COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 8, 2024 5:42 PM
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2024) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #270 ("Oil and Gas Operations Strict Liability for Damages") **Petitioners:** Steven Ward and Suzanne Taheri, **v.** **Respondents:** Jessica Goad and Alicia Ferrufino-Coqueugniot, **and** **Title Board**: Theresa Conley, Jeremiah Barry, and Kurt Morrison.	▲ **COURT USE ONLY** ▲ Case No. 2024SA132
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THE TITLE BOARD'S OPENING 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) or C.A.R. 28.1(g).

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ISSUES ON REVIEW

Whether the Title Board correctly determined that Proposed Initiative 2023-2024 #270 contains a single subject.

Whether the Title Board acted within its discretion in setting title by declining to include language detailing that the initiative would hold oil and gas operators, owners, or producers strictly liable for damages "regardless of the exercise of reasonable care [or] adherence to industry best practices," when the title already states that the initiative would impose strict liability "without regard to fault, negligence, or intent."

STATEMENT OF THE CASE

Proposed Initiative 2023-2024 #270 ("#270") seeks to protect public health, safety, property, wildlife, and the environment by imposing strict liability for damages caused by oil and gas operations. *See* Record at 3, filed May 1, 2024. The measure defines "strict liability" as "liability without regard to fault, negligence, or intent." *Id.* It further specifies that oil and gas operators, owners, and producers may be held

strictly liable regardless of whether they "exercised reasonable care and adhered to industry best practices." *Id.*

At a hearing held April 18, 2024, the Title Board ("Board") concluded that #270 contained a single subject and set title. *Id.* at 5. Petitioners Suzanne Taheri and Steven Ward filed a timely motion for rehearing, arguing that #270 violates the single-subject requirement and that the title set on April 18th was unclear and misleading. *Id.* at 9-10. On April 26, 2024, the Board granted Petitioners' motion only to the extent that the Board revised #270's title. *Id.* at 7.

In their Petition for Review, Petitioners revive their single-subject objection. They also assert that the title remains unclear, because it does not specifically advise voters that #270 imposes liability "regardless of the exercise of reasonable care [or] adherence to industry best practices." Pet. for Review at 4. However, the title does state that strict liability is imposed "without regard to fault, negligence, or intent." Record at 7.

SUMMARY OF ARGUMENT

Petitioners' single-subject objection focuses on #270's definition of "strict liability," which imports the term's regularly accepted usage. Because the definition is necessarily and properly connected to #270's purpose, it does not introduce a separate subject.

Petitioners' arguments to the contrary draw a false equivalence between #270's definition of "strict liability" and the definition of that term in a different initiative, Proposed Initiative 2023-2024 #289. For #289, the Board concluded that the "strict liability" definition violated the single-subject requirement. But there, the definition was contrary to the term's standard meaning and undermined the initiative's stated purpose, and thus the Board's determination on #289 should not govern the result here.

Petitioners' remaining single-subject challenge relies on speculation about how #270 might be understood to interact with general tort law, if passed. However, at this stage, neither the Board nor this Court is charged with interpreting the initiative's future

effects. And there is no basis in the initiative's plain language to find that it contains a second purpose of modifying standard tort doctrine.

Petitioners' clear title challenge should also be rejected. The title set by the Board on rehearing plainly informs voters that #270 would impose liability for damage caused by oil and gas operations regardless of an actor's fault, negligence, or intent. Because the title need not set out an initiative's every detail, the Board was not required to further specify that liability could be imposed without regard to reasonable care or adherence to best practice. Indeed, both concepts are subsumed within the phrase "liability without regard to fault, negligence, or intent." It was therefore unnecessary for the Board to include these details in order to avoid a material omission or misrepresentation. The Board's determinations should be affirmed.

ARGUMENT

I. The proposed initiative contains a single subject.

A. Standard of review and preservation

The Title Board has jurisdiction to set a title only when a measure contains a single subject. *See* Colo. Const. art. V, § 1(5.5). To satisfy the

single-subject requirement, the "subject matter of an initiative must be necessarily and properly connected rather than disconnected or incongruous." *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8. An initiative contains a single subject when "its provisions are directly tied to and implement its central focus." *In re Title, Ballot Title & Submission Clause for 2015-2016 #63*, 2016 CO 34, ¶ 8. By contrast, an initiative contains multiple subjects if it "relates to more than one subject and has at least two distinct and separate purposes." *Id.* ¶ 10.

The Court will "overturn the Board's finding that an initiative contains a single subject only in a clear case." *In re Title, Ballot Title, & Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 9 (quotations omitted). "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 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 Title, Ballot Title, & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 8.

The Board agrees this issue was preserved. It was raised in Petitioners' motion for rehearing, which was denied by the Board as to this issue. *See* Record at 7, 9-10.

B. Proposed Initiative #270's definition of "strict liability" does not create a separate subject.

Proposed Initiative #270 contains one subject: protecting the public by imposing strict liability for damage caused by oil and gas operations. The initiative's definition of "strict liability" —which fully accords with the common usage of that term—does not introduce a second subject. Rather, the definition effectuates the initiative's

purpose, and thus #270 comprises a single subject. *See In re 2015-2016 #63*, 2016 CO 34, ¶ 8.

The purpose of #270 is to "ensure the protection of public health, safety, property, wildlife, and the environment by establishing strict liability for damages caused by oil and gas operations." Record at 3. It finds that to effectuate that purpose, "[i]t is necessary to hold any operator, owner, or producer accountable for *any* harm caused . . . by oil and gas operations." *Id.* (emphasis added). This is consistent with the standard usage of "strict liability," under which an actor may be held liable without regard to whether they exercised reasonable care or acted with a culpable state of mind. *See, e.g., Camacho v. Honda Motor Co., Ltd.,* 741 P.2d 1240, 1244 (Colo. 1987) (noting the Court's adoption of the strict liability doctrine set forth in Restatement (Second) of Torts § 402A (1965) for defective products, pursuant to which a seller is liable "even though he has exercised all possible care in the preparation and sale of the product"); Restatement (Third) of Torts: Phys. & Emot. Harm 4 Scope Note (2010) ("Strict liability is liability imposed without regard

to the defendant's negligence or intent to cause harm."); LIABILITY, Black's Law Dictionary (11th ed. 2019) ("[S]trict liability. (1844) Liability that does not depend on proof of negligence or intent to do harm but that is based instead on a duty to compensate the harms proximately caused by the activity or behavior subject to the liability rule. . . . Also termed liability without fault.").

Proposed Initiative #270's definition of strict liability is "directly tied to and implement[s] its central focus." *In re 2015-2016 #63*, 2016 CO 34, ¶ 8. It defines strict liability to mean "liability without regard to fault, negligence, or intent." Record at 3. By adopting the term's standard meaning, #270 furthers its stated aim of protecting the public health and environment by imposing strict liability for damage caused by oil and gas operations. It also effectuates the goal of holding oil and gas operators, owners, or producers liable for "any harm" their operations cause, regardless of the actor's state of mind or the objective reasonableness of the actor's conduct. *In re 2015-2016 #63*, 2016 CO 34 ¶ 14 (initiative's definition of term was not a separate subject where it

was "necessarily and properly connected to the initiative's purpose"); *In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 #256*, 12 P.3d 246, 254–55 (Colo. 2000) (initiative did not violate single-subject requirement where it included a definition that was related to its purpose).

Petitioners argue that #270 must contain separate subjects because the Board concluded with respect to a *different* Proposed Initiative, 2023-2024 #289 ("#289"), that the definition of "strict liability" in that initiative introduced a second subject.[1] But because the definition of strict liability in #270 furthers #270's purpose, whereas the definition in #289 does not, the Board's two decisions are entirely consistent.

Proposed Initiative #289 contains nearly identical text to #270 in most respects. *Compare* Record at 3 *with* Record at 3, Case No. 2024SA133, filed May 1, 2024. Like #270, #289 states that its purpose is to "ensure the protection of public health, safety, property, wildlife and

[1] #289 is before this Court on a separate petition for review.

the environment by establishing strict liability for damages caused by oil and gas operations," and it finds it "necessary to hold any operator, owner, or producer accountable for any harm caused . . . by oil and gas operations." *See* Record at 3, Case No. 2024SA133. But crucially, #289's definition of strict liability is contrary to the term's standard meaning: it defines strict liability as "liability where an operator, owner, or producer has acted with gross negligence or willful misconduct." *Id.* Whereas strict liability is typically a stricter form of liability than negligence, #289's definition flips the term on its head by creating a *less* strict standard than negligence requiring a higher degree of culpability. This counterintuitive definition undermines #289's stated purposes by (1) limiting the very liability the initiative purports to create, and (2) holding actors liable only for culpable conduct, rather than "any harm" their oil and gas operations cause. *Id.* Because, by contrast, #270's definition effectuates its purpose, the Board properly concluded that #270 contains a single subject, even if #289 does not.

Petitioners' other arguments on the single-subject requirement are based in speculation about how the initiative might be construed if it passes, and they should therefore be rejected. In their Petition for Review, Petitioners maintain that #270 "modifies the long-standing negligence standard to eliminate contributory negligence and other common tort defenses," though #270 says no such thing. Pet. for Review at 4. Similarly, in their motion for rehearing, Petitioners suggested that #270's definition of strict liability "must be intended to have some effect beyond" the term's common meaning, and "may be read to supersede other claims involving negligence or intent, such as an intentional tort or criminal act." Record at 9-10. But neither the Board nor this Court may "determine the initiative's efficacy, construction, or future application." *In re 2013-2014 #76*, 2014 CO 52, ¶ 8; *see also In re Title, Ballot Title, & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 59 (Colo. 2008) (rejecting single-subject challenge where "Petitioner's argument is comprised of mere speculation about the potential effects of the Initiative"). Petitioners' theories about how #270 may be applied in

the future do not undermine the Board's proper determination that it contains a single subject.

Finally, #270 does not pose either of the risks that the single-subject requirement seeks to avoid. *See In re Title, Ballot Title & Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶ 11. It does not combine two unrelated matters in order to secure voter support for two measures that could not garner enough votes to pass independently. And #270's definition of strict liability poses no risk of causing voter surprise and confusion, because it accords with the term's commonly accepted definition.[2]

Before the Board, Petitioners argued that #270's "strict liability" definition is more expansive than its common usage, relying on the Merriam Webster dictionary definition. Merriam Webster defines strict liability solely as "liability imposed without regard to fault," whereas #270 further specifies that strict liability includes liability imposed

[2] For this reason, too, #270 and #289 diverge: #289's definition creates a substantial risk of confusion by defining "strict liability" in a way that is entirely contrary to its usual meaning.

without regard to negligence or intent. *See* Record at 9. But Petitioners' selective reliance on a single source ignores other widely recognized authorities that define strict liability by reference to negligence and intent, including the Restatement (Third) of Torts, the Restatement (Second) of Torts, and Black's Law Dictionary. *See supra*; *see also* Restatement (Second) of Torts § 519 cmt. d (1977) (explaining that strict liability for "abnormally dangerous" activities is liability that "is not based upon any intent of the defendant to do harm to the plaintiff or to affect his interests, nor is it based upon any negligence").

Moreover, because negligence and intent are both fault-based standards, liability imposed "without regard to fault, negligence, or intent" accords with, and does not undermine, the concept of liability imposed "without regard to fault." *See* Restatement (Third) of Torts: Phys. & Emot. Harm 4 Scope Note (2010) ("Negligence is an obvious form of 'fault'; absent an applicable privilege the intent to cause physical harm is generally faulty as well. . . . Accordingly, liability for negligence or for intent is liability based on fault. By contrast, strict

liability signifies liability without fault, or at least without any proof of fault."). As a result, #270's definition does not create any risk of voter confusion.

Proposed Initiative #270's definition of strict liability is "necessarily and properly connected" to the initiative's purpose. *In re 2013-2014 #76*, 2014 CO 52, ¶ 8. It takes a term central to the initiative's goals and adopts its standard definition. As this is far from a "clear case" of multiple subjects, the Board's single-subject determination should be upheld.

II. The title set by the Board satisfies the clear title standard.

A. Standard of review and preservation

When considering a challenge to a title, the Court does not "consider whether the Title Board set the best possible title." *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. "The Title Board's duty in setting a title is to summarize the central features of a proposed initiative." *In re 2013-2014 #90*, 2014 CO 63, ¶ 24. The Board "is given discretion in resolving interrelated problems of

length, complexity, and clarity in setting a title and ballot title and submission clause." *Id.* The titles set must be "fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation, but the titles need not spell out every detail of a proposal." *In re 2015-2016 #63*, 2016 CO 34, ¶ 23 (cleaned up).

The Board agrees that Petitioners preserved their challenge to #270's title. *See* Record at 10.

B. The title adequately informs voters that #270 would impose liability regardless of the degree of care exercised in oil and gas operations.

The title set by the Board on rehearing is: "A change to the Colorado Revised Statutes concerning holding any oil and gas operator, owner, or producer strictly liable for any damages including personal injury, property damage, or environmental harm that result from oil and gas operations without regard to fault, negligence, or intent." Record at 7. Before the rehearing, the title omitted the last three words, "negligence or intent." *Id.* at 5. On rehearing, the Board decided to add this last phrase at Petitioners' request. Nonetheless, Petitioners still

maintain that the title is misleading, because it does not specifically detail that liability may be imposed regardless of the "exercise of reasonable care [or] adherence to industry best practices." Pet. for Review at 4.

This does not come close to a "material omission or misrepresentation." *In re 2015-2016 #63*, 2016 CO 34, ¶ 23. By its plain meaning, liability without regard to "fault, negligence, or intent" encompasses liability without regard to whether the actor exercised reasonable care or adhered to best practice. To the extent there is any daylight between the two, the title set by the Board on rehearing adequately summarizes #270's central features, and it need not "spell out every detail" regarding the circumstances under which liability may be imposed. *In re 2013-2014 #90*, 2014 CO 63, ¶ 24; *In re 2015-2016 #63*, 2016 CO 34, ¶ 23. The Board acted well within its discretion in setting #270's title.

CONCLUSION

The Title Board correctly determined that #270 contains a single subject and set an appropriate title. The Court should therefore affirm the title set by the Title Board on #270.

Respectfully submitted on this 8th day of May, 2024.

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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 8th day of May, 2024, addressed as follows:

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