

SUPREME COURT, STATE 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 2015-
2016 #75

Petitioners: SHAWN MARTINI and SCOTT
PRESTIDGE

v.

Respondents: BRUCE MASON and KAREN
DIKE

and

Title Board: SUZANNE STAIERT; JASON
GELENDER; and FREDERICK R. YARGER

▲ COURT USE ONLY ▲

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Case No.: 16SA70

**RESPONDENTS' ANSWER BRIEF IN SUPPORT OF PROPOSED
INITIATIVE 2015-2016 #75**

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 3,790 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.A.R. 32.

By: s/Martha M. Tierney

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Bruce G. Mason and Karen Dike (jointly “Proponents” or “Respondents”), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Answer Brief in support of the title, ballot title and submission clause (jointly, the “Title”) that the Title Board set for Proposed Initiative 2015-2016 #75 (“Initiative #75”), and in response to the Opening Brief filed by Petitioners.

SUMMARY OF ARGUMENT

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. The remaining provisions, including the ability to enact prohibitions, moratoria, or limits on oil and gas development; the authorization of local laws and regulations that are more restrictive of oil and gas development and at least as protective of a community’s health, safety, welfare, and environment as state law; and the prohibition on state preemption of local laws or regulations, are all tied to the central focus of the measure.

Initiative #75 does not violate the single subject requirement by allowing local governments to prohibit oil and gas development within their geographic borders. The objective of Initiative #75 is to give local governments the power to adopt laws regulating oil and gas development within their geographic boundaries,

including the power to enact prohibitions, moratoria, or limits on oil and gas development. The proponents did not combine an array of disconnected subjects into the measure for the purpose of garnering support from various factions, and voters will not be surprised by, or fraudulently led to vote for, any surreptitious provisions coiled up in the folds of a complex initiative. Petitioners' concerns about the effects that Initiative #75 could have on the doctrine of preemption, the Oil and Gas Act, or any other laws if enacted are not appropriate for review at this stage. Similarly, statements contained in the purposes and findings of Initiative #75, including a statement that oil and gas development, including the use of hydraulic fracturing, has detrimental impacts on public health, safety, general welfare, and the environment, do not create a separate subject. Petitioners' apparent belief that Initiative #75 is a bad idea does not mean that Initiative #75 contains more than a single subject. Finally, Initiative #75 alters the existing power and authority of state and local governments to enact certain regulations pertaining to the central purpose of the initiative – the regulation of oil and gas development – and this does not violate the single subject requirement.

The title for Initiative #75 fairly and accurately sets forth the major features of the measure and is not misleading. The title need not contain the declaration that oil and gas development has detrimental impacts on public health, safety,

general welfare and the environment. The Title need not state that the measure prioritizes local control of oil and gas development over matters of state interest and matters of statewide concern, or that the measure increases the authority of local governments to enact laws that prohibit or limit oil and gas development. The Title clearly states that local governments will have the authority to regulate oil and gas development within their geographic borders, including the authority to enact prohibitions, moratoria, or limits on oil and gas development. The Title also makes clear that the state cannot preempt conflicting local laws or regulations that prevent or mitigate local impacts from oil and gas development. The Title Board is only obligated to fairly summarize the salient points of a proposed measure, and need not refer to every nuance and feature contained in the proposed measure. While a title must be fair, clear, accurate and complete, it is not required to set out every detail of an initiative.

The Title Board properly exercised its broad discretion in drafting the title for Initiative #75. Accordingly, there is no basis to set aside the Title, and the decision of the Title Board should be affirmed.

ARGUMENT

I. INITIATIVE #75 CONTAINS A SINGLE SUBJECT.

A. Standard of Review and Preservation of the Issue on Appeal.

Petitioners only partially set forth the appropriate standard of review for a single subject analysis employed by this Court when reviewing the Title Board's action in setting a title. Petitioners agree with the Proponents that when reviewing a challenge to the Title Board's decision, this Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's action." *In re Initiative for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014). Also, that the Court "does not determine an initiative's efficacy, construction, or future application." *In re Initiative for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009). Finally, that when construing an initiative, the Court applies the general rules of statutory construction. *See In re Initiative for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006). Petitioners fail to mention that the Court will "only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re Initiative for 2013-2014 #89*, 328 P.3d at 176. Proponents agree that Petitioners preserved the single subject issue for appeal.

B. The Single Subject of Initiative 2015-2016 #75 Is Clear.

The single subject of initiative #75, as accurately expressed in the title, is the authority for local governments to enact laws regulating oil and gas development within their geographic borders. The remaining provisions of Initiative #75 – specifying that local governments may enact prohibitions, moratoria, or limits on oil and gas development; authorizing local laws and regulations that are more restrictive of oil and gas development and at least as protective of a community’s health, safety, welfare, and environment as state law; and prohibiting the state from preempting any local laws or regulations regulating oil and gas development – are all connected to the central focus of the measure. “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).

C. Granting Local Governments the Power to Ban Oil and Gas Development Is Not a Separate Subject.

Petitioners contend that Initiative #75 contains a separate subject because it authorizes local governments to completely ban oil and gas operations within their jurisdictions. *Pet. Op. Br.*, pp. 12-13. The authority of local governments to ban oil and gas development does not create a separate subject, but instead is a provision tied to the central focus of the measure. The objective of Initiative #75 is to give local governments the power to adopt laws regulating oil and gas

development within their geographic boundaries, including the power to enact prohibitions, moratoria, or limits on oil and gas development. “[I]f the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law.” *In re Initiative for 2013-2014 #89*, 328 P.3d at 177 (quoting *In re Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1079 (Colo. 1995)).

Petitioners assert that a prohibition on oil and gas development within a local government’s geographic border would conflict with the Oil and Gas Act, would “upend the state’s interest in the efficient development of [oil and gas] resources and would “significantly and adversely affect the substantive rights of private-property owners.” *Pet. Op. Br.*, pp. 13-14. Petitioners’ point is really, and quite explicitly, that Initiative #75 is a bad policy choice that may lead to serious and undesirable consequences. In determining whether a proposed initiative comports with the single subject requirement, however, it is not appropriate to address the merits of the proposed initiative or predict how it may be applied if adopted by the electorate. As this Court has made clear, “[w]hether a proposed initiative is a "bad idea" is not the test of whether it meets the single subject requirement. *In re Initiative for 2013-2014 #90*, 328 P.2d 155, 161 (Colo. 2014).

Petitioners’ reliance on *In re Initiative for 2003-2004 No. 32 & No. 33*, 76 P.3d 460 (Colo. 2003), is misplaced. In that case, a series of initiatives proposed

that all lawyers be excluded from serving on the ballot title board, and this Court found that there was no necessary or proper connection to the central purpose of the proposed measures - to liberalize the procedure for initiative and referendum petitions – with the exclusion from the title board of a specifically identifiable group. *Id.* at 463. Petitioners contend that Initiative #75 would “substantively curtail the rights of private mineral owners,” and that the curtailment of rights of a “specifically identifiable group” is a separate subject. *Pet. Op. Br.*, p. 14. Yet, Initiative #75 does not specifically identify private mineral owners in any way, nor will its provisions impact the substantive rights of all private mineral owners. Rather, what Petitioners are concerned with is what effect Initiative #75 might have on some private mineral owners if a local government decided to prohibit oil and gas development within its geographic borders. Neither the Title Board nor this Court may “address the merits of a proposed initiative, nor . . . interpret its language or predict its application if adopted by the electorate.” *In re Initiative for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008).

Similarly, Petitioners contend that “granting local governments the constitutional authority to completely prohibit existing and future oil and gas operations is a significant departure from long-standing Colorado law,” *Pet. Op. Br.*, p. 14, and this poses the prospect of “logrolling,” one of the evils to which the

single subject requirement is directed. §1-40-106.5(1)(e)(I), (II), C.R.S. (2015).

When examined closely, however, it is quite difficult to envision co-option of independent advocates of (a) giving local governments the ability to limit oil and gas development within their geographic borders; (b) giving local governments the ability to prohibit for a period of time oil and gas development within their geographic borders; and (c) giving local governments the ability to prohibit oil and gas development within their geographic borders. If a voter does not favor stricter local laws regulating oil and gas development, she will not vote for a measure that gives local governments in Colorado the right to limit oil and gas development within their geographic borders; nor will she vote for a measure that gives local governments the right to prohibit oil and gas development within their geographic borders. Similarly, a voter who favors giving local governments the authority to enact stricter local laws regulating oil and gas development is also likely to support giving local governments the right to decide if a prohibition, a moratorium, or some other limits are right for their community. Initiative #75 does not combine an array of unconnected subjects into the measure for the purpose of garnering support from groups with different, or even conflicting interests. *See In re Initiative for 2013-2014 #89*, 328 P.3d at 177.

Finally, voters will not be surprised to learn that the measure allows a local government to prohibit, limit, or impose moratoriums on oil and gas development because those provisions are clearly stated in the text of the initiative and clearly reflected in the title. Thus, any concern about voter fraud or surprise is not implicated in Initiative #75. *See In re Initiative for 2013-2014 #85*, 328 P.3d 136, 143 (Colo. 2014).

Importantly, in 2014 this Court found a single subject after Petitioner Scott Prestidge challenged a similar measure that granted local governments the authority to enact prohibitions or limits on oil and gas development within their geographic borders. *In re Initiative for 2013-2014 #90*, 328 P.2d at 160-61.

D. Initiative #75’s Effect on the Preemption Doctrine Is Not a Separate Subject.

This Court has repeatedly found that a ballot measure containing a change in preemption law does not create a separate subject. *See In re Initiative for 2013-2014 #89*, 328 P.3d at 178 (“Not only is the effect of an initiative outside of the scope of our review, but the mere fact that an initiative may create a change does not mean that it violates the single subject requirement.”) (citations omitted); *In re Initiative for 2013-2014 #90*, 328 P.2d at 161 (“[A]ny effect [the initiative] would have on Colorado’s preemption doctrine does not constitute a separate subject.”).

Petitioners contend that Initiative #75 contains a second subject because it “precludes the application of preemption” to local laws “that are enacted to prevent or mitigate local impacts from oil and gas development.” *Pet. Op. Br.*, p. 15.

Petitioners then hypothesize at great length as to how Initiative #75 might allow local governments to preempt air pollution, rent control, and possibly other state laws by enacting laws to mitigate local impacts from oil and gas development. *Id.*, pp. 16-17. Yet, the mere fact that an initiative may change the law does not mean that it violates the single-subject requirement, even if it “makes policy choices that are not inevitably interconnected.” *In re Initiative for 2013-2014 #129*, 333 P.3d 101, 105 (Colo. 2014). In any event, the Court cannot consider “[t]he effects this measure could have on Colorado . . . law if adopted by voters.” *Id.* Those concerns, however valid, are irrelevant to a review of whether a proposed initiative contains a single subject. *See id.*

When drafting a title, the Title Board is not responsible for anticipating, and taking a position on, legal issues which may be presented by a proposed amendment. *In re Initiative on Surface Mining*, 797 P.2d 1275, 1282 (Colo. 1990).

E. Initiative #75’s Purposes and Findings Do Not Create a Separate Subject.

Petitioners finally contend that Initiative #75’s purposes and findings section contains statements that directly conflict with Colorado’s current Oil and Gas Act,

§34-60-102, C.R.S. (2015), and that this creates a separate subject because it would “curtail the state’s ability to advance the public interest in developing oil and gas.” *Pet. Op. Br.*, pp. 21-26. Here again, Petitioners make the “bad idea” argument and combine it with a parade of horrors to suggest what effects Initiative #75 might have on existing law. Yet, as this Court has made clear, whether an initiative is a bad idea is not relevant to the inquiry of whether it meets the single subject requirement. *See In re Initiative for 2013-2014 #90*, 328 P.2d at 161. Similarly, an analysis of the effects a ballot measure may have on Colorado law is irrelevant to a review of whether a proposed initiative contains a single subject. *See In re Initiative for 2013-2014 #129*, 333 P.3d at 105.

Petitioners err when they contend that curtailing the state’s ability to develop oil and gas is a separate and distinct subject from giving local governments more control of oil and gas development. Initiative #75 alters the existing power and authority of state and local governments to enact certain regulations pertaining to the central purpose of the initiative – the regulation of oil and gas development – and this does not violate the single subject requirement.

II. THE INITIATIVE'S TITLE FAIRLY AND ACCURATELY REFLECTS THE TRUE INTENT AND MEANING OF THE MEASURE.

A. Standard of Review and Preservation of the Issue on Appeal.

Once again, Petitioners only partially set forth the appropriate standard of review for a clear title analysis employed by this Court when reviewing the Title Board's action. Petitioners appear to agree with the Proponents that 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 Initiative on "Trespass-Streams with Flowing Water"*, 910 P.2d 21, 24 (Colo. 1996). Also that the title must be sufficiently clear to "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 Initiative for 2009-2010 #24*, 218 P.3d 350, 356 (Colo. 2009) (citations omitted). Petitioners fail to mention that the Title Board's language should be rejected "only if it is so inaccurate as to clearly mislead the electorate." *In re Initiative for 2007-2008 #61*, 184 P.3d 747, 752 (Colo. 2008). Proponents agree that Petitioners preserved for appeal the issue of clear title.

B. The Title and Submission Clauses for Initiative #75 Are Clear.

The Title for Initiative #75 is clear and will not mislead voters. The text of Initiative #75 vests in local governments the power and authority to adopt laws

concerning oil and gas development within their geographic borders; including the ability to enact prohibitions, moratoria, or limits on oil and gas development; authorizes local laws and regulations that are more restrictive of oil and gas development, but which must be at least as protective of a community's health, safety, welfare, and environment as state law; and prohibits the state from preempting any local laws or regulations. The Title for Initiative #75 captures the salient features of the measure and presents them in a clear and straightforward manner.

C. The Title Need Not Include a Declaration about the Detrimental Impacts of Oil and Gas Development.

The Petitioners claim that Initiative #75's title is misleading because it fails to contain a declaration that oil and gas development "has detrimental impacts on public health, safety, general welfare, and the environment." *Pet. Op. Br.*, p. 28. Here again, Petitioners launch into an argument about the effects of Initiative #75 on the Oil and Gas Act, and how the proposed measure will be a significant policy change from current law. And again, these arguments are not relevant to this Court's review of the title for Initiative #75. The Title Board is not required to provide specific explanations of the measure or discuss its every possible effect. *See In re Initiative for 2013-2014 #90*, 328 P.2d at 164.

The title is not intended to address every conceivable hypothetical effect the Initiative may have if adopted by the electorate. *See In re Initiative for 1999-2000 #255*, 4 P.3d 485, 497 (Colo. 2000). Rather, the Title Board is to provide a concise summary of a proposed initiative, focusing on the most critical aspects of the proposal, not simply to restate all of the provisions of the proposed initiative. *In re Initiative for 1999-2000 #235(a)*, 3 P.3d 1219, 1225 (Colo. 2000). The critical aspects of Initiative #75 are clearly spelled out in its title.

D. The Title Need Not Include the Terms “State Interest” or “Matters of Statewide Concern.”

Petitioners also claim that the title of Initiative #75 is misleading and confusing because it uses the term preemption, and fails to reflect that the measure prioritizes local control of oil and gas development over matters of state interest and matters of statewide concern. *Pet. Op. Br.*, p. 29. The title for Initiative #75 captures and fairly reflects the primary features of the measure, including that it “prohibit[s] the state from preempting any local laws or regulations that prevent or mitigate local impacts from oil and gas development.” While the title does not include the terms “state interest” or “matters of statewide concern,” the Title Board determined that the average voter would more likely understand the preemption concept as it is captured in the title, rather than by inclusion of terms of art which are not widely used outside the legal context. While titles must be fair, clear,

accurate and complete, the Title Board is not required to set out every detail of an initiative.” *In re Initiative for 2013-2014 #90*, 328 P.2d at 164.

Petitioners also contend that the term “preemption” is used incorrectly in the title for Initiative #75, suggesting that preemption functions only as a directive to courts, and that its usage in the title for Initiative #75 renders the title ambiguous. Respectfully, there is no ambiguity.

When construing an initiative, this Court applies the general rules of statutory construction. *See In re Initiative for 2005-2006 #75*, 138 P.3d at 271.

Accordingly, it is appropriate to look to the plain meaning of the word “preemption.” West’s Encyclopedia of American Law defines preemption as “a doctrine of state law that holds that a state law displaces a local law or regulation that is in the same field and is in conflict or inconsistent with the state law.”

“Preemption” West's Encyclopedia of American Law, edition 2. (2008), retrieved April 3 2016 from <http://legal-dictionary.thefreedictionary.com/preemption>.

Similarly, Merriam-Webster defines preemption, albeit in the federal/state law context as opposed to the state/local context, as “a doctrine in law according to which federal law supersedes state law when federal law is in conflict with a state law.” “Preemption” Merriam-Webster.com. Merriam-Webster, n.d. Web. 3 Apr. 2016.

When the language of the title for Initiative #75 is viewed in light of these definitions, there is no ambiguity that the term “preemption” in this context means that state laws do not supersede or displace any local laws or regulations that prevent or mitigate local impacts from oil and gas development. The title for Initiative #75 accurately captures that meaning where it states that the measure “prohibit[s] the state from preempting any local laws or regulations that prevent or mitigate local impacts from oil and gas development.” While true ambiguity may be appropriate for expression in a title, it is not the task of the Title Board to accept unreasonable invitations to manufacture it.

E. The Title Makes Clear that Local Governments May Enact Laws That Prohibit or Limit Oil and Gas Development.

Finally, Petitioners contend that the title for Initiative #75 fails to inform voters that the measure gives local governments the “authority to intrude upon the state’s role of regulating oil and gas development,” and this will lead to voter surprise. *Pet. Op. Br., p. 31*. To cure this deficiency, Petitioners argue that the title for Initiative #75 must state that the measure increases local government authority to regulate oil and gas development. *Id.* Yet, Initiative #75’s title makes clear that the measure authorizes local governments to prohibit, limit, or impose moratoriums on oil and gas development within their geographic borders. “A title is not unclear or misleading simply because it does not refer to the initiative’s

possible interplay with existing state and federal laws.” *In re Initiative for 2013-2014 #85*, 328 P.3d at 145.

Moreover, the Court is not to “consider whether the Title Board set the best possible title; rather, [its] duty is to ensure that the title "fairly reflect[s] the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board." *In re Initiative for 2007-2008 #62*, 184 P.3d at 58. Here, the title of Initiative # 75 succinctly captures the key features of the measure, is not likely to mislead voters as to the initiative's purpose or effect, nor does the title conceal some hidden intent.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board with regard to Proposed Initiative 2015-2016 #75.

Respectfully submitted this 5th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2016 a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF IN SUPPORT OF PROPOSED INITIATIVE 2015-2016 #75** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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