

SUPREME COURT OF COLORADO
2 East 14th Avenue
Denver, CO 80203

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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 2015-
2016 #75 (“Local Government Authority to
Regulate Oil and Gas Development”)

**Petitioners: SHAWN MARTINI and SCOTT
PRESTIDGE**

v.

**Respondents: BRUCE MASON and KAREN
DIKE**

and

**Title Board: SUZANNE STAIERT;
FREDERICK YARGER; and JASON
GELENDER**

▲ COURT USE ONLY ▲

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Case No. 2016SA70

**PETITIONERS’ ANSWER BRIEF IN SUPPORT OF PETITION FOR
REVIEW OF PROPOSED INITIATIVE 2015-2016 #75 (“LOCAL
GOVERNMENT AUTHORITY TO REGULATE OIL AND GAS
DEVELOPMENT”)**

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3,072 words (answer brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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 or 28.1, and C.A.R. 32.

s/Elizabeth H. Titus _____

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SUMMARY OF THE ARGUMENT

The arguments set forth in the Proponents' Opening Brief do not support the Title Board's (the "Board") determination that proposed initiative 2015-2016 #75 (hereinafter the "Initiative" or "Proposed Initiative" or "Initiative #75") contains a single subject or that the title is fair and accurate.¹

Proponents claim that "Initiative #75 contains a single subject by vesting in local governments the power and authority to adopt laws concerning oil and gas development within their geographic borders." Resp'ts' Opening Br. 4. They argue that all remaining provisions are "implementing and enforcement details that flow from the measure[']s single subject." *Id.* However, as set forth in the Proponents' Opening Brief and further described herein, the Proposed Initiative contains provisions that (1) allow local governments to completely ban oil and gas development, (2) exempt from preemption local laws that are unrelated to oil and gas development, and (3) include a new constitutional policy directive that would undermine the state's ability to regulate oil and gas development. These are not simply "implementing and enforcement details," but rather, constitute distinct and separate purposes.

¹ This Answer Brief addresses only certain disputed points arising from the Proponents' Opening Brief. Petitioners do not concede any arguments presented in Petitioners' Opening Brief that are not addressed herein.

Proponents assert in their Opening Brief that the Initiative’s Final Title (“Final Title”) is sufficient because it “fairly and accurately sets forth the major features of Initiative #75 and is not misleading.” Resp’ts’ Opening Br. 5. To the contrary, the Final Title fails to reflect central features of the Initiative, including that the measure (1) declares on behalf of the people of Colorado that oil and gas development has “detrimental impacts on public health, safety, general welfare, and the environment,” (2) prioritizes local control of oil and gas development over matters of statewide concern, and (3) increases local governments’ authority to enact laws that prohibit or limit oil and gas development.

Accordingly, the Court should remand this matter to the Board, directing it to strike the Final Title and to return the Initiative to Proponents. In the alternative, the Court should remand this matter to the Board, directing it to amend the Final Title to address the issues presented herein.

ARGUMENT

I. THE INITIATIVE FAILS TO COMPLY WITH THE SINGLE-SUBJECT REQUIREMENT, INSTEAD PROMOTING FOUR MULTIPLE AND DISTINCT SUBJECTS.

The Proponents and Petitioners agree that that the primary purpose of the measure is to provide local governments with authority to regulate oil and gas development. Pet’rs’ Opening Br. 9; Resp’ts’ Opening Br. 8. Proponents define

the purported single subject of the Initiative as “vesting in local governments the power and authority to adopt laws concerning oil and gas development within their geographic borders.” Resp’ts’ Opening Br. 8. Where the parties disagree, and what ultimately this Court must decide, is whether the remaining provisions are properly connected to this primary purpose. Pet’rs’ Opening Br. 4. For the reasons set forth below and in Petitioners’ Opening Brief, the Proposed Initiative contains multiple and distinct subjects that are not connected to its primary purpose in violation of Article V, Section 1(5.5) of the Colorado Constitution.

A. Standard of Review.

The Petitioners described the applicable standard of review in their Opening Brief, which is consistent with the standard set forth in the Proponents’ Opening Brief. *Compare* Pet’rs’ Opening Br. 8–9 *with* Resp’ts’ Opening Br. 6–7.

B. The Initiative Grants Local Governments Constitutional Authority to Regulate Oil and Gas Development Within their Geographic Borders.

The Proponents define the purported single subject of the Initiative as “vesting in local governments the power and authority to adopt laws concerning oil and gas development within their geographic borders.” Resp’ts’ Opening Br. 8. As explained in Petitioners’ Opening Brief, this grant of power seeks to increase local governments’ authority to regulate oil and gas operations to a level on par

with the state. Pet’rs’ Opening Br. 10–12. Although such local regulation must not be less protective of public health, safety and the environment, the measure does not otherwise limit the scope of local regulation of oil and gas development. Initiative § 3(1).

C. The Initiative’s Other Provisions Exceed the Scope of Implementation of a Local Government’s Right to Regulate Oil and Gas Development.

Proponents claim that the additional purposes identified in Petitioners’ Opening Brief constitute “implementation terms to protect or enforce” the rights granted in the measure and that they are “directly tied to the measure’s central focus.” Resp’ts’ Opening Br. 8. To the contrary, the Initiative’s other subjects promote distinct agendas.

1. Granting Local Governments Authority to Ban Oil and Gas Activities is Separate and Distinct from Granting Local Governments Authority to Regulate these Activities.

The measure gives local governments the authority to ban oil and gas development within their respective jurisdictions. Resp’ts’ Opening Br. 8. Granting constitutional authority to ban legal activities that support a statewide “public interest ... in the balanced development, production, and utilization of the natural resources of oil and gas” is separate and distinct from granting local governments the authority to regulate these activities. *See* C.R.S. §34-60-

102(1)(a). The meaning of the word “ban” is “to officially or legally prohibit”; whereas, the definition of “regulate” is “to control or supervise ... by means of rules and regulations.” Oxford Dictionaries, <http://www.oxforddictionaries.com/us> (last visited March 28, 2016). At the most basic level, the two actions are incompatible. It is not plausible to control or supervise something that has been officially prohibited.

This additional grant of authority effectuates the exact result Proponents’ Opening Brief identifies as a violation of the single subject rule: it is designed to gain support from groups that have “different or conflicting goals.” Resp’ts’ Opening Br. 8–9; *see also In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 442 (Colo. 2002). For example, voters who generally support a greater delegation of the state’s authority to local governments will likely favor “vesting in local governments the power and authority to adopt laws concerning oil and gas development.” *See* Resp’ts’ Opening Br. 8. The provision authorizing a ban of oil and gas activities, however, will attract voters opposed to fossil fuel development. The Initiative is vulnerable to the danger identified by the Court in *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 No. 43*, that “measures, incapable of being enacted on their own merits, will nonetheless be passed because joining multiple

subjects having no necessary or proper connection will secure the support of various factions that may have different or even conflicting interests.” *See 2001-02 No. 43*, 46 P.3d at 442. Standing alone, neither a measure vesting local governments with the authority to regulate oil and gas development, nor a measure allowing a local government to ban these activities is likely achieve voter approval. Banning and regulating oil and gas development are actions with conflicting purposes, and an Initiative promulgating both purposes would push voters into an all-or-nothing decision.

2. Exempting from Preemption Local Laws Intended to Mitigate Impacts from Oil and Development Vests Local Government with an Additional Power Extending Beyond Regulation of Oil and Gas Activities.

Proponents claim that Initiative #75’s preemption provision complies with the single-subject requirement because it “alters the existing power and authority of state and local governments to enact certain regulations pertaining to the central purpose of the initiative.” Resp’ts’ Opening Br. 10. However, the preemption provision reaches far beyond the Proponents’ stated central purpose of “vesting in local governments the power and authority to adopt laws concerning oil and gas development within their geographic borders.” *See Pet’rs’ Opening Br. 17–19; see also Resp’ts’ Opening Br. 8; see also Initiative § 3(2).*

The Initiative’s preemption provides: “In matters of local, statewide, or mixed local and state concern, local laws, regulations, ordinances or charter provisions that are *enacted to prevent or mitigate local impacts from oil and gas development are not subject to preemption...*” Initiative § 3(2) (emphasis added). As explained in Petitioners’ Opening Brief, laws intended to mitigate impacts of oil and gas development could address numerous and diverse areas of state law, regulating matters of statewide concern including, for example, air quality standards and rent control. Pet’rs’ Opening Br. 17–19. Exempting from the application of preemption locals laws on these topics, as well as potentially numerous other topics, exceeds implementation of the measure’s central purpose. Rather, it is tantamount to providing another grant of authority to local governments to enact laws that are beyond the scope of “concerning oil and gas development.”

This additional grant of authority triggers the “second ‘danger’ of omnibus measures” identified in the Proponents’ Opening Brief – voter surprise resulting from a surreptitious provision. Resp’ts’ Opening Br. 9 (citing *2001-02 No. 43*, 46 P.3d at 442–43). Here, voters might be enticed to vote for a measure to support local control of oil and gas activities, or to support a local ban on such activities, without realizing that the measure would simultaneously provide local

governments with an additional power unrelated to oil and gas development. *See Id.* at 443 (citing *Matter of Title, Ballot Title, & Submission Clause, Summary for 1997-98 No. 30*, 959 P.2d 822, 827 (Colo. 1998)).

Finally, this case is distinguishable from *Matter of Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155 (Colo. 2014). *2013-2014 No. 90* does not stand for the proposition that any change to Colorado’s preemption doctrine survives the single-subject test. *2013-2014 #90*, 328 P.3d at 161. Instead, the case makes clear that a change to the preemption doctrine resulting directly from granting local governments the power to enact “more restrictive regulations on oil and gas development” than existing state law does not violate the single-subject rule. *Id.* Thus, the Court held that the “effect” of the oil and gas local control measure upon “Colorado’s preemption doctrine does not constitute a separate subject.” Pet’rs’ Opening Br. 20 (citing *2013-2014 #90*, 328 P.3d at 161). Petitioners do not contend that the effect on Colorado’s preemption doctrine resulting from local control of oil and gas development constitutes a separate subject. Rather, the exemption from preemption of a different, distinct and broader category of local laws constitutes a separate subject. Pet’rs’ Opening Br. 20-21.

3. The Operative Provisions Coiled within the Initiative's Declaration Constitute a Separate Subject.

In their Opening Brief, Petitioners demonstrated how the Initiative's Declaration would impede the state's interest to advance the production of oil and gas in a manner that protects public health, safety and the environment consistent with the provisions of Colorado's Oil and Gas Conservation Act, C.R.S. §34-60-102. Pet'rs' Opening Br. 21–24. Contrary to Proponents' assertion, this argument does not concern the application of the doctrine of preemption. Resp'ts' Opening Br. 9–10. Rather, Petitioners argue that a constitutional declaration that “[o]il and gas development, including the use of hydraulic fracturing, has detrimental impacts on public health, safety, general welfare and the environment...” constitutes a fundamental change in public policy, is clearly intended to support a statewide hydraulic fracturing ban, and is incongruous with the state's interest in promoting responsible development of oil and gas described in the Colorado Oil and Gas Act. Pet'rs' Opening Br. 21–24. Accordingly, for these reasons, and the reasons set forth in Petitioners' Opening Brief, provisions contained in Initiative's declaration constitute a separate and distinct subject.

II. THE TITLE AND SUBMISSION CLAUSE ARE UNCLEAR AND WILL MISLEAD VOTERS.

The Proponents and Petitioners both acknowledge that the Final Title must inform voters of the central features of the Initiative, so that voters, regardless of their familiarity with the subject matter, can make thoughtful decisions regarding whether to support the Initiative. The Final Title, however, contains numerous defects that will prevent voters from understanding the Initiative's central features and ultimate effect. The Final Title (1) omits key a provision that oil and gas development "has detrimental impacts on public health, safety, general welfare, and the environment, (2) fails to accurately describe the Initiative's preemption provision, and (3) fails make clear that the Initiative's increase in local government authority. Final Title; Proposed Initiative §1(a). For the reasons set forth below and in the Petitioners' Opening Brief, the Proposed Initiative's Final Title is unclear and will mislead voters in violation of Colo. Rev. Stat. §1-40-106. Therefore, and in the alternative, the Court should remand this matter, directing the Board to amend the Final Title to resolve the issues presented herein.

A. Standard of Review.

The Petitioners described the applicable standard of review in their Opening Brief, which is consistent with the standard included in the Proponents' Opening Brief. *Compare* Pet'rs' Opening Br. 27 *with* Resp'ts' Opening Br. 11–12.

B. The Board Improperly Omitted the Initiative’s Declaration that Oil and Gas Development has “Detrimental Impacts on Public Health, Safety, General Welfare, and the Environment” from the Final Title.

In error, the Board omitted any reference to the Initiative’s declaration that oil and gas development “has detrimental impacts on public health, safety, general welfare, and the environment” from the Final Title. Final Title; Proposed Initiative §1(a). Proponents contend that the declaration only gives “context to the reasons for the constitutional amendment [and] is not a central feature of the measure.” Resp’ts’ Opening Br. 12–13. As described above and in Petitioners’ Opening Brief, the Initiative’s declaration provides much more than context for the measure – it significantly alters the underlying public policy for the state’s regulation of oil and gas development. Pet’rs’ Opening Br. 21–24. Moreover, the oil and gas industry has a substantial presence in Colorado and contributes to the state’s economic well-being.² Thus, Proponents’ contention that Colorado voters need not be alerted to the fact that a “yes” vote in favor of the Initiative includes a

² Brian Lewandowski & Richard Wobbekind, *Oil and Gas Industry Economic and Fiscal Contributions in Colorado by County, 2014*, Leeds School of Business, University of Colorado Boulder (Dec. 2015), <http://www.coloradopetroleumassociation.org/wp-content/uploads/2014/03/COGA-2014-OG-Economic-Impact-Study.pdf> (finding that in 2014 the oil and gas industry accounted for 38,650 direct jobs, contributing nearly \$4.1 billion in employee income to Colorado households, and the total economic impact of the industry was \$31.7 billion).

constitutional finding that oil and gas development “detrimentally impacts public health, safety, general welfare, and the environment” is absurd. Therefore, the Board’s failure to include this central feature of the measure renders the title defective.

C. The Final Title does not Accurately Reflect the Initiative’s Preemption Provision.

As required by law and acknowledged in Proponents’ Opening Brief, the Final Title of an initiative must accurately reflect the central features of the proposed measure. Resp’ts’ Opening Br. 11 (citing *Matter of Title, Ballot Title & Submission Clause & Summary for Proposed Initiative “Trespass-Streams with Flowing Water,”* 910 P.2d 21, 24 (Colo. 1996)). Proponents admit in their Opening Brief that the Initiative’s preemption provision is one of its primary features. Resp’ts’ Opening Br. 14. As such, the Final Title must clearly and accurately reflect the preemption provision of the Initiative.

The formulation of Initiative #75’s preemption provision in the Final Title will confuse and mislead voters. The Final Title states that the Initiative will prohibit “the state from preempting any local laws or regulations that prevent or mitigate local impacts from oil and gas development.” Final Title. Most voters lack the legal background to understand the meaning of the term “preempting.” Further, the Final Title incorrectly characterizes the doctrine of preemption.

Courts apply the doctrine of preemption to invalidate certain local laws; whereas, the state does not actively preempt anything. *See Colo. Mining Ass'n v. Bd. of Cty. Comm'rs of Summit Cty.*, 199 P.3d 718, 723 (Colo. 2009). The Final Title will confuse voters by suggesting that execution of the Initiative's provisions requires state action or inaction, when instead, preemption is a judicial doctrine that determines primacy of conflicting state and local laws. Therefore, the Final Title must be amended to accurately reflect the meaning of preemption generally and with regard to this Initiative.

D. The Final Title Fails to Reflect that the Measure Increases the Authority of Local Governments to Enact Laws that Prohibit or Limit Oil and Gas Development.

In order to prevent voter surprise and confusion, the Final Title should indicate that the Initiative increases local governments' authority to enact laws prohibiting or limiting oil and gas development. As Proponents explained in their Opening Brief, the title and submission clause must “enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such proposal.” Resp'ts' Opening Br. 11 (quoting *In re Title, Ballot Title & Submission Clause for 2009-2010 No. 24*, 218 P.3d. 350, 356 (Colo. 2009)). The Final Title does not inform voters unfamiliar with Colorado's regulatory framework that the Initiative

significantly increases local power over oil and gas development. Therefore, such voters will be unable to intelligently evaluate the proposal.

Proponents cite *In re Title, Ballot Title, Submission Clause for 2007-2008, No. 62* to support their contention that the Final Title is sufficient and need not reflect the Initiative's increase in local government authority to restrict oil and gas operations. Resp'ts' Opening Br. 13. The reasoning of that case is inapplicable here. In *2007-2008 No. 62*, the petitioners unsuccessfully argued that the title of the measure should explain the measure's *potential effects* on existing law. *In re Ballot Title, Submission Clause for 2007-2008, No. 62*, 184 P.3d 52, 60 (Colo. 2008) ("the potential impact of the Initiative, if any ... is uncertain, yet Petitioner would have that possible consequence included in the titles"). The Court explained that it was unnecessary to spell out certain possible consequences of the initiative, and rejected the petitioners' argument because it was "comprised of mere speculation about the potential effects of the Initiative." *Id.* In contrast, the Proposed Initiative's effect, of increasing the local governments' authority and significantly intruding upon the state's authority and duties, is certain. The Board's failure to include this central feature in the Final Title renders the title misleading. Thus, the measure should reflect this central feature.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioners respectfully request that the Court find that the Initiative does not contain a single subject and remand this matter to the Title Board with direction to return the Initiative to the Proponents. In the alternative, Petitioners request that the Court remand the matter to the Title Board with the instructions to amend the title consistent with the concerns set forth above.

Respectfully submitted this 5th day of April, 2016 by:

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CERTIFICATE OF SERVICE

I certify that on April 5, 2016, a true and correct copy of the above and foregoing **PETITIONERS’ ANSWER BRIEF IN SUPPORT OF PETITION FOR REVIEW OF PROPOSED INITIATIVE 2015-2016 #75 (“LOCAL GOVERNMENT AUTHORITY TO REGULATE OIL AND GAS DEVELOPMENT”)** was electronically filed with the Court and served via ICCES upon:

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