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COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE BALLOT TITLE AND SUBMISSION CLAUSE FOR
INITIATIVE 2019-2020 #309

MOTION FOR REHEARING

Tim Howard (“objector”), a registered elector of the State of Colorado, through undersigned counsel, hereby submits this Motion for Rehearing of Initiative 2019-2020 #309 pursuant to Section 1-40-107(I)(a)(I) C.R.S. As grounds therefore objector states the following:

I. The Title Board lacks jurisdiction over Initiative #309 because it contains multiple separate and distinct subjects in violation of the Constitution’s single subject requirement.

Initiative #309 contains multiple subjects and therefore the Title Board lacks jurisdiction to set title. Colorado law requires “that every constitutional amendment or law proposed by initiative ... be limited to a single subject, which shall be clearly expressed in its title.” C.R.S. § 1-40-106.5(1)(a); see also 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...”). A proposed initiative violates this rule if its text “relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other.” *People ex rel. Elder v. Sours*, 74 P. 167, 177 (1903); see *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d 438, 441 (Colo. 2002) (describing use of *Sours* test to analyze ballot initiatives). As such, the subject matter of an initiative must be “necessarily and properly connected” rather than “disconnected or incongruous.” *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by Title Bd. Pertaining to a Proposed Initiative “Pub. Rights in Waters II,”* 898 P.2d 1076, 1079 (Colo.1995). A proponent’s attempt to characterize a proposed initiative under “some overarching theme” will not save the measure if it contains separate and unconnected purposes. *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442.

In this case, the proponents attempt to use an overarching theme of “concerning the regulation of oil and gas operation” to fuse together separate and unconnected purposes. The central theme of the initiative is disbanding the Colorado Oil and Gas Conservation Commission (“COGCC”) and replacing it with the Independent Oil and Gas Board. However, the following subjects are “coiled up in the folds” of the initiative that either would not have passed on their own accord or were written with the intent of misleading voters to garner support from those with diverse interests, *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 566 (Colo. 2012), including: (1) granting the new board veto authority over new rules promulgated by four other state agencies and creating a new rulemaking process that falls outside the state Administrative Procedures Act, and (2) limiting local government authority to regulate oil and gas regulation.

1. **Grants the new board veto authority over new rules promulgated by four other state agencies and creates a new rulemaking process that falls outside the state Administrative Procedures Act**

Initiative #309 grants the Independent Board veto authority over the rulemaking of the Air Quality Control Commission (“AQCC”), Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission. This veto authority granted to the Independent Board is a separate subject. This “surreptitious provision ‘coiled up in the folds’ of a complex initiative,” *In re Proposed Initiative 2001–02 No. 43*, 46 P.3d at 442; *see* § 1–40–106.5(1)(e)(II), is unrelated to eliminating the COGCC and replacing it with the Independent Board.

Initiative #309, at proposed Colo. Const. Art. XVIII, Sec. 17(12) states:

BECAUSE THE FOLLOWING AREAS OF REGULATION ARE OF SUCH IMPORTANCE IN BALANCING THE PUBLIC HEALTH, SAFETY AND WELFARE OF CITIZENS WITH RESPONSIBLE DEVELOPMENT THAT REVIEW AND OVERSIGHT BY MORE THAN ONE AUTHORITY IS WARRANTED, THE FOLLOWING ENTITIES OR ANY SUCCESSOR ENTITIES HAVE THE AUTHORITY TO ADOPT RULES PURSUANT TO THE FOLLOWING STATUTES OR SUCCESSOR STATUTES, BUT SUCH RULES SHALL ONLY BECOME EFFECTIVE UPON APPROVAL OF THE INDEPENDENT BOARD:

- (a) THE AIR QUALITY CONTROL COMMISSION FOR RULES REGARDING ARTICLE 7 OF TITLE 25, COLORADO REVISED STATUTES, THE EMISSION OF AIR POLLUTANTS FROM OIL AND GAS OPERATIONS;
- (b) THE WATER QUALITY CONTROL COMMISSION FOR RULES REGARDING ARTICLE 8 OF TITLE 25, COLORADO REVISED STATUTES, THE DISCHARGE OF WATER POLLUTANTS FROM OIL AND GAS OPERATIONS;
- (c) THE STATE BOARD OF HEALTH FOR RULES REGARDING SECTION 25-11-104, COLORADO REVISED STATUTES, THE DISPOSAL OF NATURALLY OCCURRING RADIOACTIVE MATERIALS AND TECHNOLOGICALLY ENHANCED NATURALLY OCCURRING RADIOACTIVE MATERIALS FROM OIL AND GAS OPERATIONS; AND
- (d) THE SOLID AND HAZARDOUS WASTE COMMISSION FOR RULES REGARDING:
 - (I) ARTICLE 15 OF TITLE 25, COLORADO REVISED STATUTES, THE DISPOSAL OF HAZARDOUS WASTE FROM OIL AND GAS OPERATIONS; OR
 - (II) SECTION 30-20-109(1.5), COLORADO REVISED STATUTES, THE DISPOSAL OF EXPLORATION AND PRODUCTION WASTE FROM OIL AND GAS OPERATIONS.

The initiative language does not state what form the “approval of the Independent Board” must take. Whether the Independent Board must take formal action to affirm the agencies’ rules or if it must undertake a separate independent rulemaking, the result is the same: No rule affecting oil and gas development passed by these four agencies may go into effect without the approval of the Independent Board.

As written, the Independent Board’s authority over the rulemaking of the AQCC, Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission occurs despite the fact that the other state agencies have different missions and expertise. For example, the AQCC, acting on its authority pursuant to Article 7 of Title 25 of the Colorado Revised Statutes, would not be permitted to enact new oil and gas operation rules to address compliance with federal ozone standards without the explicit approval of the Independent Board. The considered judgment and expertise of the AQCC to accomplish its mission of achieving “the maximum practical degree of air purity in every portion of the state, to attain and maintain the national ambient air quality standards, and to prevent the significant deterioration of air quality in those portions of the state where the air quality is better than the national ambient air quality standards,” C.R.S. § 25-7-102(1), and its efforts to meet federal and state legislative air quality mandates are made subservient to the expertise and judgment of the Independent Board that is

charged with balancing public health safety and welfare with responsible oil and gas development.

The expertise, judgment, and missions of the Water Quality Control Commission, Board of Health, and the Solid and Hazardous Waste Commission also will be subservient to the Independent Board. The wholesale shift of authority from state agencies charged with protecting public health, air quality, drinking water quality, and radioactive and hazardous waste disposal to the Independent Board is an unlawful second subject.

Granting veto authority to one executive branch agency for rules promulgated by another executive branch agency also runs counter to the rules of all four impacted executive agencies and conflicts with the Colorado Administrative Procedures Act (“APA”). The Colorado APA only grants the General Assembly, the legislative branch, the legal authority to determine if a new or amended rule complies with statutes via the annual rule review bill, and the Governor, executive branch, has the power to veto the annual rule review bill. C.R.S. § 24-4-103 (8)(c) & (d). The Colorado APA process for adopting rules does not contemplate another agency also having to adopt the same rule.

An initiative violates the single subject rule when it proposes a shift in governmental powers that bear no necessary or proper connection to the central purpose of the initiative. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1077 (Colo. 2010) (citing *In re No. 29*, 972 P.2d at 262–65; *In re # 64*, 960 P.2d at 1197–1200.) Granting veto authority to the new board over four other agencies within the Executive Branch is a separate subject.

2. Limits local government authority to regulate oil and gas development

The proposed initiative’s elimination of a local government’s ability to apply its statutory land use authority to oil and gas operations is a second subject that is unrelated to the subject of eliminating the COGCC and replacing it with an Independent Board. In Colo. Const. Art. XVIII, Sec. 17(13)(a), the proposed initiative states that subsections (13)(b) and (13)(c) “alter, impair, or negate the authority” of local governments to regulate oil and gas development pursuant to Colorado statutes at article 65.1 of title 24 and sections 29-20-104 and 34-60-131. The proposed initiative also strikes C.R.S. § 34-60-105(1)(b)(V), which says “...nothing...alters, impairs, or negates the authority of: (V) a local government to regulate oil and gas operations pursuant to section 29-20-104.” The initiative limits local government authority by eliminating current laws that give local governments authority without limitation and replaces it with an enumerated list of regulatory powers in subsection (13)(c).

The construction of subsection (13)(c) specifically limits what regulatory powers are available to local governments, which results in rescinding all other local government planning for and regulating oil and gas development within its jurisdiction. Subsection (13)(c) is a limited list of activities that “each local government within its respective jurisdiction has the authority to plan for and regulate oil and gas development.” The universe of activities that local governments can plan for and regulate is limited to five provisions: 1) creating a setback requirement, 2) requiring air quality monitoring at new oil and gas operations, 3) requiring safety at plugged and

abandoned wells in areas of new production, 4) regulating flow lines, and 5) requiring health and safety training for oil and gas workers.

By declaring what regulatory authority a local government has over oil and gas development within its jurisdiction, everything not included in subsection (13)(c) is therefore excluded and beyond the regulation authority of the local government. In interpreting an initiative, the court will apply the general rules of statutory construction and accord the language of the measure its plain meaning. *In re Title, Ballot Title & Submission Clause, & Summary for 2005–2006 # 75*, 138 P.3d 267, 271 (Colo.2006). Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others. *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001); *Cain v. People*, 327 P.3d 249, 253 (Colo. 2014). The phrase “*expressio unius est exclusio alterius*” (the express mention of one thing excludes all others) stands for the canon of construction that when a statute includes a list of specific items, the list is presumed to be exclusive. Therefore, the statute applies only to the listed items and not to others.

Subsection (13)(b) limits the ability of local governments to regulate oil and gas operations by requiring that they “regulate and authorize oil and gas development in a manner that balances” responsible oil and gas development with protections of public health, safety and welfare. Local governments are further required to ensure that its actions are “feasible and reasonable.” The COGCC had a similar balancing requirement in its statute prior to SB19-181. In *COGCC v. Martinez*, 433 P.3d 22 (Colo. 2019), the Court addressed this exact balancing question and found it had multiple objectives. The Court determined that the legislative intent of the statute was “to promote multiple policy objectives, including the continued development of oil and gas resources...” *COGCC v. Martinez*, 433 P.3d at 30. As discussed in *Martinez*, requiring local governments to “authorize oil and gas development in a manner that balances the protection of public health, safety, and welfare” and the environment places substantial new restrictions on local governments’ ability to protect public health, safety, welfare and the environment.

Voters would be surprised to learn that the initiative that abolishes the COGCC also severely curtails the ability of local governments to regulate oil and gas development within their jurisdictions. Reducing local government land use authority is “coiled within the folds” of this complex initiative and therefore represents a second subject. *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 3*, 274 P.3d 562, 566 (Colo. 2012).

II. Even if the Title Board has jurisdiction, the Ballot Title and Submission Clause is incomplete and misleading.

Several parts of the proposed initiative are not adequately described in the title. The title and submission clause should allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal. *In re Title, Ballot Title & Submission Clause for 2013–2014 #90*, 328 P.3d 155, 162 (Colo. 2014). The Title Board’s language must “clearly and concisely reflect the central features of a proposed initiative.” *In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs*, 830 P.2d 963, 970 (Colo. 1992). To accomplish this task, the Court has required an initiative’s title to provide enough information that a voter, “whether familiar or unfamiliar with the subject matter of a particular proposal, [can] determine intelligently whether

to support or oppose such a proposal.” *In re 2013–2014 #90*, 328 P.3d at 162. In addition, the title must “correctly and fairly express the true intent and meaning” of the initiative. C.R.S. §1-40-106(3)(b).

The title inadequately describes the initiative because it would remove most local government land use authority over oil and gas rather than granting “additional authority.”

The title is inaccurate because the initiative would remove most local government land use authority over oil and gas rather than granting “additional authority.”

The ballot title incorrectly states that local governments are being granted additional authority to plan for and regulate oil and gas development, when actually local government authority is severely limited by the proposed initiative.

As described above, the construction of proposed Colo. Const. Art. XVIII, Sec. 17(13)(a) & (13)(c) specifically limits what regulatory powers are available to local governments and rescinds all other current local government planning and regulating of oil and gas development within its jurisdiction. Subsection (13)(c) enumerates a limited list of activities that “each local government within its respective jurisdiction has the authority to plan for and regulate oil and gas development.” By declaring what regulatory authority a local government has over oil and gas development within its jurisdiction, everything not included in subsection (13)(c) is therefore excluded and beyond the regulation authority of the local government.

Limiting setback distances to 1,000 feet is also a curtailment because local governments can and currently have setbacks greater than 1,000 feet. For example, Adams County and the Town of Superior have recently passed local land use regulations that provide setbacks that require oil and gas facilities to be located farther than 1,000 feet from homes and schools.

The universe of activities that local governments can plan for and regulate is therefore limited to five provisions: 1) creating a setback requirement of no greater than 1,000 feet, 2) requiring air quality monitoring at new oil and gas operations, 3) requiring safety at plugged and abandoned wells in areas of new production, 4) regulating flow lines, and 5) requiring health and safety training for oil and gas workers.

Therefore, an accurate ballot title would state the initiative is, “limiting local governments’ authority to plan for and regulate oil and gas development to the following areas:” and then list the five enumerated provisions. Language has been proposed in Exhibit A below.

We propose amending the ballot title language as shown in Exhibit A to correctly and fairly express the true intent and meaning of the initiative

III. Conclusion

Accordingly, the objector respectfully requests that this Motion for Rehearing be granted and a hearing set pursuant to C.R.S. § 1-40-107(1).

Respectfully submitted this 22nd day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing MOTION FOR REHEARING was served via US Mail or email to the proponents on 22nd day of April, 2020 to the following:

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EXHIBIT A

Proposed Initiative 2019-2020 #309

An amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning the regulation of oil and gas operation, and, in connection therewith, replacing the oil and gas conservation commission with a new independent oil and gas board; specifying the appointment process for and qualification of board members with the intent of ensuring the political independence of the board; vesting all regulatory power and jurisdiction over oil and gas development in the board except as otherwise specified; requiring the board and local governments to regulate and authorize oil and gas development in a manner that balances the protection of the public health, safety, and welfare of citizens, the protection of the environment, and the responsible development of oil and gas resources; requiring the board to establish a statewide minimum distance standard for new oil and gas development and to set a minimum financial assurance per well; specifying a requirement that rules pertaining to oil and gas operations promulgated by ~~the air quality control commission, water quality control commission, board of health, and the solid and hazardous waste commission~~ ~~certain other state rule-making entities~~ may become effective only upon approval of the board; and ~~granting local governments specified additional authority to plan for and regulate oil and gas development~~ limiting local governments' authority to plan for and regulate oil and gas development to the following areas: 1) creating a setback requirement of no greater than 1,000 feet, 2) requiring air quality monitoring at new oil and gas operations, 3) requiring safety at plugged and abandoned wells in areas of new production, 4) regulating flow lines, and 5) requiring health and safety training for oil and gas workers.