revised legal framework.” *In re 2011-2012 No. 45*, 274 P.3d at 581. 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.” *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).

Initiative #311 also will not lead to the “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative” because there are no

embedded provisions that would lead to voter surprise or fraud. *In re 2011-2012 No. 45*, 274 P.3d at 582. Initiative #311 is specific and descriptive and limited to a single regulatory framework concerning the regulation of oil and gas operations, and there are no hidden provisions that are unrelated to the initiative’s “central theme.” See *Matter of Title, Ballot Title and Submission Clause for 2013-2014 #129*, 333 P.3d 101, 104 (Colo. 2014).

As such, the plain language of Initiative #311 unambiguously specifies and implements the independent board’s authority over the conduct of oil and gas operations. Voters would not be surprised to learn that by voting for Initiative #311, they would be voting to reform the existing way oil and gas operations are regulated in Colorado.

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 title 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 Clearly, Accurately and Fairly Describes

Initiative #311 and Incorporates All Central Features

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), citing *In re Proposed Petition on Campaign and Political Fin.*, 877 P.2d 311, 313 (Colo.1994). 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)). A title need not set out every detail of the initiative. *In re Title, Ballot Title & Submission Clause Summary for 2005-2006 #73*, 135 P.3d 736, 740 (Colo. 2006).

Here, the Title captures every central feature of Initiative #311: (1) creating of the independent board; (2) indicating that the members of the independent board have political independence; (3) vesting regulatory power with the independent board; (4) giving the independent board a check on oil and gas regulations passed by other state agencies; and (5) maintaining current local government authority.

Petitioner will likely attempt to argue that Initiative #311’s proposed Colo. Const. art. XVIII §17(12) imposes a new required

standard for the independent board when evaluating other agency rules, and that standard must also be included in the Title. However, that provision neither imposes a requirement on the independent board nor sets a new required standard for evaluation. Instead, that provision merely expresses the rationale for the independent board's check on the other state agency rulemaking. It states that "...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... such rules shall only become effective upon approval of the independent board." That provision is akin to a preamble or legislative declaration and has no binding effect upon the independent board or any other state agency. Therefore, it is not a central element of Initiative #311, and the Title is not flawed for its omission.

To the contrary, the Title clearly, accurately, and fairly describes Initiative #311, incorporates all of its central features, and voters can understand the meaning of a "yes" or "no" vote.

CONCLUSION

For all these reasons, Respondents respectfully request that the Court affirm the actions of the Title Board for Initiative #311.

Dated: May 15, 2020

Respectfully submitted,

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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:

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