

<b>COLORADO SUPREME COURT</b> 2 East 14th Avenue, Denver, Colorado 80203	
Original Proceeding Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
<b>Petitioners:</b> David Davia and Cody Davis  v. <b>Respondents:</b>  <b>Title Board:</b> Theresa Conley, Kurt Morrison, and Jason Gelender and <b>Objector:</b> Kelly Nordini	<b>▲ COURT USE ONLY ▲</b>
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<b>Petitioners' Opening Brief</b>	

## 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 **3,323** 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/Gwendolyn A. Benevento*

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Petitioners David Davia and Cody Davis, registered electors of the State of Colorado and the designated representatives of the proponents of Initiative 2021-2022 #136 (“Proposed Initiative”), through counsel respectfully request this Court’s review of the actions of the Ballot Title Setting Board (“Title Board”) with respect to its decision to deny setting of a title for the Proposed Initiative on the grounds that the Proposed Initiative does not contain a single subject.

### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

Did the Title Board err in finding that the Proposed Initiative does not properly contain a single subject in violation of Colo. Const. art. V, §1(5.5) and section 1-40-106.5, C.R.S.?

### **STATEMENT OF THE CASE**

This is an original proceeding pursuant to section 1-40-107(2), C.R.S. Petitioners filed the Proposed Initiative concerning the regulation of oil and gas operations with the Secretary of State on April 8, 2022. The Proposed Initiative provides for the creation of an independent oil and gas commission, grants that commission with a legal framework and defined scope of authority to regulate oil and gas development in the state, and delineates other governmental authority under that same regulatory regime.

The Title Board conducted its initial public hearing and denied jurisdiction to set the title for the Proposed Initiative on April 21, 2022, based on single subject issues. Petitioners filed a motion for rehearing on April 27, 2022. The Title Board considered the motion at its April 28, 2022, hearing where the Title Board denied the motion.

### **SUMMARY OF THE ARGUMENT**

The Title Board erred in its determination that the Proposed Initiative does not contain a single subject. The Proposed Initiative creates a regulatory regime for the independent regulation of oil and gas development intended to minimize partisan political bias and interest group pressure in the process. The Proposed Initiative establishes the independent regulatory commission, provides defined regulatory authority to the new independent board, and defines the scope of authority other agencies have over oil and gas operations, which affects the existing legal authority held by other agencies over oil and gas development. If the Title Board's reasoning is upheld regarding its single subject objection, that this measure cannot both create a new commission and reallocate authority from existing state agencies, it would essentially bar the creation of any new agency or commission by an initiative or legislative action (for any new agency or



commission with a substantive role would indeed require a reallocation of governmental authority).

The Title Board's ruling directly conflicts with precedent and longstanding practice. In 2020, the Title Board set title on a virtually identical measure, and the Supreme Court affirmed the Title Board's jurisdiction based on single subject. In 2018, the general assembly referred and voters approved a measure to create independent redistricting commissions, which reallocated authority from other state agencies and the general assembly to the new commissions. Also in 2018, the general assembly enacted sweeping legislation to reform the Colorado oil and gas conservation commission, which included expanding the commission's authority and altering the authority of other agencies. In 2006, the Title Board set title for an initiative creating the independent ethics commission, which reallocated authority from other state agencies and the legislature to the new commission.

The members of the Title Board may not support the idea of an independent oil and gas commission with comprehensive authority, but the Title Board must apply the same legal standards in a consistent and objective manner as they applied to the independent redistricting commissions and independent ethics commission.

The provisions of the Proposed Initiative are properly related, and the Title Board incorrectly found that it contained more than one subject single subject in violation of the law.

## **ARGUMENT**

### **A. The Proposed Initiative Meets the Single Subject Requirement**

#### **1. Standard of Review**

Colo. Const. art. V, § 1(5.5) requires that “[n]o measure shall be proposed by petition containing more than one subject.” *See also* section 1-40-106.5, C.R.S., (statutory single-subject requirement). The Title Board cannot set a title for an initiative that contains multiple subjects, meaning one that contains provisions that have no “necessary and proper relationship to the substance of the initiative.” *Howes v. Hayes (In re Title, Ballot Title & Submission Clause)*, 962 P.2d 927, 929 (Colo. 1998) citing *Title v. Hufford*, 917 P.2d 1277, 1279-80 (Colo. 1996); *Kelley v. Tancredo (In re Proposed Ballot Initiative on Parental Rights)*, 913 P.2d 1127, 1130-31 (Colo. 1996).

While the Court does "employ all legitimate presumptions in favor of the propriety of the Board's actions," it will overturn the Title Board's single subject determination in a clear case. *Johnson v. Curry (In re Title, Ballot Title, &*

*Submission Clause for 2015-2016 #132*), 374 P.3d 460, 464 (Colo. 2016), citing *Kemper v. Hamilton (In re Title, Ballot Title & Submission Clause for 2011-2012 #3)*, 274 P.3d 562, 565 (Colo. 2012) (quoting *Earnest v. Gorman (In re Title, Ballot Title & Submission Clause for 2009-2010 #45)*, 234 P.3d 642, 645 (Colo. 2010)).

In addition, "[t]he right of initiative and referendum, like the right to vote, is a fundamental right under the Colorado Constitution." *Herpin v. Head (In re Title, Ballot Title & Submission Clause)*, 4 P.3d 485, 492 (Colo. 2000), citing *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994). The single-subject requirement must be liberally construed to preserve and protect the right of initiative and "so as not to impose undue restrictions on the initiative process." C.R.S. § 1-40-106.5(2); *Howes*, 962 P.2d at 929; citing *In Re Proposed Initiative on Parental Choice In Education*, 917 P.2d 292, 294 (Colo. 1996).

2. **The Proposed Initiative's Provisions are Related to One General Object or Purpose.**
  - a. **The General Purpose of the Initiative is to Provide an Independent Regulatory Regime to Govern the Regulation of Oil and Gas.**

The intent behind the Proposed Initiative is to ensure that decisions about oil and gas development are made free from partisan political bias and interest group

pressure. To this end, the Proposed Initiative would establish a new regulatory body and regulatory regime to have authority over state decisions concerning the regulation of oil and gas development. The provisions of the Proposed Initiative are all interconnected and related to its subject; this is a clear case of an initiative with the single subject of the regulation of oil and gas in Colorado.

“[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. *Kemper v. Leahy (In re Title, Ballot Title)*, 328 P.3d 172, 177 (Colo. 2014) (finding “the creation of a public right to Colorado's environment” to be a single subject, including provisions to create government trustees and restrict local government’s lawmaking authority with respect to the environment), 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). As long as the procedures specified have a necessary and proper

relationship to the substance of the initiative, they are not a separate subject.

*Howes*, 962 P.2d at 929, citing *Hufford*, 917 P.2d at 1279-80; *Kelley*, 913 P.2d at 1130-31.

An initiative may encompass “a host of significant changes” and still constitute a single subject. *Johnson*, 374 P.3d at 465-66, citing *Hayes v. Spalding (In re 2013-2014 #76)*, 333 P.3d 76, 81-83 (Colo. 2014) (describing changes to signature thresholds, ballot content, manner of filling vacancies, the applicability of campaign finance laws, and petition circulation requirements for recall elections as constituting a single subject).

The new independent commission would consist of impartial regulators whose appointment and decisions would be more insulated from partisan political pressure than they are under the current regulatory structure. The Proposed Initiative spells out the details related to the function and authority of the independent commission through the appointment process, conferring regulatory authority, and defining the scope of authority of the independent commission and that of other agencies that impact the independent commission’s ability to regulate oil and gas operations. These are related matters, they have a necessary and proper relationship to the substance of the Proposed Initiative, and they carry out the

general object or purpose of the independent commission's framework, functions, and authority. The provisions are not "disconnected and incongruous," rather, they "have the single distinct purpose of describing a new legal regime" that would govern oil and gas operations. *Kemper v. Hamilton*, 274 P.3d at 567, citing *Pub. Rights in Waters II*, 898 P.2d at 1079.

To borrow an analogy from a member of the Title Board, proposing an initiative for voter approval may involve small or large changes to the status quo, like throwing a small or large rock in a pond. The single subject rule prohibits proponents from having unconnected provisions, or, from throwing two rocks in the pond. The law does not prohibit more than one significant change in the law from appearing in a single initiative if the provisions are connected to the initiative's objective. The Proposed Initiative may be a big rock, but it is just one rock.

**b. The Authority to Approve Other Agency Regulations is Not a Second Subject.**

The Proposed Initiative would provide that the independent commission with all regulatory authority and specifies that, although other state agencies<sup>1</sup> with

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<sup>1</sup> The Air Quality Control Commission, Water Quality Control Commission, Board of Health, and the Solid and

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 commission.<sup>2</sup>

“[T]he mere fact that a constitutional amendment may affect the powers exercised by government ... 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.” *Garcia v. Chavez (In re 1999-2000 No. 258(A))*, 4 P.3d 1094, 1098 (Colo. 2000). Furthermore, an initiative does not necessarily violate the single subject requirement just because it "makes policy choices that are not inevitably interconnected." *Kemper v. Leahy*, 328 P.3d at 178, quoting *In re Title v. John Fielder (In re 1999-2000 No. 256)*, 12 P.3d 246, 257 (Colo. 2000).

This provision is not only connected to, but is critical to the cohesive functioning of the comprehensive and impartial regulatory regime that the Proposed Initiative seeks to create. It allows continued reliance on the expertise of other agencies, while at the same time allowing the independent commission to

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Hazardous Waste Commission.

<sup>2</sup> Proposed Initiative Section 1 (proposed article XVIII, sec. 17 (10)).

exercise its responsibility to ensure that regulatory decisions over oil and gas do not result from political bias and industry pressure.

Authorizing the independent board to serve as a check on the oil and gas regulations passed by other state agencies connects logically to the central focus of the Initiative and does not constitute a separate subject.

**c. Delegating Permit Authority to the Director is not a Separate Subject.**

The Proposed Initiative would delegate permitting decisions to the independent commission's director.<sup>3</sup> This provision relates directly to the function and efficient operations of the new independent commission and is closely connected to its central focus of establishing a comprehensive regulatory regime. Provisions that describe "part of the legal framework" to achieve the purposes of the Initiative are "properly connected to the subject." *Kemper v. Leahy (In re 2013-2014 #89)*, 328 P.3d 172, 177 (Colo. 2014).

This provision does not alter fundamental rights or have any effect outside of the scope of the new independent commission's framework and function that

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<sup>3</sup> Proposed Initiative Section 1 (proposed article XVIII, sec. 17 (9)(e)).



would constitute a second subject. It is merely a procedural change with minimal effect on the permitting process. There is no imposition on the right to a hearing under statutory law, for no hearing is required on permit applications under § 34-60-106. *Colo. Oil & Gas v. Grand Valley Citizens*, 279 P.3d 646, 647 (Colo. 2012). “Permits are governed by section 34-60-106(1)(f), which grants the Oil and Gas [Conservation] Commission broad authority to promulgate rules governing the permitting process, including the authority to determine who may request a hearing.” *Id.* The Proposed Initiative does not alter the ability of persons other than the permit holder to challenge the issuance of a permit under C.R.S. §§ 24-4-106 and 34-60-111. *See Weld Air & Water v. Colo. Oil & Gas Conservation Comm'n*, 457 P.3d 727, 733 (Colo. 2019). Just like the existing Commission, the new independent commission will have the authority to prescribe the rules for permitting and hearings pursuant to C.R.S. § 34-60-106(f)(I)(B), and it can adapt its rules of practice and procedure within the new legal framework if necessary or desired.<sup>4</sup>

**d. The Scope of the Proposed Initiative is Comparable to Other Comprehensive Initiatives and Legislative Proposals.**

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<sup>4</sup> See 2 CCR 404-1, Colorado Oil and Gas Conservation Commission, Practice and Procedure Regulations

The Proposed Initiative's structure aligns with that of enacted ballot measures that established other independent commissions, specifically the state's redistricting commissions and the independent ethics commission, it is comparable in scope to 2018 enacted legislation reforming Colorado Oil and Gas Conservation Commission; and it is nearly identical to the 2020 initiative establishing an independent oil and gas regulatory board that had title set and was affirmed by the Court.

Two referred ballot measures in 2018, Amendments Y and Z, created the Colorado Independent Congressional and Legislative Redistricting Commissions. The redistricting measures overhauled Colorado's congressional redistricting process, including removing congressional redistricting authority from the General Assembly and placing it in the hands of a new Colorado Independent Congressional Redistricting Commission. *In re Colo. Indep. Cong. Redistricting Comm'n*, 497 P.3d 493, 497 (Colo. 2021), citing *In re Interrogatories on Senate Bill 21-247*, 488 P.3d 1008, 1013 (Colo. 2021). Related to the creation of the independent redistricting commissions, the amendments established commissioner qualifications, provided for public participation, required lobbying disclosure, established deadlines and the methods for drawing maps, and defined the role and

limited the authority of the Supreme Court in reviewing maps.

In 2006, an initiative, adopted by voters as Amendment 41, established the Colorado Independent Ethics Commission. It consolidated the authority over ethics regulation in a new entity that was “separate and distinct from the executive and legislative branches, vested with the authority to adopt its own rules for the purpose of administering and enforcing the Amendment's provisions.”

*Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008). The independent commission was given jurisdiction over all state, county, and municipal officials and employees, removing authority previously held by the legislature and local entities. *Id.* at 532. It also restricted gifts to elected officials and regulated lobbying activities.

The concepts contained in the Initiative are the same as the concepts contained in Colorado Senate Bill 19-181 (“SB 181”), which was signed into law on April 16, 2019, and was also required to have a single subject under Colo. Const art. V, §21. SB 181 overhauled the Colorado oil and gas conservation commission through drastic changes to the oil and gas regulatory regime. The legislative enactment revised the makeup of the commission, shifted the commission’s and other agencies priorities, expanded the commission’s authority,

directed the air quality control commission to adopt related rules and required a new standard for its air quality rules, specified new oil and gas permit criteria and clarified the oil and gas commission's ability to delay permit applications, and expanded local government authority, along with several other substantive changes. None of the provisions of the Proposed Initiative "alter the long-recognized scope of the subject" also seen in SB 181. *Kemper v. Lehey*, 274 P.3d at 581. Assuming SB 181 properly contained a single subject, the Proposed Initiative does as well.

Finally, the Proposed Initiative is substantively the same as Proposed Initiative 2019-2020 #311 (Initiative #311), which created an independent oil and gas commission with the exact same scope of authority as the Proposed Initiative. The Initiative #311 commission would have comprehensive authority over oil and gas regulation, specifically including the same provisions providing authority to approve regulations issued by other agencies that would affect oil and gas operations in Colorado. The Title Board had discussions at significant length regarding the authority of the new Commission and specifically regarding the new commission's authority to regulate in areas that affected oil and gas regulations but were under the purview of other executive agencies in existing law. The Title

Board found that Initiative #311 had a single subject and set the title. The single subject question and title were reviewed by petition to the Colorado Supreme Court, with the Court affirming the jurisdiction and title set by the Title Board. Colorado Supreme Court Case 2020SA160 (June 11, 2020). The opening brief submitted by the Title Board’s own attorneys argued that “[t]he 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.”<sup>5</sup> Title Board’s decision to deny title setting for the Proposed Initiative failed to follow its statutory directive to apply judicial decisions construing the constitutional single-subject requirement. C.R.S. § 1-40-106.5(3).

**B. The Proposed Initiative Does Not Implicate Dangers to be Prevented by Single Subject Requirement**

The 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

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<sup>5</sup> Title Board Opening Brief for Supreme Court Case 2020SA160, Page 4, ¶ 1.

surreptitious provision coiled up in the folds of a complex initiative. Colo. Const. art. 5, § 1(5.5); C.R.S. § 1-40-106.5.

The Proposed Initiative is a cohesive proposal to regulate the conduct of oil and gas operations and does not trigger either of the two dangers of multiple-subject initiatives. First, the Proposed Initiative's provision all relate to its objective, and 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).

Second, the Proposed Initiative 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. *Kemper v. Lehey*, 274 P.3d at 582. Creating a comprehensive new legal regime to govern oil and gas regulation using plain language that unambiguously proposes such regime does not contain surreptitious

provisions that will surprise voters. See *Kemper v. Hamilton*, 274 P.3d at 581. The provisions are limited to a single regulatory framework concerning the regulation of oil and gas operations, and the Proposed Initiative does not “hide purposes unrelated to the [i]nitiative's central theme’ to gain passage of a hidden provision.” *Milo v. Coulter (Matter of Title, Ballot Title and Submission Clause for 2013-2014 #129)*, 333 P.3d 101, 104 (Colo. 2014). It is reasonable and not surprising that the creation of an *independent* commission governing oil and gas regulation includes defining its comprehensive and consolidated regulatory authority.

## CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Court affirm the actions of the Title Board for the Proposed Initiative.

Dated: May 9, 2022

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2022, I electronically filed a true and correct copy of this **Petitioners' 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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