

COLORADO SUPREME COURT

2 East 14th Avenue

Denver, CO 80203

Original Proceeding Pursuant to

§ 1-40-107(2), C.R.S. (2021-2022)

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.

Respondent: Kelly Nordini,

and

Title Board: Theresa Conley, Kurt
Morrison, and Jason Gelender.

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Case No. 2022SA125

THE TITLE BOARD'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, I certify that:

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

It contains 1,160 words.

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

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INTRODUCTION

Proposed initiative 2021-2022 #137 seeks to create a politically independent commission to oversee oil and gas operations in Colorado. It also seeks to strip environmental regulators of their authority to regulate matters in their spheres of expertise if those matters touch on oil and gas operations. These two provisions are not necessarily and properly connected. They also present the risk of logrolling and voter confusion. Therefore, they are separate subjects and the Title Board properly denied setting a title here.

In their opening brief, Proponents argue that the limitations put on environmental regulators define the new commission's authority. But this Court has rejected similar arguments in the past. A reallocation of governmental authority that is not necessarily and properly connected to the central purpose of a measure violates the single subject requirement. The Title Board's determination that #137 contains multiple subjects should therefore be affirmed.

ARGUMENT

- I. **The Title Board correctly concluded that the measure contains multiple subjects.**
 - A. **The comprehensive scheme proposed by #137 would change governmental powers in a manner not necessarily or properly connected to its main purpose of creating a politically independent oil and gas regulator.**

Number 137 would give the newly created commission the ability to veto any decisions by the Air Quality Control Commission, Water Quality Control Commission, state Board of Health, and the Solid and Hazardous Waste Commission that affect oil and gas operations. As argued by the objector, the initiative may also limit the ability of the General Assembly to legislate in this area. *See Resp.'s Op. Br. at 9-10.*

These reallocations of governmental powers are separate subjects from the primary purpose of #137, creating a politically independent oil and gas regulator. These separate provisions undermine both purposes served by the single subject requirement. First, these provisions risk logrolling—individual voters could support #137 as a good government measure even though they would otherwise oppose limiting the

authority of environmental regulators. *See In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 13. Second, these provisions risk voter surprise and confusion—the eight-page bill largely concerns the new commission, and the provision limiting environmental regulators’ authority is “coiled up in the folds.” *See id.*

Proponents argue that these provisions serve only to define the new commission’s authority. They liken #137 to other comprehensive schemes involving redistricting, the ethics board, and other oil and gas legislation. But tellingly, Proponents did not cite any case law addressing any single subject issues with those laws. The existence of these other laws therefore does not support Proponents’ argument that #137 contains a single subject.

Additionally, single subject case law concerning the redistricting commissions actually supports the Title Board’s determination here. Proponents cite Amendments Y and Z, which created the redistricting commissions. Prior to those amendments, this Court struck down a proposed initiative that sought to combine congressional and state

legislative redistricting. *See In re Title, Ballot Title & Submission Clause for 2015-2016 #132*, 2016 CO 55.

The proponents there argued, like the proponents here, that removing congressional redistricting from the authority of the General Assembly and giving it to the new redistricting commission was connected to the central purpose of the measure because it defined the powers of the new commission. This Court rejected that argument. “Although shifting the responsibility of congressional redistricting to the Reapportionment Commission affects its duties, the objective of this aspect of the proposed initiative is to reallocate constitutional authority and control over congressional redistricting.” *Id.* at ¶ 29. Here, too, while giving the new commission a veto over environmental regulations that affect oil and gas affects the duties of the new commission, this provision reallocates the authority and control for these boards and agencies to regulate in their spheres of expertise. Such a purpose is not necessarily and properly connected.

Proponents stress that their initiative is “comprehensive.” *See, e.g.,* Pet’rs Op. Br. at 11. But it does not follow that #137 satisfies single subject just because it is comprehensive. “An initiative proposing a comprehensive framework contains a single subject if all of its provisions relate directly to its single subject.” *In re Title, Ballot Title & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). But “when provisions seeking to accomplish one purpose are coupled with provisions proposing a change in governmental powers that bear no necessary or proper connection to the central purpose of the initiative, the initiative violates the single-subject rule.” *Id.* at 1077.

That is precisely the problem with #137. The measure seeks to create a politically independent commission to regulate oil and gas operations in the state. But it also “propos[es] a change in governmental powers that bear no necessary or proper connection” to this central purpose. *Id.* Specifically, it would remove the authority of environmental regulators to regulate in their areas of expertise. That change is not necessarily and properly connected to creating a

politically independent oil and gas regulator. It therefore constitutes an impermissible second subject and the Board's determination should be affirmed. *See id.* at 1078 (“In prior ballot title cases, we have reversed the Title Board's action in setting titles for initiatives affecting substantial rearrangement of existing governmental powers[.]”).

B. The 2020 case cited by Petitioners has no precedential effect.

The Board argued in its opening brief that the single subject argument presented by this appeal was not argued in the 2020 appeal. Upon closer review of the record in that case, the Board agrees with Proponents that the argument was raised in 2020, though it was framed somewhat differently. The Board therefore withdraws any argument in its opening brief that the single subject argument concerning the limitations on environmental regulators' rulemaking authority was not made in that case.

But that still fails to establish that the 2020 opinion has any precedential value here. The Court affirmed the Title Board in 2020 in a one-sentence summary order. *See In re Title, Ballot Title, & Submission*

Clause for 2019-2020 #311, 2020SA160 (June 11, 2020). Summary orders, “being unpublished, do not constitute the binding precedent that a published opinion” from this Court would. *People v. Meier*, 954 P.2d 1068, 1071 (Colo. 1998) (referring to private attorney censure). To the contrary, because such orders are “necessarily brief” and “do not fully reflect the facts of the particular case,” they are not instructive here in determining whether the Board properly applied this Court’s published precedents. *Id.*; see also *People v. Small*, 962 P.2d 258, 260 n.1 (Colo. 1998) (stating that citation of unpublished dispositions is “discouraged by this [C]ourt”); cf. C.A.R. 35(e) (stating that only opinions “designated for official publication” by the court of appeals must be followed as precedent).

Therefore, while the Board agrees that a similar argument was raised in *2019-2020 #311*, the Court’s disposition of that argument is not binding on the Court here.

CONCLUSION

The Court should affirm the decision of the Title Board that it lacked jurisdiction to set a title on 2021-2022 #137.

Respectfully submitted on this 16th day of May, 2022.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 16th day of May, 2022, addressed as follows:

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