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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 #137

Petitioners: DAVID DAVIA and CODY DAVIS

v.

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

And

Respondent: KELLY NORDINI

▲COURT USE ONLY▲

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Case No.: 2022SA125

RESPONDENT'S ANSWER 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 2,559 words.

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

For the party raising the issue:

X 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.AR. 32.

By: s/Martha M. Tierney

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Respondent Kelly Nordini ("Respondent"), a registered elector of the State of Colorado, through undersigned counsel, respectfully submits this Answer 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 #137 ("Proposed Initiative" or "Initiative 137")).

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 137 contains multiple subjects. First, it proposes to create a new independent oil and gas commission with new duties, powers, and an entire regulatory framework. Second, 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. 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. Fourth, 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. 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 Contains More Than One Subject Coiled Up in Its Folds.

Initiative #137 violates the single subject requirement because it would surprise and defraud voters by shifting governmental powers in surreptitious provisions coiled up in the folds of the complex initiative. *See In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002). The Petitioners claim that the intent of the measure is "to ensure that decisions about oil and gas development are made free from partisan political bias and interest group pressure." *Pet. Op. Brf.*, pp. 5-6. Yet what the measure does is surreptitiously shift power from other levels of government, and place much of that power in the hands of the oil and gas industry. Initiative #137 does this in several ways, all of which are coiled up in the folds of the measure and would surprise voters.

To determine if an initiative violates the single subject requirement, the Court must "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). 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).

Here, the hidden purpose of Initiative #137 is to shift power away from all levels of government and redirect it in furtherance of oil and gas development.

A. The Initiative Shifts the Priority of the Commission from Protecting Public Health, Safety and the Environment to Balancing Those Goals with the Development of Oil and Gas.

First, the Initiative replaces the current requirement of the Colorado Oil and Gas Conservation Commission ("COGCC") to "regulat[e] the surface impacts of oil and gas operations in a reasonable manner to … protect and minimize adverse impacts to public health, safety, and welfare and the environment[,]" §29-20-104(1)(h), with a requirement that the new Independent Oil and Gas Commission regulate oil and gas development "in a manner that protects the public health, safety, and welfare of citizens *in balance with the responsible development of oil and gas resources.*" Initiative #137, proposed Colo. Const. art. 17, §(1)(a) (emphasis supplied). This shift in priority from protecting and minimizing adverse impacts to public health, safety, and welfare, and the environment, to placing those needs on an equal footing with oil and gas development is not evident on the face

of the measure and will surprise voters who may think they are passing a good government measure to place regulation over oil and gas development in the hands of an independent body.

B. <u>The Initiative Impermissibly Grants Veto Power Over Four State Agencies to the New Commission</u>.

Second, the Initiative gives the new independent oil and gas commission veto authority over four unrelated executive agencies, whose members are appointed by the Governor. Petitioners claim that this provision "authoriz[es] the independent [commission]to serve as a check on the oil and gas regulations passed by other agencies." *Pet. Op. Brf., p. 10.* This shift in power, however, bears no necessary or proper connection to the central purpose of the initiative. *In re Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1077 (Colo. 2010).

This is particularly evident when viewed in light of the change in priority for the new commission away from protecting and minimizing adverse impacts to public health, safety, and welfare, and the environment, and instead placing those needs on an equal footing with oil and gas development. Voters may favor creation of an independent oil and gas commission to regulate oil and gas operations but would be surprised to learn that the commission may also regulate air pollution emissions, wastewater discharge into rivers and streams, and solid and

hazardous waste disposal in a manner that balances oil and gas development with public health, safety, and welfare, and the environment.

The proposed reallocation of governmental authority and control is not essential to the central purpose of the initiative - disbanding the COGCC and replacing it with an independent oil and gas commission that is not appointed by the Governor and is entirely unregulated by the legislature.

C. The Initiative Removes Due Process for Federal, State, Local and Tribal Governments, and Special Districts for Oil and Gas Development Plan hearings and Gives that Authority to Oil and Gas Developers.

Third, the Initiative removes the authority of the federal, state, local, tribal governments, and other "affected persons" and gives the right to request a hearing on an Oil and Gas Development Plan to the oil and gas developer only. Contrary to Petitioners' statement that this "is merely a procedural change with minimal effect on the permitting process," Pet. Op. Brf. at p. 17, this change entirely upends the current permitting process and would have sweeping implications for how decisions are made, and the due process afforded those who are directly impacted by those decisions.

COGCC Rules presently state, "A person who may be adversely affected or aggrieved by an application may submit a petition to the Commission as an affected person to participate formally as a party in an adjudicatory proceeding." 2

CCR 404-1(507)(a).[1] The COGCC Rules go on to grant automatic "affected person" standing to affected federal, state, local and tribal governments, along with special districts, and surface owners and residents located within 2,000 feet of proposed oil and gas development to participate formally as parties in adjudicatory proceedings involving oil and gas surface location permits (called "Oil and Gas Development Plans"). *Id.* The proposed Initiative upends that change by imposing a requirement that (1) permits will be decided by the Director (without a hearing) and (2) only a permit applicant (the oil and gas developer) may request a hearing to review the Director's decision. Proposed Colo. Const. art. XVIII, §17(9)(e).

Petitioners' citation to *Colo. Oil & Gas Conservation Comm'n v. Grand Valley Citizens' Alliance*, 279 P.3d 646, 647 (Colo. 2012) ("GVCA"), as authority for their assertion that currently "no hearing is required on permit applications under § 34-60-106" is misleading at best. The Court in *GVCA* found that the statute was *silent* on the issue of whether a hearing was required for oil and gas permits and therefore the COGCC was granted the authority to determine who had standing to require a hearing. *GVCA,* 279 P.3d at 649. At the time of *GVCA*, the

[1] COGCC Rules can be found here: https://www.sos.state.co.us/CCR/GenerateRulePdf.do?ruleVersionId=10123&fileName=2%20CCR%20404-1

COGCC allowed "the operator, surface owner, or the relevant local government" to request a hearing on an oil and gas permit. *Id.*

The current COGCC rules were adopted in the wake of *GVCA* and Senate Bill 19-181, to specifically address the lack of standing afforded all affected persons. Current COGCC rules (1) *require* a hearing on oil and gas development plans and (2) grant automatic standing to participate in those hearings to federal, state, local and tribal governments, and directly impacted residents. 2 CCR 404-1(507)(a)(1)-(2). As the COGCC stated in the Statement of Basis and Purpose, "the Commission's review of proposed oil and gas development plans affords operators and all affected persons with additional procedural rights to ensure that all interested parties receive due process."[2]

To ensure fairness, due process requires, at a minimum, notice and an opportunity to be heard in a *meaningful* manner. *Goss v. Lopez,* 419 U.S. 565, 596 (1975). The Initiative not only eliminates the requirement for a hearing, it also eliminates the rights of local governments and even directly impacted surface

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[2] 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 99. Available at https://docs.google.com/document/d/1R-GS88pBa1uiDr1-EIQhN8NmUFwKdb1S/edit?rtpof=true

owners to request a hearing before the COGCC to reconsider the Director's decision. These are rights that have been in place well before *GVCA* was decided in 2012. The Petitioners state that other parties may challenge a permit under C.R.S. §§ 24-4-106 and 34-60-111 – the right of judicial review. If the Director allows an oil and gas facility on private land, without the surface owner's permission,[3] the right to sue the state government and oil and gas industry in district court is not the "opportunity to be heard in a meaningful manner" and is not due process.

The Initiative's sea change shift in due process afforded all parties (including affected local governments and surface owners) is completely unrelated to the creation of an independent oil and gas commission "to ensure that decisions about oil and gas development are made free from partisan political bias and interest group pressure." *Pet. Op. Brf.*, pp. 5-6. This provision, not found in Initiative 311 (2020), 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), C.R.S., and is unrelated to creation of an independent oil and gas commission. Voters may very well agree to an independent oil and gas

[3] The COGCC and state law allows mineral owners to place wells and oil and gas facilities on private property without permission of the surface owner. *See Gerrity Oil & Gas v. Magness*, 946 P.2d 913, 926 (Colo.1997).

commission to regulate oil and gas operations but would be surprised to find that the right to a hearing on oil and gas locations has been eliminated for everyone except the oil and gas industry.

D. 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

The initiative eliminates the role of the executive branch and legislative branch in regulating oil and gas activities with the sweeping proclamation that, "(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). This powerful provision, coiled up in the folds of this measure, would shock voters who thought they were simply voting on an independent oil and gas commission.

Petitioners soft-pedal the initiative's dramatic impact on Colorado's executive and legislative branches, and our democratic form of government, by claiming that the language is no different than referred ballot measures Y and Z in 2018 that removed congressional redistricting authority from the General Assembly and placed it into the hands of a new Colorado Independent Congressional Redistricting Commission. *Pet. Op. Brf.*, p. 12. This comparison is

completely without merit. Congressional redistricting is an *extremely* political function of that happens once every ten years. This initiative would allow an unelected body (appointed by retired justices) to make all rules and decisions for the oil and gas industry on an ongoing basis.

Petitioners also claim that the referred Independent Redistricting Commission, as well as the initiated Independent Ethics Commission, and Colorado Senate Bill 19-181 were at least as broad as the Proposed Initiative and therefore this initiative should be considered a single subject as well. *Pet. Op. Brf.*, pp. 11-14. However, none of those measures were legally challenged as violating single subject laws. The fact that the unchallenged measures eventually passed is neither an indication that they contained a single subject, nor do they constitute legal precedent. We also join the Title Board's position that the Court's unpublished decision on #311 is not binding when the arguments made are different. *Title Bd. Op. Brf.*, pp. 11-13.

This shift in governmental powers is concealed within the measure, bears no necessary or proper connection to the central purpose of the initiative - creating an independent oil and gas commission - and voters will be surprised to learn that the Initiative effectuates this power shift. The purpose of the single subject requirement is to "obviate the risk of uninformed voting caused by items concealed

within a lengthy or complex proposal." *Public Rights in Waters II*, 898 P.2d at 1076, 1079 (Colo. 1995).

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)).

CONCLUSION

The Petitioner respectfully requests the Court to affirm the actions of the Title Board regarding Proposed Initiative 2021-2022 #137 because the measure contains multiple subjects.

Respectfully submitted this 14th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RESPONDENT'S ANSWER BRIEF** was filed and served via the Colorado Courts E-Filing System on the 14th day of May, 2022 to the following:

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