

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. §1-40-107(2)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2021-
2022 #136

Petitioners: DAVID DAVIA and CODY DAVIS

v.

Title Board: THERESA CONLEY; KURT
MORRISON; and JASON GELENDER

And

Objector: KELLY NORDINI

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Case No.: 2022SA124

OBJECTOR’S OPENING BRIEF

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 C.A.R. 28(g). It contains 3,655 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. __, p. __), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

By: s/Martha M. Tierney

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Objector Kelly Nordini (“Objector”), a registered elector of the State of Colorado, through undersigned counsel, respectfully submits this Opening Brief in support of the title, ballot title, and submission clause set by the Ballot Title Setting Board (“Title Board”) for Proposed Initiative 2021-2022 #136 (“Proposed Initiative” or “Initiative 136”).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board erred in ruling that the measure contains a single subject as required by Article V, §1(5.5) of the Colorado Constitution and C.R.S. §1-40-106.5?

STATEMENT OF THE CASE

This is an appeal of the Title Board’s setting of the Proposed Initiative. On April 8, 2022, the last day to file for measures to appear on the November 2022 General Election Ballot, Petitioners David Davia and Cody Davis submitted the Proposed Initiative to the Title Board for the setting of a title, ballot title, and submission clause. The Title Board held a hearing on April 21, 2022. Objector participated in the hearing and argued that the measure violated the single subject requirement. The Title Board agreed, and on a vote of two to one, determined that it lacked jurisdiction to set a title because the Proposed Initiative contained more than a single subject.

Petitioners filed a Motion for Rehearing on April 27, 2022, contending that the Proposed Initiative did not violate the single subject requirement and requesting that the Title Board set a title. The Title Board conducted a rehearing on April 28, 2022, at which time Objector again participated and argued that the Title Board should deny the motion for rehearing because the Proposed Initiative violated the single subject requirement. The Title Board agreed and on a vote of two to one, denied the motion for rehearing in its entirety. Petitioners filed a Petition for Review with this Court pursuant to section 1-40-107(2), C.R.S. on May 5, 2022.

STATEMENT OF FACTS

The Proposed Initiative would amend the Colorado Constitution and Colorado Revised Statutes to, among other things:

- Create a new, constitutionally required, six-member oil and gas commission, that would be appointed by a panel of retired justices or judges, proposed Colo. Const. art. XVIII, §17(3)(a); §17(4);
- Strip all regulatory authority over oil and gas operations from the Governor and the Legislature and vest that authority in this new commission, §17(9)(a);

- Divest from state, local, and tribal governments, and local landowners, the right to a request a hearing on an oil and gas permit, §17(9)(e); and
- Give the new oil and gas commission regulatory veto authority over rules promulgated by four executive agencies – Air Quality Control Commission, Water Quality Control Commission, State Board of Health, and Solid and Hazardous Waste Commission, §17(12).

SUMMARY OF THE ARGUMENT

The Title Board appropriately denied title setting for the Proposed Initiative because it contains multiple subjects, contrary to Colo. Const. art. V, § 1(5.5).

While the Title Board set a title and found a single subject on a somewhat similar measure in 2020 (Initiative 2019-2020 #311), with this Court affirming that decision, the Proposed Initiative is sufficiently different, the landscape significantly altered, and the issues raised substantially divergent from those raised regarding #311. These altered dynamics underpin the Title Board's determination that the Proposed Initiative lacks a single subject.

Initiative 136 contains multiple subjects. First, it proposes to create a new oil and gas commission with a new mission, duties, powers, and an entire regulatory framework. Second, the Proposed Initiative strips responsibility to

regulate oil and gas development from the governor and the legislature and transfers that power to the new oil and gas commission, whose commissioners are appointed by a panel of retired justices or judges. Third, the Proposed Initiative divests power from state, local, and tribal governments, and local landowners in a new provision, nonexistent in Initiative 311, that restricts the right to a hearing on a permit application to only oil and gas operators. Finally, the measure supersedes prior grants of authority concerning oil and gas development, and restricts rulemaking authority, including the adoption of temporary or emergency rules, by granting regulatory veto authority to the new oil and gas commission over rules promulgated by the Air Quality Control Commission, Water Quality Control Commission, State Board of Health, and Solid and Hazardous Waste Commission.

While the central theme of the measure – the creation of an independent oil and gas commission - may itself be a single subject; coiled up in the folds of the measure are at least three additional subjects that would surprise voters, and are thus incongruous, and not necessarily or properly connected to the central theme of the initiative.

The Proposed Initiative violates the single subject requirement, and this Court should affirm the Title Board's decision that it lacked jurisdiction to set a title.

ARGUMENT

I. THE PROPOSED INITIATIVE VIOLATES THE SINGLE-SUBJECT REQUIREMENT

A. Standard of Review.

In reviewing Title Board decisions, the Court will “employ all legitimate presumptions in favor of the propriety of the Board’s actions.” *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012) (quoting *In re Title, Ballot Title & Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645 (Colo. 2010)). The Court will “only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.*

Though neither addressing the merits nor potential applications of a proposed initiative, the Court “must examine their wording to determine whether the initiatives and their titles comport with the single subject and clear title requirements.” *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016). To do so, the Court will “examine sufficiently an initiative’s central theme to determine whether it contains a hidden purpose under a broad theme.” *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007). “In conducting this

limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning.” *Id.* at 874.

Objector preserved this issue at the Rehearing on April 28, 2022.¹

A. **The Proposed Initiative Contains More Than a Single Subject.**

Article V, §1(5.5) of the Colorado Constitution requires that a proposed initiative only contain one subject. Further codifying the single-subject rule, Colorado statute prevents the Board from setting a title for a measure that contains “incongruous subjects ... having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits.” Section 1-40-106.5(1)(e)(I), C.R.S. (2021).

The requirement that a proposed initiative contain only a single subject serves two functions. “First, the single subject requirement ‘is intended to ensure that each proposal depends upon its own merits for passage.’” *Johnson*, 374 P.3d at 465, quoting *In re Proposed Initiative on Public Rights in Waters II*, 898 P.2d

¹ A recording of the Title Board rehearing proceedings related to proposed initiatives 2021-2022 #136 and #137 can be found on the Colorado Secretary of State’s website starting at minute 2:24 at https://csos.granicus.com/player/clip/316?view_id=1&redirect=true. Objector’s initial statements specifying how the measure violates the single subject requirement can be found starting at minute 4:30.

1076, 1078 (Colo. 1995). This requirement “prevents proponents from engaging in ‘log rolling’ tactics, that is, combining multiple subjects into a single initiative in the hope of attracting support from various factions that may have different or even conflicting interests.” *Id.*

Second, “the single subject requirement is intended ‘to prevent surprise and fraud from being practiced upon voters’ caused by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.” *Id.* quoting *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002* #43, 46 P.3d 438, 442 (Colo. 2002). As noted in *In re Proposed Initiative 2001-2002* #43, 46 P.3d at 442-43, the purpose is to “obviate the risk of ‘uninformed voting caused by items concealed within a lengthy or complex proposal’” (quoting *Public Rights in Waters II*, 898 P.2d at 1079).

The subject matter of an initiative must be “necessarily and properly connected” rather than “disconnected or incongruous.” *Public Rights in Waters II*, 898 P.2d at 1079. A proponent’s attempt to characterize a proposed initiative under “some overarching theme,” here: “concerning the regulation of oil and gas operations,” will not save the measure if it contains separate and unconnected purposes. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442. An initiative violates the single subject rule when it proposes a shift in governmental powers

that bear no necessary or proper connection to the central purpose of the initiative. *Aisenberg v. Campbell, In re Title, Ballot Title, Submission Clause for 1997-1998 No. 64*, 960 P.2d 1192, 1199-1200 (Colo. 1998); *Howes v. Brown, In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1077 (Colo. 2010).

1. Stripping responsibility to regulate oil and gas development from the Governor and the Legislature and transferring that power to the new oil and gas commission is a separate, second subject.

Initiative #136 takes away the ability of the Governor to appoint Commission members of an executive agency – giving that authority to retired members of the judicial branch. The Proposed initiative also removes all regulatory authority and oversight from the Governor and the State Legislature over oil and gas operations. This is a second subject similar to *In re Initiative 1997-1998 #64*, where the central theme was changing the qualifications of judicial officers. 960 P.2d 1192. However, the initiative also: divested the Judicial Discipline Commission of regulatory authority; and eliminated the ability of the City of Denver to select and appoint judges. *Id.* at 1195.

In that case, this Court found that the proposed reallocation of governmental authority and control was not essential to the objective of changing the qualifications of judicial officers. In fact, the Court declared that even if the “entire

judicial branch” were the single subject, the initiative provisions proposing to change the composition, manner of selection, powers, and procedures of the Commission further a distinct purpose and therefore there were multiple subjects. *Id.* at 1200.

Similarly, the Proposed Initiative seeks to divest the General Assembly of all responsibility to regulate oil and gas development. Initiative 311 declared that:

The responsibility to regulate oil and gas development should be removed from the governor, the governor’s political appointees, and the legislature, and transferred to an independent oil and gas board that will balance the public health, safety and welfare of citizens with responsible development of oil and gas resources through the issuance and enforcement of rules and other decisions and action that are necessary, feasible, and reasonable.²

While the Proposed Initiative does not contain that specific language, it does state, “(9)(a) all regulatory authority over oil and gas development is hereby vested in the commission, except as otherwise provided in this section.” Proposed Colo. Const. art. XVIII, §17(9)(a). The Proponents argued that the measures are identical and should be viewed in the same light. As a result, the Title Board read Initiative

² This issue was not raised in the challenge to Initiative #311 in 2020 and therefore was not properly before the Court. *In re Ballot Title 1999-2000 No. 265*, 3 P.3d 1210, 1215-16 (Colo. 2000). (Failure to raise an issue before the Title Board in a motion for rehearing or at the rehearing itself precludes the Court from considering the issue in a matter to reverse the action of the Title Board.)

136 as removing from the governor, the governor's political appointees, and the legislature - and transferring to an independent oil and gas commission - all responsibility to regulate oil and gas development in the state of Colorado. When viewed in that light, the Proposed Initiative contains more than a single subject coiled up in the folds of the measure.

In their Motion for Rehearing, the proponents sought to expand the scope of their single subject to "concerning the regulation of oil and gas operations." But broadening their statement of single subject to cover all regulation of oil and gas operations does not save the measure from violating the single subject requirement.

As this Court found in *In re Initiative 1997-1998 #64*:

If the entire judicial branch were regarded as a single subject, incongruous and disconnected provisions could be contained in a single initiative and the very practices the single subject requirement was intended to prevent would be facilitated.

960 P.2d at 1200 (*citing In re Public Rights in Waters II*, 898 P.2d at 1079, (where two provisions merely have a common characteristic, such a connection is "too broad and too general" to make them part of the same subject.)

The Title Board agreed that the initiative violates the single-subject rule because it contains provisions seeking to accomplish one purpose that are coupled with provisions proposing a change in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. *See In re Title, Ballot*

Title, Submission Clause for 2009-2010 No. 91, 235 P.3d 1071, 1077 (Colo. 2010) (citing *In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No.29*, 972 P.2d 257, 262–65 (Colo. 1999)).

In this case, limiting the authority of the governor and the legislature, on all matters related to the regulation of oil and gas, is an impermissible second subject.

2. Divesting power from state, local, and tribal governments, special districts, and landowners, and restricting the right to a hearing on a permit application to only oil and gas operators is a separate, third subject.

The Proposed Initiative contains an important and sweeping change that is “coiled up in the folds” of the initiative and was not present in the previous Initiative 311. If approved, this initiative would fundamentally change the power of the state, local, and tribal governments, and special districts and landowners, to affect decisions on oil and gas permits.

Pursuant to current law and Colorado Oil and Gas Conservation Commission’s (“COGCC”) rules that took effect on January 15, 2021, the COGCC allows the federal, state, local, and tribal governments, along with surface landowners to have automatic standing in a public hearing on all surface location permitting decisions. The Proposed Initiative would (1) make oil and gas location permits administrative decisions of the commission’s director rather than requiring

a public hearing before the full commission, and (2) eliminate the ability of any entity, except the oil and gas industry, as the permit applicant, from being able to request a public hearing before the new commission. Contrary to what Petitioners argued at the rehearing on this matter, this is a substantial alteration of power and will not allow anyone other than the oil and gas operator permittee to request a public hearing.

In Colo. Oil & Gas Conservation Comm'n v. Grand Valley Citizens' Alliance, 279 P.3d 646 (Colo. 2012) (“GVCA”), two adjacent landowners and citizens’ groups sought to challenge a permit proposing drilling within two miles of a former underground nuclear blast site in Rulison, Colorado. In GVCA, this Court found that the landowners and citizens’ groups lacked standing to request a hearing challenging the drilling permit because hearings were restricted, at the time, to permit applicants and local governments. 279 P.3d at 649.

In the wake of the GVCA decision, and the adoption of new legislation (Senate Bill 19-181), the COGCC determined that it was necessary to broaden its standing requirements to provide for participation in COGCC proceedings by all affected persons. The COGCC recognized that members of the public other than oil and gas operators may be well-positioned to provide insight into potential public health, safety, welfare, environmental, and wildlife impacts of various

COGCC-approved actions. Additionally, Senate Bill 19-181 expanded the authority of local governments over surface impacts of oil and gas operations, and, therefore, their standing, to participate in Commission proceedings relevant to those surface impacts.³

The current COGCC rules give automatic standing as “affected persons” to (1) federal agencies, state agencies, tribal governments, relevant local governments, and special districts with legal authority over the application and, (2) directly impacted surface owners and residents within 2,000 feet of the proposed oil and gas location.⁴ Because they are granted party status, these parties can fully participate in the permit hearings before the COGCC. This includes submitting briefs, requesting discovery, and calling and cross-examining witnesses.

The Proposed Initiative removes these important new rights by (1) declaring that all applications will be made administratively by the director; they will no longer be made by the Commission through a public hearing, and (2) declaring that only the applicant (the oil and gas operator) may challenge a decision made by the

³ Statement of Basis, Specific Statutory Auth., & Purpose: New Rules & Amendments to Current Rules of the Colo. Oil and Gas Conservation Comm’n, Colo. Oil & Gas Conservation Comm’n, 2 CCR 404-1, Cause No. 1R Docket No. 200300071, “200-600 Mission Change” Final Draft, November 23, 2020 page 186. Available at <https://docs.google.com/document/d/1R-GS88pBa1uiDr1-EIQhN8NmUFwKdb1S/edit?rtpof=true>

⁴ 2 Colo. Code Regs. § 404-1.507.a(1)-(2), (2022).

director. Proposed Initiative §17(9)(e). The Proposed Initiative would divest the state, local, and tribal governments, some special districts, surface owners and impacted residents of power they currently hold. This sweeping change is coiled up in the folds of the Proposed Initiative and will not be evident to voters reading its text. Note that even the Title Board was unaware of this monumental shift in power hidden in the measure's text until Objector pointed it out at the rehearing.⁵ Again here, the Proposed Initiative offers a change in governmental powers that bears no necessary or proper connection to the central purpose of the initiative. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d at 1077 (citing *In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No. 29*, 972 P.2d at 262–65); *In re # 64*, 960 P.2d at 1197–1200.

Changing due process by eliminating the right of impacted residents, landowners, special districts, and federal, state, local, and tribal governments to a hearing on oil and gas development is a second subject, that bears no necessary or proper connection to the creation of an independent oil and gas commission and would surprise voters.

⁵ Rehearing on proposed initiatives 2021-2022 #136 and #137 at minute 31:03-34:13 at https://csos.granicus.com/player/clip/316?view_id=1&redirect=true.

3. Granting the new commission veto authority over certain rules promulgated by four other state agencies is a separate, fourth subject.

The Petitioners attempt to use a late asserted overarching theme of “concerning the regulation of oil and gas operations” to fuse together separate and unconnected purposes. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442. The central purpose of the initiative is disbanding the COGCC and replacing it with a constitutionally mandated, independent oil and gas commission that is not appointed by the Governor and is entirely unregulated by the legislature. The Proposed Initiative usurps even more authority from the Governor by requiring the independent commission to “approve” all new rules promulgated by four executive agencies that could affect oil and gas operations. Granting the independent commission veto authority over four unrelated executive agencies, whose members are appointed by the Governor, is a shift in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. *In re Title for 2009-2010 No. 91*, 235 P.3d at 1077.

The Proposed Initiative does not state what form the “approval of the Independent Commission” must take. Whether the commission must take formal action to affirm the agencies’ rules or if it must undertake a separate independent rulemaking, the result is the same: No rule affecting oil and gas development

passed by these four agencies may go into effect without the approval of the independent commission.

Allowing the independent commission to exercise unprecedented control over four unrelated executive agencies is a “surreptitious provision ‘coiled up in the folds’ of a complex initiative,” *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442; section 1-40-106.5(1)(e)(II), and is unrelated to eliminating the COGCC and replacing it with the independent commission. Voters may very well agree to an “independent oil and gas commission” to regulate oil and gas operations but would be surprised to find that the independent commission is also regulating air pollution emissions, wastewater discharge into rivers and streams, as well as solid and hazardous waste disposal. This effort to group distinct purposes under a broad theme does not satisfy the single subject requirement. *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006).

As written, the independent commission’s authority over the rulemaking of the AQCC, Water Quality Control Commission, State Board of Health, and the Solid and Hazardous Waste Commission occurs despite the fact that these other state agencies have different missions and expertise. For example, the AQCC, acting on its authority pursuant to Article 7 of Title 25 of the Colorado Revised

Statutes, would not be permitted to enact new oil and gas operation rules to address compliance with federal ozone standards without the explicit approval of the independent commission. The considered judgment and expertise of the AQCC to accomplish its mission of achieving “the maximum practical degree of air purity in every portion of the state, to attain and maintain the national ambient air quality standards, and to prevent the significant deterioration of air quality in those portions of the state where the air quality is better than the national ambient air quality standards,” section 25-7-102(1), C.R.S., and its mandate to meet federal and state legislative air quality requirements are made subservient to the judgment of the independent commission.

The wholesale shift of authority from state agencies charged with protecting public health, air quality, drinking water quality, and radioactive and hazardous waste disposal to the independent commission is an unlawful second subject.

CONCLUSION

The Petitioner respectfully requests the Court to affirm the actions of the Title Board regarding Proposed Initiative 2021-2022 #136 because the measure contains multiple subjects.

Respectfully submitted this 9th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **OBJECTOR'S OPENING BRIEF** was filed and served via the Colorado Courts E-Filing System on the 9th day of May, 2022 to the following:

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