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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 #90, #91, #92, and #93 **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. 14SA120 (Cases consolidated 14SA121, 14SA123 and 14SA124)
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 3,461 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 #90 ("Initiative #90), Proposed Initiative 2013-2014 #91 ("Initiative "91"), Proposed Initiative 2013-2014 #92 ("Initiative #92"), and Proposed Initiative 2013-2014 #93 ("Initiative #93") (jointly the "Initiatives"):

SUMMARY OF THE ARGUMENT

1. Initiative #90, Initiative #91, Initiative #92 and Initiative #93 do not violate the single subject requirement of Colo. Const. art. V, §1(5.5), by (a) vesting in local governments the right to limit, or prohibit (Initiatives #90, #91, and #92 only) oil and gas development; (b) providing that the article applies to all cities, towns and counties in Colorado; (c) clarifying that if any law enacted pursuant to the article conflicts with a state law, the more restrictive law governs; and (d) establishing that any laws enacted pursuant to the article are not to be considered a taking under the Colorado constitution (Initiatives #90 and #93 only).

2. The Title for Initiative #93 accurately omits the term "prohibit" because the operative language of the measure does not contain the term in contrast to the Titles for Initiatives #90, #91 and #92.

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 issue, and the Titles are correct in not suggesting otherwise.

4. Proponents' Cross Petition: To fairly and adequately reflect the central purpose and focus of these measures, the Titles should include the complete phrase "the ability to enact prohibitions or limits on oil and gas development, including 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.

1. The Single Subject Is Clear.

The single subject of each of these initiatives, as accurately expressed in the Titles, is the authority for local governments to enact laws regulating oil and gas development, including hydraulic fracturing, that may be more restrictive and

protective of a community's health, safety, welfare, and environment than state laws. The remaining provisions of the Initiatives – that the measures apply to all counties, cities and towns, and that any laws adopted pursuant to the measures are not a taking of private property under the Colorado constitution (Initiatives #90 and #93 only)– spell out how the measure is to be implemented. "Implementation details that are 'directly tied' to the initiative's 'central focus' do not constitute a separate subject." *See In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000).

2. Application of the Initiatives to All Cities, Towns, and Counties Does Not Add a Separate Subject.

Each of the Initiatives #90-#93 contains a statement in the grant of authority in Section 2 that "[t]he provisions of this article apply to every Colorado city, town, county, and city and county, notwithstanding any provision of article XX, or section 16 of article XIV, of the Colorado constitution."

Petitioners contend that this application of the Initiatives to all cities, towns and counties creates a second subject. First, Petitioners assert that the Initiatives "change the requirements for acquiring home-rule authority and remove the decision-making process from the voters." Pet. Op. Br. at p. 11. 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").

Second, Petitioners cite to *In re Initiative for 1997-1998 #64*, 960 P.2d 1192, 1198 (Colo. 1998), as support for their claim that application of the Initiatives to all cities, towns, and counties creates a separate subject. *In re #64* is readily distinguishable, however, because in that case the court found that the section of the proposed measure that granted the City and County of Denver control over Denver county court judges was a separate subject from the measure's main goal, which was to establish new and different qualifications for judicial officers. *See Id.* Here, the single subject of the Initiatives is to grant local governments the authority to enact laws regulating oil and gas development, including hydraulic fracturing, that may be more restrictive and protective of a community's health, safety, welfare, and environment than state laws. The application of the Initiatives to all cities, towns and counties is merely a definitional or an implementation detail

that is directly tied to the Initiatives' central focus and is not a separate subject. *See #200A*, 992 P.2d at 30.

3. Allowing Local Governments to Enact Laws That Are More Restrictive and Protective Than State Law Is Not a Separate Subject.

Petitioners contend that the Initiatives create a second subject by adopting a new preemption standard beyond the single subject of the measure because they may conflict with existing constitutional law and common law doctrine. The single subject of each of the Initiatives, as accurately expressed in the Titles, is the authority for local governments to enact laws regulating oil and gas development, including hydraulic fracturing, that may be more restrictive and protective of a community's health, safety, welfare, and environment than state laws. In short, the local government's authority to enact laws regulating oil and gas development, including hydraulic fracturing, that are more restrictive than state laws *is* the subject of the Initiatives, and is not an unconnected preemption standard that creates a separate subject.

Petitioners improperly conflate the effects a measure could have on existing law if adopted by voters, with the single subject determination. *See In re Initiative for 2011-2012 #3* 274 P.3d 562, 568 n.2 (Colo. 2012); *In re Proposed Initiative on Parental Rights*, 913 P.2d at 1132 (Colo. 1996).

4. The "Not a Taking" Provision of Initiatives #90 and #93 Is Not a Separate Subject.

Two of the alternative proposed measures (#90 and #93) state that "*Any law, regulation, prohibition, or limit enacted pursuant to this article* is not a taking of private property and does not require the payment of just compensation pursuant to sections 14 and 15 of article II of the Colorado constitution" – a proviso accurately reflected in each of the titles (emphasis added). By its explicit terms, this qualification applies and is connected *only* to laws enacted pursuant to this particular article. There is nothing in either measure to suggest a broader or independent application. It is an implementation stipulation solely pertinent and connected to laws enacted pursuant to the measure within which it appears. *See #200A*, 992 P.2d at 30 (implementation details that are 'directly tied' to the initiative's 'central focus' do not constitute a separate subject.)

Incidentally, in support of their argument that the "Not a taking" provisions of Initiatives #90 and #93 create a separate subject by allowing for the taking of property without just compensation, Petitioners cite to *City & County of Denver v. Denver Buick,* 347 P.2d 919, 923-24 (Colo. 1959), which this Court overruled in *Stroud v. Aspen,* 532 P.2d 720 (Colo. 1975), holding "that off-street parking requirements are not per se unconstitutional as a taking of property without just compensation." *Id.*, at 723.

Petitioners' point is really, and quite explicitly, that the Initiatives are a very bad idea that may lead to serious and undesirable consequences. Petitioners posit, specifically, that the "liberties and property rights of mineral owners are affected in a manner that is unprecedented in this state." Pet. Op. Br. at p. 16. 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 52, 58 (Colo. 2008). That is the task of political campaigns, and the Petitioners will have ample opportunity to inform the public of their concerns.

5. The Initiatives Do Not Logroll Multiple Subjects Into One Measure.

Petitioners appear to suggest that the Initiatives pose the prospect of "logrolling," one of the evils to which the single subject requirement is directed. §1-40-106.5(1)(e)(I), (II), C.R.S. (2013). When examined closely, however, it is quite difficult to envision co-option of independent advocates of (a) local laws regulating oil and gas development, including hydraulic fracturing, that may be more restrictive and protective of a community's health, safety, welfare, and environment than state laws; (b) application of *only* those laws to cities, towns and counties in Colorado; and (c) takings exemptions applicable *only* to those laws.

If a voter does not favor stricter local laws regulating oil and gas development, including hydraulic fracturing, she will not vote for a measure that gives all cities, towns and counties in Colorado the right to enact such laws; nor will she vote for such laws at the local level if she opposes conferring such authority upon cities, towns and counties.

Similarly, if a voter does not favor exempting laws regulating oil and gas development from a takings analysis, she will not vote for giving that right specifically to local governments; if a voter does not favor local laws regulating oil and gas development, 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 for Initiative #93 Appropriately Omits the Word "Prohibit."

In contrast to Initiatives #90, #91 and #92, Initiative #93 omits the word "prohibitions" in the operative text of the measure in Section 2 (Grant of authority). Initiatives #90, #91 and #93 state

> [t]he people of the state of Colorado hereby vest the right, power, and authority in local governments to regulate oil and gas development

> within their geographic borders; this right, power, and authority includes the ability to enact *prohibitions or* limits on oil and gas development, including hydraulic fracturing [emphasis supplied].

Initiative #93 states

> [t]he people of the state of Colorado hereby vest the right, power, and authority in local governments to regulate oil and gas development within their geographic borders; this right, power, and authority includes the ability to enact limits on oil and gas development, including hydraulic fracturing.

While the staff drafts for all four measures initially included the word "prohibit" in the Titles, Proponents moved at the rehearing on April 16, 2014, that the word "prohibit" be removed from the Title for Initiative #93, because the operative language of the measure differed from the other three in that regard, and its inclusion in the Title for Initiative #93 was misleading. The Title Board agreed and struck the word "prohibit" from the Title for Initiative #93.

While Proponents did not file their own motion for rehearing, the Petitioners' rehearing motion raised an issue that brought the original error in the Title for Initiative #93 to light. Specifically, the Petitioners challenged the Initiative on the basis that it did not include "measured increases," which highlighted that Initiative #93 differed from the others by excluding the prohibition language. Proponents raised this at the rehearing in colloquy with the Title Board and the Petitioners, and the Title Board determined that they had the authority to

alter the Title and remove the word "prohibit," and that not removing the term from the Title might be misleading to the voters. In setting a Title, the Title Board must "correctly and fairly express the true intent and meaning" of the proposed initiative and must "consider the public confusion that might be caused by misleading titles." §1-40-106(3)(b), C.R.S. (2013); *In re Ballot Title 1999-2000 ## 245(f) & 245(g)*, 1 P.3d 739, 743 (Colo. 2000).

Petitioners point out that Section 3 (Not a taking) of Initiative #93 contains a reference to a "prohibition," and that requires keeping the word "prohibit" in the Title. Yet, the Title Board rejected that argument and determined that it could harmonize Section 2(Grant of authority) without the term "prohibition" with Section 3(Not a taking) with the term "prohibition," because there could be a regulation that is not a taking that prohibits some specific action but that does not prohibit oil and gas development entirely.

Finally, the Title Board noted that whether the "Not a taking" provision allowed for a prohibition of oil and gas development was a matter of implementation and interpretation for a later proceeding, and did not render the Title misleading to the voters.

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 Issue, and the Titles are Correct in Not Suggesting Otherwise.

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 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) states that "the people of the State of Colorado hereby vest the right, power, and authority in local governments to regulate oil and gas development within their geographic borders." There is no limitation to developing oil and gas resources that happen to be owned by the State. Further, two of the alternative measures (#90 and #93) state that laws enacted pursuant to the measures "shall not be considered a taking of private property" – a proviso that would make little sense if the measures were limited to exploitation of publicly owned resources.

Petitioners draw their proffered ambiguity from a definition of a term used in the measures – specifically "oil and gas operations" (in #91) or "oil and gas development" (in #90, #92 and #93) being defined as "exploration for and production of Colorado's oil, gas, other gaseous and liquid hydrocarbons, and

carbon dioxide." In the context of these measures, the construction suggested by the Petitioners makes no sense – why would it matter for purposes of these measures, and in the context of the language 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 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.

Proponents' Cross-Petition

D. To fairly and adequately reflect the central purpose and focus of these measures, the Title to Initiative #90 should include the complete phrase "authorizing local laws that prohibit or limit oil and gas development, including hydraulic fracturing." This would not constitute a catch phrase.[1]

As described in Proponents' Opening Brief, the text of Initiative #90 refers to hydraulic fracturing in three places: (1) in the title of the new amendment which is called "Local Government Control of Oil and Gas Development Including

[1] The Proponents have filed a Cross-Petition on this issue only with regard to Initiative #90.

Hydraulic Fracturing;" (2) in the statement of purpose in section 1(a) which states "the conduct of oil and gas development, including the use of hydraulic fracturing;" and (3) in the operative language of section 2 which states "the ability to enact prohibitions or limits on oil and gas development, including hydraulic fracturing." The point was to assure that there would be no ambiguity in application on this point.

The Title initially set for Initiatives #90 reflects this language by describing the measure as

> an increase in the authority of local governments to regulate oil and gas development, and, in connection therewith, authorizing local laws that prohibit or limit oil and gas development, including hydraulic fracturing[.]

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 "authorizing local laws that prohibit or limit oil and gas development, including hydraulic fracturing," (1) is not a catch phrase and (2) is centrally material to communicating the effect of the measure to the voter. The complete phrase should be restored to the Title.

In drafting their proposed initiative, the Proponents were explicit – in the title of the new amendment, in the statement of purpose section and in the operative language of the measure – that the regulation of oil and gas development would specifically include regulation of hydraulic fracturing. It is not disputed that hydraulic fracturing operations are the principal focus of the measure, or that new hydraulic fracturing operations would be directly *and primarily* impacted by the measures.[2]

"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 Initiative for 2009-2010 #24*, 218 P.3d 350, 356 (Colo. 2009).

Without the complete reference in the Titles to "authorizing local laws that prohibit or limit oil and gas development, including hydraulic fracturing," it is at best problematic whether many, or most, voters would understand the phrase "oil and gas development" – by itself – to include hydraulic fracturing operations. One recent poll suggests that 63% of likely voters either do not believe that regulation

[2] 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.

of oil and gas wells includes hydraulic fracturing, or are not sure whether regulation of oil and gas wells includes hydraulic fracturing.[3]

Petitioners have, understandably, expressed the fear that the term "hydraulic fracturing" has become controversial. That does not, however, render it 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 "authorizing local laws that prohibit or limit oil and gas development, including hydraulic fracturing" certainly contributes, and may be essential, to widespread voter understanding. Rather than distracting voters from the proposal's 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 an alternative term to use. Albeit at some level controversial, "hydraulic fracturing" is the term used by the Colorado Oil and Gas Conservation Commission, [4] the United States Department of Energy,[5] the

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

[4] http://cogcc.state.co.us/Announcements/Hot_Topics/Hydraulic_Fracturing/Hydra_Frac_topics.html

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

Environmental Protection Agency,[6] the Bureau of Land Management,[7] the U.S. Chamber of Commerce,[8] Shell Oil,[9] ConocoPhillips,[10] and even Petitioners' own industry.[11] 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 necessarily 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 #90, #91, #92, and #93,

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

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

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

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

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

[11] See footnote 2, above.

except that they request the Court to reverse the actions of the title Board with regard to Proposed Initiative 2013-2014 #90 for the sole purpose of remanding that measure to the Title Board with a direction to restore the complete phrase "authorizing local laws that prohibit or limit oil and gas development, including hydraulic fracturing" to the Title.

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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