IN RE: TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2023-2024 #44 ("DISCONTINUE ISSUEANCE OF NEW OIL AND GAS PERMITS")

Initiative Proponents;
Paul Culnan and Patricia Nelson

Objector:
Timothy E. Foster

MOTION FOR REHEARING

By undersigned counsel, Timothy E. Foster, a registered voter of Mesa County, objects to the titles set for Initiative #44, pursuant to C.R.S. § 1-40-107(1)(a)(I).

On May 3, 2023, the Title Board set the following ballot title and submission clause for Initiative #44:

> *Shall there be a change to the Colorado Revised Statutes concerning discontinuing the issuance of new oil and gas operation permits by December 31, 2030, and, in connection therewith, requiring the phase-out of new oil and gas operation permits in order to protect land, air, and water; allowing existing oil and gas operations to continue; and requiring the state to explore transition strategies for impacted oil and gas workers who may transition to other employment?*

I. Initiative #44 violates the single subject requirement.

A. Initiative #44 pairs changes to oil and gas permitting with a phantom jobs program, intended to attract voter support.

Initiative #44 violates the single subject requirement by including a program for workers who will not, based on Proponents' testimony, be affected for about five decades.

At the May 3 Title Board hearing,[1] Mr. Michael Foote testified on behalf of the proponents that: (a) #44's cap on permits goes into effect at the end of 2030; (b) those permits allow production to begin within 3 to 7 years after the permit issues; and (c) operations continue for "up to 40 years from when they start" production. In other words, if the voters adopt this measure at the 2024 election, there are 6 years until permit issuance stops (2024 to 2030),

[1] Mr. Foote's comments may be reviewed as part of the recording of this hearing which is found at: https://csos.granicus.com/player/clip/381?view_id=1&redirect=true&h=28e2f0e4cd948661eb54b7c1bef6e45c

another 3 to 7 years for production to begin (2030 to 2033 or to 2037), and another 40 years for production to continue once it commences (2033 to 2077 or to 2081).[2] Importantly, "the permit is not necessary in order for production to continue."[3]

As a result, the actual displacement of workers due to the operation of Initiative #44 is between 49 and 56 years from any passage of #44. Given proponents' own testimony, a person who is 21 years old today and working in the industry would be at least 70 years old at the time newly permitted wells cease to produce. There is no basis for hypothesizing that other workers will be affected by a discontinuance in permitting.

As such, the "strategies" to be "explore[d]" by OFW are not going to be targeted to current industry workers. But given the information provided on behalf of the initiative's proponents, even the Title Board didn't realize the distance in time for the need for job retraining strategies. If the Board didn't realize this, neither will voters. But it is likely that voters will be lured into support of this measure, thinking they are providing a near-term solution for a near-term employment downturn when that issue is literally a half a century away.

The inclusion of a worker reorientation program is included to appeal to voters who might otherwise oppose the measure. At minimum, voters will be told the measure is a no harm/no foul situation for industry workers and that there will be "transition strategies for impacted workers" when, based on testimony, those workers will be on Medicare by the time the strategies are needed. Holding out an illusory benefit to attract support is the type of ill the single subject requirement was intended to prevent, and therefore no title should be set for this measure.

B. Initiative #44 also eliminates an overarching doctrine relating to "waste" of natural resources in what otherwise appears to be an Oil and Gas Commission rules revision process about oil and gas permitting.

The General Assembly recognizes, and the courts emphasize, the existing policy of preventing waste of the natural resources at issue here. Specifically, priority is currently given to "the state's interest in efficient production and development of oil and gas resources in a manner preventing waste and protecting the rights of producers." *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 761-762 (Colo. App. 2002), citing *Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061, 1065-68 (Colo. 1992). This policy is so central that it is the basis for finding the statewide concern relating to oil and gas policy making. *Board of County Comm'rs v. Bowen/Edwards Assoc.*, 830 P.2d 1045, 1058 (Colo. 1992).

Initiative #44 carves a reversal in policy to prevent permitting of otherwise qualifying lands. *See* proposed amendment to § 34-60-106(2.5)(b). But it does so in the context of a bill that mostly appears to be about rule making, requiring the Commission to adopt some types of rules and repeal other types of rules. Further, its central prohibition refers back to the multifaceted rule making mandated. *See* proposed § 34-60-106(20.5) and proposed amendment to § 29-20-104(h)(II). Much like the combination of a new water doctrine and water agency reorganization,

[2] *See* note 1, *supra* at 8:50-9:30.

[3] *See* note 1, *supra* at 10:40-42.

this amalgamation violates the single subject requirement. *See In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007) (citing precedent for an initiative in which "the public trust standard was joined with a proposal for reforming water district rules," contrary to the single subject requirement).

Therefore, the Board lacked jurisdiction to set this title.

II. The Board approved a misleading and inaccurate title.

A. The title is misleading where it states a potential effect rather than a central feature of the initiative itself.

The inclusion of "in order to protect land, air, and water" in the title is clear error that the proponents urged the Board to make. This phrase is an aspirational statement in #44, *see* proposed § 34-60-106(20.5), but that does not make it a central feature of the measure or even a statement of the "intent and meaning" of the text they support.

As the Board knows, its job is "merely to summarize the central features of the initiated measure in a clear and concise manner without arguing either for or against the proposal." *In re Title*, 756 P.2d 995, 999 (Colo. 1988). No matter how laudable the goals of the measure may be, they are statements of the hoped-for effects of the measure, not the legal change it actually brings about in the Colorado Revised Statutes. The Board must be able to know that a statement in a title is accurate, based on the text submitted. The Board simply "may not speculate on the potential effects of the initiative if enacted." *In re Title, Ballot Title, and Submission Clause for Initiative 2013-2014 #89*, 2014 CO 66, ¶24, 328 P.3d 172, 179, citing *In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 720-21 (Colo. 1994).

The Board should be wary about including such a phrase in this ballot title, lest the Board have to state the desired outcome of other proponents in other ballot measures. Had the Board done this in just those titles it set earlier this year, such titles would likely read as follows:

For Initiative 2023-2024 #3 relating to affordable housing, the title would have included the highlighted language below:

> Shall there be a change to the Colorado Revised Statutes concerning funding to increase attainable housing, and, in connection therewith, on and after January 1, 2024, imposing a community attainable housing fee *IN ORDER TO PROVIDE HOUSING FOR WORKERS SUCH AS NURSES, TEACHERS, FIREFIGHTERS AND LAW ENFORCEMENT OFFICERS,*[4] payable by the purchaser, upon the recording of deeds for real property equal to 0.1% of the amount by which the purchase price exceeds $200,000….

[4] *See* proposed § 29-4-1201(1) of Initiative #3; https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/3Final.pdf

The title for Initiative #3 could just as easily address other goals that initiative says it seeks to achieve (thus replacing the capitalized language above with any of the following):

> *IN ORDER TO LIMIT LONG COMMUTES FOR WORKERS AND IMPROVE AIR QUALITY***;**[5]
>
> or
>
> *IN ORDER TO MAKE COMMUNITIES STRONGER AND MORE RESILIENT BECAUSE WORKERS LIVE CLOSE TO THEIR JOBS;*[6]
>
> or
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> *IN ORDER TO ENHANCE THE CULTURE, INCLUSIVITY, AND DIVERSITY OF COMMUNITIES;*[7]
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> or
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> *IN ORDER TO HAVE FULLY STAFFED SCHOOLS, HOSPITALS, HEALTHCARE PROVIDERS, EMERGENCY SERVICE PROVIDERS, AND GOVERNMENT OFFICES.*[8]

Initiative #3's title isn't the only one this cycle where, if the practice of using proponents' list of policy goals was a standard Board undertaking, this year's ballot titles would read differently than the Board's actual decisions. For instance, the title for Initiative 2023-2024 #19 addressing school choice could very well read:

> Shall there be an amendment to the Colorado constitution concerning the right to school choice, and, in connection therewith, creating a right for parents and guardians to direct per pupil funding to schooling of their choice which includes public and private schooling; home schooling; and open enrollment *IN ORDER TO GIVE ALL CHILDREN EQUAL OPPORTUNITY TO ACCESS A QUALITY EDUCATION*?[9]

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[5] *See id.* (language found in proposed § 29-4-1201(3).

[6] *See id.* (language found in proposed § 29-4-1201(7).

[7] *See id.* (language found in proposed § 29-4-1201(8).

[8] *See id.* (language found in proposed § 29-4-1201(9).

[9] *See* proposed article IX, section 18(1) of Initiative #19; https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/19Final.pdf

And the title for Initiative 2023-2024 #44 dealing with parole eligibility would read:

> Shall there be a change to the Colorado Revised Statutes concerning parole eligibility for an offender convicted of certain crimes, and, in connection therewith,… *IN ORDER TO PRESERVE THE SAFETY AND WELFARE OF SOCIETY*,[10] continuing the governor's authority to grant parole for any such offender before the eligibility date if extraordinary mitigating circumstances exist?

Here, Initiative #44 contained three policy objectives of the proponents: "to reduce water consumption, lower greenhouse gases and other pollutants, and protect land, air, and water." See proposed § 34-60-106(20.5). If the Board is going to go down the road of including vague policy aims rather than actual proposed changes to the law in the titles it sets, it has some fundamental questions to decide.

- How many of the proponents' stated goals are enough to include in the titles?

- How will the Board choose which one(s) to incorporate in the titles?

- If policy goals constitute a measure's "true meaning and intent," what guidelines will the Board use to decide what statements in the measure cannot be used in the titles?

Putting aside the practical problems with such language, the legal issue is clear. A statement about what a measure might bring about is not a statutory change but is, instead, a statement of what proponents think will be an effect of the measure. An initiative's effects belong in the campaign rather than the titles; it is the campaign where they can be "brought to the attention of the voters by public debate." *In re the Title, Ballot Title, Submission Clause and Summary Pertaining To Sale of Table Wine in Grocery Stores*, 646 P.2d 916, 921 (Colo. 1982).

Addressing an uncertain future effect in a ballot title is not required or warranted under the Title Board's operative statute. But the wording sanctioned here opens the door to proponents' arguments as to all future titles that the Board should state what proponents hope will happen if their measure is adopted. There is simply too great a potential for gamesmanship in drafting initiative texts to justify creating precedent for the practice at issue here.

Further, statements about a measure's intended objective will always be a positive statement that will appear to be a Title Board endorsement of the measure's merits. Of course, characterizing an initiative's merits is far beyond the role of title setting. *Bauch v. Anderson*, 497 P.2d 698, 699 (Colo. 1972) ("We must not in any way concern ourselves with the merit or lack of merit of the proposed amendment since, under our system of government, that resolution rests with the electorate").

Therefore, the titles should be amended to exclude this language that is not a "central feature" of the initiative.

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[10] *See* proposed § 17-22.5-303.3(5); https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/30Final.pdf

B. The title is misleading where it contains the political catch phrase, "in order to protect land, air, and water."

A catch phrase is a term or phrase that "mask[s] the policy… [and] tips the substantive debate surrounding the issue to be submitted to the electorate." *In re Title, Ballot Title & Submission Clause*, 4 P.3d 1094, 1100, (Colo. 2000). It makes no difference that the phrase in question is included in the initiative itself. *Id.*

The finding that such wording is a political slogan is "an imprecise process" but it must be based on some "convincing evidence." *In re Title, Ballot Title & Submission Clause for Initiative 1997-1998 #105*, 961 P.2d 1092, 1100 (Colo. 1998). Here, a poll[11] released publicly in the weeks leading up to the filing of this initiative established that 75% of Coloradans find the impact of oil and gas drilling on the "land, air, and water" is a "serious problem and forty-four percent (44%) found it to be an "extremely" or "very" serious problem."[12]

The measure – and now the title – refer to one of the aspirational goals of the measure: "to protect land, air, and water." *See* proposed § 34-60-106(20.5). It's virtually the same litany of words as are found in the above-referenced poll. This is not what the measure actually *does* as a matter of amending Colorado law; it's what the proponents *say* the impact of their measure they hope will be. And here they do it with the support of a poll that reflects current political sensitivities – not just the views of national voters or even regional voters. The concerns of Coloradans are documented by bipartisan pollsters who publicized their results just prior to the filing of language for this measure.

A ballot title should not be part and parcel of a political argument. Regarding the language at issue here, that's exactly what this ballot title does, and it should be amended to delete this of goals.

C. The title is misleading as it states only "existing" oil and gas operations will be allowed to continue their operations.

The title states that #44 "allow[s] existing oil and gas operations to continue." In fact, it allows operations that exist on, and beyond, Election Day (when voters will evaluate the ballot title and submission clause) to operate. Applications can be submitted and will be considered from Jan. 1, 2026 to Dec. 31, 2030. *See* proposed § 34-60-106(20.5)(a).

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[11] The poll was conducted for the Colorado College State of the Rockies Project Jan. 5-22, 2023 and included 437 registered voters Colorado. *See* file:///C:/Users/mark/Downloads/2023%20Conservation%20in%20the%20West%20Presentation.pdf at 2 (last viewed May 10, 2023) (attached hereto). The "effective margin of error is +2.4% at the 95% confidence interval for the total sample; and at most +4.9% for each state." *See* https://www.coloradocollege.edu/other/stateoftherockies/_documents/2023-poll-data-and-graphics/ccpoll%202023%20national%20release.pdf at 3.

[12] *Id.* at 57.

In referring only to "existing" operations, the titles' language communicates that entities receiving permits after Election Day (or, at the latest, after the effective date of the initiative) but before Dec. 31, 2030 cannot operate. There is no question that is inaccurate, and this title wording is error.

D. The title is misleading in stating that the measure "allow[s] existing oil and gas operations to continue" as there is no such provision in #44.

Initiative #44 does not expressly provide for the continued operation of any permitted location or facilities. At most, it provides for "[t]he continuation of commission rules ensuring the protection of public health, safety, welfare, the environment, and wildlife for all existing oil and gas operations." *See* proposed § 34-60-106(20.5)(d).

In other words, #44 provides for continued rules for issues *relating to* oil and gas operations. It does not affirmatively provide for continuation of oil and gas operations in their own right. If such continuation may occur due to already existing laws, that is a characterization of current law that is beyond the Title Board's power to include here. This phrase should thus be deleted from the titles.

E. The title is misleading because it does not state that there will be a consistent reduction in permits approved each year between Jan. 1, 2026 and Dec. 31. 2030.

The measure requires "an iterative and consistent reduction in permits approved each year" between Jan. 1, 2026 and Dec. 31, 2030.

The mandated limit on permits is not implied by the single subject statement of "discontinuing the issuance of new oil and gas permits by December 31, 2030." The meaning of "discontinue" is "to stop doing or providing something."[13] But this measure does not stop the provision of permits by a single point in time; fewer permits will be granted for four years before that date. The titles should not conceal the limits to be imposed well before the date specified in the single subject statement.

F. The title is misleading where it in referring to the "phasing out" of permits.

The title states that this measure "requir[es] the phase-out of new oil and gas operation permits." This reference will confuse voters.

The common meaning of "phase-out" is "to stop using something gradually in stages over a period of time."[14] As a result, voters will be left with the impression that #44 imposes

[13] https://dictionary.cambridge.org/us/dictionary/english/discontinue

[14] https://www.oxfordlearnersdictionaries.com/us/definition/american_english/phase-out#:~:text=phase%20somethingout&text=to%20stop%20using%20something%20gradually,phased%20out%20by%20next%20year.

limited *durations* on any new permits granted. But that's not what the measure does. It changes the Commission's power to grant permits rather than changing the effective period during which new permits can be used.

In terms of the substantive law changed by this measure, #44 only uses "phasing out" of a new permit regarding its provision that its new limits "do not constitute waste." *See* proposed § 34-60-106(2.5)(b). To the extent that Proponents intend that "phasing out" is shorthand for the required "reduction in permits approved each year" between 2026 and 2030, the title should be specific about that construction, as addressed above.

G. The title is misleading because it does not reflect #44's prohibition on permit modification or its required expiration of certain of the new permits.

Initiative #44 requires Commission rules "to **prohibit** the modification and require the expiration of all previously issued permits by December 31, 2033, if drilling operations have not commenced by that date." *See* proposed § 34-60-106(20.5)(c); *see also* proposed § 29-20-104(1)(h)(II) (permitting of new facilities and locations "is prohibited pursuant to section 34-60-106(20.5)").

A provision that alters the modification of operating permits is a key element of an initiative. Changes to what will or will not be permitted under the initiative – such as potential modification of permits – must be accurately described in the titles. *See In re Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #215*, 3 P.3d 11 (Colo. 2000) (striking title language that incorrectly portrayed a measure's limit on modifying certain extractive permits).

Similarly, the title is silent about the required expiration of permits granted where oil and gas production has not commenced. The expiration of permits is a key element of the measure, particularly given the array of possible lead-up activities that necessarily precede production. About this, the Board heard testimony on May 3.[15] The measure does not just limit the number of new permits to be issued but also adds a time clock for activation of certain of those new permits. This is an important feature of Initiative #44 that should be related in the titles.

H. The title is misleading in that it does not relate that the measure specifically "prohibit[s]" permitting of any new "oil and gas facilities" and "oil and gas locations."

This title is couched as a discontinuation of permitting of oil and gas operations. But the measure itself refers to the legal changes as a prohibition. *See* proposed § 34-60-106(20.5)(c) (permit modification is prohibited) and § 29-20-104(1)(h)(II) (permitting of new oil and gas facilities and locations is prohibited).

In addition, the title does not identify to what this prohibition applies. Yet, the measure is specific that it applies to "oil and gas facilities" and "oil and gas locations" which have specific

[15] *See* note 1, supra at 10:20-40 (testimony of M. Foote); *see also* C.R.S. § 34-60-103(6.5) (listing of activities comprising "oil and gas operation").

definitions that are different than "oil and gas operations." *Compare* C.R.S. § 34-60-103(6.2), (6.4), and (6.5).

The titles should be specific as to the measure's undisputed "prohibition" on permitting of oil and gas "facilities" and "locations."

I. The title is misleading as it is silent about the changed mission of the Colorado Oil and Gas Commission whose future activities will be limited to monitoring, plugging, and remediating oil and gas facilities.

Under current law, the Oil and Gas Commission has exceedingly broad powers. For example:

> **The commission has jurisdiction** over all persons and property, public and private, necessary to enforce this article 60, the power to make and enforce rules and orders pursuant to this article 60, and **to do whatever may reasonably be necessary to carry out this article 60…. Any delegation of authority to any other state officer, board, or commission to administer any other laws of this state relating to the conservation of oil or gas**, or either of them, is hereby rescinded and withdrawn, and that authority **is unqualifiedly conferred upon the commission**, as provided in this section.

C.R.S. § 34-60-105 (a), (b) (emphasis added). Under Initiative #44, though, the Commission's duties will have no such breadth and will be restricted to "primarily the monitoring, plugging, and remediating" of these facilities. *See* proposed § 34-60-106(20.5)(e). This is a fundamental change in powers that should, at the very least, be communicated in the titles.

J. The title is silent about the fact that the doctrine of waste cannot be applied based on the Commission's acts to restrict oil and gas permitting.

Voters should, at a minimum, be informed through the ballot title of the change to the doctrine of waste and thus the lack of associated remedies for holders of the rights of development. The underlying basis and importance of this doctrine are set forth in the single subject argument above and are incorporated here.

RESPECTFULLY SUBMITTED this 10th day of May, 2023.

RECHT KORNFELD, P.C.

s/ Mark Grueskin
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CERTIFICATE OF SERVICE

I, Mark Grueskin, hereby affirm that a true and accurate copy of the **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #44** was sent this day, May 10, 2023, via email to Paul Culnan and Patricia Nelson, via their counsel of record, Martha Tierney, at:

mtierney@tls.legal

s/ Mark Grueskin