| | |
|---|---|
| SUPREME COURT OF COLORADO<br>2 East 14th Avenue<br>Denver, CO 80203<br><br>Original Proceeding<br>Pursuant to Colo. Rev. Stat. § 1-40-107(2)<br>Appeal from the Ballot Title Board<br><br>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #90-93 ("Oil and Gas Operations")<br><br>**Petitioners: MIZRAIM S. CORDERO AND SCOTT PRESTIDGE**<br>**v.**<br>**Respondents: CAITLIN LEAHY and GREGORY DIAMOND**<br><br>**and**<br><br>**Title Board: SUZANNE STAIERT; DANIEL DOMENICO; and JASON GELENDER** | DATE FILED: June 2, 2014 4:58 PM<br><br>COURT USE ONLY |
| Attorneys for Petitioners:<br><br>Chantell Taylor, No. 33059<br>Elizabeth H. Titus, No. 38070<br>Hogan Lovells US LLP<br>1200 Seventeenth Street, Suite 1500<br>Denver, Colorado 80202<br>Phone: (303) 899-7300<br>Fax: (303) 899-7333 | Case Nos: 2014SA120, 14SA121, 14SA123 and 14SA124 |

**PETITIONERS' CONSOLIDATED ANSWER BRIEF IN SUPPORT OF PETITIONS FOR REVIEW OF PROPOSED INITIATIVES 2013-2014 #90, 2013-2014 #91, 2013-2014 #92, and 2013-2014 #93**

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

**Cases**

## 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).

Choose one:
❑It contains words_____.
☒It does not exceed 30 pages.

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.A.R. 32.

s/Chantell Taylor

## SUMMARY OF ARGUMENTS

The conclusory arguments set forth in the Proponents' and the Title Board's Opening Briefs fail to support the Title Board's determination that the measures contain a single subject or that the titles are fair and accurate. The facts remain that under the broad category of local control of oil and gas development, these measures contain additional subjects that would dramatically alter long-standing principles of home-rule status, preemption, and regulatory takings. Moreover, the titles are confusing, misleading, and not reflective of the Proponents' intent and, therefore, must not be forwarded to the voters.

Petitioners' Answer will address only certain disputed points arising from the Opening Briefs. Petitioners are not conceding any arguments from the Opening Brief that are not addressed herein; rather, Petitioners elect not to restate those legal arguments but specifically incorporate them by reference.

As set forth in Petitioners' Opening Brief and below, the Court should remand this matter to the Board with directions to strike the Final Titles and to return the Initiatives to the Proponents. In the alternative, the Court should remand this matter to the Board with directions to amend the Final Titles consistent with the concerns expressed herein.

## ARGUMENT

### I. The Initiatives Impermissibly Contain Multiple Subjects.

#### A. Standard of Review

The Petitioners agree with the standard of review as set forth in the briefs of the Proponents and the Title Board.

#### B. Under the Category of "Local Government Regulation of Oil and Gas Operations," the Initiatives Impermissibly Include Multiple, Unrelated Subjects.

Proponents and the Title Board argue that the single subject of each measure is to expand the power of local governments to prohibit or limit oil and gas development within their respective jurisdictions and, according to the Title Board, the remaining provisions are "*in pari materia*" with this single subject. Title Board Opening Brief at 6, 8. The plain language of the measures, however, belies this argument. In addition to expanding local government authority, the measures eviscerate the distinction between home rule and non-home rule status, reverse well-established precedent regarding state primacy, and deprive property owners of constitutional takings protections. These provisions are stand-alone subjects and would therefore result in impermissible "log-rolling." Accordingly, Petitioners request that the Court remand this matter to the Board with directions to strike the titles and submission clauses.

1. Shifting authority of oil and gas regulation from state to local governments constitutes a separate subject.

The Title Board recognizes that Initiatives 90-93 would change current law by "designat[ing] local governments as the governmental entities with the primary legal authority to regulated oil and gas within their respective jurisdictions." Title Board Opening Brief at 11 (emphasis added). As discussed in detail in Petitioners' Opening Brief, this constitutes a major shift in well-established designations of power between state and local governments in Colorado. Currently, the state has primary legal authority to regulate oil and gas development, while local governments' power is limited to land use regulation. *Voss v. Lundvall Bros. Inc.*, 830 P.2d 1061, 1068-69 (Colo. 1992); *see also Bd. of County Comm'ns, La Plata County v. Bowen/Edwards Assocs.*, 830 P.2d 1045, 1058 (Colo. 1992). Even then, local regulations must not frustrate the development of oil and gas and must work in harmony with Colorado's Oil and Gas Conservation Act. *Voss*, 830 P.2d at 1069. Accordingly, under current law, local governments may not impose a "total ban" on oil and gas operations within their limits. *Id.* at 1068. Moreover, local governments may not impose regulations that are inconsistent with state requirements relating to the "technical aspects of drilling, pumping, plugging, waste prevention, safety precautions, and environmental restoration" and the "location and spacing of wells." *Bowen/Edwards*, 830 P.2d at 1058. These measures would turn that power structure on its head.

In support of their argument that Initiatives 90-93 contain a single subject, the Title Board relies on *In re Title, Ballot Title and Submission Clause, and Summary for 1990-00 No. 256*, 12 P.3d 246 (Colo. 2000) ("*#256*"). In that case, however, the provisions at issue were considered "minor" and dealt directly with the management of development – the broad single subject of the measure. *Id.* at 253 (Minor provisions necessary to effectuate the purpose of the initiative to amend the state Constitution are properly included within its text and do not violate the single-subject requirement.)

Here, the additional provisions, affecting application of the home-rule amendment, state primary and constitutional takings protections, are anything but minor. This Court's holding in *In the Matter of the Title, Ballot Title and Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071 (Colo. 2010) (herein after "*#91*") is instructive. In *#91*, the Court considered an initiative to amend the state constitution so as to impose a beverage container tax and direct 80% of the revenue to Colorado's nine basin roundtables and the interbasin compact committee. *#91*, 235 P.3d at 1074. In addition, the initiative imposed a prohibition on legislative actions by the General Assembly that would alter related governing statutes or empower a state agency to supersede or usurp the authority of the roundtables or compact committee. *Id.* This Court determined that the initiative impermissibly contained two subjects: (1) creating the container tax, and (2) prohibiting

legislative authority and ceding such authority to another body. *Id.* In reaching its conclusion, the Court reasoned as follows:

> While many of Initiative #91's provisions relate to a beverage container tax and its administration, coiled in the folds of this initiative is a separate and distinct subject that would negate the power of the General Assembly to exercise legislative supervision over the basin roundtables and the interbasin compact committee, or create or empower any other agency to supersede or be superior to them, until the year 2015, while also embedding these entities into the water sections of the Colorado Constitution and vesting in them new authority over Colorado water matters.

*Id.* at 1077.

Citing its conclusion in *In the Matter of Title, Ballot Title & Submission Clause, & Summary for 1997-1998 No. 64,* 960 P.2d 1192 (Colo. 1998) (herein after "*#64*"), this Court noted that it reversed the Title Board's action in setting titles for other such initiatives "affecting substantial rearrangement of existing governmental powers." *Id.* at 1078. Initiatives #90-93 fall squarely within this category. Coiled in the folds of these initiatives, which purport to be just about local control of oil and gas development, are separate and distinct subjects that would reverse long-standing preemption standards and negate the power of the General Assembly. As with *#64* and *#91*, the action of the Title Board should be reversed with directions to strike the title and return the initiative to the Proponents.

2. Eviscerating home-rule status and constitutional protections for private property rights are not implementing provisions; each constitutes a separate subject.

Proponents argue that, rather than being separate subjects, the provisions that affect application of Colorado's home-rule amendment and eliminate takings protections for private property owners are merely implementing provisions related to the single subject of enhanced local control. Proponents' Opening Brief at 7. That argument is unavailing.

This Court has held that an initiative with a single, distinct subject does not violate the single-subject requirement if it also spells out details relating to its implementation, so long as the procedures or mechanics specified in the measure have a necessary and proper relationship to the substance of the initiative. *See In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 74*, 962 P. 2d 927, 929 (Colo. 1998) (herein after "*#74*"). An initiative containing two or more provisions with *no* necessary connection, however, "offends the single-subject requirement even if all parts of the initiative address the same general area of law." *Id.* at 928. Such is the case here.

The additional provisions at issue here go far beyond simple details or mechanics. In addition to expanding local governments' authority to prohibit or limit oil and gas development, these measures would, *inter alia*, allow statutory cities and towns to (1) act as if they have home-rule authority without conforming

the home-rule process detailed in Amendment XX to the Colorado Constitution, and (2) take private property without providing just compensation. Moreover, these additional provisions are not necessary in order to expand the authority of local governments to regulate oil and gas development.

In all cases where this Court rejected single-subject arguments based on a finding that the additional provisions were merely implementing language, there is an obvious and administratively necessary connection between the two. For example, in *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 255*, 4 P. 3d 485, 496 (Colo. 2000) (herein after "*#255*"), the Court determined that the single-subject requirement was not violated by inclusion of a mandatory appropriation provision in an initiative to require background checks at gun shows. The Court reasoned that the provision was directly related to the initiative's central propose because state agencies could not conduct background checks without appropriated funds, and the provision did not mandate reduction of funding for any other state program. Further, the fee related directly to making a background check practical and to making it more likely that they would be performed.

The facts in *#74* are also illustrative here. The initiative proposed assessing "school impact fees" on newly constructed housing. *#74*, 962 P.2d at 928. In addition to this central provision, the initiative specified how payments and

exemptions from the fees would be resolved. *Id*. The Court concluded that the additional provisions, "which simply provide[d] a mechanism to administer the details of the impact fee proposal," did not constitute additional subjects.

Unlike in *#255* and *#74*, where the additional provisions unmistakably relate to the initiatives' central focus, the additional provisions here extends far beyond enhancing local governments' authority to regulate oil and gas development and offer nothing specific in terms of mechanical or procedural implementing details.

As set forth more fully in Petitioners' Opening Brief, these provisions are stand-alone subjects and, therefore, the decision of the Title Board be reversed with directions to strike the title and return the initiative to the Proponents.

## II. The Final Titles Do Not Fairly and Accurately Inform Voters of Important Aspects of the Measures.

### A. Standard of Review

The Petitioners do not dispute the standard of review as set forth in the briefs of the Proponents and the Title Board.

### B. The Title Fails to Inform Voters of the Initiatives' Definition of Oil and Gas Development.

As discussed in Petitioners' Opening Brief, the Initiatives expand the authority of local governments to regulate either "oil and gas operations" (*see* #91 § 2) or "oil and gas development" (*see* #90, #92, and #93 § 2). These terms are defined in the Initiatives as follows: "exploration for and production of *Colorado's*

oil, gas, other gashouse and liquid hydrocarbons, and carbon dioxide." *See* Initiatives § 2 (emphasis added).

Without any citation or other supporting authority, the Title Board asserts that Proponents' definition of oil and gas development "refers to minerals located within Colorado's borders." Opening Brief at 15. The plain language of the measures, however, contradicts the Title Board's impermissible interpretation. The measures say nothing about Colorado's borders and instead use the possessive noun "Colorado's..." A strict reading of the possessive noun leads to only one interpretation – the measures apply only to mineral rights owned by the state. As written, the titles suggest that the measures apply to privately held oil and gas development, which is a gross mischaracterization of the measures' actual language. The question is not whether the Title Board suffers from any confusion, as Proponents' suggest (*see* Opening Brief at 10), the question is whether voters will be duped into supporting a measure relying on misleading or inaccurate information. As written, the title and submission clause do not contain sufficient information to enable the electorate to "determine intelligently whether to support or oppose such a proposal." *See Proposed Initiative on Parental Notification*, 794 P.2d 238, 242 (Colo. 1990).

Therefore, the Court should remand this matter to the Title Board with instructions to revise consistent with the concerns expressed above.

## III. The Title Board Properly Removed an Impermissible Catch-Phrase

### A. Standard of Review

The Petitioners do not dispute the standard of review as set forth in the briefs of the Proponents and the Title Board.

### B. The Term "Hydraulic Fracturing" is an Impermissible Catch-Phrase and Should Not be Included in the Title

Proponents' arguments in favor of re-inserting "hydraulic fracturing" into the title only underscore its prejudicial effect. As Proponents point out in their Opening Brief, the term "hydraulic fracturing" appears in three places besides the title, so voters will have adequate notice that "oil and gas development" includes this process. If, as Proponents argue, the banning of hydraulic fracturing is "a critical, and indeed precipitating, focus of the measures" they could have limited the measures as such. Instead, they elected to broadly address "oil and gas development" with "hydraulic fracturing" being but one of many examples.

The titles therefore accurately reflect the scope of the measures without containing impermissible, prejudicial catch phrases and should be affirmed.

## CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioners respectfully request that the Court find that Initiatives 90-93 do not contain a single subject and remand this matter to the Title Board with direction to return the Initiatives to Proponents. In the alternative, Petitioners request that the Court remand the matter

to the Title Board with the instructions to amend the titles consistent with the concerns set forth above and in Petitioners' Opening Brief.

Respectfully submitted this 2nd day of June, 2014 by:

HOGAN LOVELLS US LLP

s/ *Chantell Taylor*
Chantell Taylor, No. 33059
Elizabeth H. Titus, No. 38070
Hogan Lovells US LLP
1200 Seventeenth Street, Suite 1500
Denver, Colorado 80202
Phone: (303) 899-7300
Fax: (303) 899-7333

*Attorneys for Mizraim S. Cordero and Scott Prestidge*

## CERTIFICATE OF SERVICE

I certify that on June 2, 2014, a true and correct copy of the above and foregoing **PETITIONERS' CONSOLIDATED OPENING BRIEF IN SUPPORT OF PETITIONS FOR REVIEW OF PROPOSED INITIATIVES 2013-2014 #90, 2013-2014 #91, 2013-2014 #92, and 2013-2014 #93**was served by ICCES upon:

Edward T. Ramey, Esq.
Martha Tierney, Esq.
Heizer Paul LLP
2401 Fifteenth Street, Suite 300
Denver, Colorado 80202
Email: eramey@hpfirm.com
mtierney@hpfirm.com
**Attorneys for Respondents**

Maurice G. Knaizer, Esq.
LeeAnn Morrill, Esq.
Office of the Colorado Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Email: Maurice.Knaizer@state.co.us
LeeAnn.Morrill@state.co.us
**Attorneys for the Ballot Title Setting Board**

s/ Marcia Yannacito