

<p>COLORADO SUPREME COURT 2 East 14th Ave. Denver, Colorado 80203</p>	
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the 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,</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><b>THE TITLE BOARD’S ANSWER BRIEF</b></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 word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,540 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1 and C.A.R. 32.

*s/ Grant T. Sullivan*

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## SUMMARY OF THE ARGUMENT

This Court should affirm the title as set by the Title Board for Proposed Initiative 2019-2020 #311 (“#311”), for the reasons stated in the Board’s opening brief. This answer brief responds to the arguments raised by Petitioner/Objector Timothy Steven Howard’s opening brief.

I. The Board’s title for #311 satisfies the single subject rule. Whether characterized as a “veto” power or sensible regulatory oversight, requiring the Independent Oil and Gas Board to approve oil and gas rules promulgated by existing state agencies is sufficiently related to the measure’s central focus of creating a new board to oversee oil and gas operations in Colorado. Moreover, the measure’s slight deviation from the Administrative Procedures Act for oil and gas rules is at most a mere effect of #311, not an impermissible second subject.

II. The Board also properly exercised its drafting discretion in setting a brief title that complies with the clear title rule. Under this Court’s precedent, the title need not specify that the new board holds limited rulemaking authority, let alone describe the nature or scope of that authority. The Title Board therefore did not abuse its drafting

discretion by omitting the requirement that the Independent Oil and Gas Board's approved rules "balance" public health interests with responsible oil and gas development.

## **ARGUMENT**

### **I. Changing the rulemaking authority of existing agencies is not a second subject.**

Howard asserts that #311 contains an impermissible second subject because it both creates the new Independent Oil and Gas Board and grants it "veto" authority over oil and gas rules promulgated by four existing state agencies. Howard argues that this veto authority is unrelated to the initiative's central purpose of disbanding the Colorado Oil and Gas Conservation Commission and replacing it with the new independent board. Howard also contends that #311 changes the rulemaking procedures under the Administrative Procedures Act, creating yet another second subject. This Court should reject Howard's arguments.

**A. Creating a new board and defining its rulemaking authority constitute a single subject.**

This Court has already rejected single subject arguments similar to Howard's, holding that an initiative creating new requirements for a board's membership and defining its newly created authority constitutes a single subject. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 246(e)*, 8 P.3d 1194, 1196-97 (Colo. 2000). This is true even if the measure impacts the powers exercised by other parts of government under preexisting laws. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000).

In *In re Title No. 246(e)*, for example, the initiative created new requirements for the composition, selection, and terms of members of the Commission on Judicial Discipline. 8 P.3d at 1196. But the initiative also defined new powers and responsibilities for the commission. *Id.* at 1196-97. This Court explained these new powers and responsibilities were mere implementing provisions that were properly "tied to the central focus of judicial discipline, which is a discrete

subject that is not overbroad in relation to the initiative’s content.” *Id.* at 1197.

The same reasoning applies here to #311. The measure both creates new requirements for selecting the members of the Independent Oil and Gas Board and defines the new board’s authority. That authority includes rulemaking oversight over four existing agencies, but only for new rules pertaining to oil and gas; the new independent board’s rulemaking oversight does not extend to rules unrelated to oil and gas. Record at 9 (proposed Colo. Const. art. XVIII, § 17(12)(a)-(12)(d), granting rulemaking oversight for rules regarding “the emission of air pollutants from oil and gas operations,” “discharge of water pollutants from oil and gas operations,” “radioactive materials from oil and gas operations,” “disposal of hazardous waste from oil and gas operations,” and “disposal of exploration and production waste from oil and gas operations.”).

Just like *In re Title No. 246(e)*’s provisions regarding judicial discipline, each of these provisions in #311 are “tied to the central focus” of oil and gas operations in Colorado. 8 P.3d at 1197. Were it otherwise,



proponents routinely would be required to bring two separate yet related initiatives—one to establish a new board and a separate measure to define its authority. Such redundancy is illogical and not required by this Court’s single subject precedent.

Nor are #311’s provisions regarding the Independent Oil and Gas Board’s rulemaking oversight “coiled up in the folds” of the measure. At Howard’s own urging, the Title Board edited the title’s language during the rehearing to make explicit that #311 requires the new independent board to approve oil and gas rules promulgated by four existing agencies. *Compare* Record at 14, *with* Record at 22. The edited title even identifies the four agencies by name. Record at 22. Voters are therefore alerted to this feature of #311. It is not a “surreptitious provision” that may occasion “fraud and surprise” on the voters. *In re Title, Ballot Title, Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010) (quotations omitted).

**B. #311 does not change the  
Administrative Procedures Act.**

Howard also contends that #311's change to the rulemaking process under the APA for oil and gas rules constitutes an impermissible second subject. Howard is incorrect for two reasons.

*First*, #311 does not alter the standard APA rulemaking process for oil and gas rules. The measure does not amend the APA's provisions in article 4 of Title 24, for example, but rather states that oil and gas rules promulgated by the four identified agencies "shall only become effective" upon approval by the new Independent Oil and Gas Board. Record at 9. This type of multi-level approval process for new rules is common in Colorado.<sup>1</sup> The APA even contains a built-in provision that flexibly accommodates agencies' variable approval methods, recognizing that not all agencies follow identical rulemaking procedures. *See* § 24-4-

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<sup>1</sup> *See, e.g.*, § 24-33.5-205 (stating chief of the Colorado State Patrol "shall set forth, with the approval of the executive director [of the Department of Public Safety], rules and regulations governing all operating procedures of the Colorado state patrol"); § 12-20-103(4) (stating Department of Regulatory Agencies' supervision includes "the approval or disapproval of rules of the boards, commissions, and director relating to the examination and licensures, certification, or registration of applicants").

103(8)(a), C.R.S. (“No rule shall be issued except within the power delegated to the agency and as authorized by law.”).

*Second*, #311’s change to the approval process for oil and gas rules promulgated by existing state agencies is a mere effect of the measure, not a second subject. This Court has made clear that it requires “more than the omission of a full accounting of potential effects” before it concludes that an initiative contains multiple subjects. *In re Matter of Title, Ballot Title and Submission Clause for 2015-2016 #63*, 370 P.3d 628, 632 (Colo. 2016). Under this Court’s precedent, the Board correctly concluded that #311 satisfies the single subject rule.

**II. The title more than adequately explains the nature of the new board’s rulemaking authority.**

This Court should reject Howard’s clear title argument for the reasons set forth in the Title Board’s opening brief. The requirement that the new Independent Oil and Gas Board approve oil and gas rules that “balance” public health interests with responsible oil and gas development is not a central feature of #311. Title Bd. Br. 13-15. Adding the additional language that Howard seeks would add undue length to the title, contrary to the statutory requirement that titles “be brief.”

§ 1-40-106(3)(b), C.R.S. (2019).

This Court previously rejected similar clear title arguments in *In re Proposed Tobacco Tax*, 830 P.3d 984 (Colo. 1992). There, the initiative sought to create a state commission on tobacco and health and give the new commission rulemaking authority to carry out the purposes of the initiative, among other powers. *Id.* at 986. A challenger argued that the title was misleading because it did not inform voters of the rulemaking power being delegated to the commission. *Id.* at 989. This Court rejected the challenger’s argument, explaining that the new commission’s rulemaking authority was limited and that the increased length of the title was not worth the expense of brevity: “Addition of language detailing the commission’s rulemaking power would increase the length of the title . . . while providing little information that would advance voters’ understanding of the initiative.” *Id.* at 990.

Here, the Board’s title for #311 gives voters *more* information than was provided in *In re Proposed Tobacco Tax*. It explains that the Independent Oil and Gas Board must approve oil and gas rules promulgated by existing state agencies, even specifying the agencies by

name. Record at 22. Voters are thus informed that, although the new independent board cannot itself draft new rules, it must approve oil and gas rules issued by other executive agencies. This is far more information than was deemed acceptable in *In re Proposed Tobacco Tax*, where the title omitted completely the fact that the new commission held limited rulemaking authority. Just as the title in *In re Proposed Tobacco Tax* passed muster under the clear title rule, so too does the Board's title for #311.

### CONCLUSION

This Court should affirm the Title Board's actions in setting the title for #311.

Respectfully submitted this 29th day of May, 2020.

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*/s/ Grant T. Sullivan*

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**CERTIFICATE OF SERVICE**

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties or their counsel electronically via CCE and/or via U.S. first class mail at Denver, Colorado this 29th day of May, 2020, addressed as follows:

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