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SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to §1-40-107(2), C.R.S. (2013) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #85, #86, #87, and #88 **Petitioners/Cross-Respondents:** MIZRAIM CORDERO and SCOTT PRESTIDGE v. **Respondents/Cross-Petitioners:** CAITLIN ANNE LEAHY and GREGORY M. DIAMOND **and** **Title Board:** SUZANNE STAIERT; DANIEL DOMENICO; and JASON GELENDER	**▲ COURT USE ONLY ▲**
Attorneys for Respondents/Cross-Petitioners: Martha M. Tierney, #27521 Edward T. Ramey, #6748 Heizer Paul LLP 2401 15th Street, Suite 300 Denver, CO 80202 Telephone: 303-595-4747 Facsimile: 303-595-4750 E-mail: mtierney@hpfirm.com eramey@hpfirm.com	Supreme Court Case No. 14SA116 (Cases consolidated 14SA119, 14SA122 and 14SA125)
RESPONDENTS/CROSS-PETITIONERS' ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 2,916 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☐It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☐It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

By: s/Martha M. Tierney

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Caitlin Anne Leahy and Gregory M. Diamond (jointly "Respondents/Cross-Petitioners" or "Proponents"), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Answer Brief with regard to the title, ballot titles and submission clauses (the "Titles") set by the Ballot Title Setting Board with regard to Proposed Initiative 2013-2014 #85 ("Initiative #85), Proposed Initiative 2013-2014 #86 ("Initiative "86"), Proposed Initiative 2013-2014 #87 ("Initiative #87"), and Proposed Initiative 2013-2014 #88 ("Initiative #88") (jointly the "Initiatives"):

SUMMARY OF THE ARGUMENT

1. Initiatives #85, #86, and #87 do not violate the single subject requirement of Colo. Const. art. V, §1(5.5).

2. The Title Board is not required to explain in the Titles to Initiatives #85, #86, or #87 that the measures will not impact federal constitutional rights.

3. The Initiatives do not apply exclusively to oil and gas resources owned by the State of Colorado, there is no ambiguity in the measures on this point, and the Titles are correct in not suggesting otherwise.

4. The use of the phrase "statewide setback" requirement in the Titles is neither misleading nor a catch phrase.

5. The titles for Initiatives #86, #87, and #88 do not conflict with the title for Initiative #85, nor with one another.

Proponents' Cross Petition

6. To fairly and adequately reflect the central purpose and focus of these measures, the Titles should include the complete phrase "any new oil and gas well, including those using hydraulic fracturing." This would not constitute a catch phrase.

ARGUMENT

I. The Initiatives Do Not Violate the Single Subject Requirement.

A. Standard of review.

The Proponents concur with the standard of review recited by Petitioners.

B. The Initiatives contain a single subject.

The single subject of each of these initiatives, as accurately expressed in the Titles, is the establishment of a setback requirement for new oil and gas wells, including those using hydraulic fracturing, from occupied structures.

Three of the alternative proposed measures (#85, #86, and #87) state that "*Application of the statewide setback established pursuant to this article* shall not be considered a taking of private property nor require the payment of just compensation pursuant to sections 14 and 15 of article II of the Colorado

constitution" (emphasis added) – a proviso accurately reflected in each of the titles. By its explicit terms, this qualification applies and is connected *only* to the "statewide setback established pursuant to this article." There is nothing in any of the measures to suggest a broader or independent application. It is an implementation stipulation solely pertinent and connected to the setback requirement established by the measure within which it appears.

The Petitioners appear to suggest, somewhat inconsistently, that the "taking" proviso poses the prospect of both "surprise" and "logrolling," two of the evils to which the single subject requirement is directed. §1-40-106.5(1)(e)(I), (II), C.R.S. (2013). With regard to "surprise," the proviso is clearly stated in the measures and clearly and prominently reflected in each of the relatively short titles. With regard to "logrolling" (which belies surprise), it is quite difficult to envision co-option of independent advocates of (a) setback requirements and (b) takings exemptions applicable *only* to those setback requirements. If a voter does not favor exempting setback requirements from a takings analysis, she will not vote for setback requirements incorporating such exemption; if a voter does not favor setback requirements, she will not vote for a measure that not only enacts them but exempts them from a takings analysis.

II. The Titles Are Neither Unfair Nor Misleading, Except with Regard to the Single Issue Raised by the Proponents in their Cross-Petition.

A. Standard of review.

The Proponents concur with the standard of review recited by Petitioners.

B. The Title Board is not required to explain in the titles to Initiatives #85, #86, or #87 that the measures will not impact federal constitutional rights.[1]

The texts of Initiatives #85, #86, and #87 each provide that the subject setback requirements "shall not be considered a taking of private property nor require the payment of just compensation pursuant to sections 14 and 15 of article II of the Colorado constitution." Each of the titles duly reflect that the measures establish "that the statewide setback requirement is not a taking of private property requiring compensation under the Colorado constitution."

Petitioners complain that the titles must also explain that other potential "claims and compensation" – specifically arising under the United States Constitution – may not be affected.

[1] Petitioners' arguments are addressed by the Proponents in this Answer Brief in the order presented in Petitioner's Opening Brief. This order varies from the recital of advisory issues in Petitioners' Petition for Review – and thus from Proponents' Opening Brief (which tracked that order). The discussion of this issue is found at section II.D (pp. 10-11) of the Argument in Proponents' (Respondents/Cross-Petitioners') Opening Brief, and section II.C (pp. 18-19) of the Title Board's Opening Brief.

As frequently reiterated by this Court, "[t]he Board is not required to 'state the effect that an initiative may have on other constitutional provisions.'" *In re Proposed Initiative on Parental Rights*, 913 P.2d 1127, 1132 (Colo. 1996), quoting *In re Proposed Initiative on Limited Gaming in the City of Antonito*, 873 P.2d 733, 740 (Colo. 1994). As explained in *City of Antonito*, any such potential effect "is a question of constitutional interpretation and is not subject to review in this proceeding." 873 P.2d at 740. *Accord, In re Initiative for 1999-2000 #255*, 4 P.3d 485, 498 (Colo. 2000) (titles not misleading "because they do not refer to the Initiative's possible interplay with existing state and federal laws"); *In re Proposed Initiative Pertaining to Branch Banking*, 612 P.2d 96, 100 (Colo. 1980) ("leaving for public debate the question of the impact of federal law on implementation of the proposed law").

C. The Initiatives do not apply exclusively to oil and gas resources owned by the State of Colorado, there is no ambiguity in the measures on this point, and the Titles are correct in not suggesting otherwise.[2]

Petitioners submit that it is not clear from the texts of each of these initiatives whether they apply solely to oil and gas resources owned by – rather

[2] Please see footnote 1, above. This issue is addressed in section II.B (pp. 8-9) of the Argument in Proponents' Opening Brief, and section II.B (pp. 16-18) of the Title Board's Opening Brief.

than simply located in – the State of Colorado. And they argue that this purported ambiguity must be reflected in the Titles.

Respectfully, there is no ambiguity. The operative language (Section 2 of each of the measures) establishes a statewide setback for "all new oil and gas wells requiring a state or local permit, including those using hydraulic fracturing." There is no limitation to wells exploiting resources that happen to be owned by the State. Further, three of the alternative measures (#85, #86, and #87) state that the setback requirements "shall not be considered a taking of private property" – a proviso that would make little sense if the measures were limited to exploitation of State-owned resources.

Petitioners draw their proffered ambiguity from a definition of a term used exclusively in the measures' statement of "purposes and findings" – specifically "oil and gas operations" (in #85 and #88) or "oil and gas development" (in #86 and #87) being defined as "exploration for and production of Colorado's oil, gas, other gaseous and liquid hydrocarbons, and carbon dioxide." Even in the context of these non-operative recitals, the construction suggested by the Petitioners makes no sense – why would it matter, in the context of the recitals read as a whole, whether the subject resources were privately, publicly, or federally owned?

Further, "[i]n determining whether the descriptions affixed by the Board express the true intent and meaning of the proposal, consideration of testimony from the proponent is appropriate." *In re Initiative Concerning Unsafe Workplace Environment*, 830 P.2d 1031, 1034 (Colo. 1992). As Petitioners acknowledge, the Proponents were clear on this point – that "Colorado's" meant "located in Colorado" – and the Title Board suffered from no confusion on its part. While true ambiguity may be appropriate for expression in a title, it is not the task of the Title Board to accept unreasonable invitations to manufacture it.

D. The use of the phrase "statewide setback" requirement in the Titles is neither misleading nor a catch phrase.[3]

Initially arguing that the use of the term "statewide setback" in the Titles was misleadingly "alliterative and innocuous," Petitioners now suggest that it also rises to the level of a catch phrase.

First, the term is assuredly not a catch phrase. "'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.'" *In re Initiative for 2007-2008 #62*,

[3] Please see footnote 1, above. This issue is addressed in section II.C (pp. 9-10) of the Argument in Proponents' Opening Brief, and section II.D (pp. 19-20) of the Title Board's Opening Brief.

184 P.3d 52, 60 (Colo. 2008), quoting *In re Initiative for 1999-2000 #258(a)*, 4 P.3d 1094, 1100 (Colo. 2000). The term "statewide setback" – drawn directly from the texts of the measures – describes precisely what each of these measures would do, *i.e.*, create a "statewide setback" requirement. Calling it something else would be less precise at best, and contribute less to voter understanding of the actual contents of the measure.

Petitioners' point is really, and quite explicitly, that the proposed "statewide setback" requirement – a term easily understood by the voters – is a very bad idea that may lead to serious and undesirable consequences. Petitioners posit, specifically, that the proposed setbacks "may result in a total prohibition of oil and gas development in some high density areas." Pet. Op. Br. at p. 17. In the context of both the single subject and clear title requirements, however, neither the Title Board nor this Court may "address the merits of a proposed initiative, nor . . . interpret its language or predict its application if adopted by the electorate." *In re Initiative for 2007-2008 #62*, 184 P.3d at 58, quoting *In re Proposed Initiative for 1997-1998 # 64*, 960 P.2d 1192, 1197 (Colo. 1998). That is the task of political campaigns, and the Petitioners will have ample opportunity to inform the public of their concerns.

E. The titles for Initiatives #86, #87, and #88 do not conflict with the title for Initiative #85, nor with one another.[4]

Finally, Petitioners note that §1-40-106(3)(b), C.R.S. (2013), states that "Ballot titles . . . shall not conflict with those selected for any petition previously filed for the same election." The Title Board, at both the rehearing on these measures and in its Opening Brief at pp. 20-21, recited its practice of accepting the assurances of, and realistic constraints upon, proponents of alternative versions of a similar measure – a not infrequent occurrence at the title setting stage – that they will only proceed to the ballot with one measure. This Court has accepted these representations and practical constraints as well, both explicitly – *see, e.g.*, *In re Second Initiated Constitutional Amendment*, 613 P.2d 867, 870 (Colo. 1980) – and implicitly – *see, e.g.*, *In re Initiatives for 2009-2010 #24, #23, and #22*, 218 P.3d 350 (Colo. 2009); I*n re Initiatives for 1999-2000 #245(b), 245(c), 245(d), and 245(e)*, 1 P.3d 720 (Colo. 2000).

As importantly, the ballot titles selected for each of the measures at issue here do not conflict with one another. The titles for Initiatives #85, #86, and #87 clearly recite the different length of each measure's proposed setback. The title for Initiative #88, though specifying the same setback as #86, discloses a different

[4] Please see footnote 1, above. This issue is addressed in section II.E (pp. 11-12) of the Argument in Proponents' Opening Brief, and section II.E (pp. 20-22) of the Title Board's Opening Brief.

waiver authorization and contains no takings exclusion. While the measures conflict, the titles do not.

Even were the Proponents to attempt – irrationally and despite their assurances – to place more than one of these measures on the ballot, "nothing prevents two conflicting amendments from being proposed or even adopted at the same election." *In re Initiative Concerning "Fair Treatment II"*, 877 P.2d 329, 332 (Colo. 1994). "What is prohibited are conflicting ballot titles which fail to distinguish between overlapping or conflicting proposals." *Id*. These short and easily readable ballot titles clearly distinguish between the alternative measures.

Proponents' Cross-Petition

F. To fairly and adequately reflect the central purpose and focus of these measures, the Titles should include the complete phrase "any new oil and gas well, including those using hydraulic fracturing." This would not constitute a catch phrase.[5]

As described in Proponents' Opening Brief, the text of each of their measures establishes a statewide setback requirement "for all new oil and gas wells requiring a state or local permit, including those using hydraulic fracturing." The Titles initially set for each of the initiatives reflected this language by describing the measures as "requiring any new oil and gas well, including those using

[5] The Proponents have filed a Cross-Petition on this issue only with regard to Initiatives #86 and #87.

hydraulic fracturing, to be located" the specified distance from the nearest occupied structure. At the rehearing, the Petitioners objected to inclusion of the phrase "hydraulic fracturing" in the Titles as constituting an impermissible catch phrase. The Title Board, acknowledging the Petitioners' concern and concluding that the phrase was not particularly material in any event, deleted the reference.

Respectfully, the complete phrase "any new oil and gas well, including those using hydraulic fracturing" (1) is not a catch phrase and (2) is centrally material to clear communication of the effect of these measures to the voters. The complete phrase should be restored to the Titles.

In drafting their proposed initiatives, the Proponents were explicit – in both their statements of purposes and findings and in the operative language of the measures – that the proposed new statewide setback requirements would be applicable to all new oil and gas wells, specifically including those using hydraulic fracturing. What may not be readily known by many voters is that the operation known as hydraulic fracturing (as distinct from a more generalized perception of an oil or gas well) is almost certainly to be *the operation primarily impacted by the*

measures.[6] It is simply not fair to the voters to obfuscate the fact that hydraulic fracturing would be directly affected by adoption of these measures.

"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 Initiative for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010), quoting *In re #24*, 218 P.3d at 356.

Without the complete reference in the Titles to "any new oil and gas well, including those using hydraulic fracturing," it is at best problematic whether most voters would understand the phrase "any new oil and gas well" – by itself – to include hydraulic fracturing operations. One recent poll suggests that 63% of likely voters either do not believe that regulation of oil and gas wells includes hydraulic fracturing, or are not sure whether regulation of oil and gas wells includes hydraulic fracturing.[7]

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[6] Per the Colorado Oil and Gas Association (COGA), "Over 90 percent of wells in Colorado are hydraulically fractured." http://www.coga.org/index.php/FastFacts/Hydraulic_Fracturing#sthash.AVhz3gV4.dpbs.

[7] See http://www.publicpolicypolling.com/pdf/2014/ColoradoResults%201.pdf.

Petitioners have expressed the fear that hydraulic fracturing operations have become controversial. That does not, however, render the term "hydraulic fracturing" a catch phrase. "Catch phrases are words that work in favor of a proposal *without contributing to voter understanding*." *In re #45*, 234 P.3d at 649 (emphasis added). Here, the complete phrase "any new oil and gas well, including those using hydraulic fracturing" certainly contributes, and may be essential, to widespread voter understanding of these measures. Rather than distracting voters from the proposals' merits, it directly informs them of the primary focus and impact of the measure.

Finally, Proponents are at a loss – and have received no suggestions from the Petitioners or the Title Board – as to what else to call hydraulic fracturing. Controversial or not, "hydraulic fracturing" is the term uniformly used by the Colorado Oil and Gas Conservation Commission, [8] the Colorado Geological Survey,[9] the United States Department of Energy,[10] the Environmental Protection

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[8] http://cogcc.state.co.us/Announcements/Hot_Topics/Hydraulic_Fracturing/Hydra_Frac_topics.html; http://dnr.state.co.us/SiteCollectionDocuments/COGCC%20release%20June%207.pdf

[9] http://geosurvey.state.co.us/energy/Oil/Pages/Oil.aspx

[10] http://energy.gov/fe/hydraulic-fracturing-technology

Agency,[11] the Bureau of Land Management,[12] the U.S. Chamber of Commerce,[13] Shell Oil,[14] ConocoPhillips,[15] and even Petitioners' own Colorado Oil & Gas Association.[16] And it is the term generally recognized by the public as representing the operation to which it refers. If that operation has generated public controversy, and if the term polls well or poorly, it does not thereby morph into an impermissible catch phrase. *In re #45*, 234 P.3d at 650. Respectfully, the essential informative value of ballot titles should not be sacrificed because they refer clearly to a controversial topic.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board with regard to Proposed Initiatives 2013-2014 #85, #86, #87, and #88,

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[11] http://www2.epa.gov/hydraulicfracturing

[12] http://www.blm.gov/co/st/en/BLM_Programs/oilandgas/Hydraulic_Fracturing.html

[13] https://www.uschamber.com/blog/epa-wants-regulate-hydraulic-fracturing-even-though-states-already-do

[14] http://www.shell.com/global/future-energy/natural-gas/gas/technical-challenges.html

[15] http://www.conocophillips.com/sustainable-development/common-questions/can-hydraulic-fracturing-be-done-responsibly/Pages/default.aspx

[16] See footnote 6, above.

except that they request the Court to reverse the actions of the Title Board with regard to Proposed Initiatives 2013-2014 #86 and #87 for the sole purpose of remanding those measure to the Title Board with a direction to restore the complete phrase "any new oil and gas well, including those using hydraulic fracturing" to the Titles.

Respectfully submitted this 2nd day of June, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of June, 2014, a true and correct copy of the foregoing **RESPONDENTS/CROSS-PETITIONERS' ANSWER BRIEF** was filed and served via the Integrated Colorado Courts E-filing System, to the following:

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In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made for inspection by other parties or the Court upon request.