COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2025-2026 #311

MOTION FOR REHEARING

On behalf of Lynn Granger and Carly West (collectively, the "Objectors"), registered electors of the State of Colorado, the undersigned counsel hereby submit this Motion for Rehearing for Proposed Initiative 2025-2026 #311 ("Initiative #311") pursuant to C.R.S. § 1-40-107, and as grounds therefore state as follows:

This Motion seeks the Title Board's review for three reasons: (1) the Title Board lacks jurisdiction to set a title because Initiative #311 impermissibly contains multiple separate and distinct subjects in violation of the single-subject requirement; (2) the Title Board lacks jurisdiction to set a title because Initiative #311 is vague, confusing, and unclear; and (3) the title set for the proposed measure fails to accurately describe the measure and would mislead voters.

I. INITIATIVE #311 IMPERMISSIBLY CONTAINS MULTIPLE SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

Initiative #311 contains multiple distinct subjects improperly coiled in the folds that would lead to either voter surprise or impermissible logrolling. The single-subject requirement is designed to:

> [F]orbid . . . the practice of putting together . . . subjects having no necessary or proper connection, for the purpose of enlisting in support of the [initiative] the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits.

C.R.S. § 1-40-106.5(1)(e)(I); *see also In re Title, Ballot Title & Submission Clause, for 2007–2008, #17*, 172 P.3d 871, 875 (Colo. 2007) ("We must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme.").

According to proponents, the single subject of Initiative #311 is "protecting underground sources of drinking water from injected oil and gas wastewater." The measure seeks to achieve this goal by imposing joint and several liability on oil and gas operators and waste injectors for damages caused by generating or injecting exploration and production waste. But the measure does more than that.

First, Initiative #311 imposes joint and several liability for all costs associated with "remediation of the underground source of drinking water to restore it to its pre-damage condition." What "pre-damage condition" means is unclear. If fracking operations occurred, does that require placing all the underground rock back in its original location? Nevertheless, Colorado law currently does not require that oil and gas operators and waste injectors restore underground source of drinking water to "its pre-damage condition." Rather, current law involves ensuring that groundwater meets quality standards and qualifications. *See, e.g.*, Energy and Carbon Management Commission ("ECMC") Rule 912.c.1 These are different things. Groundwater could be remediated to meet current quality standards but not be restored to "its pre-damage condition." As a result, Initiative #311 clandestinely contains a new cause of action—requiring restoration to pre-damage conditions—not currently in Colorado law. This aspect is coiled up in the folds of the measure and not necessarily and properly connected to the measure's central feature of imposing joint and several liability on such operations.

Second, Initiative #311 also improperly combines two aspects with different temporal elements: (1) providing for damages for conduct that has transpired (backward-looking) and (2) requiring restoration (forward-looking). These purposes are separate and distinct. *See In re 2009–2010 #91*, 235 P.3d at 1076 (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1997–1998 #64*, 960 P.2d 1192, 1196 (Colo. 1998)) ("[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.'") (alteration in original).

These multiple subjects are not necessarily and properly connected to each other, but instead achieve separate and distinct purposes. *See In re Matter of Title, Ballot Title and Submission Clause for 2019–2020 #315*, 500 P.3d 363, 367 (Colo. 2020) (quoting *In re 2015–2016 #73*, 369 P.3d at 568) (in deciding whether an initiative addresses a single subject, the relevant question is if its provisions are "necessarily and properly connected rather than disconnected or incongruous"). The measure thus falls victim to the ills plaguing omnibus measures. In particular, Initiative #311 presents logrolling risks, as different voters or groups may favor one aspects (requiring oil and gas operators to restore contaminated drinking water to pre-damage conditions) but disapprove of the other (imposing joint and several liability on these operators for harm caused). *Outcelt v. Bruce*, 961 P.2d 456, 464 (Colo. 1998) ("[T]he purpose of the single subject requirement of article V, section 1(5.5) is to prohibit the practice of putting together in one measure subjects having no necessary or proper connection for the purpose of garnering support for measures from parties who might otherwise stand in opposition.) (Kourlis, J., dissenting); *see In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076, 1079 (Colo. 1995) (explaining that a central purpose of the single-subject requirement is that it "precludes the joining together of multiple subjects into a single initiative in the hope of attracting support from various factions which may have different or even conflicting interests"). Accordingly, Initiative #311 contains multiple subjects and

the Title Board lacked jurisdiction to set title. *Matter of Titles, Ballot Titles, & Submission Clauses for Proposed Initiatives 2021-2022 #67, #115, & #128*, 526 P.3d 927, 929 (Colo. 2022).

II. THE TITLE BOARD LACKS JURISDICTION TO SET TITLE ON INITIATIVE #311 BECAUSE THE MEASURE IS SO VAGUE, CONFUSING, AND UNCLEAR THAT IT CANNOT BE UNDERSTOOD.

The Colorado Constitution mandates that an initiative's single subject shall be clearly expressed in its title." *See In re Title, Ballot Title and Submission Clause for 2015-2016 #73, 369 P.3d 565, 568 (Colo. 2016).* The clear title standard requires that titles "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." *Id.* The Board must consider the confusion that may arise from a misleading title and set titles that "correctly and fairly express the true intent and meaning" of a measure. *Id.* (quoting C.R.S. § 1-40-106(3)(b)). Based on these principles, if an initiative is so vague, confusing, or unclear that its true purpose cannot be understood, then the Title Board lacks jurisdiction to set a title. The Title Board has declined to set a title on this ground in the past, and it should similarly refrain from doing so here.

The proposed statutory text of Initiative #311 reads:

> Any oil and gas operator or waste injector that generates or injects exploration and production waste resulting in damage to an underground source of drinking water *shall be held* jointly and severally liable for all costs associated with: (a) remediation of the underground source of drinking water to restore it to its pre-damage condition; and (b) compensation for any economic, environmental, or health-related harm caused by the damage.

(Emphasis added). Similarly, the title as designated by the Title Board reads:

> A change to the Colorado Revised Statutes *holding* oil and gas operators and waste injectors jointly and severally liable for damage to underground drinking water sources caused by the generation or injection of exploration and production waste, and, in connection therewith, *holding* operators and waste injectors liable for all costs to restore the drinking water source and for economic, environmental, or health-related harm caused by the damage.

(Emphasis added).

The title language above implies the existence of an enforcement mechanism to impose the potential liability described in Initiative #311. However, there is no explicit enforcement provision in Initiative #311.

As Initiative #311 would reside in Title 34, Article 60 of the Colorado Revised Statutes, and it does not contain its own enforcement provision, it must rely on enforcement mechanism already present in Article 60. Section 34-60-114 of the Colorado Revised Statutes provides private individuals with the opportunity to sue for damages for violations of Article 60. Section 34-60-121 of the Colorado Revised Statutes variously provides the ECMC with the ability to impose penalties by order after a hearing for violations of Article 60 and provides the state's Attorney General with the ability to bring an action to recover the amount of any monetary penalties on behalf of the commission.

While Initiative #311 is unclear about which of these enforcement mechanisms it seeks to avail itself of, it seems likely that this measure would be enforced at least in part by individuals. Section 34-60-121 of the Colorado Revised Statutes, which provides that "[a]ny energy and carbon management operator that violates this article 60, any rule or order of the commission, or any permit is subject to a penalty of not more than fifteen thousand dollars for each act of violation per day that the violation continues," is inherently incongruous with the joint and several liability for "costs associated with" remediation and compensation imposed through Initiative #311. Such associated costs could reasonably exceed the damages cap expressed in C.R.S. § 34-60-121.

However, the title and the proposed statutory language of Initiative #311, confusingly, do not square with an enforcement regime centered upon a private right of action. The title text provides for "a change to the Colorado Revised Statutes *holding* oil and gas operators and waste injectors jointly and severally liable" and the proposed statutory language provides that operators "shall be held" jointly and severally liable." This language implies automatic liability, as adverse action automatically transpires, rather than an opportunity for imposition of this kind of liability through civil suits or administrative action.

If the measure was intended to provide an opportunity for imposition of joint and several liability through individual civil suits, it should make that intention clear. Likewise, if the measure was intended to be enforced through administrative action by the ECMC or Attorney General, that should be clear in the text of the measure.

As it stands, it is unclear if Initiative #311 intends for ECMC or Attorney General enforcement because of the inherent conflict between the damages cap in C.R.S. § 34-60-121 and the uncapped damages language in the proposed measure. The language of Initiative #311 also does not comport with a private civil

enforcement regime. Thus, this uncertainty as to enforcement results in an initiative that is so vague, confusing, and unclear that its true purpose cannot be understood by voters. Resultingly, Title Board lacks jurisdiction to set a title.

And, at minimum, this aspect needs to be addressed in the title. The measure does not "hold" oil and gas operators and waste injectors liable. Rather, they would be found liable by the courts or administrative agencies. The title should clarify that liability is not automatic.

III. THE TITLE FAILS TO ACCURATELY DESCRIBE THE MEASURE AND WOULD MISLEAD VOTERS.

Even if the Title Board were to affirm it has jurisdiction to set a title, and that the measure does not impermissibly contain multiple subjects, setting a title for Initiative #311 is problematic for at least five reasons. The draft title approved at the April 15th hearing must be amended so that the title fully and accurately captures the measure's central features and does not mislead voters.

First, the title as written makes it appear that Initiative #311 has a retroactive effect. According to the text of the measure, however, it applies only to current and future generation or injection of exploration and production waste. Simply adding "current and future" in the below manner will provide much-needed clarity and avoid voter confusion as to what conduct the measure targets:

> A change to the Colorado Revised Statutes holding oil and gas operators and waste injectors jointly and severally liable for damage to underground drinking water sources caused by the ***current and future*** generation or injection of exploration and production waste, and, in connection therewith, holding operators and waste injectors liable for all costs to restore the drinking water source and for economic, environmental, or health-related harm caused by the damage.

Moreover, does "conduct" apply to both generation and injection? What happens where waste is generated before the effective date but injected after? These aspects need to be clarified in the title.

Second, the title needs to make clear that the restoration of the drinking water source damaged by generation or injection of exploration and production waste is restoration "to its pre-damage condition," which is a new legal requirement. This addition can be made clear through adding language akin to the below:

> A change to the Colorado Revised Statutes holding oil and gas operators and waste injectors jointly and severally

> liable for damage to underground drinking water sources caused by the generation or injection of exploration and production waste, and, in connection therewith, holding operators and waste injectors liable for all costs to restore the drinking water source ***to its pre-damage condition*** and for economic, environmental, or health-related harm caused by the damage.

Third, the title as currently written does not make clear that operators held liable for damage to underground drinking water sources caused by the generation and injection of exploration and production waste are those actually responsible for generation or injection of waste. For example, this can be made clearer by the addition of the following language:

> A change to the Colorado Revised Statutes holding oil and gas operators and waste injectors jointly and severally liable for damage to underground drinking water sources caused by the generation or injection of exploration and production waste, and, in connection therewith, holding ***the responsible*** operators and waste injectors liable for all costs to restore the drinking water source and for economic, environmental, or health-related harm caused by the damage.

Fourth, the term "joint and several liability" is not commonly understood by the average voter and may lead to confusion. Thus, the title should include a plain language definition of the term to assuage any potential confusion and allow voters to understand the measure. For example, the title could convey in plain terms that the measure would make oil and gas operators and waste injectors collectively and individually responsible for the entire amount of damages or remediation, no matter how much that party is at fault.

Fifth, the title as drafted suggests that oil and gas operators and waste injectors jointly and severally liable for damage to underground drinking water sources caused by the generation or injection of exploration ***in all circumstances*** and that the clauses after "in connection therewith" provide two of the possible examples of this. But the measure is drafted differently. The two "examples" are actually the only instances where joint and several liability apply. This clarification needs to be made in the title.

The title must be amended to make these changes because otherwise the title would not "correctly and fairly express the true intent and meaning" of the measure. *See* C.R.S. § 1-40-106(3)(b). Indeed, Title Board's "duty is to ensure that the title, ballot title and submission clause, and summary fairly reflect the proposed initiative so that petition signers and voters will not be misled into support for or

against a proposition by reason of the words employed by the board." *In re Ballot Title 1997–1998 # 62*, 961 P.2d 1077, 1082 (Colo. 1998) (quoting *In re Proposed Initiated Constitutional Amendment Concerning the Fair Treatment of Injured Workers Amendment*, 873 P.2d 718, 719 (Colo. 1994)).

CONCLUSION

Accordingly, the Objectors respectfully request that a rehearing is set pursuant to C.R.S. § 1-40-107(1) and that the Title Board grant this Motion.

Respectfully submitted this 22nd day of April 2026.

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