

COLORADO SUPREME COURT

2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2021-2022)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative
2023-2024 #289

Petitioners: Suzanne Taheri and Steve
Ward,

v.

Title Board: Theresa Conley, Jeremiah
Barry, and Kurt Morrison

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Case No. 2024SA133

THE TITLE BOARD'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

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The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,023 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

The brief contains, under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/ Reed W. Morgan

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TABLE OF CONTENTS

ISSUE ON REVIEW	1
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. The Title Board lacked jurisdiction to set a title because Initiative #289 contains multiple subjects.	3
A. Standard of review and preservation.	3
B. Initiative #289 contains multiple subjects that carry out separate and distinct purposes.	5
C. The multiple subjects of Initiative #289 risk causing voter surprise.	8
D. Initiative #270 does not affect the determination that Initiative #289 contains multiple subjects.	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<i>Camacho v. Honda Motor Co., Ltd.</i> , 741P.2d 1240 (Colo. 1987)	6
<i>Gerrity Oil & Gas Corp. v. Magness</i> , 946 P.2d 913 (Colo. 1997)	5
<i>In re Matter of Title, Ballot Title and Submission Clause for 2021-2022 #16</i> , 2021 CO 55	8, 9, 10
<i>In re Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #89</i> , 2014 CO 66	9
<i>In re Title, Ballot Title & Submission Clause for 2009-2010 #91</i> , 235 P.3d 1071 (Colo. 2010).....	1
<i>In re Title, Ballot Title & Submission Clause for 2017-2018 #4</i> , 2017 CO 57	5, 7
<i>In re Title, Ballot Title, & Submission Clause for 2013-2014 #76</i> , 2014 CO 52	3, 4
<i>In re Title, Ballot Title, & Submission Clause for 2019-2020 #3</i> , 2019 CO 57	4
<i>In re Title, Ballot Title, Submission Clause for 1997-1998 #30</i> , 959 P.2d 822 (Colo. 1998).....	9

CONSTITUTIONS

Colo. Const. art. V, § 1(5.5).	3
--------------------------------------	---

STATUTES

§ 1-40-107(2), C.R.S.	1
----------------------------	---

§ 18-1-502, C.R.S. 6

§ 34-60-114.1, C.R.S. 1, 6

OTHER AUTHORITIES

Restatement (Second) of Torts section 402A (1965)..... 6

ISSUE ON REVIEW

I. Whether the Title Board correctly denied setting a title for 2023-2024 #289 on the basis that it contains multiple subjects.¹

STATEMENT OF THE CASE

Proposed initiative 2023-2024 #289 (“Initiative #289”) would enact § 34-60-114.1, C.R.S., imposing strict liability for oil and gas operations that cause damages arising from personal injury, property damage, or environmental harms. *See Record*, p 3, filed May 1, 2024. The stated purpose of the initiative is to ensure the protection of public health, safety, property, wildlife and the environment. *See id.* It would also, separately, change the definition of “strict liability” in such contexts to apply *only* to instances of gross negligence and willful misconduct. *See id.*

¹ The Petition for Review identifies two issues for review. The first issue is the same one identified here by the Title Board. The second issue, which references proposed initiative 2023-2024 #270 (“Initiative #270”), is the subject of a separate proceeding before this Court under § 1-40-107(2), C.R.S.

At its April 18, 2024, meeting, the Title Board concluded that it lacked jurisdiction to set a title for Initiative #289 because the measure contains multiple subjects. One, the imposition of a new strict liability legal standard for claims against oil and gas operators, owners, or producers. And, two, the re-definition of “strict liability” to encompass only gross negligence and willful misconduct. *Id.* at 5. Petitioners Suzanne Taheri and Steve Ward filed a timely motion for rehearing challenging these findings by the Title Board. *Id.* at 9-10. The Board considered the motion at its April 25, 2024 meeting. *Id.* at 7. By a 3-0 vote, the Board denied the motion. *Id.*

Petitioners now challenge whether the Board correctly found that it lacked jurisdiction to set a title for Initiative #239 because the measure has multiple subjects. *See* Pet. for Review 4.

SUMMARY OF ARGUMENT

The Title Board correctly denied setting a title for Initiative #289. The Title Board lacked jurisdiction to set a title for Initiative #289 because it contains multiple subjects. These subjects include a re-

definition of strict liability that is separate and distinct (and, in fact, contradictory) to both its other subject (imposition of a strict liability standard) and expressed purpose (to protect the health, safety and environment). Initiative #289 also would cause voter confusion. Its expressed purpose indicates it protect health, safety and the environment by holding oil and gas operations strictly liable for their conduct, when in fact, the initiative would make it more difficult to hold those operators liable due to its definition of strict liability that is inconsistent with Colorado law.

ARGUMENT

I. The Title Board lacked jurisdiction to set a title because Initiative #289 contains multiple subjects.

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). “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 Title, Ballot Title, & Submission Clause for*

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 2019-2020 #3*, 2019 CO 57, ¶ 8. 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 2013-2014 #76*, 2014 CO 52, ¶ 8.

The Title Board agrees this issue is preserved. Petitioners’ Motion for Rehearing challenged the Title Board’s determination that “imposing a strict liability standard for oil and gas operations and defining ‘strict liability’ in a way that is more limited than its common usage constitutes two separate subjects.” Record, p 9.

B. Initiative #289 contains multiple subjects that carry out separate and distinct purposes.

“We have held repeatedly that where a proposed initiative ‘tends to effect or to carry out one general objective or purpose,’ it presents only one subject.” *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 8. “[W]here an initiative advances separate and distinct purposes, ‘the fact that both purposes relate to a broad concept or subject is insufficient to satisfy the single subject requirement.’” *In re Title, Ballot Title & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010).

Under existing Colorado law, oil and gas operators, owners and producers are liable for damages arising out of their operations consistent with standard principles of common tort law, including in the event of negligence and trespass. *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 926 (Colo. 1997).

The first subject and described purpose of Initiative #289 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 in the state of Colorado” Record, p 3. In describing its purpose, Initiative #289 further finds that it is “necessary to hold any operator, owner, or producer accountable for any harm caused to public health, safety, property, wildlife or the environment by oil and gas operations and to promote responsible practices within the industry.” *Id.* In accord with its described purpose, Initiative #289 would provide that “any operator, owner, or producer is strictly liable for any damages, including personal injury, property damage, and environmental harm, resulting from oil and gas operations.” *Id.*

Strict liability is a commonly understood and well-established doctrine in Colorado. *See, e.g., Camacho v. Honda Motor Co., Ltd.*, 741P.2d 1240, 1244 (Colo. 1987) (noting the Court’s adoption of the strict liability doctrine set forth in Restatement (Second) of Torts section 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”); § 18-1-502, C.R.S. (“If [a voluntary act or omission] is all that is required for commission of a particular offense,

or if an offense or some material element therefore does not require a culpable mental state on the part of the actor, the offense is one of ‘strict liability.’”).

In addition to its first subject (imposing strict liability for oil and gas operations), Initiative #289 also contains a second subject, which is to re-define strict liability as follows: “‘strict liability’ or ‘strictly liable’ means liability where an operator, owner, or producer has acted with gross negligence or willful misconduct.” Record, p 3.

Making oil and gas operators liable via a strict liability regime (the first subject) is separate from the re-definition of strict liability (the second subject) because they do not “carry out one general objective or purpose.” *In re 2017-2018 #4*, 2017 CO 57, ¶ 8. Rather, they advance “separate and distinct purposes.” *In re 2009-2010 #91*, 235 P.3d at 1076. The second subject limits liability of oil and gas operations by re-defining strict liability. Record, p 3. This is contrary to the purpose of the first subject, which expands the liability of oil and gas operators for the protection of public health, safety, property, wildlife and the

environment. Record, p 3. The second subject is also contrary to the finding that it is “necessary to hold any operator, owner, or producer accountable for *any* harm caused to public health, safety, property, wildlife or the environment by oil and gas operations” *Id.*

(emphasis added). The fact that both subjects relate to the same broad concept – oil and gas operator liability – does not render them the same subject since they have separate and distinct purposes.

C. The multiple subjects of Initiative #289 risk causing voter surprise.

The single subject rule is aimed at “prevent[ing] surprise and fraud from being practiced upon the voters.” *In re Matter of Title, Ballot Title and Submission Clause for 2021-2022 #16*, 2021 CO 55, ¶ 11 (quoting § 1-40-106.5(1)(e)(II), C.R.S.). In *In re 2021-2022 #16*, 2021 CO 55, the Court reviewed an initiative that would incorporate livestock into animal cruelty statutes, but which also contained an expanded definition of “sexual act with an animal” that criminalized new conduct toward all animals. *Id.*, ¶ 41. In finding that the initiative contained multiple subjects, the Court reasoned that “notwithstanding the

initiative’s brevity,” combining the two matters “run[s] the risk of surprising voters with a ‘surreptitious’ change” *Id.*, ¶ 41 (citation omitted). In particular, “voters may focus on one change and overlook the other” *Id.* (citation omitted). *See also In re Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 2014 CO 66, ¶ 19 (danger of voter surprise exists where initiative, “although claiming to have a single subject, in reality has multiple purposes, and as a result, voters would not expect that passing the initiative would lead to one or more of the initiative’s outcomes”); *In re Title, Ballot Title, Submission Clause for 1997-1998 #30*, 959 P.2d 822, 827 (Colo. 1998) (initiative that provided a tax break presented a danger of surprise because “buried within the tax cut language” was a second subject that imposed new criteria for voter approval of revenue and spending increases).

Initiative #289 presents an even greater risk than Initiative #16 of “surprising voters with a ‘surreptitious’ change.” *In re 2021-2022 #16*, 2021 CO 55, ¶ 41. While Initiative #16 contained two separate subjects

that broadly (although differently) sought to protect animal lives and welfare, Initiative #289 contains a second subject that surreptitiously undermines its first subject, expressed purpose and finding.

Specifically, in connection with Initiative #289's described purpose of protecting public health, safety, property, wildlife and the environment, and its finding that oil and gas operations should be liable for any harm they cause, the initiative would implement strict liability against oil and gas operations, but then also insulate such operations (including from existing common law claims) by re-defining a commonly-used and well-established term – strict liability – to permit claims only in the event of gross negligence or willful misconduct.

D. Initiative #270 does not affect the determination that Initiative #289 contains multiple subjects.

Petitioners argue that Initiatives #270 and #289 must be similarly construed such that they both either contain a single subject or multiple subjects. Petition for Review at 4 and n.1; Record, p 10. Initiative #270 is separately before the Court and is not the subject of this proceeding. Nevertheless, to briefly respond to Petitioners' argument, each of the

factors demonstrating that Initiative #289 contains multiple subjects is absent in Initiative #270. Initiative #270 and Initiative #289 have the same expressed purposes.² Initiative #270, however, defines strict liability as “liability without regard to fault, negligence, or intent.” See <https://shorturl.at/akCTW>.

As detailed above, Initiative #289’s definition of “strict liability” conflicts with its first subject, expressed purpose, and finding. But Initiative #270’s definition of strict liability is consistent with Initiative #270’s expressed purpose and finding and seeks to further that purpose to protect public health, safety, and the environment by increasing liabilities for oil and gas operations in Colorado. And, because Initiative #270’s definition of strict liability is consistent with the initiative’s

² Initiative #270, identically to Initiative #289, describes its purpose as follows: “The purpose of this section 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 in the state of Colorado, including emissions of harmful air pollutants, harm to wildlife or habitat, spills or releases of toxic chemicals, fires, explosions, or earthquakes.” See <https://shorturl.at/akCTW>.

expressed purpose and finding and the strict liability doctrine in Colorado, there is no risk of voter confusion with Initiative #270.

CONCLUSION

The Court should therefore affirm the Title Board's decision to not set a title for 2023-2024 #289 because it contains multiple subjects.

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, 2023, addressed as follows:

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