

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 9, 2022 5:29 PM</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021-2022) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #136</p>	
<p>Petitioners: David Davia and Cody Davis</p>	
<p>v.</p>	
<p>Title Board: Theresa Conley, Kurt Morrison, and Jason Gelender.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>PHILIP J. WEISER, Attorney General MICHAEL KOTLARCZYK, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6187 FAX: (720) 508-6041 E-Mail: mike.kotlarczyk@coag.gov Registration Number: 43250 *Counsel of Record <i>Attorneys for the Title Board</i></p>	<p>Case No. 2022SA124</p>
<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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g).

It contains 2,262 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).

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 C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Michael Kotlarczyk

MICHAEL KOTLARCZYK, #43250
Assistant Attorney General

TABLE OF CONTENTS

ISSUE ON REVIEW 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT 5

 I. The Title Board correctly concluded that the measure
 contains multiple subjects..... 5

 A. Standard of review and preservation. 5

 B. The Title Board properly concluded that the measure
 contains multiple subjects..... 6

 C. The Court’s decision affirming titles in a similar measure
 in 2020 is not binding here because neither the Board nor
 the Court considered the single-subject objection presented
 here. 11

CONCLUSION 13

TABLE OF AUTHORITIES

CASES	PAGES
<i>Ariz. Christian Sch. Tuition Org. v. Winn</i> , 563 U.S. 125 (2011).....	12
<i>In re Title, Ballot Title & Submission Clause for 1997-1998 #64</i> , 960 P.2d 1192 (Colo. 1998).....	10
<i>In re Title, Ballot Title & Submission Clause for 2007-2008 #17</i> , 172 P.3d 871 (Colo. 2007).....	10
<i>In re Title, Ballot Title & Submission Clause for 2015-2016 #132</i> , 2016 CO 55	9
<i>In re Title, Ballot Title, & Submission Clause for 2009-2010 #91</i> , 235 P.3d 1071 (Colo. 2010).....	8, 10
<i>In re Title, Ballot Title, & Submission Clause for 2011-2012 #45</i> , 2012 CO 26	7
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #76</i> , 2014 CO 52	5, 6, 10

<i>In re Title, Ballot Title, & Submission Clause for 2019-2020 #3,</i> 2019 CO 57	5
<i>In re Title, Ballot Title, & Submission Clause for 2019-2020 #311,</i> 2020SA160.....	11
<i>In re Title, Ballot Title, & Submission Clause for 2021-2022 #16,</i> 2021 CO 55	7, 9
<i>In re Title, Ballot Title, & Submission Clause Pertaining to a</i> <i>Proposed Initiative “Public Rights in Waters II”, 898 P.2d 1076</i> <i>(Colo. 1995).....</i>	10
<i>Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)</i>	12
<i>Romer v. Bd. of Cnty. Comm’rs of Pueblo Cnty., 956 P.2d 566</i> <i>(Colo. 1998).....</i>	12

CONSTITUTIONS

Colo. Const. art. V, § 1(5.5)	5
-------------------------------------	---

STATUTES

§ 1-40-106.5(1)(e)(I), C.R.S. (2021).....	6
---	---

§ 1-40-107(2), C.R.S. (2021).....	13
§ 34-60-105(1)(b), C.R.S. (2021)	2, 8

OTHER AUTHORITIES

<i>Hearing Before Title Board on Proposed Initiative 2021-2022 #136</i> (Apr. 21, 2022), https://tinyurl.com/3e4zd5su	2
<i>Hearing Before Title Board on Proposed Initiative 2021-2022 #136</i> (Apr. 28, 2022), https://tinyurl.com/2p82k9hb	3
<i>Hearing Before Title Board on Proposed Initiative 2021-2022 #137</i> (Apr. 21, 2022), https://tinyurl.com/2p93b9j3	1
<i>Hearing Before Title Board on Proposed Initiative 2021-2022 #137</i> (Apr. 28, 2022), https://tinyurl.com/2p82k9hb	1

ISSUE ON REVIEW

Whether the Title Board correctly determined that it lacked jurisdiction to set a title on Proposed Initiative 2021-2022 #136 because it contains more than one subject.

STATEMENT OF THE CASE

Proponents David Davia and Cody Davis seek to circulate Proposed Initiative 2021-2022 #136. The proposed initiative seeks to amend the Colorado Constitution and the Colorado Revised Statutes by creating a new independent oil and gas commission and removing certain powers from other parts of government to empower the newly created commission. *See Record*, p 2, filed May 4, 2022.¹

¹ Numbers 136 and 137 are substantially the same, as are the Board's briefs concerning the two measures. The Board and Proponents incorporated their discussion of #136 when discussing #137 at both the initial hearing and the rehearing. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #137* (Apr. 21, 2022), <https://tinyurl.com/2p93b9j3> (discussion from 5:15:30 to 5:18:00); *Hearing Before Title Board on Proposed Initiative 2021-2022 #137* (Apr. 28, 2022), <https://tinyurl.com/2p82k9hb> (discussion from 45:30 to 49:30).

At the April 21, 2022 hearing on #136, the Board discussed whether the initiative contained a single subject. *See Hearing Before Title Board on Proposed Initiative 2021-2022 #136* (Apr. 21, 2022), <https://tinyurl.com/3e4zd5su> (“Hearing”) (discussion from 4:38:15 to 5:15:30). The Title Board focused in particular on the provision that allowed other executive agencies—the Air Quality Control Commission, the Water Quality Control Commission, the state Board of Health, and the Solid and Hazardous Waste Commission—to promulgate rules concerning oil and gas operations, but that allowed those rules to become effective only upon approval of the newly created commission. *See Record* at 6. This would give the newly created commission an effective veto over the rulemakings of these other agencies and boards. *See, e.g.,* *Hearing* at 5:09:30. That is a change from current law, where those agencies retain full authority to regulate in their respective spheres. *See* § 34-60-105(1)(b), C.R.S. (2021). The Board found multiple subjects and denied setting a title by a 2-1 vote.

Proponents filed a timely motion for rehearing. *See Record* at 13. The Title Board heard that motion on April 28. *See Hearing Before Title*

Board on Proposed Initiative 2021-2022 #136 (Apr. 28, 2022), <https://tinyurl.com/2p82k9hb> (“Rehearing”) (discussion from 2:30 to 45:30). The Board noted that the measure may also deprive the General Assembly of the authority to legislate in the area. *See id.* at 29:00. In a 2-1 vote, the Board denied the motion for rehearing.

SUMMARY OF ARGUMENT

Number 136 seeks to create a new, politically independent oil and gas commission. It also removes from several existing state boards that are appointed by the governor the authority to regulate the air, water, and waste impacts of oil and gas development, instead making any such regulations subject to approval by the new board.

These two objects are not necessarily and properly connected and are therefore separate subjects. Nothing about political independence of oil and gas decisions requires removing the authority of these other executive boards to regulate the environmental concerns they are responsible for regulating. This measure violates the two central purposes of the single-subject rule. First, it encourages logrolling, as some voters may favor greater political independence for oil and gas

decisions in Colorado but oppose diminishing the regulatory authority over state environmental regulators, or vice versa. Second, the measure may confuse or surprise voters. Voters may think they are voting on a measure to increase the political independence of oil and gas decisionmakers only to later find out that they also diminished the authority of state environmental regulators. The purposes of #136 thus are not necessarily and properly connected and so the Title Board lacked jurisdiction to set titles.

Finally, Proponents argued before the Title Board that the measure is substantially similar to 2019-2020 #311, a measure that the Board found contained a single subject and was affirmed by this Court without opinion. But the single subject arguments made in #311 were entirely different. The parties did not brief, and this Court did not decide, the single subject question presented by this appeal. Because this Court is not obligated to independently scour the record for single subject violations not raised by the parties, its decision affirming the Board's decision in 2020 concerning another single subject argument does not resolve this case.

ARGUMENT

I. The Title Board correctly concluded that the measure contains multiple subjects.

A. Standard of review and preservation.

This Court's standard of review is deferential to the Title Board.

The Board only has jurisdiction to set a title for a measure that contains a single subject. *See* Colo. Const. art. V, § 1(5.5). “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*, 2014 CO 52 ¶ 8. In doing so, the Court does “not address the merits of the proposed initiative” or “suggest how it might be applied if enacted.” *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 57, ¶ 8. Nor can the Court “determine the initiative’s efficacy, construction, or future application.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. Instead, the Court “must examine the initiative’s wording to determine whether it comports with the constitutional single-subject requirement.” *In re 2019-2020 #3*, 2019 CO 57, ¶ 8.

The Title Board agrees Petitioners preserved the single subject issue by raising it in a motion for rehearing. *See* Record at 13.

B. The Title Board properly concluded that the measure contains multiple subjects.

In reviewing the Title Board’s single-subject determination, the Court’s role “is limited to determining whether the contested language within the initiative creates a distinct and separate subject which is not connected to or dependent upon the remaining aspects of the initiative.” *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. To pass this test, the various parts of the proposed initiative “must be necessarily and properly connected.” *Id.*

The single-subject rule serves two well-recognized purposes: first, an anti-logrolling purpose prohibits putting into a single measure different subjects to secure support from “the advocates of each measure [to] secur[e] the enactment of measures that could not be carried upon their merits” (§ 1-40-106.5(1)(e)(I)); second, an anti-fraud purpose protects against “voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex

initiative.” *In re Title, Ballot Title, & Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶ 12 (quotations omitted). In light of these two purposes, this Court “has often taken into account whether voters might favor only part of an initiative and the potential for voter surprise.” *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 16. Here, the Title Board’s conclusion that #136 contained multiple subjects is supported by both purposes.

First, #136 presents a risk of logrolling. Voters may be in favor of a new independent commission to oversee oil and gas operations in the state but be opposed to limiting the authority of the Air Quality Control Commission, Water Quality Control Commission, state Board of Health, and the Solid and Hazardous Waste Commission (as well as the General Assembly, if the measure is interpreted to restrict their authority as well). These other agencies currently have authority to regulate for the public health and safety in their respective areas of expertise, but #136 would circumscribe their current ability to regulate the public health and safety in matters that touch on oil and gas development. Different voters may very well support these different

purposes. See *In re Title, Ballot Title, & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1079 (Colo. 2010) (“An elector going to the polls in the upcoming general election might favor a beverage container tax while being opposed to depriving the General Assembly of its legislative authority over the basin roundtables and the interbasin compact committee or vice versa.”).

Second, #136 also risks voter confusion or surprise. “The single-subject rule also serves to prevent voter surprise by prohibiting proponents from hiding effects in the body of a complex proposal.” *Id.* Voters may vote for this measure thinking that they are depoliticizing oil and gas regulation, but be surprised to find out they have also limited state environmental bodies from being able to regulate on matters within their purview if those matters also “concern[] oil and gas development.” Record at 6. The measure gives the new commission an effective veto over any such regulations, in contrast to current law which leaves such powers unaffected. See § 34-60-105(1)(b). This removal of regulatory authority by state environmental bodies is coiled up in the folds of #136.

Proponents have argued that these separate purposes can be united under the broad single subject of “concerning the regulation of oil and gas operations.” Record at 15. A broad framing of a single subject may be appropriate if the measure advances only purposes that are necessarily and properly connected. But “where an initiative advances separate and distinct purposes, the fact that both purposes relate to a broad concept or subject is insufficient to satisfy the single subject requirement.” *In re 2021-2022 #16*, 2021 CO 55, ¶ 15. Oil and gas operations is the type of theme this Court has held is too broad to unite separate purposes like political independence and removal of environmental regulatory authority. For example, in *2021-2022 #16*, the Court held that “animal cruelty” was too broad a subject to unite the disparate purposes of including livestock within animal cruelty statutes and redefining the crime of “sexual act with an animal.” *Id.* at ¶ 22.

The Court in *2021-2022 #16* cited additional examples of themes that are too broad to unite separate purposes:

- “Redistricting in Colorado.” *In re Title, Ballot Title & Submission Clause for 2015-2016 #132*, 2016 CO 55, ¶ 34.

- “Recall of government officers.” *In re Title, Ballot Title & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 10.
- “To protect and preserve the waters of this state.” *In re 2009-2010 #91*, 235 P.3d at 1080.
- “Environmental conservation and conservation stewardship.” *In re Title, Ballot Title & Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875-76 (Colo. 2007).
- “The entire judicial branch.” *In re Title, Ballot Title & Submission Clause for 1997-1998 #64*, 960 P.2d 1192, 1200 (Colo. 1998).
- “Water.” *In re Title, Ballot Title, & Submission Clause Pertaining to a Proposed Initiative “Public Rights in Waters II”*, 898 P.2d 1076, 1080 (Colo. 1995).

Here, too, “oil and gas regulation” is too broad a theme to unite the political independence purpose and the removal of environmental regulatory authority purposes.

In short, the provisions of #136 that deprive other state bodies—and ultimately the governor, who appoints the members of those

bodies—of authority to regulate air, water, and waste associated with oil and gas development are not necessarily and properly connected to the main purpose of the measure, creating a politically independent oil and gas board.

C. The Court’s decision affirming titles in a similar measure in 2020 is not binding here because neither the Board nor the Court considered the single-subject objection presented here.

Finally, much of the discussion at the hearing and rehearing concerned similarities between this measure and 2019-2020 #311. The language of #311 was substantially similar, the Title Board found a single subject, and this Court affirmed the Board without opinion. *See In re Title, Ballot Title, & Submission Clause for 2019-2020 #311, 2020SA160.*

But the single subject concern considered by the Board and this Court in #311 was different. There, the parties addressed whether the measure’s effective change to the Administrative Procedures Act by granting the new board veto authority over rules promulgated by other state agencies constituted a second subject. *See Petr’s Op. Br.,*

2020SA160. Because the Court was not presented with this single subject argument, its prior decision has no binding effect on this appeal. Here, the Title Board concluded it lacked jurisdiction to set a title because the measure contains more than one subject. “When questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.” *Romer v. Bd. of Cnty. Comm’rs of Pueblo Cnty.*, 956 P.2d 566, 570 n.4 (Colo. 1998) (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 119 (1984)); *see also Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) (“When a potential jurisdictional defect is neither noted nor discussed in a . . . decision, the decision does not stand for the proposition that no defect existed.”).

Treating this court’s decision in #311 as binding here would also have negative consequences for Title Board appeals in the future. Such a rule would require the Court to independently analyze every measure presented to it to ensure that no single subject violations—even those not briefed by the parties—are present in the measures. But that is not

the law. Rather, the Court is required to “dispose[] of promptly” the objections of those registered electors who appeared before the Title Board at the rehearing and “are not satisfied with the ruling of the title board upon the motion” for rehearing. § 1-40-107(2). The Court does not decide those matters that are not raised at the rehearing and presented to the Court for a ruling.

CONCLUSION

The Court should affirm the decision of the Title Board that it lacked jurisdiction to set a title on 2021-2022 #136.

Respectfully submitted on this 9th day of May, 2022.

PHILIP J. WEISER
Attorney General

/s/Michael Kotlarczyk

MICHAEL KOTLARCZYK, 43250*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 9th day of May, 2022, addressed as follows:

Suzanne Taheri
Gwendolyn A. Benevento
Maven Law Group
1800 Glenarm Place, Suite 950
Denver, CO 80202
staheri@mavenlawgroup.com
gbenevento@mavenlawgroup.com

Attorneys for Petitioners / Proponents

Marth M. Tierney
Tierney Lawrence LLC
225 E. 16th Avenue, Suite 350
Denver, CO 80203
mtierney@tierneylawrence.com

Matt Sura
7354 Cardinal Lane
Longmont, CO 80503
Mattsura.law@gmail.com

Attorneys for Objector Kelly Nordini

s/ Xan Serocki

Xan Serocki