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| <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> <p>Case No.: 2020SA160</p> |
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| <p>THE TITLE BOARD’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 word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,534 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).

Under a separate heading placed before the discussion of each issue, the brief contains statements of the applicable standard of review with citation to authority, statements whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised.

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.

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STATEMENT OF THE ISSUES

- 1) Whether the measure satisfies the single subject requirement.
- 2) Whether the title as set by the Title Board satisfies the clear title requirement.

STATEMENT OF THE CASE AND FACTS

Diane Schwenke and David Davia (“Proponents”) seek to circulate Proposed Initiative 2019-2020 #311 (“#311”) to obtain the requisite number of signatures to place a measure on the ballot to add section 17 to article XVIII of the Colorado Constitution, to amend section 13 of article XII of the Colorado Constitution, and to add and amend certain statutory provisions in Titles 34 and 39 of the Colorado Revised Statutes. The proposed initiative creates a new Colorado Independent Oil and Gas Board. *Attachments to Petition for Review* (“Record”) at 2-13.

Unlike the related Proposed Initiatives 2019-2020 #307 to #310 where the Title Board found the measures contained multiple subjects, #311 is limited to creating a new Colorado Independent Oil and Gas

Board and defining its authority. The measure does not impact the current authority of local governments over oil and gas development. Record at 9 (proposed Colo. Const. art. XVIII, § 17(13), leaving local government authority unaltered).

The Board conducted an initial public hearing on April 15, 2020. The Proponents stated at the hearing that #311's single subject is the conduct of oil and gas operations.¹ The Board agreed that #311 contained a single subject and therefore proceeded to set a title.

Petitioner/Objector Timothy Steven Howard filed a motion for rehearing, asserting objections based on violations of both the single subject requirement and the clear title requirement. Record at 16-19.

The Board conducted a rehearing on April 23, 2020.² The Board denied the single subject portion of Howard's motion for rehearing, but made certain changes to its original title in response to some of

¹ *Hearing Before Title Board on Proposed Initiative 2019-2020 #311* (Apr. 15, 2020), available at <https://tinyurl.com/y87ovusw> (statement at minute 4:36:03).

² *Rehearing Before Title Board on Proposed Initiative 2019-2020 #311* (Apr. 23, 2020), available at <https://tinyurl.com/yctt99fp> (beginning at minute 5:17:10).

Howard's clear title arguments. Record at 22-23. The title as fixed by the Board at the rehearing is:

An amendment to the Colorado constitution and a change to the 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.

Record at 22.

Howard filed a timely petition for review with this Court on April 30, 2020, raising both single subject and clear title arguments. Petition at 3-4.

SUMMARY OF THE ARGUMENT

This Court should affirm the Title Board's actions in setting title for #311. The Board correctly determined that the measure satisfies the

single subject rule because all of #311's provisions relate to the single subject of creating the new Colorado Independent Oil and Gas Board and defining its authority. The measure's provision changing the rulemaking authority of existing state agencies is merely an effect that #311 has on existing law, not an impermissible second subject.

The Title Board also properly exercised its drafting discretion in setting a title that complies with the clear title requirement. The specific language in the measure requiring the new Independent Oil and Gas Board to "balance" the interests of protecting the public health and environment with responsible oil and gas development is not a central feature that must appear in the title. The measure contains multiple guiding principles and standards that help inform the new independent board's decisions. But none of them are central features. Attempting to summarize all of the measure's guiding principles in the title would add undue length and violate the statutory requirement that titles be brief.

ARGUMENT

I. The measure does not contain multiple subjects.

Howard's petition alleges that #311 violates the single subject rule because it both creates the Colorado Independent Oil and Gas Board and reduces the power of other state agencies that currently oversee oil and gas development in Colorado, creating a "veto authority" for the new board over other agencies' rulemaking power. Petition at 3. This Court should reject Howard's arguments.

A. Standard of Review Preservation.

This Court's standard of review is deferential to the Title Board. "In reviewing a challenge to the Title Board's single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board's actions." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014). The Court will "only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.*

Howard preserved his single subject argument by raising it in his motion for rehearing. Record at 16-17.

B. The Board correctly found that #311 satisfies the single subject rule.

The Colorado Constitution provides that “[n]o measure shall be proposed by petition containing more than one subject.” Colo. Const. art. V, § 1(5.5); *see also* § 1-40-106.5, C.R.S. (2019) (addressing constitutional single subject rule). The single subject rule serves two purposes. *First*, it prohibits “the practice of putting together in one measure subjects having ‘no necessary or proper connection,’ for the purposes of garnering support for measures from parties who might otherwise stand in opposition.” *In re Proposed Initiative Amend TABOR 25*, 900 P.2d 121, 125 (Colo. 1995) (quoting § 1-40-106.5(1)(e)(I)). *Second*, the single subject rule prevents “surprise and fraud upon the voters” caused by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. *Amend TABOR 25*, 900 P.2d at 125; *see In re Title, Ballot Title, and Submission Clause for 2009-2020, No. 24*, 218 P.3d 350, 355 (Colo. 2009).

“The subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous.” *In re Title #76*, 333 P.3d at 79. A measure does not violate the single subject

requirement, however, simply because it may have different effects on other provisions of Colorado law. *See In re Title, Ballot Title and Submission Clause for 2013-2014 #90 & #93*, 328 P.3d 155, 160-61 (Colo. 2014). Such effects are “irrelevant” to whether the measure contains a single subject. *Id.* at 160 (quoting *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 274 P.3d 562, 568 n.2 (Colo. 2012)).

Here, #311’s change to the rulemaking authority held by existing state agencies does not constitute an impermissible second subject. The measure gives the new Colorado Independent Oil and Gas Board rulemaking oversight over existing state agencies that currently hold rulemaking power for discrete oil and gas issues, including the Air Quality Control Commission, the Water Quality Control Commission, the State Board of Health, and the Solid and Hazardous Waste Commission. Record at 8-9 (proposed Colo. Const. art. XVIII, § 17(12)). The measure states that rules promulgated by these agencies concerning oil and gas “shall only become effective upon approval of the Independent [Oil and Gas] Board.” Record at 9.

Far from constituting a second subject, the change in rulemaking authority held by existing state agencies is merely an effect that #311 has on existing law. See *In re Title 2013-2014 #90 & #93*, 328 P.3d at 160-61. This Court has previously held that “the 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.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). This Court’s holding in *No. 258(A)* makes logical sense. After all, all proposed initiatives have the effect of “changing the status quo” in some respect if adopted by the voters. *Id.*; see also *In Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1077 (Colo. 2010) (reaffirming *No. 258(A)*’s holding).

Accordingly, #311’s change to the current rulemaking authority of existing state agencies does not constitute an impermissible second subject.

II. The Board's title for #311 is fair, clear, accurate, and complete.

Next, Howard's petition asserts that the title set by the Board violates the clear title requirement. He argues the title fails to inform voters that the new Independent Oil and Gas Board will evaluate rules promulgated by existing state agencies based on whether they "balance" the interests of protecting the public health and environment with responsible oil and gas development. Petition at 4. This Court should reject Howard's arguments.

A. Standard of Review and Preservation

This Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010). Instead, the Court grants "great deference" to the Board in the exercise of its drafting authority. *Id.* This Court reads the title as a whole to determine whether it properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water*, 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board's decision only if the titles are insufficient, unfair, or misleading. *In re Title, Ballot*

Title and Submission Clause, and Summary for 2009-2010 #45, 234

P.3d at 648.

This Court also employs “all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title and Submission Clause, and Summary for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case will the Court reverse a decision of the Board. *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Howard preserved his clear title arguments in his motion for rehearing. Record at 18-19.

B. The Board’s title summarizes #311’s central features.

Section 1-40-106(3)(b), C.R.S. (2019) establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). Among other requirements, the title must “be brief,” it must be in the form of a question which may be answered “yes/for” or “no/against,” and it must “unambiguously state

the principle of the provision sought to be added, amended, or repealed.”
§ 1-40-106(3)(b).

The Board is not required to set out every detail of the measure in the title. *In re Title, Ballot Title, and Submission Clause for Proposed Initiatives 2001-02 #21& #22*, 44 P.3d 213, 222 (Colo. 2002). Rather, the Board must summarize only the “central features” of the proposal. *In re Proposed Initiated Petitions*, 907 P.2d 586, 591 (Colo. 1995). In doing so, the Board must balance the need for brevity in the title against the need for completeness. *See In re Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d 853, 857 (Colo. 1994) (stating Title Board “must navigate the straits between brevity and unambiguously stating the central features”).

In this case, Howard’s clear title argument before the Board on rehearing was two-fold: the title should (1) alert voters regarding which existing agencies the new Independent Oil and Gas Board will oversee; and (2) inform voters that the new independent board must “balance” the protection of public health and safety with responsible oil and gas development. Record at 19.

The Title Board agreed to make Howard’s first category of requested changes, replacing “other state rule-making entities” with “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.” *Compare* Record at 14, *with* Record at 22.

As to the second category of Howard’s requested changes, the Board disagreed that the “balancing” language in proposed section 17(12) of article XVIII amounted to a central feature of the measure. Record at 8. The Title Board members viewed the “balancing” language as analogous to a legislative declaration of purpose that provides justification for the new independent’s board’s creation, not a substantive legal standard that the new independent board must apply. Howard’s contrary argument suggesting that the “balancing” language is a new substantive legal standard would require this Court and the Title Board to review the measure’s efficacy, construction, and future application—something this Court has repeatedly cautioned against. *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328

P.3d 172, 176 (Colo. 2014); *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010).

Moreover, even if the “balancing” language referenced by Howard does amount to a new legal standard that the Independent Oil and Gas Board must apply, it still does not amount to a central feature of #311. The measure includes many other arguable substantive legal standards, for example, that the new Independent Oil and Gas Board must also apply:

- It must regulate oil and gas “in a reasonable manner to protect and minimize adverse impacts to public health, safety, and welfare, the environment, and wildlife resources” and protect against “adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations.” Record at 8 (proposed Colo. Const. art. XVIII, § 17(11)(b)).
- Its rules and decisions must be based on the “best available science and engineering principles,” consider “local input,” and seek to “resolve conflicting factors and values in a balanced,

reasonable and judicious manner.” Record at 2 (proposed Colo. Const. art. XVIII, § 17(1)(d)).

- Its members must be “guardians of the public trust” and “ensure transparency in the oil and gas regulatory process.”

Record at 12 (proposed § 34-60-132(1)-(2), C.R.S.).

Including each and every one of these arguable legal standards imposed on the new Independent Oil and Gas Board would add considerable length and complexity to the title, contrary to the statutory requirement that titles “be brief.” § 1-40-106(3)(b).

Rather than add undue length that may confuse voters, the Title Board sensibly elected to summarize only the most important features of #311. The central features summarized by the Title Board include that “all regulatory power” over oil and gas development—including approval of rules from specifically enumerated agencies—is vested in the new Independent Oil and Gas Board except as otherwise specified. Record at 22. This middle-of-the-road approach appropriately balances the competing interests of brevity and completeness. *See In re Proposed Initiative Concerning Automobile Insurance Coverage*, 877 P.2d at 857.

Voters wishing to receive more detail about the substantive legal standards to be applied by the new Independent Oil and Gas Board of course remain free to consult the Blue Book's summary that accompanies the ballot or the language of the measure itself.

CONCLUSION

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

Respectfully submitted this 15th day of May, 2020.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCE and/or via U.S. first class mail at Denver, Colorado this 15th day of May, 2020, addressed as follows:

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