

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, #87

Petitioners: CAITLIN ANNE LEAHY and
GREGORY M. DIAMOND

v.

Respondents: MIZRAIM CORDERO and
SCOTT PRESTIDGE

and

Title Board: SUZANNE STAIERT; DANIEL
DOMENICO; and JASON GELENDER

▲ COURT USE ONLY ▲

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Supreme Court Case No.
14SA122

**PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE
SETTING BOARD CONCERNING
PROPOSED INITIATIVE 2013-2014 #87**

Caitlin Anne Leahy and Gregory M. Diamond (“Petitioner-Proponents”), registered electors of the State of Colorado, through their undersigned counsel, respectfully petition this Court pursuant to Colo. Rev. Stat. § 1-40-107(2), to review the actions of the Ballot Title Setting Board (“Title Board”) with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2013-2014 #87.

STATEMENT OF THE CASE

A. Procedural History of Proposed Initiative #87

Caitlin Anne Leahy and Gregory M. Diamond are the proponents of Initiative 2013-2014 #87 (the “Proposed Initiative”). The Offices of Legislative Council and Legislative Legal Services held a review and comment hearing on the Proposed Initiative. Thereafter, the Petitioner-Proponents submitted a final version of the Proposed Initiative to the Secretary of State.

The Title Board held a hearing on April 2, 2014, and determined the Proposed Initiative contained a single subject and set a title. On April 9, 2014, Respondents Mizraim Cordero and Scott Prestidge filed a Motion for Rehearing alleging that the Proposed Initiative violated the single subject requirement and that its title was unfair, misleading and contained an impermissible catch-phrase. The Title Board held a rehearing on April 16, 2014, at which time it granted the

Motion for Rehearing to the extent that it amended the title, and denied it as to all other respects.

B. Jurisdiction

Petitioner-Proponents are entitled to a review before the Colorado Supreme Court pursuant to Colo. Rev. Stat § 1-40-107(2). After the initial title setting hearing for Initiative #87, the title contained the words “including hydraulic fracturing.” After Respondents filed a motion for rehearing on April 9, 2014, Petitioner-Proponents participated in the rehearing on April 16, 2014, and over their objections, the Title Board removed the words “including hydraulic fracturing” from the title. *See* C.R.S. §1-40-107(1). Petitioner-Proponents timely filed this Petition for Review within seven days from the date of the hearing on the Motion for Rehearing. *Id.* §1-40-107(2).

As required by Colo. Rev. Stat. §1-40-107(2), attached to this Petition for Review are certified copies of: (1) the initiative filed by the Petitioner-Proponents; (2) the title and the submission clause set by the Title Board; (3) the Motion for Rehearing filed by the Respondents; and (4) the ruling on the Motion for Rehearing. Petitioner-Proponents are not satisfied with the Title Board’s ruling on the Motion for Rehearing and the resulting title. Consequently, this matter is properly before the Colorado Supreme Court.

GROUNDNS FOR APPEAL

In violation of Colo. Rev. Stat. § 1-40-106(3)(b), the Title Board set a title that is misleading, does not fairly and correctly express the true meaning of the initiative, does not unambiguously state the principles of the provisions to be added to the Constitution, and will lead to voter confusion. The following is an advisory statement of the issue to be addressed in Petitioner-Proponents' brief:

Whether the ballot title is misleading when it omits from the title the words "including hydraulic fracturing," thereby failing to advise the electorate of the central purpose of the measure as expressed in the measure itself.

PRAYER FOR RELIEF

Petitioners-Proponents respectfully request that, after consideration of the parties' briefs, this Court determine that the title set for the Proposed Initiative be corrected to reinsert the words "including hydraulic fracturing" to ensure the title accurately and fairly represents the text of the initiative.

Respectfully submitted this 23rd day of April, 2014.

s/Martha M. Tierney

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**ATTORNEYS FOR PETITIONER-
PROponents**

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of April, 2014, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2013-2014 #87** was filed and served via the Integrated Colorado Courts E-filing System, to the following:

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s/Amy Knight
Amy Knight



STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **SCOTT GESSLER**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the final text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2013-2014 #87 'Oil and Gas Operations'".....

..... **IN TESTIMONY WHEREOF** I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 23rd day of April, 2014.



A handwritten signature in blue ink, reading "Scott Gessler".

SECRETARY OF STATE

RECEIVED

MAR 21 2014

2013-2014 #87 - FINAL

Colorado Secretary of State
SWARD 1:15PM

Be it Enacted by the People of the State of Colorado:

SECTION 1. In the constitution of the state of Colorado, add article XXX as follows:

ARTICLE XXX

Mandatory Setback of Oil and Gas Wells

Section 1. Purposes and findings. THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE:

(a) THAT THE CONDUCT OF OIL AND GAS DEVELOPMENT, INCLUDING THE USE OF HYDRAULIC FRACTURING, MAY IMPACT PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT;

(b) THAT ANY IMPACTS ARE EXPERIENCED MOST DIRECTLY IN LOCAL COMMUNITIES;

(c) THAT SUCH IMPACTS ARE MINIMIZED AND MITIGATED BY LOCATING WELLS AWAY FROM OCCUPIED STRUCTURES; AND

(d) THAT TO PRESERVE THE PUBLIC'S HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT, THE PEOPLE DESIRE TO ESTABLISH A STATEWIDE SETBACK REQUIRING NEW OIL AND GAS WELLS BE LOCATED AWAY FROM OCCUPIED STRUCTURES, INCLUDING HOMES, SCHOOLS AND HOSPITALS.

Section 2. Grant of authority. THE PEOPLE OF THE STATE OF COLORADO HEREBY ESTABLISH A STATEWIDE SETBACK THAT ALL NEW OIL AND GAS WELLS REQUIRING A STATE OR LOCAL PERMIT, INCLUDING THOSE USING HYDRAULIC FRACTURING, MUST BE LOCATED AT LEAST TWO THOUSAND SIX HUNDRED FORTY FEET FROM OCCUPIED STRUCTURES. FOR PURPOSES OF THIS ARTICLE, "OCCUPIED STRUCTURE" MEANS ANY BUILDING OR STRUCTURE THAT REQUIRES A CERTIFICATE OF OCCUPANCY, OR BUILDING OR STRUCTURE INTENDED FOR HUMAN OCCUPANCY, INCLUDING HOMES, SCHOOLS, AND HOSPITALS. FOR PURPOSES OF THIS ARTICLE, "OIL AND GAS DEVELOPMENT" MEANS EXPLORATION FOR AND PRODUCTION OF COLORADO'S OIL, GAS, OTHER GASEOUS AND LIQUID HYDROCARBONS, AND CARBON DIOXIDE. THE OWNER OF A HOME MAY WAIVE THIS SETBACK ONLY WITH REGARD TO THE OWNER'S HOME.

Section 3. Not a taking. APPLICATION OF THE STATEWIDE SETBACK ESTABLISHED PURSUANT TO THIS ARTICLE SHALL NOT BE CONSIDERED A TAKING OF PRIVATE PROPERTY NOR REQUIRE THE PAYMENT OF JUST COMPENSATION PURSUANT TO SECTIONS 14 AND 15 OF ARTICLE II OF THE COLORADO CONSTITUTION.

Section 4. Self executing, severability, conflicting provisions. ALL PROVISIONS OF THIS ARTICLE ARE SELF-EXECUTING, ARE SEVERABLE, AND SHALL SUPERSEDE CONFLICTING STATE AND LOCAL LAWS AND REGULATIONS. LAWS AND REGULATIONS MAY BE ENACTED TO FACILITATE THE OPERATION OF THIS ARTICLE, BUT CANNOT IN ANY WAY REDUCE THE SETBACK STANDARD OR THE POWERS AND RIGHTS ESTABLISHED IN THIS ARTICLE.

Ballot Title Setting Board

Proposed Initiative 2013-2014 #87¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least one half mile from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be An amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least one half mile from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution?

Hearing April 3, 2014:

Single subject approved; staff drafts amended; titles set.

Hearing adjourned 11:02 a.m.

¹ Unofficially captioned “**Oil and Gas Operations**” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

RECEIVED

APR 10 2014

Colorado Secretary of State

COLORADO TITLE SETTING BOARD

S.WARD 3:38P.M.

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2013-2014 #87

MOTION FOR REHEARING ON PROPOSED INITIATIVE 2013-2014 #87

On behalf of Mizraim Cordero and Scott Prestidge, registered electors of the State of Colorado, the undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2013-2014 #87 ("Initiative"), and as grounds therefore states as follows:

I. THE MEASURE IMPERMISSIBLY CONTAINS SEVERAL SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE CONSTITUTIONAL AND STATUTORY SINGLE-SUBJECT REQUIREMENT.

Under article V, section 1(5.5) of the Colorado constitution and section 1-40-106.5, C.R.S., proposed ballot measures must contain only a single subject. "[T]he Board may not set the titles of a proposed Initiative, or submit it to the voters, if the Initiative contains multiple subjects." *Aisenberg v. Campbell (In re Title, Ballot Title, & Submission Clause 1990-2000 #104)*, 987 P.2d 249, 253 (Colo. 2000).

As reflected in the language of the Initiative, as well as in the colloquy between the proponents' attorney and the Board at the April 3 hearing, the Initiative impermissibly weaves together the following multiple subjects:

1. Overriding current statewide setback rules with an expanded statewide setback from all "occupied structures," as that term is defined in the Initiative (§ 2);
2. Depriving property owners of the rights and protections granted under sections 14 and 15 of the Colorado constitution (§ 3);
3. Limiting the use of hydraulic fracturing in "oil and gas development," as that term is defined in the Initiative (§ 2); and
4. Authorizing a homeowner to waive a setback as to the homeowner's home (§ 2).

These are separate and distinct subjects that violate the constitutional and statutory single-subject requirement. The Initiative thus fails to meet the jurisdictional threshold for the Board to set a title and, on rehearing, title setting should be denied.

II. THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE AS DRAFTED CONFLICT WITH THOSE PREVIOUSLY SELECTED, CONTAIN IMPERMISSIBLE CATCH PHRASES, AND FAIL TO DESCRIBE THE PURPOSE OF THE INITIATIVE.

In the alternative, the title and ballot title and submission clause as drafted conflict with a title and ballot title and submission clause previously selected for a 2013-2014 proposed initiative. Moreover, the title and ballot title and submission clause are misleading and confusing because they contain impermissible catch phrases and fail to fairly express the true intent and meaning of the Initiative.

Here, the Initiative's title was set as follows:

An amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least one half mile from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution.

The Initiative's ballot title and submission clause was set as follows:

Shall there be an amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least one half mile from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution?

Pursuant to section 1-40-106(3)(b), ballot titles "shall not conflict with those selected for any petition previously filed for the same election." "Such a conflict exists where 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).

Here, the title and ballot title and submission clause conflict with the title and ballot title and submission clause previously selected for Proposed Initiative 2013-2014 #85 and Proposed Initiative 2013-2014 #86. When asked by the Board to explain the relationship between Proposed Initiative 2013-2014 #85, Proposed Initiative 2013-2014 #86, Proposed Initiative 2013-2014 #87, and Proposed Initiative 2013-2014 #88, the proponents' attorney described them as a "packet" of initiatives with "little tweaks" to each of them and characterized them as having an identical single subject: "I would say for all of #85 through #88, they create a setback requirement for new oil and gas wells from occupied structures." Thus, if the proponents' position is that these four initiatives are the same, then there is no disagreement that the titles conflict and it cannot be the case that voters will be able to distinguish between them.

In addition, the statute requires the title and ballot title and submission clause to "correctly and fairly express the true intent and meaning" of the proposed initiative. "[A] material omission can create misleading titles." *Garcia v. Chavez (In re Title, Ballot Title, &*

Submission Clause 1999–2000 #258A), 4 P.3d 1094, 1098 (Colo. 2000). Titles are also prohibited from containing a “catch phrase” that unfairly prejudices the proposal in its favor because such catch phrases contravene section 1-40-106(3). *Id.*

For the following reasons, the title and ballot title and submission clause as drafted here are misleading and confusing:

1. The catch phrase “statewide setback” has an alliterative quality that masks its true, plain language meaning in a way that is likely to elicit support for the Initiative without contributing to public understanding of the effect of the Initiative;
2. Use of the term “new” is a vague catch phrase that is likely to prejudice the Initiative in its favor without contributing to public understanding of the reach of the Initiative;
3. The catch phrase “hydraulic fracturing” is politically charged and its inclusion is likely to appeal to voter emotion without contributing to public understanding of the relationship between the Initiative and hydraulic fracturing;
4. The title and ballot title and submission clause fail to describe the effect of the Initiative as an override of current statewide setback rules; and
5. The title and ballot title and submission clause fail to describe the type of oil and gas wells affected by the Initiative.

Hence, the title and ballot title and submission clause, as drafted, do not conform to the statutory requirements of section 1-40-106(3)(c) or to the case law construing the statute and require amendment consistent with these concerns.

III. REQUEST FOR RELIEF TO GRANT THE MOTION FOR REHEARING AND TO REJECT THE MEASURE FOR LACK OF JURISDICTION OR, ALTERNATIVELY, TO AMEND THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE.

Because the Initiative contains multiple subjects, the Board lacks jurisdiction to set a title. To the extent the Board determines it has jurisdiction to set a title, the title and ballot title and submission clause, as drafted, conflict with those previously drafted, contain impermissible catch phrases, and fail to describe the purpose of the measure in ways that are misleading and confusing.

Accordingly and pursuant to section 1-40-107(1), C.R.S., the objectors request that this Motion for Rehearing be granted and that the Board reject the Initiative for lack of jurisdiction or, alternatively, amend the title and ballot title and submission clause consistent with the concerns set forth above.

Respectfully submitted this 10th day of April, 2014.



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Ballot Title Setting Board

Proposed Initiative 2013-2014 #87¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, changing existing setback requirements to require any new oil or gas well to be located at least one half mile from the nearest occupied structure; authorizing a homeowner to waive the setback requirement for the homeowner's home; and establishing that the statewide setback requirement is not a taking of private property requiring compensation under the Colorado constitution.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, changing existing setback requirements to require any new oil or gas well to be located at least one half mile from the nearest occupied structure; authorizing a homeowner to waive the setback requirement for the homeowner's home; and establishing that the statewide setback requirement is not a taking of private property requiring compensation under the Colorado constitution?

Hearing April 3, 2014:

Single subject approved; staff drafts amended; titles set.

Hearing adjourned 11:02 a.m.

Rehearing April 16, 2014:

Motion for rehearing granted to the extent that the Board made changes to the titles; denied in all other respects.

Hearing adjourned 2:32 p.m.

¹ Unofficially captioned "Oil and Gas Operations" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.