

COLORADO TITLE SETTING BOARD

Suzanne Taheri and Steve Ward, Objectors

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #271

Suzanne Taheri and Steven Ward, registered electors of the State of Colorado, object to the Title Board's finding that Initiative 2023-2024 # 271 ("Initiative") constitutes a single subject and submit this Motion for Rehearing.

On April 18, 2023, the Title Board set the following ballot title and submission clause for the Initiative:

A change to the Colorado Revised Statutes allowing a Colorado resident, the state, or any political subdivision to bring a lawsuit against a person violating a law concerning oil, gas, or mineral operation to enjoin the violation or for damages caused by the violation to protect the public health, environment and natural resources; and, in connection therewith, specifying that any monetary damages collected be deposited in a state account.

The Initiative contains multiple subjects in violation of the Colorado Constitution. The Board lacks jurisdiction to set title as the Initiative contains multiple subjects.

If the Board does set a title, the title should be amended to include all material provisions.

A. The Initiative Impermissibly Contains Separate and Distinct Subject in Violation of the Single Subject Requirement.

While the intent of the proponents was to limit the Initiative to violations of oil and gas statutes, the text of the Initiative does not accomplish this.

The Proponents and the title of section 34-60-14 proposed by the Initiative purport to create a private action to enforce oil and gas statutes and regulations only. However, by its own terms, the Initiative applies a private right of action to the violation of any statute in title 34 of the Colorado Revised Statutes.

Although the title of section 34-60-14 only refers to oil and gas, that does not limit the scope of the Initiative. A "title cannot limit the plain meaning of a more specific provision within a statute." *In re Arvada Vill. Gardens LP v. Garate*, 529 P.3d 105 (Colo. 2023); citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

Thus, the Initiative provides a private right of action related to a broad range of statutes related to mineral resources, for example, title 34 statutes include mining operations, the underground storage of natural gas, reclamation, extraction of construction materials, geological

survey studies, mine ownership and leasing, ownership of mining equipment, property rights and rights-of-way, and county clerk recording duties.

The Colorado Constitution requires that “[n]o measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title...” and, “[i]f 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.” Colo. Const., art. V, § 1(5.5); *see also* § 1-40-106.5. “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*, 274 P.3d 562, 565 (Colo. 2012).

Grouping the provisions of a proposed initiative under the broad concept, such as “mineral resources,” would potentially mislead voters and does not satisfy the single-subject requirement. *In re Proposed Initiative 1996-4*, 916 P.2d 528 (Colo. 1996); *In re Ballot Title 1999-2000 Nos. 245(b), 245(c), 245(d), & 245(e)*, 1 P.3d 720 (Colo. 2000); *In re Ballot Title 1999-2000 Nos. 245(f) and 245(g)*, 1 P.3d 739 (Colo. 2000).

Therefore, the Initiative’s private right of action applicable to an expansive range of claims under various statutes that are not dependent upon or connected with each other does not satisfy single subject requirements. The Objectors request that the Title Board reconsider its decision and deny setting of a title for the Initiative on the grounds that the Initiative does not contain a single subject.

B. The Initiatives Provisions are So Vague, Misleading, and Broad that the Title Board Cannot Set a Title that Encompasses and Reflects the Purpose of the Measure.

The title of section 34-60-14 in the Initiative refers only to oil and gas statutes, which is misleading given the application of the private right of action to any statute in title 34. Voters would be surprised, given the exclusive reference to oil and gas statutes, to find that the private right of action applies to other, unrelated statutes and activities such as coal mining or property rights.

The single-subject rule prevents two potential dangers: combining subjects with no necessary or proper connection for the purposes of garnering support from voters with different interests, and avoiding voter surprise and fraud due to a surreptitious provision coiled up in the folds of an initiative. *In re Ballot Title 2011-2012 No. 45*, 274 P.3d 576 (Colo. 2012); *In the Matter of the Title, Ballot Title & Sub. Clause for 2015-2016 No. 63*, 370 P.3d 628 (Colo. 2016). The misleading text of the Initiative may garner support for the private right of action against oil and gas operators from voters who would not find it desirable or appropriate to establish a private right of action applied to the many other statutes in title 34. Similarly, the vagueness, exceptionally broad scope, and misleading text of this Initiative may surprise voters who support a private right of action against oil and gas operators but would not know that the reference to title 34 includes various unrelated statutes and, as a result, is not limited to claims against oil and gas operators.

C. The Title excludes Material Features of the Initiative.

The single subject of an initiative “be clearly expressed in its title.” Colo. Const. Art. V, section 1 (5.5). The Title Board to set a title which shall “correctly and fairly express the true intent” of the initiative. C.R.S. § 1-40-106(3)(b). An initiative that contains “a material and significant omission, misstatement, or misrepresentation” cannot stand. *In re Title, Ballot Title, and Submission Clause for 1999–2000* #29, 972 P.2d 257, 268 (Colo. 1999).

The title set for the Initiative excludes two material features of the measure. First, it states that it allows a resident, the state, or any political subdivision to bring a lawsuit against a person violating a law *concerning oil, gas, or mineral operation*. This is only a partial description of the statutes covered by the Initiative. The Initiative allows a lawsuit for violations of any statute under title 34, which have a much broader concern than just oil, gas, and mineral operations. The Board’s title fails to include this material information.

Second, awarding litigation costs to complainants who fully or partially prevail or who file a lawsuit that serves the public interest is a material feature of the Initiative and should be included in the title.

Finally, the measure contains a catch phrase “to protect the public health, environment and natural resources” “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 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), 1 C.R.S. (1999); *In re Ballot Title 1999-2000 # # 245(f) & 245(g)*, 1 P.3d 739, 743 (Colo. 2000).

In *Garcia, supra*, the principal purpose of the amendment was to direct public schools to deliver instruction in English. The ballot title was set as follows:

An amendment to the Colorado Constitution concerning English language education, and in connection therewith, requiring all children in Colorado public schools to be taught English *as rapidly and effectively as possible*(Emphasis added.)

The Court found the words operate as both a catch phrase and a slogan. They mask the policy question regarding whether the most rapid and effective way to teach English to non-English speaking children is through an English immersion program, a question of great public debate. The Court further found that the “as rapidly and effectively as possible” language in the titles tipped the substantive debate on an issue to be submitted to the electorate. Even though the

initiative contained this language, the Title Board was not permitted to include the wording where it is constituted a catch phrase. *Citing See In re Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850-51 (Colo. 1994).

Inserting the proponent's campaign slogan in the title is precisely the type of language the clear title requirement protects against. By including "in order to protect land, air, and water" the Board masks the policy question of whether banning oil and gas production in Colorado will protect land, air and water, a matter of great public debate. It also tips the debate through the use of this catch phrase.

The Board's job is to capture the *true* intent of the Measure and not include unabashed language that advocates for a Measure. While the Board may look the proponent's stated intent, they may not use slogans and catch phrases in presenting this to the voters.

Should the Title Board decide that it has jurisdiction to set a title for the Initiative, the title should be amended to cure these defects that would otherwise mislead and confuse voters.

The Objectors respectfully request that this Motion for Rehearing be granted and a rehearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 25th day of April, 2024.

/s/ Suzanne Taheri

West Group
Attorney for Objectors