DATE FILED: June 2, 2014 4:30 PM

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2)
Appeal from the Ballot Title Setting Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiatives 2013-2014 #90, #91, #92, and #93 ("OIL AND GAS OPERATIONS")

Petitioners:

Mizraim Cordero and Scott Prestidge,

v.

Respondents:

Caitlin Leahy and Gregory Diamond,

and

Title Board:

Suzanne Staiert, Daniel Domenico, and Jason Gelender.

▲ COURT USE ONLY ▲

Case Nos. 2014SA120, 2014SA121, 2014SA123 and 2014SA124.

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ANSWER BRIEF OF THE TITLE BOARD

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 2,435 words.

The brief complies with C.A.R. 28(k).

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.

/s/ Sueanna Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

CONSTITUTIONAL PROVISIONS

RULES

Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board (the "Title Board"), by and through undersigned counsel, hereby submit their Answer Brief.

STATEMENT OF THE CASE

The Title Board incorporates its Statement of the Case from its Opening Brief.

STATEMENT OF THE FACTS

The Title Board incorporates its Statement of the Facts from its Opening Brief. The Title Board continues to refer to the proposed initiatives either individually as #90, #91, #92, or #93 or collectively as "Initiatives."

SUMMARY OF THE ARGUMENT

The Initiatives contain a single subject. The central purpose of the measures is to authorize local governments to enact laws concerning the limitation (or for certain of the measures prohibition) of oil and gas operations or development. The fact the measures apply to both home-rule and nonhome-rule cities does not constitute separate subjects.

Likewise, this Court has previously upheld on single subject grounds measures that included local preemption provisions. Finally, the no takings provisions in #90 and #93 do not constitute separate subjects, as they are "necessary and proper" to the local oil and gas laws to which the measures authorize.

The titles for the Initiatives are clear, fair, and accurate. The titles do not need to reference the definitions for oil and gas operations/development, as they do not provide a new legal standard. The word "prohibit" was properly excluded from #93, as it does not render the title misleading. And the Title Board properly removed the words "hydraulic fracturing" from #90 because the title still adequately conveys the effect of the measure.

ARGUMENT

I. The Initiatives contain a single subject.

A. The standard of review and preservation of the issue on appeal.

The Title Board concurs with the standard of review set forth by the Petitioners and Proponents with supplementation of statements

made in its own Opening Brief at 5-6. The Title Board agrees that the Petitioners preserved the issue for appeal.

B. There are no distinct subjects in the Initiatives.

The Petitioners raise three arguments to support the measures contain multiple subjects. These arguments should be rejected.

First, the Petitioners argue that because the measures apply to every Colorado city, town, or county that they "change the home-rule criteria and remove the decision to become a home-rule jurisdiction from the registered electors." Pet'r Opening Brief at 12. Additionally, the Petitioners argue that "the citizens are stripped of their ability to decide how the particular government may regulate oil and activities [sic] within their home-rule charters." *Id.* Nothing within the plain language of the measures makes such changes. The measures permit local governments to enact limits (or in some cases prohibitions) to oil and gas activities. The local laws may be more restrictive than state law, but by no means are local jurisdictions – whether a home-rule or statutory city – required to pass such regulations. *See Kemper v.*

Hamilton (In re Title, Ballot Title, and Submission Clause for 2011-2012 #45), 274 P.2d 576, 581, fn. 2 (Colo. 2012) (the Court refrains from analyzing the merits or potential effects of the measure, but confines its single subject review to the plain language of the measure).

Moreover, this Court recently affirmed on single subject grounds Proposed Initiative 2013-2014 #75 ("The Right of Local Self-Government") ("#75") on May 22, 2014 in Supreme Court case number 2014SA100.[1] #75 authorizes local governments to enact laws much broader in scope than regulation of oil and gas, and it too applies to every Colorado city, town or county notwithstanding application of Colo. Const., art. XX, § 6.

The objectors for #75 are the same Petitioners objecting to the Initiatives at issue in this case. The objectors to #75 made similar

[1] The entire briefing for #75 and order affirming the actions of the Title Board may be found on the Supreme Court's website page at http://www.courts.state.co.us/Courts/Supreme_Court/2013Initiatives.cfm. The Court may take judicial notice of related court proceedings. *See* C.R.E. 201; *see also Walker v. Van Laningham*, 148 P.3d 391, 396 (Colo. App. 2006) (the court took judicial notice of the contents of a related court proceeding); *Lovato v. Johnson*, 617 P.2d 1203, 1204 (Colo. 1980) (judicial notice may be taken at any stage of the proceeding, whether in the trial court or on appeal).

arguments that the measure's inclusion of Colo. Const., art. XX, § 6 created a separate subject, and the measure would "effectively eliminate the distinction between home-rule and nonhome-rule municipalities." This Court rejected the objectors' arguments for #75 to the extent it affirmed the actions of the Title Board, and it should do the same here.

Second, the Petitioners argue that the preemption provisions in the measures that allow a local law to be more restrictive than state law constitutes a separate subject. Pet'r Opening Brief at 13-14. #75 also has a preemption provision that permits local laws to be more restrictive than state law, again concerning subject matter far broader than regulation of oil and gas. In fact, the preemption provision in #75 allows local laws to be more restrictive than laws passed by federal, state, or international entities. The objectors for #75 made similar arguments that the preemption provision in that measure constituted a separate subject. This Court rejected the objectors' arguments for #75 to the extent it affirmed the actions of the Title Board, and it should do the same here.

Third, the Petitioners argue that #90 and #93 contain separate subjects due to the no takings provisions in those measures. As pointed out by the Proponents, "the 'necessary and proper' connection is apparent – the statement the law shall not be deemed a taking under the Colorado Constitution has no discernable meaning absent application to the authority to enact the new [local] law." Proponent Opening Brief at 7-8. As such, the no takings provisions can be construed as nothing more than an implementation detail to the central purpose of #90 and #93. *See Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45)*, 234 P.3d, 642, 647 (Colo. 2010) (implementing provisions directly tied to the central focus of the initiative are not separate subjects). The Title Board's findings of a single subject for #90 through #93 should be upheld.

II. The titles for the Initiatives are fair, clear, and accurate.

A. The standard of review and preservation of the issue on appeal.

The Title Board concurs with the standard of review set forth by the Petitioners and Proponents with supplementation of statements made in its own Opening Brief at 15-17. The Title Board agrees that the Petitioners preserved the issues for appeal.

B. The titles for #90 through #93 properly convey the central provisions of the measures.

The Petitioners raise two arguments to support the titles are misleading or inaccurate. The Proponents cross-petition that the term "hydraulic fracturing" should be restored to the title for #90. All arguments should be rejected.

First, the Petitioners argue that the word "prohibit" should be included in the title for #93, and that the Title Board lacked jurisdiction to remove it from its previously set title because the Proponents failed to file their own motion for rehearing. Pet'r Opening Brief at 18-20. At the April 3rd hearing, the Title Board set title for #93, which stated in

part: "An amendment to the Colorado constitution concerning local government regulation of oil and gas development, and in connection therewith, allowing local governments to *prohibit or limit* oil or gas development[.]" Attachment to Petition for Review for #93. (emphasis added). At the rehearing, the Proponents acknowledged that while they did not independently file their own motion for rehearing, because the word "prohibit" does not appear in Section 2 for #93, it should be removed from the title. *See* Exhibit E of Pet'r Opening Brief at 30:8:25; 31:1-13; 32:22-25; 33:1-11. The Petitioners objected to the removal of "prohibit" because the measure arguably allows local governments to enact prohibitions, as evidenced by the word appearing in Section 3.

The issue of whether the word "limit" is synonymous with "prohibit" was debated at the Title Board rehearing. Whether a limitation is less than a prohibition, as advanced by the Proponents, must await further interpretation of the measure. *See In re Title, Ballot Title and Submission Clause for 2007-2008, #57*, 185 P.3d 142, 145 (Colo. 2008) (neither the Court nor the Title Board may interpret a measure or "construe it future legal effects.") This point was aptly

illustrated by the Title Board when it acknowledged that the Petitioners argue "prohibit" and "limit" are synonymous now, but may very well change their tune in the future if the measure passes to limit the applicability of the measure, and vice versa for the Proponents.

For purposes of setting title, however, in responding to questions raised by the Title Board, the Proponents acknowledged that any limits enacted by a local government would have to fall short of a prohibition under #93. The Title Board did not err when it relied on the Proponents' testimony that the exclusion of the word "prohibit" from the measure was intended, and as such, it should be excluded from the title. *See Hayes v. Ottke (In re Title, Ballot Title, & Submission Clause for Proposed Initiatives 2011-2012 Nos. 67, 68, 69),* 293 P.2d 551, 555 (Colo. 2013) (the Board must give deference to the intent of the proposal as expressed by the proponents balanced with setting titles that avoid public confusion).

With respect to the second part of Petitioners' argument that the Title Board lacked jurisdiction to address this issue, the Title Board has broad discretion to draft titles and should have authority to

independently correct errors in its titles. *See Kelly v. Tancredo (In re Proposed Ballot Initiative on Parental Rights)*, 913 P.2d 1127, 1131 (Colo. 1996) (stating that the Supreme Court grants "great deference to the board's broad discretion in the exercise of its drafting authority."); *see also cf. Herpin v. Head (In re Title, Ballot Title & Submission Clause)*, 4 P.3d 485, 493-94 (Colo. 2000) (the Title Board has authority to correct clerical mistakes in its titles).

To the extent the Title Board lacked jurisdiction to make changes not raised in a motion for rehearing, its action is akin to harmless error in this case. If "limit" and "prohibit" are synonymous as advanced by the Petitioners, then both terms need not be included in the title. *See Brown v. Peckman (In re Title)*, 3 P.3d 1210, 1213 (Colo. 2000) (the Supreme Court will reverse the actions of the Title Board in setting the title only when the chosen language is "clearly misleading."); *see also cf. In re Title,* 873 P.2d 733, 738, n. 4 (Colo. 1994) (the Court has exercised its original jurisdiction to review matters that were not raised in the motion for rehearing).

Second, the Petitioners argue that the definition of oil and gas operations/development needs to be included in the title given the possessive use of the word Colorado. The rules of statutory construction require a court to construe a statute as a whole to give consistent, harmonious and sensible effects to all of its parts. *Colo. Water Conservation Board v. Upper Gunnison River Water Conservancy Dist.*, 109 P.3d 585, 593 (Colo. 2005). Reading the measures as a whole, the possessive form of Colorado refers to oil and gas wells located within the geographic boundaries of Colorado, as opposed to oil and gas resources belonging to the state. The Proponents point out that if there was any question of their intent, the fact that #90 through #93 contain "no takings" provisions should be sufficient to demonstrate that the measures authorize local regulations and laws that affect privately owned mineral rights. Proponent Opening Brief at 9-10.[2]

[2] The Proponents' point was raised by the Title Board when one Board Member indicated: "the takings language would make no sense if this was limited to taking the government's – the oil and gas the government already owns, since it's not private property to which the takings clause applies." Exhibit E to Pet'r Opening Brief at 19:22-25; 20:1.

The Title Board distinguished its action in this case from another measure concerning oil and gas regulation in which it determined that the definition of oil and gas should be included in that other title because it changed what voters might typically associate with oil and gas operations/development. *Id.* at 19:4-14. Here, on the other hand, for the sake of brevity, the Title Board exercised its discretion and excluded the definition of oil and gas operation/development from the titles because it did not set forth a new legal definition. *See cf. In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990) (requiring definition of "abortion" to be included in the title because it "adopts a legal standard that is new and likely to be controversial[.]"); *see also Herpin,* 4 P.3d at 497 (condensing the definition of "gun show" in the interest of brevity did not render the title clearly misleading).

Finally, the Proponents cross-petition on grounds that the words "including the use of hydraulic fracturing" should be restored to the title for #90. Assuming "hydraulic fracturing" is a catch phrase, the Proponents' argument for why they want the words in the title

underscores the exact reason why the Title Board exercised its discretion in removing it. The Proponents state: "And in a climate where hydraulic fracturing is a process familiar to most voters and *much in the news*, it would be a disservice to mask or finesse a proposed initiative's impact upon it." Proponent Opening Brief at 13. (emphasis added). The words "hydraulic fracturing" – even if the technical term – have the potential to invoke a pejorative association that may appeal to voters on the basis of emotion rather than further understanding of the measure. *See In re Title,* 875 P.2d 871, 875-76 (Colo. 1994) (the Court reversed the Title Board holding that the terms "open government" and "consumer protection" were catch phrases because it was clear that the terms could likely be used for slogans).

But whether or not "hydraulic fracturing" is a catch phrase is actually immaterial for disposition of this issue. Because the title accurately reflects the effect of the measure with the exclusion of the words – i.e. the local government may enact laws limiting (or prohibiting) oil and gas operations that may include, for example, hydraulic fracturing – the Title Board's action should be upheld. *See*

Brown, 3 P.3d at 1213 (the title does not warrant reversal, as the chosen language is not "clearly misleading.")

CONCLUSION

Based on the foregoing authorities and reasons, this Court should affirm the Title Board, and approve the titles for #90 through #93.

Respectfully submitted this 2nd day of June, 2014.

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CERTIFICATE OF SERVICE

This is to certify that, on this 2nd day of June, 2014, I duly served this **ANSWER BRIEF OF THE TITLE BOARD** on all parties via ICCES as addressed as follows:

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