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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' OPENING 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 2,998 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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CONSTITUTIONAL PROVISIONS

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 Opening 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"):

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Issues Presented by Petitioners/Cross-Respondents Cordero and Prestidge.[1]

1. Do Initiative #85, Initiative #86, and Initiative #87 violate the single subject requirement of Colo. Const. art. V, §1(5.5), by: (a) establishing a statewide setback requirement for the location of new oil and gas wells from occupied structures and (b) providing that this setback requirement shall not be considered a taking under Colo. Const. art. II, §§14 or 15?

2. Are the Titles set for the Initiatives unfair and misleading because:

[1] These issues are drawn, as best Proponents are able, from Petitioners/Cross-Respondents' "Advisory Statement of Issues" in their Petition for Review.

a. they do not inform the voters that they apply only to oil and gas resources belonging to the State of Colorado (as distinguished from private and federal interests);

b. they use the phrase "statewide setback" rather than "prohibition;"

c. with regard to Initiative #85, Initiative #86, and Initiative #87, they risk deceiving the voters into thinking claims for takings under the federal Constitution would be barred; and

d. with regard to Initiative #86, Initiative #87, Initiative #88, the Title is confusingly similar to titles set for other initiatives?

II. Issue Presented by Respondents/Cross-Petitioners Leahy and Diamond (Proponents).

With regard to Initiative #86 and Initiative #87, do the Titles fail to fairly and adequately express the true meaning and intent of the Initiatives by omitting the phrase "including those using hydraulic fracturing," thereby failing to advise the voters of the central focus and impact of the measures?

STATEMENT OF THE CASE

I. Nature of the Case, Course of Proceedings, and Disposition Before the Title Board.

The Title Board conducted its initial public meeting and set Titles for Initiative #85, Initiative #86, Initiative #87, and Initiative #88 on April 3, 2014.

Petitioners/Cross-Respondents filed Motions for Rehearing on April 10, 2014, objecting to the actions of the Title Board upon a variety of bases, including those noted above. The Motions for Rehearing were heard by the Title Board on April 16, 2014, and were granted in part and denied in part.

On April 23, 2014, Petitioners/Cross-Respondents filed their Petitions for Review with regard to each of the Initiatives with this Court pursuant to §1-40-107(2). Also on April 23, 2014, the Proponents filed a Petition for Review with regard to the single issue noted above, resulting from a change to the Titles for two of the Initiatives made at the rehearings in response to Objections by the Petitioners/Cross-Respondents. Pursuant to Order of Court dated April 30, 2014, the proceedings with regard to each of these Initiatives were consolidated for purposes of briefing.

II. Statement of Facts.

The four Initiatives at issue are substantially similar in content and are alternative versions of a single measure the Proponents seek to place on the 2014 General Election ballot in Colorado. As stated to the Title Board, the Proponents will only circulate petitions for, and seek to place on the ballot, one of these alternative Initiatives.

Each of the Initiatives establishes an alternative statewide setback requirement for the location of new oil and gas wells, specifically including those using hydraulic fracturing, from occupied structures.[2] Three of the measures – Initiatives # 85, #86, and #87 – state that the setback requirement shall not be considered a taking of private property under Colo. Const. art. II, §§14 or 15; Initiative #88 is silent on that point. Three of the measures – Initiatives #85, #86, and #87 – allow the owner of a home to waive the setback requirement with regard to his or her home; Initiative #88 allows the owner of the surface estate to waive the setback requirement with regard to any occupied structure on the property.

At the April 16 rehearing on these measures, the Title Board made various revisions to the Titles, largely at the request of the Petitioners/Cross-Respondents and with the consent of the Proponents. One revision, however, was made over the objection of the Proponents – the Petitioners/Cross-Respondents argued that the phrase "including those using hydraulic fracturing" (following the phrase "any new oil and gas well") was a politically charged catch phrase. Proponents disagreed, noting that the text of the measure itself contained that precise phrase and that the voters were entitled to be advised that hydraulic fracturing operations were the

[2] Initiative #85 would establish a 1500 foot setback. Initiative #86 and Initiative #88 would establish a 2000 foot setback. Initiative #87 would establish a 2640 foot (one-half mile) setback.

primary focus of the measure. The Title Board removed the phrase from each of the Titles. This issue is the sole object of Proponents' Cross-Petition.

SUMMARY OF THE ARGUMENT

1. Initiative #85, Initiative #86, and Initiative #87 do not violate the single subject requirement of Colo. Const. art. V, §1(5.5), by establishing a statewide setback requirement for the location of new oil and gas wells from occupied structures and, concurrently, providing that this setback requirement shall not be considered a taking under the Colorado Constitution.

2. The Initiatives do not apply exclusively to oil and gas resources owned by the State of Colorado, and the Titles are correct in not suggesting otherwise.

3. The use the phrase "statewide setback requirement" in the Titles is neither misleading nor difficult for the voters to understand.

4. There is nothing in the Titles to Initiatives #85, #86, or #87 that would risk deceiving voters that their federal constitutional rights would or could be affected in any way by anything in the measures.

5. As only one of these alternative Initiatives would proceed to the ballot, there is no risk of conflicting titles on the ballot. Further, the titles to these Initiatives would not be conflicting in any event.

6. Proponents' Cross Petition: 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.[3]

ARGUMENT

I. Alternative Initiatives #85, #86 and #87 Do Not Violate the Single Subject Requirement.

A. Standard of Review.

Colo. Const. art. V, §1(5.5), and §1-40-106.5(1)(a), C.R.S. (2013) , require a proposed initiative to contain only "a single subject which shall be clearly expressed in the title." The purpose of the single subject requirement is to "forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits;" and to "prevent surreptitious measures and apprise the people of the subject of each measure, that is, to prevent surprise and fraud from being practiced upon voters." §1-40-106.5(1)(e)(I), (II), C.R.S. (2013).

[3] The Court is respectfully advised that the Proponents have filed a Cross-Petition on this issue only with regard to alternative Initiatives #86 and #87.

B. Each of These Initiatives Contains a Single Subject.

There is nothing "incongruous" or "surreptitious" about clarifying that a new setback requirement shall not be deemed a "taking" under the Colorado Constitution within the same measure that creates the new setback requirement. At most, the former is an "implementation or enforcement detail directly tied to the initiative's single subject." *In re Initiative for 2007-2008 #57*, 185 P.3d 142, 146 (Colo. 2008); *In re Initiative for 2005-2006 #73*, 135 P.3d 736, 739 (Colo. 2006). The "necessary or proper" connection is apparent – the statement that the setback requirement shall not be deemed a taking under the Colorado Constitution has no discernable meaning absent application to the setback requirement. The complete dependency of the takings provision upon the setback requirement to which it is exclusively applicable removes any potential for the enlistment of independent voter support, or "logrolling." And the inclusion of the takings provision in the measures – and its clear reference in the Titles – directly prevents, rather than invites, voter surprise or fraud.

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 Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Proposed*

Initiative on "Trespass-Streams with Flowing Water", 910 P.2d 21, 24 (Colo. 1996). Section 1-40-106(3)(b), C.R.S. (2013), requires the Title Board to "consider the public confusion that might be caused by misleading titles" and to "avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear." *See also In re Initiative for 2009-2010 #45*, 234 P.3d 642, 649 (Colo. 2010).

The purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose. *Id*. The titles must be sufficiently clear and brief for the voters to understand the principal features of what is being proposed; a material omission can create misleading titles. *See In re Ballot Title 1999-2000 # 29,* 972 P.2d 257, 266 (Colo. 1999).

B. The Initiatives Do Not Apply Exclusively to Oil and Gas Resources Owned by the State of Colorado, and the Titles Are Correct in Not Suggesting Otherwise.

The alternative Initiatives use the term "oil and gas operations" (Initiatives #85 and #88) or "oil and gas development" (Initiatives #86 and #87) in their statements of legislative purposes and findings (and only there), and separately define those terms as "exploration for and production of Colorado's oil, gas, other gaseous and liquid hydrocarbons, and carbon dioxide." Petitioners/Cross-

Respondents have remarkably construed this to mean that the measures apply only to oil and gas resources owned by the State of Colorado – and not to privately or federally owned resources within the geographic bounds of the state.

If the blanket language in the operative provisions of the Initiatives – *e.g.*, "statewide setbacks" for "all new oil and gas wells requiring a state or local permit" from any building or structure certified or intended for human occupancy – were not enough to bely this interpretation, the presence in three of the measures of a statement that the setback requirement "shall not be considered a taking of private property" should seal the issue. The Title Board suffered from no confusion, understood the measures to be directed to operations geographically within Colorado (rather than Kansas or elsewhere), and set the Titles accordingly.

C. The Use of the Phrase "Statewide Setback Requirement" in the Titles is Neither Misleading Nor Difficult for the Voters to Understand.

Petitioners/Cross-Respondents find the use of the term "statewide setback requirement" in the Titles – reflecting the textual language of the measures – to be "alliterative and innocuous," and would prefer to substitute "prohibition." In fact, the measures establish "statewide setback requirements," nothing is "prohibited" (except presumably a violation of those setback requirements), and the language is quite within the understanding of the voters (particularly as they read the next few

lines of the Titles). Use of the word "prohibition" would assuredly be less clear, less precise, misleadingly suggestive of broader effects, and less informative as to the actual content and effect of the measures. The Title Board properly declined to adopt this suggestion.

D. There is Nothing in the Titles to Initiatives #85, #86, or #87 that Would Risk Deceiving Voters that their Federal Constitutional Rights Would or Could Be Affected in Any Way by Anything in the Measures.

The Titles to Initiatives #85, #86, and #87 accurately state that those Initiatives "establish[] that the statewide setback requirement is not a taking of private property requiring compensation under the Colorado constitution." Petitioners/Cross-Respondents now suggest (not having evinced this concern in their Motions for Rehearing) that the voters will stumble into the confused supposition that these Initiatives will also revise (in fact "bar") any protections they may have against governmental takings without compensation under the Constitution of the United States.

Whatever this argument may suggest about Petitioners/Cross-Respondents' view of Colorado voters, the Title Board – at Proponents' behest – addressed this concern by assuring that each of the Titles referred clearly and explicitly to rights "under the Colorado constitution." It could do little more without engaging in an interpretive analysis of the legal implications of the measures under federal law,

including their possible effect upon other constitutional provisions – which this Court has repeatedly held not to be the Title Board's task. *In re Initiative for 2009-2010 #24*, 218 P.3d 350, 355-56 (Colo. 2009); *In re Initiative for 1999-2000 #227 and #228*, 3 P.3d 1, 4 (Colo. 2000); *In re Proposed Initiative on Parental Rights*, 913 P.2d 1127, 1132 (Colo. 1996).

E. There is No Risk of Conflicting Titles.

Finally, Petitioners/Cross-Respondents argue that the Titles set for Initiatives #86, #87, and #88 "improperly mirror the titles previously set by the Board for other proposed initiatives," presumably Initiative #85 and one another.

First, as specifically represented to the Title Board and this Court, Proponents will only circulate petitions for and seek to place one of these alternative, and conflicting, Initiatives on the ballot.

Second, though each measure would create a statewide setback requirement for new oil and gas wells from occupied structures, the conflicting specifics of each measure – the precise length of the setback, the inclusion or omission of a takings exclusion, and the waiver authorization – are spelled out prominently and clearly in each of the short Titles. None of the Titles read the same – each clearly "distinguish[es] between overlapping or conflicting proposals." *In re Initiative Concerning "Fair Treatment II"*, 877 P.2d 329, 332 (Colo. 1994). Each Title

"accurately reflect[s] the distinctions between the measures" and would enable the voter to readily distinguish between them. *In re Initiative for 2007-2008 #61*, 184 P.3d 747, 752 (Colo. 2008).

F. Proponents' Cross-Appeal.[4]

The text of each of the measures at issue – in both the statement of purpose in section 1(a) and in the operative language of section 2 – refers to oil and gas wells or development "including those using hydraulic fracturing." The point was to assure that there would be no ambiguity in application on this point.

At the initial Title Board hearing, titles were set clearly indicating that the new setback requirements would be applicable to "any new oil and gas well, including those using hydraulic fracturing." Petitioners/Cross-Respondents objected in their Motion for Rehearing on the ground that "hydraulic fracturing" constituted a catch phrase. Over the objection of the Proponents, the Title Board deleted the phrase from the final Titles.

First – to Petitioners/Cross-Respondents' objection – "hydraulic fracturing" is not 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). "'By drawing attention to themselves and triggering a favorable

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

response, catch phrases generate support for a proposal that hinges not on the content itself, but merely on the wording of the catch phrase.'" *Id*. , quoting *In re Initiative for 2007-2008 #62*, 184 P.3d 52, 60 (Colo. 2008). "[P]hrases that merely describe the proposal are not impermissible catch phrases" – *Id*. – even though the phrase may reflect "political disagreement" or "polls with the public better than other phrases." *Id*. at 649-50.[5]

Second, in a rush to avoid the suggestion of controversy, it is critical not to gut a title of its essential informative value. The phrase "including those using hydraulic fracturing" was used in the measures because hydraulic fracturing is a critical, and indeed precipitating, focus of the measures. The voters have a right to know that. The voters are entitled to clarity on the point that the proposed statewide setbacks from "oil and gas wells" include "those using hydraulic fracturing" – a point that may not necessarily be self-evident to the average voter without the reference. 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.

[5] The Court cited several examples of phrases laden with controversy, yet descriptive of an initiative proposal, that have been properly reflected in titles without being deemed catch phrases, *e.g.*, "criminal conduct," "preserve . . . the social institution of marriage," "management of growth," "refund to taxpayers," and "protect the environment and human health." *In re #45*, 234 P.3d at 649-50. One could add "mining" or "marijuana" or "immigration" or "abortion" to this list.

"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 #45*, 234 P.3d at 648, quoting *In re Initiative for 2009-2010 #24*, 218 P.3d 350, (Colo. 2009); *accord*, *In re Initiative for 2011-2012 #45*, 274 P.3d 576, 582 (Colo. 2012).

Respectfully, in the interest of clarity with the voters, the complete phrase "any new oil and gas well, including those using hydraulic fracturing" should be restored to the Titles for Initiatives #86 and #87.

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, 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 13th day of May, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of May, 2014, a true and correct copy of the foregoing **RESPONDENTS/CROSS-PETITIONERS' OPENING 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 available for inspection by other parties or the Court upon request.