

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: March 16, 2016 1:00 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015- 2016 #75</p> <p>Petitioners: SHAWN MARTINI and SCOTT PRESTIDGE</p> <p>v.</p> <p>Respondents: BRUCE MASON and KAREN DIKE</p> <p>and</p> <p>Title Board: SUZANNE STAIERT; JASON GELENDER; and FREDERICK R. YARGER</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>RESPONDENTS' OPENING BRIEF</p>	

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 3,066 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 Opening 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”).

STATEMENT OF ISSUES PRESENTED FOR REVIEW¹

1. Does Initiative #75 violate the single subject requirement by: (a) granting local governments the authority to regulate oil and gas development in a way that is more restrictive than state law, but must not be less protective of the community’s health, safety, general welfare, and environment than state law; (b) authorizing local governments to completely ban oil and gas development within certain geographic areas; (c) exempting from preemption local laws intended to mitigate local impacts from oil and gas development; and (d) curtailing the State’s advancement of its own interests by prohibiting the State from impeding local government’s efforts to prevent and mitigate local impacts from oil and gas development.

¹ These issues are drawn, as best Respondents are able, from Petitioners’ “Advisory Statement of Issues” in their Petition for Review.

2. Is the Title set for Initiative #75 unfair and misleading because: (a) it fails to reflect 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;” (b) it fails to reflect that the measure increases the authority of local governments to enact laws that prohibit or limit oil and gas development; and (c) it fails to reflect that the measure prioritizes local control of oil and gas development over matters of state interest and matters of statewide concern.

STATEMENT OF THE CASE

This is an appeal from the Title Board’s setting of the Title for Initiative #75. On January 8, 2016, Proponents filed Initiative #75 with the directors of the Legislative Council and the Office of Legislative Legal Services. 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.

Proponents filed Initiative #75 with the Secretary of State’s office on January 21, 2016. At the Title Board hearing on February 3, 2016, the Title Board found that Initiative #75 contained a single subject, as required pursuant to article

V, section 1(5.5) of the Colorado Constitution, and Section 1-40-106.5, C.R.S.

(2015). The Title Board set the Title for Initiative #75.

On February 10, 2016, Petitioners Shawn Martini and Scott Prestidge filed a Motion for Rehearing. On February 17, 2016, the Title Board revised the Title to its current form. Petitioners Shawn Martini and Scott Prestidge filed an appeal, pursuant to Section 1-40-107(2), C.R.S. (2015), on February 24, 2016.

STATEMENT OF FACT

Initiative #75 amends the Colorado Constitution to vest 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 and 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 set by the Title Board correctly and fairly expresses the true intent and meaning of Initiative #75, and will not mislead the public. The Title follows Initiative #75's structure, using similar, and often identical, language.

The Title, as amended at the rehearing on February 17, 2016, 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.

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion in drafting the title for Initiative #75. 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 the state from preempting any local laws or regulations, are all implementing and enforcement details that flow from the measures single subject.

Initiative #75 does not present either of the dangers attending omnibus measures - 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 preemption, other laws or its application if enacted are not appropriate for review at this stage.

The Title satisfies Colorado law because it fairly and accurately sets forth the major features of Initiative #75 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 does not need to state that the measure increases the authority of local governments to enact laws that prohibit or limit oil and gas development, or that the measure prioritizes local control of oil and gas development over matters of state interest and matters of statewide concern. The Title clearly states that local governments will be vested with the authority to regulate oil and gas development and that the state is prohibited from preempting any 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 central points of a proposed measure, and need not refer to every nuance and feature of 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.

Accordingly, there is no basis to set aside the Title, and the decision of the Title Board should be affirmed.

ARGUMENT

I. The Initiative Complies with the Single Subject Requirement.

A. Standard of Review

Article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5(1)(a), C.R.S. (2015), provide that a proposed initiative must be limited to “a single subject which shall be clearly expressed in its title.” “A proposed initiative violates this rule if its text relates to more than one subject, and has at least two distinct and separate purposes not dependent upon or connected with each other.” *In re Initiative for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012). 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). The Court will “only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.*

One purpose of the single subject requirement is to apprise voters of the subject of a measure, so that surreptitious measures that could result in voter surprise or fraud are not placed on the ballot. *In re Initiative 2001-2002 #43*, 46

P.3d 438, 441 (Colo. 2002); *see also* § 1-40-106.5(1)(e)(II), C.R.S. (2015).

Implementing provisions that are directly tied to an initiative's central focus are not separate subjects. *In re Initiative for 1999-2000 # 258(A)*, 4 P.3d 1094, 1097 (Colo. 2000).

“In determining whether a proposed measure contains more than one subject, [the Court] may not interpret its language or predict its application if it is adopted.” *In re Initiative for 1999-2000 #255*, 4 P.3d 485, 495 (Colo. 2000).

Rather, the Court applies the general rules of statutory construction and accords the language of the measure its plain meaning. *See In re Initiative for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006).

The single subject requirement protects against proponents that might seek to secure an initiative's passage by joining together unrelated or even conflicting purposes and pushing voters into an all-or-nothing decision. *See In re Initiative "Public Rights in Waters II" ("Waters II")*, 898 P.2d 1076, 1079 (Colo. 1995).

However, “the single subject requirement should be construed liberally to avoid unduly restricting the initiative process.” *In re Initiative for 2007-2008 # 61*, 184 P.3d 747, 750 (Colo. 2008).

B. Initiative 2015-2016 #75 Contains a Single Subject

Initiative #75 contains a single subject: vesting in local governments the power and authority to adopt laws concerning oil and gas development within their geographic borders. The remainder of the measure contains implementation terms to protect or enforce that right - all congruous and related. The measure gives local governments 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 and 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 text of Initiative #75 is short, and its provisions are directly tied to the measure's central focus.

Initiative #75 does not present either of the "dangers" attendant to omnibus measures. *See In re Initiative 2001-2002 #43*, 46 P.3d at 442-43. First, the proponents did not combine an array of unconnected subjects into the measure for the purpose of garnering support from groups with different, or even conflicting interests. *In re Initiative for 2013-2014 #89*, 328 P.3d at 177. Rather, each subsection of Initiative #75 is tied to the central purpose of the measure: vesting in local governments the power and authority to adopt laws concerning oil and gas development within their geographic borders. Initiative #75 will pass or fail on its

merits and does not run the risk of garnering support from factions with different or conflicting goals. *See id.* at 178.

Initiative #75 also fails to trigger the second "danger" of omnibus measures because voters will not be surprised by, or fraudulently led to vote for, any "surreptitious provision[s] 'coiled up in the folds' of a complex initiative." *In re Initiative 2001-2002 #43*, 46 P.3d at 442-43. No such surprise would occur should voters approve Initiative #75 because the plain language of the measure unambiguously proposes vesting in local governments the power and authority to adopt laws concerning oil and gas development within their geographic borders, describes the breadth of the authority, describes the impact of that right on other legal rights, and lays out procedures for implementing and enforcing the constitutional amendment. Furthermore, Initiative #75 is not overly lengthy or complex, nor is the plain language confusing or otherwise misleading. *See In re Initiative for 2011-2012 #3*, 274 P.3d at 567.

Petitioners make three differing preemption-based arguments contending that the measure contains a second subject: (1) it grants local governments the authority to regulate oil and gas development in a way that is more restrictive than state law, but must not be less protective of the community's health, safety, general welfare, and environment than state law, *Petition*, p. 4, ¶1.a, (2) it exempts from

preemption local laws intended to mitigate local impacts from oil and gas development, *Petition*, p. 5, ¶1.c, and (3) it curtails 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, *Petition*, p. 5, ¶1.d. This Court looked at the issue of whether a change in preemption law creates a separate subject in the context of a similar measure in 2014, and found that it did not. *See In re Initiative for 2013-2014 #90*, 328 P.2d 155 (Colo. 2014). In that case, this Court held,

any effect the [initiatives] would have on Colorado's preemption doctrine does not constitute a separate subject. Indeed, the central purpose of the initiatives is to grant local governments the authority to enact more restrictive regulations on oil and gas development within their respective jurisdictions. Thus, that the [initiatives] declare that more restrictive regulations enacted under the initiatives would govern over conflicting state laws is necessarily and properly connected to the initiatives' central purpose.

Id. at 161. Like the 2014 measure, 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. *See Id.*

Additionally, Petitioners contend that Initiative #75 contains a separate subject because it authorizes local governments to completely ban oil and gas development within certain geographic areas. *Petition*, p. 4, ¶1.b. The authority of

local governments to ban oil and gas development does not create a separate subject. Rather, 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 power to prohibit oil and gas development is part of the central purpose of the measure. “[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 *Waters II*, 898 P.2d at 1079.)

Initiative #75 complies with the single subject rule.

II. The Initiative’s Title Correctly and Fairly Expresses the True Intent and Meaning of the Measure.

A. Standard of Review

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). Titles and submission clauses should “enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re Initiative for 2009-2010 # 24*, 218 P.3d 350, 356 (Colo. 2009) (quoting *In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)).

The purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose. *See id.*

B. The Title and Submission Clauses Are Not Misleading

The Title for Initiative #75 is clear and does not mislead the 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 measure's text in a clear and straightforward manner.

The Petitioners argue that the title set by the Title Board for Initiative # 75 is inaccurate and mischaracterizes the text of the initiative. First, they claim that the title fails to reflect that the measure contains a declaration that oil and gas development “has detrimental impacts on public health, safety, general welfare, and the environment.” *Petition, p. 5, ¶2.a.* The declaration identified, while giving context to the reasons for the constitutional amendment, is not a central feature of

the measure and, therefore, need not be included in the title. The Title Board is “only obligated to fairly summarize the central points of a proposed measure, and need not refer to every effect that the measure may have on the current statutory scheme.” *In re Initiative for 2013-2014 #90*, 328 P.2d at 164 (citations omitted). The central features of Initiative #75 are clearly spelled out in its title.

Second, Petitioners contend that the title for Initiative #75 “fails to reflect that the measure increases the authority of local governments to enact laws that prohibit or limit oil and gas development.” *Petition*, p. 5, ¶2.b. “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 136, 145 (Colo. 2014). Here, Initiative #75’s title makes clear that the measure authorizes local governments to prohibit, limit, or impose moratoriums on oil and gas development. 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 52, 58 (Colo. 2008).

Finally, Petitioners claim that the title of Initiative #75 is misleading and confusing because it fails to reflect that the measure prioritizes local control of oil

and gas development over matters of state interest and matters of statewide concern.” *Petition, p. 5 ¶2.c.* To the contrary, the Title captures and fairly reflects the primary features of Initiative #75, including 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,” which sufficiently captures the preemption concepts identified by Petitioners. “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. (citations omitted).

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 16th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2016 a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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