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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 2023-2024 #290 **Petitioners:** Jessica Goad v. **Respondents:** Suzanne Taheri and Steven Ward and **Title Board:** Theresa Conley, Jeremiah Barry, and Kurt Morrison	▲COURT USE ONLY▲
Attorneys for Respondent Martha M. Tierney, No. 27521 TIERNEY LAWRENCE STILES LLC 225 E. 16th Street, Suite 350 Denver, CO 80203 Telephone: 303-356-4870 Email: mtierney@tls.legal	Case No.: 2024SA135

PETITIONER'S OPENING BRIEF IN OPPOSITION TO PROPOSED INITIATIVE 2023-2024 #290

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 2661 words.

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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Jessica Goad ("Petitioner"), registered elector of the State of Colorado, through her undersigned counsel, respectfully submits this Opening Brief in opposition to Proposed Initiative 2023-2024 #290 ("Initiative #290").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board erred in determining that proposed initiative 2023-2024 #290 contains a single subject.

2. Whether the Title Board set a misleading title for proposed initiative 2023-2024 #290.

STATEMENT OF THE CASE

This is an appeal of the Title Board's setting of title on proposed Initiative #290. Respondents Suzanne Taheri and Steven Ward ("Respondents" or "Proponents") proposed Initiative #290. The Title Board conducted its initial hearing on April 17, 2024, at which time the Title Board found Initiative #290 had a single subject and set a title. On April 24, 2024, Petitioner Goad filed a Motion for Rehearing, alleging that Initiative #290 contained multiple subjects, and that its title was flawed.

The Title Board held a rehearing on April 25, 2024, at which time the Title Board granted Petitioner Goad's Motion for Rehearing only to the extent that it

made changes to the title. The Title Board set the title for Initiative #290 as follows:

> Shall there be a change to the Colorado Revised Statutes concerning the rules governing nitrogen oxide emissions from oil and gas operations adopted by the state in December 2023, and, in connection therewith, prohibiting the state from implementing its regulatory programs in a way that is inconsistent with the rules or changing the rules without a written finding that collectively oil and gas operators in the Denver metro front range will not reduce the nitrogen oxide emissions by 50% by 2030 as set by 2017 baseline emissions established in the state air pollution implementation plan?

Petitioner Goad timely filed this appeal.

SUMMARY OF THE ARGUMENT

As proposed, Initiative #290 contains multiple subjects. It will create voter surprise and fraud occasioned by the surreptitious provisions coiled up in the folds of a complex initiative. The measure requires that the existing nitrogen oxide ("NOx") rules must stand until and unless the Colorado Air Pollution Control Division makes a formal written finding that oil and gas operators in the ozone nonattainment area of Colorado's front range have not met or will not meet the 2030 NOx reduction target set forth in the state implementation plan. However, the current NOx rule is not going to be enough to get the state of Colorado out of nonattainment with federal ozone standards, and the state will need to require more of the oil and gas sector to meet federal Clean Air Act requirements. So, by

locking in the NOx rule, the measure requires the state to reduce other sources of NOx or violate the Clean Air Act.

These separate subjects are couched in a measure that suggests that industry is on track to reduce NOx emissions by 50% by 2030, and that may be sufficient to comply with various emissions laws. But this is the classic "coiled up in the folds" scenario whereby the voting public will be affirmatively surprised to learn that the measure will force the state to either reduce other sources of NOx, such as motor vehicle emissions, or violate the Clean Air Act and see the Denver metro area's air quality further degrade. The Title Board erroneously found that Initiative #290 meets the single subject requirement.

The Title Board further set a misleading title that does not clearly provide a general understanding of the effect of a "yes" or "no" vote to the voting electorate.

This Court should find that Proposed Initiative 2023-2024 #290 violates the single subject requirement, or in the alternative, that the title as set by the Title Board does not correctly and fairly express the true intent and meaning of the measure.

ARGUMENT

I. The Initiative Violates the Single Subject Requirement.

A. Standard of Review and Preservation.

Article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5(1)(a), C.R.S. state that a proposed initiative must be limited to "a single subject which shall be clearly expressed in its title." "A proposed initiative violates this rule if its text relates to more than one subject, and has at least two distinct and separate purposes not dependent upon or connected with each other." *In re Initiative for 2011-2012 #3,* 2012 CO 25, ¶ 9.

Pursuant to Colo. Const. art. V, §1(5.5),

> [N]o measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title . . . . If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

See also 1-40-106.5, C.R.S. The Court does "not address the merits of the proposed initiative" or "suggest how it might be applied if enacted." *In re Initiative for 2019-2020 #3,* 2019 CO 57, ¶ 8. Instead, the Court "must examine the initiative's wording to determine whether it comports with the constitutional single-subject requirement." *Id*. "[T]he Board may not set the titles of a proposed Initiative, or submit it to the voters, if the Initiative contains multiple subjects."

Aisenberg v. Campbell (In re Initiative for 1990-2000 #104), 987 P.2d 249, 253 (Colo. 2000).

Petitioner preserved the single subject issue in her Motion for Rehearing and at the rehearing on April 25, 2024.

B. The Title Board Erred in Concluding That Initiative #290 Contains a Single Subject.

Initiative #290 has multiple subjects. The single subject requirement serves two functions. First, the single subject requirement "is intended to ensure that each proposal depends upon its own merits for passage." *Johnson v. Curry (In re Initiative for 2015-2016 #132)*, 2016 CO 55, ¶ 13. Second – and as pertinent here – 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.* "If an initiative advances separate and distinct purposes, the fact that they both relate to the same general concept or subject is insufficient to satisfy the single subject requirement." *Id.*

In reviewing the Title Board's single subject determination, the Court must determine "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 Initiative for 2013-2014* #76, 2014 CO 52, ¶ 8. To

satisfy the single-subject requirement, the "subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *Id.*

A primary purpose of the single subject requirement is to "obviate the risk of 'uninformed voting caused by items concealed within a lengthy or complex proposal'" *In re Initiative for 2001-2002 #43*, 46 P.3d 438, 446 (Colo. 2002). While Initiative #290 is not long, a measure can be "complex" without necessarily being "lengthy" – indeed a short and seemingly simple initiative, directed to a large and moderately complex body of law, can harbor the most pernicious surprises "coiled up in [its] folds." *Id.*

The measure requires that the rules governing NOx emissions adopted on December 15, 2023, must stand until and unless the Colorado Air Pollution Control Division makes a formal written finding that oil and gas operators in the ozone nonattainment area of Colorado's front range have not met or will not meet the 2030 NOx reduction target set forth in the state implementation plan.[1] But the reality is that the NOx rule is not going to be enough to get the state of Colorado

[1] A State Implementation Plan (SIP) is a collection of regulations and documents used by a state, territory, or local air district to implement, maintain, and enforce the National Ambient Air Quality Standards, or NAAQS, and to fulfill other requirements of the federal Clean Air Act. www.epa.gov/air-quality-implementation-plans /Basic Information about Air Quality SIPs | US EPA (May 8, 2024)

out of nonattainment with federal ozone standards, and the state will need to require more of the oil and gas sector to meet federal Clean Air Act requirements. So, by locking in the NOx rule, the measure requires the state to reduce other sources of NOx or violate the Clean Air Act.

These separate subjects are couched in a measure that suggests that industry is on track to reduce NOx emissions by 50% by 2030, and that may be sufficient to comply with various emissions laws. But this is the classic "coiled up in the folds" scenario whereby the voting public will be affirmatively surprised to learn that the measure will force the state to either reduce other sources of NOx, such as motor vehicle emissions, or violate the Clean Air Act and see the Denver metro area's air quality further degrade. *See, In re Initiative for 2001-2002 #43*, 46 P.3d at 446.

While voters who live in the Denver metro front range nonattainment area might support a proposal that purports to regulate NOx emissions from oil and gas operations, those same voters might be surprised to learn that voting for the measure could also curtail their own emission-producing habits such as driving a car, or result in further degradation of the air quality in the Denver metro area in violation of the Clean Air Act. Holding that Initiative #290 violates the single subject requirement would avoid this improper surprise.

Initiative #290 contains multiple subjects in violation of the single subject requirement.

II. The Title Board Improperly Denied Petitioner's Motion for Rehearing on Clear Title.

A. Standard of review and preservation.

"The Title Board's duty in setting a title is to summarize the central features of a proposed initiative." *In re Initiative for 2013-2014 #90*, 2014 CO 63, ¶ 24. The title must fairly reflect the contents of the proposed initiative and contain "sufficient information to enable voters to determine intelligently whether to support or oppose the initiative." *In re Initiative for 2015-2016 #73,* 2016 CO 24, ¶32.

Petitioner preserved her challenge to clear title in her Motion for Rehearing and at the rehearing on April 25, 2024.

B. The Title Does Not Correctly and Fairly Express Initiative #290's True Intent and Meaning.

The title of Initiative #290 is misleading and does not correctly and fairly express the initiative's true intent and meaning. Section 1-40-106(3)(b), C.R.S. provides:

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or

> constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause. . ..

Titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Title, Ballot Title & Submission Clause for Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990). "The purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose." *Outcelt v. Bruce (In re Initiative for 1999-2000 # 37),* 977 P.2d 845, 846 (Colo. 2000).

Here, perhaps because the text of the proposed initiative is difficult to comprehend, the title will not be clear to the voters. As written, the title suggests that this measure reduces NOx emissions from oil and gas operations, when it does exactly the opposite. In particular, the title fails to convey to voters the change in the status quo on the state's ability to comply with the Clean Air Act, and how the initiative decreases the state's ability to reduce NOx emissions to bring the Denver metro area into attainment. As drafted, the title does not allow voters to

understand the effect of a yes or no vote. *See In re Petition Procedures*, 900 P.2d 104, 108 (Colo. 1995).

CONCLUSION

Respondent respectfully requests the Court find that Proposed Initiative 2023-2024 #290 violates the single subject requirement, or in the alternative that the title as set by the Title Board does not correctly and fairly express the true intent and meaning of the measure.

Respectfully submitted this 8th day of May 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May 2024 a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF IN OPPOSITION TO PROPOSED INITIATIVE 2023-2024 #290** was filed and served via the Colorado Courts E-Filing System to the following:

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