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SUPREME COURT OF COLORADO
2 East 14th Ave.
Denver, CO 80203

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

In the Matter of Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #46 (Concerning Oil and Gas Permits That Incorporate the Use of Fracking)

Petitioner:
Steven Ward

v.

Respondents:
Paul Culnan and Patricia Nelson

and

Title Board: Theresa Conley, Kurt Morrison, and Jerry Barry

▲ COURT USE ONLY ▲

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Case Number: 23SA161

PETITIONER'S OPENING BRIEF

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 3,322 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/ Suzanne Taheri
Suzanne Taheri

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board correctly determined that Proposed Initiative 2023-2024 #46 contains a single subject.
2. Whether the term "fracking" is an impermissible catch phrase.
3. Whether the Title Board set a clear title for Proposed Initiative 2023-2024 #46.

STATEMENT OF THE CASE

Paul Culnan and Patricia Nelson (hereafter "Proponents") submitted Initiative 2023-2024 #46 (the "Proposed Initiative" or "the measure") to the Title Board for setting of a title and submission clause pursuant to § 1-40-106, C.R.S. The Title Board held a hearing on May 17, 2023, ruled that the Proposed Initiative contains a single subject as required by Colo. Const. art. V, §1(5.5) and § 1-40-106.5, C.R.S., and set the following title:

> A change to the Colorado Revised Statutes concerning discontinuing the issuance of new oil and gas operation permits that utilize fracking by December 31, 2030, and, in connection therewith, requiring the phase-out of new oil and gas operating permits that utilize fracking; allowing permitted oil and gas operation that utilize fracking to continue; and requiring the state to explore transition strategies for impacted oil and gas workers who may transition other employment.

(*See* Record Part 1, p 2, filed June 28, 2023).

On May 24, 2023, Petitioner filed a Motion for Rehearing with the Title Board arguing that the Proposed Initiative does not constitute a single subject, and that the Title Board set misleading titles and included a catch phrase on the ballot title. *Id.* at 71. Separate Motions for Rehearing were filed by Timothy E. Foster and Proponents. *Id.,* pages 7-13 (Foster) and 80-84 (Proponents).

The Title Board held the Rehearing on June 21, 2023 and upheld the prior ruling. *Id.* at 3. Petitioner now challenges the Title Board's determination that the measure constitutes a single subject and further asserts that the Title Board failed to set clear titles.

SUMMARY OF THE ARGUMENT

The Proposed Initiative concerns the regulation of oil and gas development in Colorado. The measure bans the issuance of new oil and gas permits that incorporate the use of hydraulic fracturing by December 31, 2030. However, the measure also includes separate substantive subjects beyond discontinuing new permits. It has a number of other subjects coiled into its folds. Specifically, the measure: 1) creates a new definition of "fracking" and "hydraulic fracturing;" 2) invalidates certain Colorado Oil and Gas Conservation Commission (COGCC) rules that substantially change the jurisdiction of the Board; and 3) creates new

duties in the "Office of Future Work". The Proposed Initiative contains multiple subjects.

In addition, title set by the Title Board is inadequate because it contains the term "fracking" which is a catch phrase, while at the same time omitting the new definition of "fracking".

ARGUMENT

I. The Title Board Lacks Jurisdiction Over #46 Because the Measure Does Not Contain a Single Subject.

A. Standard of Review

An initiative must comprise a single subject in order to be considered by the Title Board. Colo. Const., art. V, § 1(5.5). Where a measure contains multiple subjects, the Title Board lacks jurisdiction to set a title.

As set forth in the Colorado Constitution and affirmed by the Colorado Supreme Court, the single subject requirement guards against a measure confusing voters in two separate ways. First, combining subjects that lack a necessary or proper connection for the purpose of garnering support for the initiative from various factions that may have different or even conflicting interests could lead to the enactment of measures that would fail on their own merits. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438,

442 (Colo. 2002). Second, the single subject requirement prevents "voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *Id. See also In re Title, Ballot Title and Submission Clause for Proposed Initiative for 2011-12 No. 3*, 274 P.3d 562, 566 (Colo. 2012).

In reviewing the Title Board's single subject decisions, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions." *Johnson v. Curry (In re Title, Ballot Title, & Submission Clause for 2015-2016 #132),* 374 P.3d 460, 464 (2016), citing *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)).

This discretion is not absolute and to make this determination the Court examines the initiative's wording to determine if it meets the constitutional requirement. *Haynes v. Vondruska (In re Title, Ballot Title & Submission Clause for 2019–2020 #315)*, 500 P.3d 363, 367 (Colo. 2020). In doing so, the general rules of statutory construction apply, and the court does not consider the merits of the initiative.

B. Initiative 46 Contains at Least Three Separate and Distinct Subjects.

1. The initiative adds a new definition of "fracking" and "hydraulic fracturing" that applies broadly, far beyond the central purpose of discontinuing permits.

The measure defines "fracking" and "hydraulic fracturing" as an "oil and gas extraction process in which fractures in rocks below the earth's surface are opened and widened by injecting proppants, water, and chemicals at high pressure." *See* Record Part 1, p. 4.

As the Proponents admitted, the definition in the initiative applies equally to the "fracking" and "hydraulic fracturing" processes:

> …the term "fracking" can be defined in different ways. Those arguments can be applied just as equally to hydraulic fracturing. These definitions aren't completely different definitions. They are just small changes to the definitions.

See Rehearing Before Title Board on Proposed Initiative 2023-2024 #46 (June 21, 2023), https://archive-video.granicus.com/csos/csos_c84dc6ef-07f3-4812-ad29-b5c904ef0dcf.mp3 (statement at 56:25). After claiming in the above passage that the change to the definition was "small", the Proponents contradicted this statement by admitting there was not, in fact, any definition of "fracking" or "hydraulic fracturing" in current Colorado statute or rule.

> But there are specific variations of what fracking means, just like many, many words in the English language. And that's exactly why we defined it in the measure. If there is any particular confusion on the part of a voter about what fracking means, it's defined in the measure. It's not currently defined in the Oil and Gas Act. It's not currently defined in the rules of the COGCC, so we defined it in the measure. We defined it for the purposes of using it within the entire Oil and Gas Act. (*Id.,* at 57:33)

In this passage, proponents admit the precise problem with this new definition—"hydraulic fracturing" is now defined, "for purposes of using it within the entire Oil and Gas Act." *Id.*

In a recent decision, this Court ruled that ballot measure definition that extends beyond the central purpose and subject of an initiative constitutes a single subject violation. In that case, using a structure similar to what Proponents attempt here, the measure sought to incorporate livestock into the animal cruelty laws. In doing so it also added a new definition of "sexual act with an animal" that was broadly applicable, not just to livestock, but to all animals. *VanWinkle v. Sage (In re Title, Ballot Title & Submission Clause for 2021-2022 #1)*, 489 P.3d 1217 (Colo. 2021).

The Court found this was a violation of single subject: "Initiative 16 fails to satisfy the single-subject requirement because expanding the definition of 'sexual act with an animal' isn't necessarily and properly connected to the measure's central focus of incorporating livestock into the animal cruelty statutes." *Id.* p. 41.

The Proposed Initiative suffers the very same legal defect. The measure expands the definition of "fracking" and "hydraulic fracturing" beyond the measure's single purpose of discontinuing permits by 2030. This expansion of the definitions is broadly applied and not necessarily and properly connected to the measure's central focus.

For example, the Colorado Oil and Gas Commission (the "Commission") derives its rule making powers from Article 60 of Title 34. *C.R.S. § 34-60-104.3-108.* Therefore, this new definition of "hydraulic fracturing" would apply and affect all Commission Rules related to "hydraulic fracturing" which would extend well beyond Commission Rules related to the discontinuance of permits. In fact, the term "hydraulic fracturing" is mentioned over 20 times in the Commission's Rules.[1] This application to Commission Rules is not necessarily and properly connected to the measure's central focus of discontinuing new permits.

In addition, the Proposed Initiative does not halt currently permitted oil and gas production in Colorado. Therefore, this new definition would also expand and apply to and impact existing energy development operations which could go on for

[1] 2 CCR 404-1 Included in definition of "Base Fluid", "Proppant", and "Total Water Volume"; definition of "Hydraulic Fracturing Additive", "Hydraulic Fracturing Fluid", "Hydraulic Fracturing Treatment"; Section 205, Access to Records; Section 205A. Hydraulic Fracturing Chemical Disclosure; Section 305.c(1) Oil and Gas Location Assessment Notice; Section 316c Field Operations Notice

decades. This application to grandfathered operations is not necessarily and properly connected to the measure's central focus of discontinuing new permits.

This expanded definition not only affects state rules but would apply to all statutory provisions within Article 60. This includes C.R.S. § 34-60-132, Disclosure of chemicals used in downhole oil and gas operations.

The Proposed Initiative's definition of "fracking" and "hydraulic fracturing" would have legal impacts far beyond the measure's single purpose of discontinuing permits by 2030 and should be overturned on single subject grounds.

2. Rule Mandates that Change the Jurisdiction of the Board are Unrelated to the Permitting Process.

The measure requires the continuation of a subset of Commission agency rules ("continued rules") that ensure the "protection of public health, safety, welfare, the environment, and wildlife for all existing oil and gas operations."[2]

The Commission's current rules would suggest this applies to everything, as the rules are promulgated to "protect and minimize adverse impacts to public health, safety, welfare, the environment, and wildlife resources, and shall protect

[2] **SECTION 3.** 34-60-106 (20.5)(d) THE CONTINUATION OF COMMISSION RULES ENSURING THE PROTECTION OF PUBLIC HEALTH, SAFETY, WELFARE, THE ENVIRONMENT, AND WILDLIFE FOR ALL EXISTING OIL AND GAS OPERATIONS.

against adverse environmental impacts on any air, water, soil, or biological resource resulting from Oil and Gas Operations." C.R.S. § 34-60-106(2.5)(a) (2023). However, the measure does not allow for this result. While the measure requires the continued rules, it also requires the repeal of existing Commission rules related to new permits ("repealed rules").

The measure operates to remove the discretion the Commission would otherwise have over rulemaking provided under Colorado Administrative Procedures Act. C.R.S. § 24-4-103 and §34-60-108. This interference in the rulemaking process by an administrative agency has no proper or necessary connection to the discontinuance of permits. Nor is there any connection between the mandate on the subject matter of the continued rules and the discontinuance of permits.

The problem stems from the structure of the measure. Rather than change substantive law related to oil and gas development, Proponents seek to change administrative processes and rulemaking, much of which is not necessarily connected to any permitting process.

An initiative violates the single subject rule when it proposes a shift 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 1071, 1077 (Colo. 2010) (citing *In re No. 29*, 972 P.2d at 262–65 (Colo. 1999); *In re # 64*, 960 P.2d at 1197–1200. (Colo. 1998))

The measure does not stop at mandating rulemaking. It also transitions the jurisdiction of the GOGCC to "primarily monitoring, plugging, and remediating of facilities permitted prior to December 31, 2030." *See* Record Part 1, p. 5. Currently, under C.R.S. § 34-60-106, the Commission has broad powers over oil and gas production in Colorado. These include specific statutory powers that are unrelated to what would be the Commission's new mission of monitoring, plugging and remediating facilities, including:

- Issuing certificates of clearance in connection with the transportation and delivery of oil and gas; § 34-60-106(1)(i), C.R.S. (2023)
- Limiting the production of oil or gas, or both, from any pool or field for the prevention of waste; § 34-60-106(3)(a), C.R.S. (2023).
- Power to make determinations, execute waivers and agreements, grant consent to delegations, and take other actions required or authorized for state agencies by those law and regulation of the United States which affect the price and allocation of natural gas and crude oil; § 34-60-106(5), C.R.S. (2023)
- Prescribing special rules and regulations governing the exercise of function delegated to or specified for it under the federal "Natural Gas Policy Act of 1978"; § 34-60-106(8), C.R.S. (2023)
- As to class II injection wells classified in 40 CFR 144.6, performing all acts for the purpose of protecting underground sources of drinking water in accordance with state programs authorized by 42 U.S.C. sec. 300f et seq., and regulations under those sections, as amended. Regulating venting and flaring; § 34-60-106(9)(a), C.R.S. (2023)
- Communitizing and unitizing leases to maximize resource recovery; and

- Reviewing MIT (mechanical integrity tests) and Bradenhead tests to ensure well integrity § 34-60-106(21), C.R.S. (2023).

Altering these statutory functions are not necessarily related to the permitting process and requiring the commission to transition their duties away from these functions has no necessary connection to the central purpose of the measure.

3. Creating New Duties in "Office of Future Work" Is a Separate and Distinct Subject.

The measure creates the "office of future work" and authorizes the new office to transition workers and communities from oil and gas.[3] This has no connection to the discontinuance of permits. Measures which can pass only by combining subjects that appeal to different factions violate the single-subject requirement. *See In re 2011-2012 No. 3*, 274 P.3d at 566.

The intent to logroll is nowhere clearer than in the Proponent's own material. The campaign for this measure is already underway with claims that the

[3] **SECTION 5.** 8-83-604 THE PURPOSE OF THE PROGRAM IS TO IDENTIFY STRATEGIES AND FUNDING TO ASSIST SECTORS OF OIL AND GAS EMPLOYEES WHO WILL TRANSITION TO OTHER EMPLOYMENT AS A RESULT OF THE STATE'S REDUCED RELIANCE ON FOSSIL FUEL EXTRACTION. THE OFFICE SHALL CONSULT WITH OTHER RELEVANT OFFICES AND AGENCIES WITHIN THE STATE AND RELEVANT OFFICES OR AGENCIES OUTSIDE OF THE STATE REGARDING SUCCESSFUL WORKFORCE TRANSITION MODELS AND PROGRAMS IMPLEMENTED BY THOSE OFFICES OR AGENCIES. THE PROGRAM SHALL EXPLORE FEDERAL, STATE, AND LOCAL SOURCES OF FUNDING AND FINANCIAL INCENTIVES TO ASSIST TRANSITIONING WORKERS AND COMMUNITIES ECONOMICALLY RELIANT ON OIL AND GAS PRODUCTION.

oil and gas industry in Colorado contributes less than 1% of the state's total employment. (Clearing the Air https://www.coloradofiscal.org/wp-content/uploads/2023/01/OG-paper-1-5-23-final.pdf; https://www.publicnewsservice.org/2023-05-22/climate-change-air-quality/coalition-turns-to-co-voters-to-phase-out-fracking-permits/a84555-1.) The Proponents cannot claim that the creation of an entire new state office is a necessary and connected feature of the underlying measure while at the same time claiming the measure will not result in a material loss of jobs.

Additionally, this section in the measure is wholly removed from oil and gas regulatory statutes. Instead, the new state office is created by amendment to § 8-83-604 to C.R.S., Title 8, Labor and Industry. By proposing initiative #47, which does not contain this provision, Proponents demonstrate they can change the permit process without creating a new "office of future work". These provisions are legally independent of each other. This additional change is not "necessarily and properly" connected to the single subject. *See In re April 17, 1996 (1996-17)*, 920 P.2d at 802 (Colo. 1996).

II. The Ballot Title and Submission is Incomplete and Contains a Catch Phrase.

A. Standard of Review

In fixing a title and a summary, the Board's duty is "'to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice . . . .'" *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999) (quoting *In re Ballot Title "1997-1998 # 62"*, 961 P.2d 1077, 1083 (Colo. 1998)). In setting title, the Title Board must fairly summarize the central points of the measure. *In re Title, Ballot Title & Submission Clause, & Summary for Petition on Campaign & Political Fin*., 877 P.2d 311, 315 (Colo. 1994).

"Catch phrases" and words that could form the basis of a slogan should be carefully avoided in writing a ballot title and submission clause. *Splets v. Klausing,* 649 P.2d 303 (Colo.1982). "Catch phrases" are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase. *Garcia v. Chavez (In re Title, Ballot Title & Submission Clause),* 4 P.3d 1094, 1100 (Colo. 2000).

The Court determines the existence of a catch phrase or slogan in the context of contemporary political debate. *See In re Ballot Title 1999-2000 # # 227 & 228, 3 P.3d 1, 6; In re Workers Comp Initiative,* 850 P.2d 144, 147 (Colo. 1993). In

setting the titles, the Title Board must "correctly and fairly express the *true* intent and meaning" of the proposed initiative and must "consider the public confusion that might be caused by misleading titles." § 1-40-106(3)(b), C.R.S. (2023); *In re Ballot Title 1999-2000 # # 245(f) & 245(g),* 1 P.3d 739, 743 (Colo. 2000).

B. The Title Fails to Advise Voters of Matters Central to the Measure.

The title fails to inform voters of the change to the definition of "hydraulic fracturing". This is a central feature of the measure. As demonstrated above, the new definition of fracking will result in legal impacts well beyond the issuance of future permits. The definition in the measure applies broadly across state statutes and state rules affecting oil and gas development and production. Given that voters have been inundated with campaigns and information about hydraulic fracturing over the past several election cycles, this is a material component in the public debate. Failing to apprise the voters of this substantial change leaves out a central point in the measure that would affect voters decision to vote for or against the measure.

The title also fails to inform voters that this measure would transform the jurisdiction and duties of the Commission. Based on the title, voters would have no

way of knowing that the Commission's duties unrelated to permits will also be substantially altered.

C. Catch Phrase: The use of the term "fracking" is a catch phrase.

The current title includes the catchphrase "fracking" rather than consistently using the proper terminology "hydraulic fracturing". It is improper to include the term "fracking" in the question for several reasons. First, the practice of hydraulic fracturing applies to the vast majority of oil and gas production in Colorado. *See City of Longmont Colo. v. Colo. Oil & Gas Ass'n,* 369 P.3d 573, 576 (2016). Folding the term into the question only serves to confuse voters that may be led to believe this is a subset of production, when in fact it will operate as a ban. This Court has said as much, finding that it is undisputed that this is now the standard for virtually all oil and gas wells in Colorado. *Id.,* at 581. "Fracking" does not aid the voter's understanding of the proposal. If anything, it causes confusion about the true intent about the measure.

Proponents have included this catchphrase to generate support for their proposal, which hinges not on the proposal itself, but on the hope that the term will generate emotions in voters.

By custom and practice, the Title Board has used the scientific term of "hydraulic fracturing". Proponents themselves use "hydraulic fracturing" interchangeably in their own definition.

The use of the term "fracking" by the proponents is clearly intended to evoke a reaction in the voters and will no doubt serve as a basis for their campaign.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court reverse the actions of the Title Board for Proposed Initiative 2023-2024 #46.

Dated: July 18, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2023, a true and correct copy of the **PETITIONER'S OPENING BRIEF** was served via the Colorado Court's E-Filing System to the following:

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