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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 #85, #86, #87, and #88 ("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. 2014SA116, 2014SA119, 2014SA122 and 2014SA125

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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 1,904 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

PAGE

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. Initiatives #85 through #87 contain a single subject. 2

A. The standard of review to determine single subject. 2

B. The "no takings" provision is related to the new setback requirements in #85 through #87. 3

II. The titles for the Initiatives are fair, clear, and accurate. 5

A. The standard of review with respect to setting a title. 5

B. The titles for #85 through #88 properly convey the central provisions of the measures. 5

CONCLUSION 11

TABLE OF AUTHORITIES

PAGE

CASES

Aisenberg v. Campbell (In re Title, Ballot Title & Submission Clause), 987 P.2d 249 (Colo. 1999) 7

Brown v. Peckman (In re Title), 3 P.3d 1210 (Colo. 2000) 11

Colo. Water Conservation Board v. Upper Gunnison River Water Conservancy Dist., 109 P.3d 585 (Colo. 2005) 7

Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45), 234 P.3d, 642 (Colo. 2010) 4

In re Branch Banking Initiative, 612 P.2d 96 (Colo. 1980) 6

In re Title, 900 P.2d 121, 125 (Colo. 1995) 2, 3

In re Title, Ballot Title and Submission Clause for 2007-2008, #57, 185 P.3d 142 (Colo. 2008) ("In re #57") 6, 8

Paredes v. Corry (In re Title, Ballot title & Submission Clause 2007-2008 #61), 184 P.3d 747 (Colo. 2008) 9, 10

Rice v. Brandon (In re Title, Ballot Title & Submission Clause), 961, P.2d 1092 (Colo. 1998) 8

Title v. Hufford, 917 P.2d 1277, 1280 (Colo. 1996) 2

STATUTES

§ 1-40-106(3)(b), C.R.S.(2013) 9

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.

SUMMARY OF THE ARGUMENT

This Court does not conduct *de novo* review of the Title Board's single subject analysis. The Title Board has "considerable discretion" in setting the title for a measure. The "no takings" provisions in #85 through #87 are directly related to the central purpose of the measure, as those provisions have no application without reference to the setback requirements.

The titles for #85 through #88 are clear and not misleading. The four arguments raised by the Petitioners and one issue raised by the

Proponents should be rejected, as the Title Board has considerable discretion in its drafting authority. The actions of the Title Board should be upheld.

ARGUMENT

I. Initiatives #85 through #87 contain a single subject.

A. The standard of review preservation of the issue for 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 11-13, except as noted herein. The Petitioners state that this Court conducts *de novo* review of the Title Board's single subject analysis. Pet'r Opening Brief at 6-7. This is incorrect. The Title Board is vested with "considerable discretion" in setting the title, ballot title, and submission clause. *Title v. Hufford,* 917 P.2d 1277, 1280 (Colo. 1996). In reviewing actions of the Title Board, the Court must "liberally construe the single-subject requirements for initiatives." *Id.; see also In re Title,* 900 P.2d 121, 125

(Colo. 1995) (this Court's review of the Board's exercise of its discretion is limited with respect to the single subject analysis). The Title Board agrees that the Petitioners preserved the issue for appeal.

B. The "no takings" provision is related to the new setback requirements in #85 through #87.

The Petitioners raise two arguments to support that #85 through #87 contain two subjects. These arguments should be rejected.

First, they argue that statements made by the Title Board demonstrating possible voter surprise merits *de novo* review by this Court. Pet'r Opening Brief at 8-9. As discussed above, this Court does not conduct *de novo* review of the Title's Board single subject analysis, but must "liberally construe" the single subject requirement, as did the Title Board. To the extent Mr. Gelender and Mr. Domenico made statements about possible voter surprise, Mr. Gelender thought his comments might be "delving too far into effects" and Mr. Domenico indicated he thought the no takings provision was "connected enough" to the central purpose of the measure. *See* Exhibit C of Pet'r Opening

Brief at 6:22; 8:1-2. Both Mr. Gelender and Mr. Domenico voted in favor of finding a single subject for #85 through #87.

Second, the Petitioners argue that because #88 does not contain a "no takings" provision, this highlights that the Proponents may have concerns that the provision in #85 through #87 may be impermissible separate subject. As pointed out by the Proponents, the no takings provisions are inoperative without reference to the setback requirements. Proponent Opening Brief at 7. As such, these provisions can be construed as nothing more than an implementation detail to the central purpose of the measures. *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). Accordingly, the Title Board's finding that #85 through #87 contain single subjects should be upheld.

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

A. The standard of review and preservation of the issue for 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 #85 through #88 properly convey the central provisions of the measures.

The Petitioners raise four arguments to support the titles are misleading or inaccurate. The Proponents cross-petition that the term "hydraulic fracturing" should be restored to the titles for #85 and #87. All arguments should be rejected.

First, the Petitioners argue that the titles for #85 through #87 are misleading because they do not adequately inform voters that takings claims under the federal constitution are unaffected. Pet'r Opening Brief at 11-12. This Court does not require the Title Board to refer to

the effect – or lack thereof purportedly in this case – a measure may have on other constitutional provisions, especially those contained in the U.S. Constitution. *See e.g. In re Branch Banking Initiative*, 612 P.2d 96, 99 (Colo. 1980) (upholding Title Board's exclusion from the title that the proposed initiative might conflict with federal banking law). The title sufficiently informs voters that the "no takings" provisions affect rights under the Colorado Constitution. Reference to the U.S. Constitution is not necessary, and would require the Title Board to impermissibly interpret or inform the voters of the effect of the measures. *In re Title, Ballot Title and Submission Clause for 2007-2008, #57*, 185 P.3d 142, 145 (Colo. 2008) ("*In re #57*") (holding that neither the Court nor the Title Board may interpret a measure or "construe it future legal effects.")

Second, the Petitioners argue that the titles for #85 through #88 need to include the ambiguity that application of the Initiatives may be limited to oil and gas wells in which the mineral rights are owned by the State of 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 state of Colorado, as opposed to belonging to the state. The Proponents point out that if there was any question of their intent, the fact that #85 through #87 contain "no takings" provisions should be sufficient to demonstrate that the setback requirements apply to privately owned mineral rights. Proponent Opening Brief at 9.

In *Aisenberg v. Campbell (In re Title, Ballot Title & Submission Clause)*, 987 P.2d 249, 259 (Colo. 1999), the case cited by the Petitioners in their Opening Brief, the issue was that the "not to exceed 5%" language for a recall petition of a judge meant that one voter signature could place the removal of a judge on the ballot, and this aspect, which was clear from the measure, needed to be explained in the title and summary. Here, on the other hand, the interpretation advanced by the Petitioners would require the Title Board to definitively define the

application and scope of the measure, which is impermissible. *In re #57*, 185 P.3d at 145.

Third, the Petitioners argue that the term “statewide setback” is an impermissible catch phrase because it has an alliterative quality and the more common word “prohibition” should be used instead. The Court has held that it must “be careful to recognize, but not create, catch phrases.” *Rice v. Brandon (In re Title, Ballot Title & Submission Clause),* 961, P.2d 1092, 1100 (Colo. 1998).

The Petitioners appear to want the word “prohibition” for the exact opposite reason they believe the term “statewide setback” is innocuous, as “prohibition” ostensibly helps in the debate *against* the measures whereas the former term, in their view, ostensibly helps the debate *for* the measures. This is evident when the Petitioners stated: “The Proposed Initiatives are asking voters a far more serious question about whether to override existing state rules concerning where oil and gas wells can be located *in a way that may result in a total prohibition of oil and gas development in some high density areas*.” Pet’r Opening Brief at 17. (emphasis added). It is not for the Title Board to further

the substantive debate one way or another. The words "statewide setback" appears in the Initiatives, the Petitioners concede the term is used in the oil and gas industry so it cannot be considered misleading, and ordinary voters likely understand the effect of a setback regarding their experience with zoning ordinances for their homes. As such, "statewide setback" is not a catch phrase, and the Title Board's use of the term should be upheld.

Fourth, the Petitioners argue that the titles for #86 through #88 conflict with #85. The interpretation by Mr. Gelender with respect to whether the Initiatives are not yet petitions so that § 1-40-106(3)(b), C.R.S. does not apply need not be addressed by this Court in order to resolve this issue. The Petitioners correctly stated that conflict in titles exist when "the titles fail to accurately reflect the distinctions between the measures, and voters comparing the titles would not be able to distinguish between the two proposed measures." *Paredes v. Corry (In re Title, Ballot title & Submission Clause 2007-2008 #61),* 184 P.3d 747, 752 (Colo. 2008).

The Petitioners seek remand so that the distinctions between the measures are put at the beginning of the titles. Pet'r Opening Brief at 20. This suggestion is both impractical and would lead to voter confusion by attempting to put the differences between #85 though #88 in the statement of the single subject. In *Paredes,* 184 P.3d at 752, the Court determined that the initiatives at issue in that case did not conflict because "although the first clause of both titles is the same, the subsequent clauses are different." This is precisely the situation here, as the titles for #85 through #88 include the same statement of the single subject, but the distinctions between the measures are set forth in subsequent clauses.

Finally, the Proponents cross-petition to require that the words "including those using hydraulic fracturing" be restored to #85 and #87. Mr. Domenico aptly summarized exclusion of the words as follows: "The reason I find it [the term hydraulic fracturing] potentially misleading is as Mr. Ramey and Mr. Feeley have pointed out, that is what's in people's minds, this is an important thing that's going on. It's a discussion that's already taking place." Exhibit D of Pet'r Opening

Brief at 23:24-25; 24:1-3. He concluded: "And since I don't think it changes the actual effect on the measure, I'm inclined to let the public debate raise the fact it includes hydraulic fracturing rather than our title." *Id.* at 24:9-14. Whether or not "hydraulic fracturing" is a catch phrase is immaterial for disposition of this issue. The Title Board has broad discretion in its drafting of titles, and because the titles accurately reflect the effect of the measures with the exclusion of the words, its action should be upheld. *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.")

CONCLUSION

Based on the foregoing authorities and reasons, this Court should affirm the actions of the Title Board and approve the titles for #85 through #88.

Respectfully submitted this 2nd day of June, 2014.

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/s/ *Sueanna P. Johnson*

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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 or regular mail, first class postage prepaid, addressed as follows:

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