

COLORADO TITLE SETTING BOARD

**IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE
FOR PROPOSED INITIATIVE 2023-2024 #86**

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2023-2024 #86

On behalf of Matthew Kirby, registered elector of the State of Colorado, the undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2023-2024 #86 (“Initiative #86”) and as grounds therefore state as follows:

I. THE TITLE SET BY TITLE BOARD AT OCTOBER 4, 2023 HEARING

On October 4, 2023, the Title Board set the following ballot title and submission clause for Initiative #86:

Shall there be a change to the Colorado Revised Statutes prohibiting the state, local governments, and special districts from adopting a law, ordinance, regulation, or code that favors or discriminates against consumer use of electricity, natural gas, solar, or wind power in homes and businesses for cooking, hot water systems, generators, or heating systems?

II. GROUND FOR REHEARING**A. The Initiative Impermissibly Contains Several Separate and Distinct Subjects in Violation of the Single Subject Requirement.**

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

no 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. “[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 Title, Ballot Title & Submission Clause 1990-2000 #104)*, 987 P.2d 249, 253 (Colo. 2000).

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 Title, Ballot Title & Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 465 (Colo. 2016). 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.*

Initiative #86 contains more than one subject in violation of article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5, C.R.S. Proponents state that the single subject of their measure is “consumer choice in energy.” But by making “energy consumption” writ large a matter of statewide concern, in addition to prohibiting the state, local governments, and special districts, from restricting an energy source used for cooking, hot water systems, generators, or heating systems based on the type of energy to be delivered to an individual consumer, the measure violates the single subject requirement.

Energy consumption is a separate subject from barring laws that restrict an energy source used for cooking, hot water systems, generators, or heating systems based upon the type of energy to be delivered to an individual consumer.

“Energy” is defined in the measure as “consumer use of electricity, natural gas [], solar energy device [], or wind electric generation.” “Energy consumption” and “consumption” are not defined in the measure. A review of common definitions of that term reveals that the term pertains to a much broader subject matter than the laws that are prohibited in the measure. Merriam Webster’s defines “consumption” as “use of something.”¹²³ The measure makes “energy consumption” a matter of statewide concern, which means that state law controls over county, local and special district laws in all matters related to energy consumption. Proponents contend that energy consumption, under the measure, is the amount of electricity, natural gas, solar energy device, or wind electric generation electricity, used for cooking, hot water systems, generators or heating systems that are delivered to an individual consumer.

Energy consumption can be measured at different levels, such as individual, household, industrial, or global.⁴ Energy consumption can also refer to the energy used by the body to maintain its functions and activities.⁵ Energy consumption is a part of energy homeostasis and is derived from food energy.⁶ These purposes are much broader than “electricity, natural gas [], solar energy device [], or wind electric generation” and include fuel for factories, gasoline or diesel or electricity for cars and trucks, including for factories, fuel for land use developers, internet access, and food for individuals.

Also, Colorado has already declared “the prevention, abatement, and control of air pollution in each portion of the state are matters of statewide concern.” Section 25-7-102(1), C.R.S. This measure, by creating a conflicting matter of statewide concern in the form of

¹ [Consumption Definition & Meaning - Merriam-Webster](#), (last accessed 10/11/2023).

² [What does Energy Consumption mean? - DEXMA](#) (last accessed 10/11/2023).

³ [World energy supply and consumption - Wikipedia](#) (last accessed 10/11/2023).

⁴ [Energy consumption - Wikipedia](#) (last accessed 10/11/2023).

⁵ *Id.*

⁶ *Id.*

allowing consumer choice in energy consumption, changes the status quo regarding Colorado's ability to pass laws to prevent, abate, and control air pollution.

Also, the measure defines "restrict" as "favoring or discriminating against an energy source." Because the measure makes energy consumption a matter of statewide concern, the state or local government or special district would not be able to favor an energy source within its boundaries, even if it were cheaper for consumers, or easier to access. That results in achieving the opposite of what the measure states it accomplishes: to "protect consumer choice in energy."

Finally, in Colorado, local governments frequently exempt from state taxes food, renewable energy components, and internet activities, just to name a few. This measure removes the taxing authority of local governments, i.e., local control, when there is any energy consumption involved.

Each of these purposes is couched in a measure that at first read would appear to be prohibiting laws that restrict an energy source (defined as electricity, natural gas, solar energy device, or wind electric generation), used for cooking, hot water systems, generators, or heating systems. But making energy consumption a matter of statewide concern is far broader. This is the classic "coiled up in the folds" scenario whereby the voting public will be affirmatively misled by the language of the measure. *See, e.g., Johnson, supra; In re Title & Ballot Title & Submission Clause for Initiative 2001-2002 #43*, 46 P.3d 438, 446 (Colo. 2002).

The purpose of the single subject requirement is to "obviate the risk of 'uninformed voting caused by items concealed within a lengthy or complex proposal'" *Id.* While the Initiative 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." Here, Initiative #86 brings all these dangers.

B. The Ballot Title and Submission Clause Is Misleading, and Does Not Correctly and Fairly Express Its True Intent and Meaning.

The title of the Initiative is misleading and does not correctly and fairly express the initiatives' 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. *See id.*

The Title for Initiative #86 does not apprise voters that the law changes county, local, and special district authority over all energy consumption, not just those that restrict an energy source (defined as electricity, natural gas, solar energy device, or wind electric generation), used for cooking, hot water systems, generators, or heating systems.

The real intent of the measure, as funded by the oil and gas industry, appears to be to stop Colorado communities from banning natural gas hook-ups in new buildings.⁷

Here, the title for Initiative #86 is one for which the general understanding of the effect of a "yes" or "no" vote will be unclear. *See generally* 1-40-106(3)(b); *see also In re Proposed Initiative on "Obscenity,"* 877 P.2d 848, 850-51 (Colo. 1994). As a result, the title for Initiative #86 does not enable voters to make an informed choice because it does not correctly and fairly express its true intent and meaning.

III. CONCLUSION

Based on the foregoing, Matthew Kirby requests a rehearing of the Title Board for Initiative 2023-2024 #86, because the initiative contains multiple subjects, the title is unclear and misleading to voters, and it fails to fairly express the initiative's true meaning and intent. As a result, the Title Board lacks jurisdiction to set a title and should reject the measure in its entirety.

Respectfully submitted this 11th day of October, 2023.

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⁷ [Fossil fuel advocates revive ballot measure to prohibit local gas bans in Colorado | Colorado Public Radio \(cpr.org\)](https://www.cpr.org/2023/10/11/fossil-fuel-advocates-revive-ballot-measure-to-prohibit-local-gas-bans-in-colorado/)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of October, 2023, a true and correct copy of **MOTION FOR REHEARING ON PROPOSED INITIATIVE 2023-2024 #86** was filed and served on Proponents Steven Ward and Suzanne Taheri, and the Title Board, via email to their counsel of record as follows:

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