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SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) 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' 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 2,870 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 "Proponents" or "Cross-Petitioners"), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Opening Brief in support of the titles, ballot titles and submission clauses (jointly, the "Titles") that the Title Board set for 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").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

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

1. Do Initiative #90, Initiative #91, Initiative #92 and Initiative #93 violate the single subject requirement of Colo. Const. art. V, §1(5.5), by: (a) expanding the authority of local governments to prohibit or limit the exploration and production of "Colorado's oil and gas;" (b) depriving property owners of rights and protections granted under Colo. Const. art. II, §§14 or 15; (c) exempting local governments from complying with the requirements of Article XX and Section 16 of Article XIV of the Colorado Constitution; and (d) changing the legal standard used to determine the validity of a local law that conflicts with a state law.

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

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

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 federals interests);

b. with regard to Initiative #91, Initiative #92, and Initiative #93, 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 #90, does the Title fail to fairly and adequately express the true meaning and intent of the Initiative by omitting the phrase "including hydraulic fracturing," thereby failing to advise the voters of the central focus 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 #90, Initiative #91, Initiative #92, and Initiative #93 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 Title for Initiative #90 made at the rehearing 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 local government control of oil and gas development, including hydraulic fracturing. Two of the measures – Initiatives #90, and #93 – state that any law enacted pursuant to the Initiatives shall not be

considered a taking of private property under Colo. Const. art. II, §§14 or 15; Initiatives #91 and #92 are silent on that point. Three of the measures – Initiatives #90, #92, and #93 – use the term "oil and gas development," while Initiative #91 uses the term "oil and gas operations." Initiative #93 omits the terms "prohibitions or" in regards to limits on oil and gas development.

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 hydraulic fracturing" (following the phrase "local government regulation of oil and gas development") 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 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 ARGUMENT

Initiative #90, Initiative #91, Initiative #92, and Initiative #93 do not violate the single subject requirement of Colo. Const. art V, §1(5.5), because they grant

local governments the authority to regulate oil and gas development, including hydraulic fracturing, by enacting local laws that are more restrictive and protective of a community's health, safety, welfare, and environment than state law, and, concurrently, providing that laws enacted pursuant to this provision shall apply to all Colorado counties, cities and towns, and shall not be considered a taking under the Colorado Constitution.

The Titles for Initiative #90, Initiative #91, Initiative #92, and Initiative #93 are not misleading because they do not apply exclusively to oil and gas resources owned by the State of Colorado, and the Titles are correct in not suggesting otherwise.

As only one of these alternative Initiatives would proceed to the ballot, there is no risk of confusingly similar titles on the ballot. Further, the Titles to these Initiatives would not conflict with one another in any event.

Proponents' Cross Petition: To fairly and adequately reflect the principal focus and effect of these measures, the Titles should include the complete phrase "local government regulation of oil and gas development 'including hydraulic fracturing.'" This would not constitute a catch phrase. [2]

ARGUMENT

[2] The Court is respectfully advised that the Proponents have filed a Cross-Petition on this issue only with regard to alternative Initiative #90.

I. Alternate Initiatives #90, #91, #92 and #93 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).

B. Initiatives 2013-2014 #90-#93 Contain a Single Subject.

Petitioners contend that the Initiatives violate the single subject requirement by granting local governments the authority to regulate oil and gas development, including hydraulic fracturing, allowing local laws to be more restrictive and protective of a community's health, safety, welfare, and environment than state law, and, concurrently, providing that laws enacted pursuant to this provision shall

apply to all Colorado counties, cities and towns, and shall not be considered a taking under the Colorado Constitution. Yet what Petitioners contend are multiple subjects, are instead a single subject – 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 – 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) (citations omitted).

There is nothing "incongruous" or "surreptitious" about clarifying that a new local law shall not be deemed a "taking" under the Colorado Constitution within the same measure that creates the authority for the local government to enact the law. At most, the former is an "implementation or enforcement detail directly tied to the initiative's single subject." *In re Title, Ballot Title, & Submission Clause for 2007-2008 #57*, 185 P.3d 142, 146 (Colo. 2008); *In re Title, Ballot Title, & Submission Clause for 2005-2006 #73*, 135 P.3d 736, 739 (Colo. 2006). The

"necessary or proper" connection is apparent – the statement that 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 law. The complete dependency of the takings provision upon the authorization to enact the law 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. *See* §1-40-106.5(1)(e)(II), C.R.S.

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.

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). Section 1-40-106(3)(b), C.R.S. (2013), requires the Title Board 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. *See 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" (Initiative #91) or "oil and gas development" (Initiatives #90, #92, and #93), 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.*, "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" –were not enough to bely this interpretation, the presence in two of the

measures of a statement that the enactment of local laws "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. There is No Risk of Conflicting Titles.

Petitioners/Cross-Respondents argue that the Titles set for Initiatives #91, #92, and #93 "improperly mirror the titles previously set by the Board for another proposed initiative," presumably Initiative #90 and one another.

Proponents represented to the Title Board and now hereby represent to this Court, that they will only circulate petitions for and seek to place one of these alternative Initiatives on the ballot.

Second, though each measure authorizes local governments to regulate oil and gas activity, including hydraulic fracturing, within their geographic boundaries, the conflicting specifics of each measure – the inclusion (#90 and #93) or omission (#91 and #92) of a takings exclusion, the use of the term "oil and gas operations" (#91) or "oil and gas development," (#90, #92, and #93) and the omission of the term "prohibit" (#93) – are spelled out clearly in each of the short Titles. None of the Titles read the same – each "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).

D. Proponents' Cross-Appeal. [3]

The text of the measure at issue 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 Hydraulic Fracturing;" (2) in the statement of purpose in section 1(a) which states "including the use of hydraulic fracturing;" and (3) in the operative language of section 2 which states "including hydraulic fracturing." The point was to assure that there would be no ambiguity in application on this point.

At the initial Title Board hearing, the Title Board set Titles clearly indicating that the measures authorized local laws that prohibited or limited "oil and gas development, including 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.

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

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 Initiative #45*, 234 P.3d at 649 (emphasis added). "'By drawing attention to themselves and triggering a favorable 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.[4]

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 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 amendment vests in local

[4] 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" and to this list.

governments the power to regulate oil and gas development within their geographic borders; and that such power includes the ability to enact prohibitions or limits on oil and gas development, including 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.

Petitioners must offer evidence beyond the "bare assertion that political disagreement currently exists" regarding the challenged phrase. *In re #45*, 234 P.3d at 649. "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 "local government regulation of oil and gas development, 'including hydraulic fracturing'" should be restored to the Title for Initiative #90.

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, 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 "local government regulation of oil and gas development, 'including hydraulic fracturing'" to the Title.

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.