

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, CO 80203</p> <hr/> <p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p> <hr/> <p>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”)</p> <p>Petitioners: SHAWN MARTINI and SCOTT PRESTIDGE v. Respondents: BRUCE MASON and KAREN DIKE</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER</p>	<p style="text-align: right;">DATE FILED: March 16, 2016 2:21 PM</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">PETITIONERS’ OPENING BRIEF IN SUPPORT OF PETITION FOR REVIEW OF PROPOSED INITIATIVE 2015-2016 #75 (“LOCAL GOVERNMENT AUTHORITY TO REGULATE OIL AND GAS DEVELOPMENT”)</p>	

CERTIFICATE OF COMPLIANCE

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 6,837 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 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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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board lacked jurisdiction to set title because the proposed initiative contains multiple, distinct, and not interdependent subjects under the single umbrella category of local government regulation of oil and gas development.
2. Whether the Title Board erred in setting a title and submission clause that are confusing, misleading, and fail to reflect the intent of the proposed initiative.

STATEMENT OF THE CASE

I. Nature of the Measure

If approved, proposed initiative 2015-2016 #75 (the “Proposed Initiative”, “Initiative” or “Initiative #75”), would grant local governments constitutional authority to regulate oil and gas development through the establishment of local laws that are more restrictive of oil and gas development, but not less protective of a community’s health, safety, general welfare, or environment, than state law. *See* Initiative § 3(1), attached hereto as Exhibit A. In addition, the Proposed Initiative enables local governments to completely ban oil and gas development within their respective jurisdictions. *Id.* The Initiative also prohibits application of the doctrine of preemption to local laws “enacted to prevent or mitigate local impacts

from oil and gas development.” *Id.* § 3(2). Finally, the Proposed Initiative’s “purposes and findings” section contradicts the current policy directives contained in Colorado’s Oil and Gas Conservation Act and, as a result, curtails the state’s ability to advance the public’s interest in responsible, balanced development and production of oil and gas in a manner consistent with protection of public health, safety, welfare and the environment. *See id* § 1(1); C.R.S. § 34-60-102(1)(a)(I).

II. Nature of the Case, Course of Proceedings, and Disposition Below

Karen Dike and Bruce Mason (collectively “Proponents”) are the designated representatives of the Proposed Initiative. Proponents submitted the Initiative to the Offices of Legislative Council and Legislative Legal Services on January 8, 2016. *See* Letter, attached as Exhibit B. Pursuant to C.R.S. §1-40-105(2), the Offices of Legislative Council and Legislative Legal Services waived the review and comment hearing required by C.R.S. § 1-40-105(1) on January 11, 2016. *See id.* Proponents thereafter submitted a final version of the Initiative to the Secretary of State on January 21, 2016, for the Title Board (the “Board”) to set title. *See* Initiative.

The Board considered and set title for the Proposed Initiative at its February 3, 2016 meeting. On February 10, 2016, Petitioners timely filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1)(a), explaining that the Board lacked

jurisdiction to set title because the Proposed Initiative violated the single-subject requirement. *See* Petitioners’ Motion for Rehearing, attached as Exhibit C. In the alternative, Petitioners argued that the title was misleading because it failed to describe important aspects of the measure. *See id.* The Title Board considered Petitioners’ Motion at its February 17, 2016 meeting and denied the motion, except to the extent that the Title Board revised the title. *See* Ballot Title Setting Board, Final Title for Proposed Initiative 2015-2016 #75 (February 17, 2016), attached hereto as Exhibit D (herein after “Final Title”).

The Final Title for Initiative #75 reads:

An amendment to the Colorado constitution concerning local government regulation of oil and gas development and, in connection therewith, authorizing local governments to prohibit, limit, or impose moratoriums 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 that prevent or mitigate local impacts from oil and gas development.

Id.

Because the Initiative does not comply with the single-subject requirement and the Final Title continues to be misleading, Petitioners timely submitted this

matter to the Court for review pursuant to C.R.S. § 1-40-107(2). *See* Petition for Review of Final Action of Ballot Title Setting Board, filed Feb. 24, 2016.

SUMMARY OF THE ARGUMENT

The Proposed Initiative contains multiple, unrelated subjects having no necessary or proper connection to the Initiative’s purported single subject: “An amendment to the Colorado constitution concerning local government regulation of oil and gas development.” *See* Final Title. In addition to expanding local governments’ authority to regulate oil and gas development, the measure also:

1. Enables local governments to completely ban existing and future oil and gas development within their jurisdictions (Initiative § 3(1));
2. Prohibits the application of the doctrine of preemption to local laws “enacted to prevent or mitigate local impacts from oil and gas development” (*id.* § 3(2)); and
3. Curtails the state’s ability to advance the public interest in responsible, balanced development and production of oil and gas in a manner consistent with protection of public health, safety, welfare and the environment (*id.* § 1).

To the extent the Court finds that the Initiative includes only one subject, the Final Title is nevertheless confusing, misleading, and not reflective of the

Proponents' intent and, therefore, must not be forwarded to the voters. The Final Title fails to reflect that the Initiative:

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” (*id.* § 1(1)(a));
2. Prioritizes local control of oil and gas development over matters of statewide concern; and
3. Increases the authority of local governments to enact laws that prohibit or limit oil and gas development.

Based on the foregoing, the Court should remand this matter to the Board with directions to strike the Final Title and to return the Initiative to the Proponents. In the alternative, the Court should remand this matter to the Board with directions to amend the Final Title consistent with the concerns expressed herein.

ARGUMENT

I. UNDER THE GUISE OF “LOCAL GOVERNMENT REGULATION OF OIL AND GAS DEVELOPMENT,” THE INITIATIVE CONTAINS MULTIPLE AND DISTINCT SUBJECTS.

As reflected in the Final Title, the purported single subject of the Initiative concerns “local government regulation of oil and gas development.” *See* Final

Title; *see also* Initiative § 3(1) (“The people of the state of Colorado hereby vest in local governments the power and authority to adopt laws, regulations, ordinances or charter provisions concerning oil and gas development within their geographic borders....”). The Initiative provides that local laws may be “more restrictive of oil and gas development” than state law. Initiative § 3(1). But the local laws “shall not be less protective of a community’s health, safety, general welfare, and environment” than state law. *Id.*

In addition to granting local governments the authority to regulate oil and gas development, the Initiative explicitly states that local governments may “enact prohibitions” on oil and gas development. *Id.* For the reasons set forth below, granting local governments the authority to prohibit existing and future oil and gas operations is a subject separate, distinct from granting local governments the authority to regulate those activities.

Initiative #75 also attempts to change the application of the doctrine of preemption to various local laws “enacted to prevent or mitigate local impacts from oil and gas development.” *Id.* § 3 (2). Changing the application of the doctrine of preemption with regard to local laws “enacted to prevent or mitigate local impacts from oil and gas development” is another subject separate and

distinct from granting local governments the authority to enact laws “concerning oil and gas development.” *Compare id.* § 3(2) *with id.* § 3(1). Laws designed to “mitigate impacts” do not necessarily also “concern[] oil and gas development.”

Id.

Finally, the provisions in the Initiative’s “purposes and findings” section would affect the state’s existing statutory and regulatory scheme governing oil and gas development, constituting yet another subject. Section 1 of the Initiative states: “the people of the state of Colorado find and declare” that: (1) “oil and gas development, including the use of hydraulic fracturing, has detrimental impacts on public health, safety, general welfare, and the environment;” and (2) “the state of Colorado has a compelling interest to prevent and mitigate detrimental impacts on public health, safety, general welfare, and the environment, and must not impede efforts by local governments to prevent and mitigate these detrimental impacts.” Initiative § 1(1). Despite their location in the purposes and findings section, these provisions have operative effects and would decrease the state’s authority to advance the public’s interest in oil and gas development, as set forth in the Oil and Gas Conservation Act, C.R.S. §§ 34-60-101 *et. seq* (herein after the “Oil and Gas Act”).

A. Standard of Review and Preservation of the Issues

The Colorado Constitution requires that citizen-initiated measures contain only a single subject, which shall be clearly expressed in its title. Colo. Const. art. V, § 1(5.5); *see also* C.R.S. § 1-40-106.5. The single-subject requirement prevents proponents from combining multiple subjects to attract a “yes” vote from voters who might otherwise vote “no” on one or more of the subjects if proposed separately. *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (citing *In re Proposed Initiative for 1997-1998 #84*, 961 P.2d 456, 458 (Colo. 1998)). Accordingly, an initiative’s subject matter “must be necessarily and properly connected rather than disconnected or incongruous.” *Id.* (citing *In re Proposed Initiative for 2011–2012 # 45*, 274 P.3d 576, 579 (Colo. 2012)). Titles containing general “umbrella proposals” to unite separate subject are unconstitutional. *Id.*

When reviewing the Board’s single-subject determination, the Court assumes legitimate presumptions in favor of the propriety of the Board’s actions. *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010) (citing *In re Title, Ballot Title, & Submission Clause for 2009-2010, #24*, 218 P.3d 350, 353 (Colo. 2009)). The Court does not consider the initiative’s efficacy, construction, or future application. *Id.* When necessary,

however, the Court “will characterize the proposal sufficiently to enable review of the Title Board’s action.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). When construing an initiative, the Court applies the general rules of statutory construction. *In re Title, Ballot Title & Submission Clause, for 2007-2008, #17*, 172 P.3d 871, 873 (Colo. 2007).

Petitioners, in their Motion for Rehearing, properly raised and preserved their challenge to the Initiative’s failure to comply with the single-subject rule. *See* Motion for Rehearing at 1-2. The Title Board considered and denied the Petitioners’ motion on this issue at the February 17, 2016 rehearing. *See* Final Title.

B. The Initiative Grants Local Governments Constitutional Authority to Regulate Oil and Gas Development.

The Initiative’s principal aim is to grant and clarify the authority of local governments to regulate oil and gas development.¹ *See* Final Title. Local governments possess only limited authority to regulate oil and gas development.

¹ The Court is currently considering the extent to which local governments can regulate or prohibit a specific oil and gas activity, in the context of hydraulic fracturing. *See City of Longmont v. Colorado Oil & Gas Association et. al* (2015SC667) and *City of Fort Collins v. Colorado Oil & Gas Association* (2015SC668).

See Bd. of Cty. Comm'rs, La Plata Cty. v. Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1058 (Colo. 1992). Applying established principals of state primacy and the doctrine of preemption, this Court has held that local governments have authority to impose land-use restrictions on oil and gas activities, so long as such restrictions do not conflict with the Oil and Gas Act. *Id.* However, the state maintains the authority to regulate “drilling, pumping, plugging, waste prevention, safety precautions ... environmental restoration,” well location, well-spacing, and other activities. *Id.*; *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1068 (Colo. 1992); *see also* C.R.S. §§ 34-60-106, 116, 117.

The Proposed Initiative attempts to vest local governments with authority to regulate oil and gas operations that closely mirrors the state’s authority. Pursuant to the Oil and Gas Act, the Colorado Oil and Gas Conservation Commission is charged with statewide regulation and administration of: (1) the drilling, producing, and plugging of wells and all other operations for the production of oil or gas; (2) the shooting and chemical treatment of wells; (3) the spacing of wells; and (4) “[o]il and gas operations so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and

welfare, including protection of the environment and wildlife resources.” C.R.S. § 34-60-106(2). “Oil and gas operations” include, among other activities, “exploration for oil and gas,” “drilling,” “production operations,” and the “generation, transportation, storage, treatment or disposal of exploration and production wastes.” *Id.* § 34-60-103(6.5).

Similar to the authority vested by the General Assembly in the COGCC, the Proposed Initiative would “vest in local governments the power and authority to adopt laws, regulations, ordinances or charter provisions concerning oil and gas development.” Initiative § 3(1) (emphasis added). The Initiative defines “Oil and gas development” as the “exploration for, and drilling, production, and processing of oil, gas, other gaseous and liquid hydrocarbons, as well as the treatment and disposal of waste associated with such exploration, drilling, storage, production and processing.” *Id.* § 2(2). Thus, this broad grant of authority would allow local governments to regulate oil and gas development in a manner that is nearly identical to the state.

Accordingly, the Initiative would vest local governments with power in excess of their current land-use authority to regulate oil and gas operations. This additional authority would significantly overlap with and intrude upon the state’s

authority over such operations. The measure’s central purpose, therefore, is to grant local governments authority, on par with the state, to regulate oil and gas development. However, as described below, the Initiative also embraces other purposes separate and distinct from local government regulation of oil and gas development.

C. Granting Local Governments the Power to Ban Oil and Gas Operations is a Separate and Distinct Subject.

The Proposed Initiative would also provide local governments the authority to completely ban oil and gas operations within their jurisdictions. Initiative § 3(1). Such a ban could require a cessation of existing operations and a prohibition on future operations within a particular jurisdiction. *See id.* § 3(1) (granting local governments the authority “to enact prohibitions, moratoria, or limits on oil and gas development”), § 2(2) (defining oil and gas development to include “exploration for, and drilling, production, and processing of oil, gas, other gaseous and liquid hydrocarbons.” (emphasis added)).

Currently, Colorado law does not permit any level of government, state or local, to completely prohibit oil and gas activities.² *See Voss*, 830 P.2d at 1068; *see also* C.R.S. §§ 34-60-102(1)(a)(I), 34-60-102(b). To the contrary, the General Assembly has declared it a matter of public interest to: “Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.” C.R.S. § 34-60-102(1)(a)(I). The purpose of the Oil and Gas Act is “to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production.” *Id.* § 34-60-102(1)(b). Accordingly, granting local governments a constitutional right to ban oil and gas operations would upend the state’s interest in the efficient development of such resources. *Voss*, 830 P.2d at 1068 (holding that a permanent drilling ban within the City of Greeley was contrary to the state’s interest “in fostering the efficient development and production of oil and gas resources”). Moreover, granting local governments the authority to ban oil and gas operations would significantly and adversely affect the

² As detailed in *Voss*, Colorado has a long history of promoting the efficient development of oil and gas. *See Voss*, 830 P.2d at 1068 (describing the history of state regulation of oil and gas development, including the prevention of waste beginning in 1915).

substantive rights of private-property owners. *See City & County of Denver v. Denver Buick*, 347 P.2d 919, 923-24 (Colo. 1959) (stating that “the privilege of a citizen to use his property according to his own will is not only a liberty but a property right”), *overruled in part by Stroud v. City of Aspen*, 532 P.2d 720 (Colo. 1975).

As described above, Initiative #75’s central purpose is to provide local governments with authority parallel to the state’s authority to regulate oil and gas operations. 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. Therefore, the Initiative impermissibly combines a proposal that voters might favor (providing local governments with authority similar to that of the state to regulate oil and gas operations), with a proposal that voters might oppose (allowing local governments to completely ban oil gas and operations). *See Matter of Title for 2013-2014 #76*, 333 P.3d at 79; *see also In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006). Moreover, a local prohibition on oil and gas development would substantively curtail the rights of private mineral owners. This Court has held that curtailment of the rights of a “specifically identifiable group” is a distinct subject

that “should be separately addressed by the voters.” *In re Title, Ballot Title & Submission Clause for 2003-2004 No. 32 & No. 33*, 76 P.3d 460, 462-63 (Colo. 2003). Therefore, this measure contains multiple and distinct subjects in violation of Article V, Section 1(5.5) of the Colorado Constitution.

D. Elimination of the Application of the Preemption Doctrine to a Category of Local Laws Is a Separate and Distinct Subject.

In addition to the central purpose of granting local governments the authority to enact laws concerning oil and gas development, and the additional purpose of allowing local governments to completely ban oil and gas operations, the Proposed Initiative also precludes the application of preemption to another specific category of local laws “that are enacted to prevent or mitigate local impacts from oil and gas development.” Initiative § 3(2). Changing the application of preemption to this specific, different category of local laws is a separate and distinct purpose.

A local law aimed at “prevent[ing] or mitigate[ing] [oil and gas] impacts” reaches beyond the scope of local laws promulgated pursuant to the Initiative’s central purpose “concerning oil and gas development.” *See* Initiative §§ 3(1), 3(2). Despite, perhaps, relating to the same broad concept, the two provisions advance separate and distinct purposes, and therefore violate the single-subject rule. *Matter of Title, Ballot Title & Submission Clause, & Summary for 1997-1998 No. 64*, 960

P.2d 1192, 1196 (Colo. 1998) (“Where two provisions advance separate and distinct purposes, the fact that they both relate to a broad concept or subject is insufficient to satisfy the single subject requirement”).

Under Colorado’s doctrine of preemption, when determining the legitimacy of a local law that conflicts with a state law, a court must first consider whether the local jurisdiction is home-rule jurisdiction to determine which law will prevail. *City of Commerce City v. State*, 40 P.3d 1273, 1279 (Colo. 2002). If the locality is a home-rule jurisdiction, the court must determine whether the matter is one of local concern or statewide concern. *Id.* “Both home-rule cities and the state may legislate in areas of local concern; however, if a home-rule ordinance or charter conflicts with a state statute regulating a local matter, the home-rule provision supersedes the conflicting state provision.” *Id.* (citing *City and Cty. Of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001)). Conversely, the state possesses the ultimate authority to legislate with regard to matters of statewide-concern. *Id.* In matters of mixed state and local concern, both home-rule localities and the state may adopt legislation. “[H]owever, in the event of a conflict between the two, the state statute supersedes a conflicting provision of the home-rule charter or ordinance.” *Id.* (citing *Qwest*, 18 P.3d at 754).

The Proposed Initiative would change application of this legal framework for any local law with the underlying purpose of mitigating local impacts from oil and gas development, regardless of whether the law is promulgated by a home-rule jurisdiction and regardless of whether the local law ultimately concerns oil and gas development. See Initiative § 3(2). As a result, any such local laws in conflict with state law would escape preemption, even if those local laws conflict with state laws promoting matters of statewide concern. *Id.*

For example, under the current primacy framework, a local government may not impose local air-quality standards that conflict with the Colorado Air Pollution Prevention and Control Act, C.R.S. §§ 25-7-102 *et seq.*, because “the prevention, abatement, and control of air pollution in each portion of the state are matters of statewide concern.” C.R.S. § 25-7-102 (emphasis added); *see also Webb v. City of Black Hawk*, 295 P.3d 480, 486 (Colo. 2013) (“in matters of statewide concern, the state legislature exercises plenary authority, and home-rule cities may regulate only if the constitution or statute authorizes such legislation”) (citing *Qwest*, 18 P.3d at 754). Pursuant to the Initiative, however, a local government might enact its own conflicting air quality-standards, applicable to not only those oil and gas operations, but applicable to all local industry and residents, based upon its

contention that increased air pollution is a local impact from oil and gas development. *See* Initiative §3(2).

Similarly, a local government might conclude that a local impact of oil and gas development is increased housing costs resulting from an influx of people to the jurisdiction working in the oil and gas industry.³ To mitigate this impact, a local government might impose rent-control laws on private residential housing. Any such local law, however, would directly conflict with C.R.S. § 38-12-301, which states: “the imposition of rent control on private residential housing units is a matter of statewide concern; therefore, no county or municipality may enact any ordinance or resolution that would control rent on either private residential property or a private residential housing unit.” (Emphasis added.) Pursuant to the Proposed Initiative, a local rent-control law in direct conflict with the mandate in

³ *See* Katie Valentine, *This North Dakota Oil Town has the Highest Rent in the Country*, Climate Progress (Feb. 20, 2014, 12:26 PM), <http://thinkprogress.org/climate/2014/02/20/3311551/williston-highest-rent/>. Moreover, in Montana local impacts of oil and gas development resulting from the influx of people working in the oil and gas industry include water scarcity, road destruction, overcrowding of schools, and the increasing presence of drugs and violent crime. *Bakken Oil Boom Brings Growing Pains to Small Montana Town*, National Geographic, <http://news.nationalgeographic.com/news/special-features/energy/2014/07/140709-montana-oil-boom-bakken-shale/>. Accordingly, local governments might be inclined to implement laws to address these impacts, and, pursuant to the Proposed Initiative those local laws in conflict with state law and matters of statewide concern would escape preemption.

C.R.S. § 38-12-301 would be valid if the law intended to mitigate increased housing costs resulting from oil and gas development.

The above examples highlight just two of potentially many examples of local laws that would no longer be subject to preemption under the Proposed Initiative. And, neither of these examples, rent control or air quality, are related to the measure's central purpose: local government regulation of oil and gas development. As a result, the Initiative violates the single-subject rule, and this Court should reverse the Title Board's decision. *See Matter of Title, Ballot Title, & Submission Clause, & Summary for 1997-98, No. 30*, 959 P.2d 822, 826-27 (Colo. 1998) (holding that an initiative implementing a tax cut and establishing new criteria for voter approval of revenue and spending increases contained multiple subjects); *see also Matter of Title, Ballot Title, & Submission Clause, & Summary for Amend Tabor No. 25*, 900 P.2d 121, 125-26 (Colo. 1995) (initiative establishing specific tax credits and amending procedures for future voter initiatives violated the single-subject rule).

Further, this case is distinguishable from the Court's decision in *Matter of Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155 (Colo. 2014). In that case, the Court considered an initiative similar to the Proposed

Initiative, and analyzed whether Initiative 2013-2014 #90's ("Measure #90") effect on Colorado's preemption doctrine would constitute a separate subject. *Id.* at 158. Measure #90's purpose, similar to the Proposed Initiative, concerned local regulation of oil and gas. *Id.* Measure #90 granted local governments authority to enact local laws that are "more restrictive regulations on oil and gas development within their respective jurisdictions" and, in connection therewith, the measure declared that more restrictive local laws would govern over conflicting state law. *Id.* at 161, Appx. A (ballot title). However, unlike the Proposed Initiative, Measure #90 did not also specifically address the application of preemption to a separate category of local laws. *Id.*, Appx. A. In considering whether Measure #90's effect on the preemption doctrine constituted a separate subject, the Court held that any change to the application of preemption was properly connected to Measure #90's central purpose of providing local governments authority to enact more restrictive regulations on oil and gas development. *Id.*

Here, however, the change to the preemption doctrine extends beyond the Proposed Initiative's central purpose of local regulation of oil and gas development. The category of laws exempted from preemption in the Proposed Initiative is significantly different in scope than local laws "concerning oil and gas

development.” Moreover, unlike the Proposed Initiative, Measure 90# did not include a provision addressing the application of preemption to local laws intended to mitigate the impacts of oil and gas development. *Id.* at 161, Appx. A (ballot title). Therefore, the Court’s decision in *2013-2014 #90* does not support the Board’s finding of single subject in this case.

Because the Initiative attempts to enlarge the power of local governments in two separate and distinct manners, the Initiative violates the single-subject rule, and the Court, therefore, should reverse the decision of the Board to set title for this measure.

E. Curtailing the State’s Authority to Advance the Public Interest in Developing Oil and Gas is a Separate Subject.

Finally, the Proposed Initiative’s “purposes and findings” include a number of provisions in direct conflict with the legislative declaration of the Oil and Gas Act, C.R.S. 34-60-102. These legislative declarations form the underlying policy directive for the state’s and the COGCC’s regulation of oil and gas activities. *See Chase v. Colo. Oil & Gas Conservation Comm’n*, 284 P.3d 161, 166 (Colo. 2012) (noting that the 1994 amendments to section 34-60-102 enlarged the COGCC’s focus from “promoting oil and gas production to include consideration of environmental impact and public health, safety, and welfare,” and consistent with

that enlarged purpose, the COGCC has adopted various rules and permit conditions).

Pursuant to section 34-60-102 it is “in the public interest” to:

- (I) Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources;
- (II) Protect the public and private interests against waste ... ;
- (III) [E]nforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas ... ; and
- (IV) Plan and manage oil and gas operations in a manner that balances development with wildlife conservation in recognition of the state's obligation to protect wildlife resources and the hunting, fishing, and recreation traditions they support, which are an important part of Colorado’s economy and culture....”

C.R.S. § 34-60-102(1)(a). Further, the Oil and Gas Act is intended “to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare” *Id.* § 34-60-102(b). Accordingly, the COGCC’s mandate includes encouraging the production of oil and gas, while also protecting public health, safety, and the environment. *See Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 925 (Colo. 1997) (“We recognize that the purposes of

the Act are to encourage the production of oil and gas in a manner that protects public health and safety and prevents waste”).

The “purposes and findings” of Initiative #75 directly conflict with the legislative declaration of the Oil and Gas Act by stating that:

The people of the state of Colorado find and declare that:

- (a) Oil and gas development, including the use of hydraulic fracturing, has detrimental impacts on public health, safety, general welfare, and the environment;
- (b) these detrimental impacts are experienced most directly in local communities;
- (c) the state of Colorado has a compelling interest to prevent and mitigate detrimental impacts on public health, safety, general welfare, and the environment, and must not impede efforts by local governments to prevent and mitigate these detrimental impacts ...

Proposed Initiative § 1(1) (emphasis added). If the Initiative is approved, these findings would be incorporated into the Colorado Constitution and, thus, would impede the state’s ability to effectuate the purpose of Oil and Gas Act as set forth in Section 34-60-102. For example, the Act’s directive to advance “responsible, balanced development, production, and utilization of ...oil and gas ... in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources” is incongruous with the

Initiative’s finding that “Oil and gas development ... has detrimental impacts on public health, safety, general welfare, and the environment.” *Compare* C.R.S. § 34-60-102 (emphasis added) *with* Proposed Initiative § 1 (emphasis added). If the Colorado Constitution contains a finding of fact that oil and gas development has detrimental impacts on public health, safety, general welfare, and the environment, the state would be hard pressed to demonstrate that its current regulatory scheme is, at the same time, advancing oil and gas development in a manner that is consistent with protecting these values. Therefore, amending the Constitution to reflect the Initiative’s purposes and findings will dramatically impact, and potentially upend, the state’s regulation of oil and gas development.

Moreover, the Initiative specifically identifies one aspect of the completion process for an oil and gas well as having detrimental impacts: “hydraulic fracturing.” Initiative § 1(1)(a). The Proponents’ identification of hydraulic fracturing as a practice with detrimental impacts is directly tied to their objective to ban this activity.⁴ Constitutionalizing a finding of fact that directly supports a

⁴ The Proponents, along with various other anti-oil and gas measures, submitted measure 2015-2016 #62 (“Measure #62”) to the Title Board, with the intent of banning hydraulic fracturing across the state. *See* 2015-2016 #62, attached as Exhibit E. Although Proponents eventually withdrew Measure #62, Proponents and their supporters have not abandoned their goal of prohibiting hydraulic

statewide hydraulic fracturing ban is a separate purpose from granting local governments authority to regulate oil and gas development.

Further, by declaring that Colorado “has a compelling interest” and “must not impede efforts by local governments to prevent and mitigate” impacts resulting from oil and gas development, the provision curtails the state’s ability to advance the public’s interest to “[f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado.”

Compare Initiative § 1(1)(c) *with* C.R.S. § 34-60-102(1)(a). Also, inserting a new “compelling [state] interest” in the constitution would permit legislative enactments deemed necessary to promote this interest, even if such enactments infringe on fundamental rights (such as vested property rights)⁵ or burden a suspect class. *See Evans v. Romer*, 882 P.2d 1335, 1341 (Colo. 1994) (“A legislative

fracturing in Colorado. In fact, a political action committee named “*Yes for Health and Safety Over Fracking*” was registered with the Secretary of State on January 1, 2016 with the purpose of “support[ing] ballot measures that establish local control of oil and gas development, mandatory setbacks from oil and gas development and oil and gas wells, the right to a healthy environment, and a ban on hydraulic fracturing in the Colorado constitution.” *See* Committee Registration Form for Yes for Health and Safety Over Fracking (emphasis added), attached hereto as Exhibit F.

⁵ “All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.” Colo. Const. art. II, § 3 (emphasis added).

enactment which infringes on a fundamental right or which burdens a suspect class is constitutionally permissible only if it is ‘necessary to promote a *compelling* state interest.’” (emphasis in original; internal citation omitted)).

As described above, the declarations included in the “purposes and findings” section of the Initiative would have operative effects, would result in a new, constitutional policy directive for oil and gas development, and thus, would curtail the state’s ability to advance the public interest in developing oil and gas as provided in Section 34-60-102. This is a separate and distinct purpose from local control of oil and gas development. Therefore, the Court should reverse the decision of the Title Board and find that the Proposed Initiative has multiple and distinct purposes in violation of article V, section 1(5.5) of the Colorado Constitution.

II. THE FINAL TITLE DOES NOT FAIRLY AND ACCURATELY INFORM VOTERS OF IMPORTANT ASPECTS OF THE INITIATIVE.

The Final Title does not include central elements of the Initiative. The Final Title excludes the measure’s declaration on behalf of the people of Colorado that oil and gas development has “detrimental impacts on public health, safety, general welfare, and the environment.” *See* Final Title; Initiative §1(1). This declaration,

as explained above, dramatically affects the state’s ability to advance the existing public interest of developing oil and gas resources in a responsible manner.

Moreover, the Final Title fails to make clear that local laws enacted pursuant to the Initiative will control over conflicting state laws. Finally, the Final Title fails to inform voters that the measure increases the authority of local governments.

A. Standard of Review and Preservation of the Issues

The Board is charged with setting a title that fully, fairly and accurately informs voters of the central elements of the measure, to enable them to make a thoughtful decision about its merits. C.R.S. § 1-40-106(3)(b); *see also In re Title for 1999-2000 No. 258(A)*, 4 P.3d at 1098. The title must be sufficiently clear so voters “understand the principal features of what is being proposed” and because “a material omission can create misleading titles.” *Id.* The requirement of a fair and accurate title is intended to prevent “surreptitious measures,” and it tasks the Title Board with the duty to “apprise the people of the subject of each measure by the title” to prevent “surprise and fraud from being practiced upon voters.” *In re Title, Ballot Title, & Submission Clause & Summary for 1999-2000 No. 29*, 972 P.2d 257, 260-61 (Colo. 1999). If the Title Board cannot comprehend a proposed initiative sufficiently enough to state its single subject clearly in the title, the initiative cannot be forwarded to the voters. *Matter of Title, Ballot Title &*

Submission Clause, & Summary for 1999-2000 No. 25, 974 P.2d 458, 465 (Colo. 1999).

In their Motion for Rehearing, Petitioners properly raised and preserved their challenge regarding the Initiative’s failure to comply with C.R.S. § 1-40-106(3).

See Motion for Rehearing at 3. The Title Board considered and denied the

Petitioners’ motion on this issue at the February 17, 2016 rehearing. *See* Final

Title.

B. The Final Title Fails to Reflect that the Initiative 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.”

As described above, the Initiative’s declaration on behalf of the people of Colorado that oil and gas development “has detrimental impacts on public health, safety, general welfare, and the environment” is a key feature of the measure. The declaration would significantly affect the state’s ability to develop and produce oil and gas as directed by the Oil and Gas Act. The effects of this declaration would constitute a significant policy change, and the Board’s failure to articulate the declaration in the Final Title will mislead voters. For example, a voter might support local regulation of oil and gas development, but would be surprised to learn that a “yes” vote for the Initiative also supports a constitutional finding that

oil and gas development has detrimental impacts. Failure to include this important aspect of the measure renders the title materially defective. *See In re Title for 1999-2000 No. 258(A)*, 4 P.3d at 1100 (reviewing a measure that required all public students to be taught in English; holding that the title’s failure to articulate that school districts and schools would not be permitted to require bilingual programs rendered the title materially defective for failure to include a key feature of the initiative).

C. The Final Title Fails to Reflect that the Measure Prioritizes Local Control of Oil and Gas Development Over Matters of State Interest and Matters of Statewide Concern.

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.” This language will confuse and mislead voters for two reasons. First, the term ‘preempt,’ as expressed in the Final Title, is not within the common understanding of the most voters. Consequently, the average voter may not understand that the Initiative allows certain categories of local law to conflict with state laws. Second, the term is used incorrectly in the Final Title. Specifically, the state does not actively preempt local laws. In contrast, the courts apply the doctrine of preemption to invalidate certain local laws. *See Colo. Mining*

Ass'n v. Bd. of Cty. Comm'rs of Summit Cty., 199 P.3d 718, 723 (Colo. 2009) (“We have applied preemption analysis in cases involving alleged conflicts between state statutes and local government land use authority”). The Final Title expresses the preemption provision with regard to a particular state action, when it would instead function as a directive to the courts. Thus, the inclusion of the term “preempt,” paired with its incorrect usage, will confuse voters and prevent them from making informed decisions about whether to support the Initiative.

Further, the full reach of the preemption provision, as described above, would cause voter surprise. Despite the ambiguity cloaking the preemption provision, more sophisticated voters could potentially understand how the Initiative modifies the preemption doctrine with regard to laws typically associated with oil and gas development. However, most voters would not understand that the Initiative might change the regulatory frameworks in Colorado for subjects as remote as rent control of private residential housing. *See, supra* § I.D.; *Matter of Proposed Election Reform Amendment*, 852 P.2d 28, 33-35 (Colo. 1993) (finding the title for an election reform initiative insufficient, in part, because it identified that the initiative would revise procedural provisions of the initiative, referendum,

and recall, but it failed to state that the initiative would revise substantive provisions of the same).

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.

As explained above, the Initiative increases the limited authority that local governments possess to enact laws restricting or prohibiting oil and gas development. Failure to provide context with regard to the local government's authority to intrude upon the state's role of regulating oil and gas development will lead to voter surprise and deprive voters of their ability to thoughtfully determine whether to vote 'yes' on the measure. *See In re Title, Ballot Title, Submission Clause, & Summary by the Title Board Pertaining to a Proposed Initiative on "Obscenity"*, 877 P.2d 848, 850 (Colo. 1994) ("There may be situations, therefore, where the title and submission clause likely would create public confusion or ambiguity about the effect of the initiative even though they merely repeat the language contained in the initiative itself").

To sufficiently inform voters of the scope of the Proposed Initiative, the Final Title must reflect the fact that the Initiative increases local government authority to regulate oil and gas development, even when such authority conflicts

with the state's interest to regulate the same. *Matter of Title, Ballot Title, Submission Clause, and Summary for 1996 No. 2*, 920 P.2d 798, 803 (Colo. 1996) (holding that title for initiative directing Air Quality Control Commission to revise enhanced emission testing program was misleading because it failed to notify the voters that the program in place only applied to certain counties; and finding a “significant risk that voters statewide will misperceive the scope of the proposed initiative”).

Therefore, and in the alternative, Petitioners request that the Court remand the matter to the Title Board with the instructions to amend the Final Title consistent with the concerns set forth herein.

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 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 16th day of March, 2016 by:

HOGAN LOVELLS US LLP

s/ *Elizabeth H. Titus*

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Attorneys for Petitioners

CERTIFICATE OF SERVICE

I certify that on March 16, 2016, a true and correct copy of the above and foregoing **PETITIONERS’ OPENING 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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s/Helen Hyatt

DATE FILED: March 16, 2016 2:14 PM

Exhibit A

RECEIVED

JAN 21 2016

S. WARD
9:12 A.M.

Clean
Initiative 2015-2016 #75

Colorado Secretary of State

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

Local Government Control of Oil and Gas Development

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

(a) OIL AND GAS DEVELOPMENT, INCLUDING THE USE OF HYDRAULIC FRACTURING, HAS DETRIMENTAL IMPACTS ON PUBLIC HEALTH, SAFETY, GENERAL WELFARE, AND THE ENVIRONMENT;

(b) THESE DETRIMENTAL IMPACTS ARE EXPERIENCED MOST DIRECTLY IN LOCAL COMMUNITIES;

(c) THE STATE OF COLORADO HAS A COMPELLING INTEREST TO PREVENT AND MITIGATE DETRIMENTAL IMPACTS ON PUBLIC HEALTH, SAFETY, GENERAL WELFARE, AND THE ENVIRONMENT, AND MUST NOT IMPEDE EFFORTS BY LOCAL GOVERNMENTS TO PREVENT AND MITIGATE THESE DETRIMENTAL IMPACTS;

(d) LOCAL GOVERNMENTS HAVE BROAD AUTHORITY TO PLAN FOR AND REGULATE LAND USE WITHIN THEIR JURISDICTIONS, INCLUDING THE AUTHORITY TO REGULATE LAND USE TO LIMIT ANY DETRIMENTAL IMPACT ON THEIR COMMUNITY;

(e) IMPLIED OR EXPRESSED THREATS OF LEGAL ACTION TO INVOKE STATE PREEMPTION RESTRICT THE ABILITY OF LOCAL GOVERNMENTS TO PREVENT AND MITIGATE THE DETRIMENTAL IMPACTS ON PUBLIC HEALTH, SAFETY, GENERAL WELFARE, AND THE ENVIRONMENT IN LOCAL COMMUNITIES, AND TO PROTECT THE NATURAL, ESSENTIAL AND INALIENABLE RIGHTS ESTABLISHED IN THIS CONSTITUTION; AND

(f) TO PRESERVE THE PUBLIC HEALTH, SAFETY, GENERAL WELFARE, AND THE ENVIRONMENT, THE PEOPLE DESIRE TO EXPRESSLY GRANT TO LOCAL GOVERNMENTS THE AUTHORITY TO PREVENT OR MITIGATE DETRIMENTAL IMPACTS ON PUBLIC HEALTH, SAFETY, GENERAL WELFARE, AND THE ENVIRONMENT, WITHOUT RISK OF STATE PREEMPTION, EVEN IF SUCH ACTS IMPOSE RESTRICTIONS ON OIL AND GAS DEVELOPMENT.

Section 2. Definitions. FOR PURPOSES OF THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "LOCAL GOVERNMENT" MEANS ANY STATUTORY OR HOME RULE COUNTY, CITY AND COUNTY, CITY, OR TOWN, LOCATED IN THE STATE OF COLORADO, NOTWITHSTANDING ANY PROVISION OF ARTICLE XX OR SECTION 16 OF ARTICLE XIV OF THE COLORADO CONSTITUTION.

(2) "OIL AND GAS DEVELOPMENT" MEANS EXPLORATION FOR, AND DRILLING, PRODUCTION, AND PROCESSING OF OIL, GAS, OTHER GASEOUS AND LIQUID HYDROCARBONS, AS WELL AS THE TREATMENT AND DISPOSAL OF WASTE ASSOCIATED WITH SUCH EXPLORATION, DRILLING, STORAGE, PRODUCTION AND PROCESSING. "OIL AND GAS DEVELOPMENT" INCLUDES THE USE OF HYDRAULIC FRACTURING.

Section 3. Grant of authority. (1) THE PEOPLE OF THE STATE OF COLORADO HEREBY VEST IN LOCAL GOVERNMENTS THE POWER AND AUTHORITY TO ADOPT LAWS, REGULATIONS, ORDINANCES OR CHARTER PROVISIONS CONCERNING OIL AND GAS DEVELOPMENT WITHIN THEIR GEOGRAPHIC BORDERS; THIS POWER, AND AUTHORITY INCLUDES THE ABILITY TO ENACT PROHIBITIONS, MORATORIA, OR LIMITS ON OIL AND GAS DEVELOPMENT. SUCH LOCAL LAWS, REGULATIONS, ORDINANCES, OR CHARTER PROVISIONS MAY BE MORE RESTRICTIVE OF OIL AND GAS DEVELOPMENT THAN LAWS ENACTED BY THE GENERAL ASSEMBLY OR REGULATIONS ADOPTED BY EXECUTIVE AGENCIES OF THE STATE, BUT SHALL NOT BE LESS PROTECTIVE OF A COMMUNITY'S HEALTH, SAFETY, GENERAL WELFARE, AND ENVIRONMENT THAN LAWS ENACTED BY THE GENERAL ASSEMBLY OR REGULATIONS ADOPTED BY EXECUTIVE AGENCIES OF THE STATE.

(2) 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 BY THE STATE OR AN AGENCY OF THE STATE, EVEN IF SUCH LOCAL LAWS, REGULATIONS, ORDINANCES OR CHARTER PROVISIONS CONFLICT WITH A STATE STATUTE, ARE MORE RESTRICTIVE ON OIL AND GAS DEVELOPMENT THAN A STATE STATUTE, AND WOULD MATERIALLY IMPEDE A STATE INTEREST IN REGULATING OIL AND GAS DEVELOPMENT.

Section 4. Self-executing – severability - conflicting provisions. ALL PROVISIONS OF THIS ARTICLE ARE SELF-EXECUTING, ARE SEVERABLE, AND SUPERSEDE CONFLICTING STATE AND LOCAL LAWS AND REGULATIONS. LAWS, REGULATIONS, ORDINANCES OR CHARTER PROVISIONS MAY BE ENACTED TO FACILITATE THE OPERATION OF THIS ARTICLE, BUT MAY NOT LIMIT OR RESTRICT THE PROVISIONS OF THIS ARTICLE OR THE POWERS AND RIGHTS HEREIN GRANTED.

DATE FILED: March 16, 2016 2:14 PM

Exhibit B

Mike Mauer, Director
Legislative Council Staff

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January 11, 2016

Bruce Mason
320 20th Street
Boulder, CO 80302

Karen Dike
708 Hayden Street
Longmont, CO 80503

Re: Proposed Initiative Measure 2015-2016 #75

Dear Mr. Mason and Ms. Dike:

Pursuant to section 1-40-105 (2), C.R.S., we hereby notify you that the above proposed measure does not raise any additional comments from our offices that have not been raised in earlier memoranda or hearings on your proposed measure on this topic. Section 1-40-105 (2), C.R.S., provides in part:

1-40-105. Filing procedure - review and comment - amendments - filing with secretary of state. (2) . . . If the directors have no additional comments concerning the amended petition, they may so notify the proponents in writing, and, in such case, a hearing on the amended petition pursuant to subsection (1) of this section is not required.

Rule 12 of the *Rules for Staff of Legislative Council and Office of Legislative Legal Services: Review and Comment Filings*, adopted by the Legislative Council on September 6, 2000, requires that such determination and notification be made no later than 72 hours after the filing. Your measure was received by our office on January 8, 2016.

This letter serves as the written notice required by section 1-40-105 (2), C.R.S. It is our understanding that pursuant to that section, no review and comment hearing pursuant to section 1-40-105 (1), C.R.S., is required.

Very truly yours,

Dan Cartin, Director
Office of Legislative Legal Services

Mike Mauer, Director
Legislative Council

DATE FILED: March 16, 2016 2:15 PM

Exhibit C

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

**IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE
2015-2016 #75**

MOTION FOR REHEARING

Registered electors, Shawn Martini and Scott Prestidge, through their legal counsel, Hogan Lovells US LLP, request a rehearing of the Title Board for Initiative 2015-2016 #75. As set forth below, Mr. Martini and Mr. Prestidge respectfully object to the Title Board's setting of title and the ballot title and submission clause on the following grounds:

TITLE AND SUBMISSION CLAUSE

On February 3, 2016, the Board set the title as follows:

An amendment to the Colorado constitution concerning the local government regulation of oil and gas development and, in connection therewith, authorizing local governments to prohibit, limit, or impose moratoriums 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 exempting from preemption by the state any local laws that prevent or mitigate local impacts from oil and gas development.

The Board set the ballot title and submission clause as follows:

Shall there be an amendment to the Colorado constitution concerning the local government regulation of oil and gas development and, in connection therewith, authorizing local governments to prohibit, limit, or impose moratoriums 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 exempting from preemption by the state any local laws that prevent or mitigate local impacts from oil and gas development?

GROUND FOR RECONSIDERATION**I. The Initiative Impermissibly Contains Multiple Subjects.**

The Colorado Constitution requires that a citizen initiated measure contain only a single subject, which shall be clearly expressed in its title. Colo. Const. art. V., § 1(5.5); *see also* C.R.S. § 1-40-106.5. The single-subject requirement prevents proponents from combining multiple subjects to attract a "yes" vote from voters who might otherwise vote "no" on one or more of the subjects if proposed separately. *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 P.3d 76, 79 (Colo. 2014). Accordingly, an initiative's subject matter "must be

necessarily and properly connected rather than disconnected or incongruous.” *Id.* (citing *In re Proposed Initiative for 2011–2012 # 45*, 274 P.3d 576, 579 (Colo.2012)). Titles containing general “umbrella proposals” to unite separate subject are unconstitutional. *Id.* (citing *In re Proposed Initiative for 2011–2012 # 45*, 274 P.3d 576, 579 (Colo. 2012)).

Contrary to the requirement that every constitutional amendment proposed by initiative be limited to a single subject, which shall be clearly expressed in its title, the Board set title for initiative #75 despite the fact that it contains multiple, distinct and separate purposes that are not dependent upon or connected with each other. Specifically, under the umbrella of “local government regulation of oil and gas development” the initiative actually includes the following several, unrelated subjects:

- (1) Granting local governments the authority to regulate oil and gas development in a way that is more restrictive than state laws, but must not be less protective of the community’s health, safety, general welfare, and environment than state laws (#75 § 3(1));
- (2) Authorizing local governments to completely ban oil and gas development within certain geographic areas (#75 § 3(1));
- (3) Exempting from preemption by the state any local laws intended to “mitigate local impacts from oil and gas development,” irrespective of whether such laws are enacted pursuant to the authority conferred upon local governments in Subsection 3(1) or are otherwise connected to the initiative’s central purpose of regulating oil and gas development (#75 § 3(2)); and
- (4) Curtailing the State’s advancement of its own interests by prohibiting the State from impeding local governments’ efforts to prevent and mitigate local impacts from oil and gas development (#75 § 1(c)).

Each of these subjects is not interdependent or connected to the other. The Title Board therefore lacks jurisdiction to set title and title setting should be denied.

II. The Title and Submission Clause as Drafted Fail to Describe Important Aspects of the Measure.

A measure’s title and submission clause must “correctly and fairly express the true intent and meaning” of the measure. C.R.S. § 1-40-106(3)(b). The title and submission clause 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 Title, Ballot Title & Submission Clause for 2009–2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010) “[A] material omission can create misleading titles.” *In re Title, Ballot and Submission Clause 1999–2000 #258A*, 4 P.3d 1094, 1098 (Colo. 2000).

The title and submission clause for measure #75 are misleading and confusing because they fail to describe important aspects of the measure. Among other defects, the title and submission clause:

(1) Fail to reflect that the measure increases the authority of local governments to enact laws that prohibit or limit oil and gas development;

(2) Fail to state that the measure 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” (#75 § 1(a));

(3) Fail to make clear that the measure prohibits local laws and regulations that are “less protective” of a community’s health, safety, welfare, and environment than state law (#75 § 3(1)); and

(4) Fail to reflect that the measure prioritizes local control of oil and gas development over matters of state interest and matters of statewide concern (#75 § 1(c)).

Therefore, in the alternative, opponents request a title and submission clause that reflect these important aspects of the measure as set forth in the proposed title and submission clause, attached as Exhibit A.

CONCLUSION

Based on the foregoing, Mr. Martini and Mr. Prestidge request a rehearing of the Title Board for Initiative 2015-2016 #75. The initiative is incapable of being expressed in a single subject that clearly reflects the intent of the proponents, and therefore the Title Board lacks jurisdiction to set a title and should reject the measure. Alternatively, Mr. Martini and Mr. Prestidge respectfully request that the Title Board amend the title and submission clause consistent with the concerns set forth above and as set forth in Exhibit A.

Respectfully submitted this 10th day of February, 2016 by:

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EXHIBIT A

Ballot Title Setting Board

Proposed Initiative 2015-2016 #75

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

An amendment to the Colorado constitution ~~concerning increasing the local governments'~~ authority to ~~regulation regulate~~ of oil and gas development and, in connection therewith, declaring that oil and gas development has detrimental impacts on public health, safety, general welfare, and the environment; authorizing local governments to prohibit, limit, or impose moratoriums on oil and gas development; authorizing local laws and regulations that are more restrictive of oil and gas development; prohibiting such local laws and regulations that are less and at least as protective of a community's health, safety, welfare, and environment as than state law; and exempting from preemption by the state any local laws and regulations that prevent or mitigate local impacts from oil and gas development even as to matters of statewide concern and even if the local laws materially impede a state interest; and preventing state government from impeding the efforts of local governments to prevent and mitigate impacts from oil and gas development.

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 increasing the local governments'~~ authority to ~~regulation regulate~~ of oil and gas development and, in connection therewith, declaring that oil and gas development has detrimental impacts on public health, safety, general welfare, and the environment; authorizing local governments to prohibit, limit, or impose moratoriums on oil and gas development; authorizing local laws and regulations that are more restrictive of oil and gas development; prohibiting such local laws and regulations that are less and at least as protective of a community's health, safety, welfare, and environment as than state law; and exempting from preemption by the state any local laws and regulations that prevent or mitigate local impacts from oil and gas development even as to matters of statewide concern and even if the local laws materially impede a state interest; and preventing state government from impeding the efforts of local governments to prevent and mitigate impacts from oil and gas development?

DATE FILED: March 16, 2016 2:15 PM

Exhibit D

Ballot Title Setting Board

Proposed Initiative 2015-2016 #75¹

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

An amendment to the Colorado constitution concerning local government regulation of oil and gas development and, in connection therewith, authorizing local governments to prohibit, limit, or impose moratoriums 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 that prevent or mitigate local impacts from oil and gas development.

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 local government regulation of oil and gas development and, in connection therewith, authorizing local governments to prohibit, limit, or impose moratoriums 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 that prevent or mitigate local impacts from oil and gas development?

*Hearing February 3, 2016:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 12:21 p.m.*

*Rehearing February 17, 2016:
Motion for Rehearing granted only to the extent that the Board made changes to the titles; denied
in all other respects.
Hearing adjourned 10:33 a.m.*

¹ Unofficially captioned "Local Government Authority to Regulate Oil and Gas Development" by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

DATE FILED: March 16, 2016 2:16 PM

Exhibit E

RECEIVED

JAN 08 2015

S. WARD

1:58 P.M.

Colorado Secretary of State

Clean
Initiative 2015-2016 #62

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

Ban on Hydraulic Fracturing

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

(a) THAT OIL AND GAS DEVELOPMENT USING HYDRAULIC FRACTURING HAS DETRIMENTAL IMPACTS ON PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT;

(b) THAT THE PROTECTION OF PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT HAS PRIORITY OVER THE RIGHTS OF OIL AND GAS DEVELOPMENT; AND

(c) THAT TO SAFEGUARD AND DEFEND PUBLIC HEALTH, SAFETY, WELFARE, AND THE ENVIRONMENT, THE PEOPLE DESIRE TO PROHIBIT THE USE OF HYDRAULIC FRACTURING IN OIL AND GAS DEVELOPMENT WITHIN THE GEOGRAPHIC BOUNDARIES OF THE STATE OF COLORADO, EXCLUDING FEDERAL LAND AND INDIAN RESERVATIONS. SUCH PROHIBITION IS DEEMED NECESSARY TO THEIR SAFETY AND HAPPINESS AND WILL NOT BE REPUGNANT TO THE CONSTITUTION OF THE UNITED STATES.

Section 2. Definitions. FOR PURPOSES OF THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(1) "ENVIRONMENT" INCLUDES AIR, WATER, LAND, AND ECOLOGICAL SYSTEMS.

(2) "HYDRAULIC FRACTURING" MEANS THE WELL STIMULATION PROCESS USED TO EXTRACT DEPOSITS OF OIL, GAS, AND OTHER HYDROCARBONS THROUGH THE INJECTION OF WATER, PROPPANT, AND CHEMICALS UNDER HIGH PRESSURE INTO A GEOLOGIC FORMATION.

(3) "OIL AND GAS DEVELOPMENT" MEANS EXPLORATION FOR AND PRODUCTION AND PROCESSING OF OIL, GAS, OTHER GASEOUS AND LIQUID HYDROCARBONS, AS WELL AS THE TREATMENT AND DISPOSAL OF WASTE ASSOCIATED WITH SUCH EXPLORATION AND PRODUCTION.

Section 3. Prohibition of hydraulic fracturing. THE USE OF HYDRAULIC FRACTURING IS PROHIBITED IN OIL AND GAS DEVELOPMENT IN ALL LANDS WITHIN COLORADO, EXCLUDING FEDERAL LAND AND INDIAN RESERVATIONS.

Section 4. Not a taking. THE PROHIBITION OF HYDRAULIC FRACTURING IS NOT A TAKING OF PRIVATE PROPERTY AND DOES NOT REQUIRE THE PAYMENT OF COMPENSATION PURSUANT TO SECTIONS 14 AND 15 OF ARTICLE II OF THE COLORADO CONSTITUTION.

Section 5. Enforcement and damages. ANY PERSON MAY ENFORCE THIS ARTICLE THROUGH AN ACTION BROUGHT IN A COURT OF COMPETENT JURISDICTION. SUCH PERSON SHALL HAVE THE RIGHT TO SEEK DECLARATORY RELIEF, EQUITABLE RELIEF, INCLUDING WITHOUT LIMITATION, INJUNCTIVE RELIEF, AND DAMAGES. THE PLAINTIFFS IN SUCH ACTION SHALL BE

ENTITLED TO RECOVER ALL REASONABLE COSTS OF LITIGATION, INCLUDING WITHOUT LIMITATION, ATTORNEY FEES AND COSTS. UPON DETERMINATION THAT A VIOLATION OF THIS ARTICLE HAS OCCURRED, PENALTIES MAY BE ASSESSED BY THE COURT OR JURY TO BE PAID INTO THE REGISTRY OF THE PRESIDING COURT AND DISTRIBUTED BY SUCH COURT TO THE LOCAL GOVERNMENT WHERE THE VIOLATION OCCURRED.

Section 6. Self-executing - severability - conflicting provisions. ALL PROVISIONS OF THIS ARTICLE ARE SELF-EXECUTING, ARE SEVERABLE, AND SUPERSEDE CONFLICTING STATE AND LOCAL LAWS AND REGULATIONS. LAWS AND REGULATIONS MAY BE ENACTED TO FACILITATE THE OPERATION OF THIS ARTICLE, BUT IN NO WAY LIMITING OR RESTRICTING THE PROVISIONS OF THIS ARTICLE.

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MEMORANDUM

TO: Bruce Mason, Karen Dike, and Martha Tierney
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: December 30, 2015
SUBJECT: Proposed initiative measure 2015-2016 #62, concerning a prohibition on the use of hydraulic fracturing

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the directors of Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the **Colorado constitution** appear to be:

1. To prohibit hydraulic fracturing on all Colorado lands, except federal lands and Indian reservations;