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SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, CO 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 #78 ("Mandatory Setback for Oil and Gas Development") **Petitioners: SHAWN MARTINI and SCOTT PRESTIDGE** **v.** **Respondents: BRUCE MASON and KAREN DIKE** **and** **Title Board: SUZANNE STAIERT; FREDERICK YARGER; and JASON GELENDER**	▲COURT USE ONLY▲
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PETITIONERS' ANSWER BRIEF IN SUPPORT OF PETITION FOR REVIEW OF PROPOSED INITIATIVE 2015-2016 #78 ("MANDATORY SETBACK FOR OIL AND GAS DEVELOPMENT")

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 3,222 words (answer brief does not exceed 9,500 words).

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

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

☒**In response to each issue raised, the appellee** must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

s/*Elizabeth H. Titus*

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SUMMARY OF THE ARGUMENT

The arguments set forth in the Proponents' Opening Brief do not support the Title Board's determination that proposed initiative 2015-2016 #78 (hereinafter the "Initiative" or "Proposed Initiative" or "Initiative #78") contains a single subject or that the title is fair and accurate.[1]

Proponents' description of the measure's alleged single subject supports Petitioners' argument that Initiative #78 contains multiple subjects and that the title set by the Title Board (the "Board") is inaccurate and misleading. Proponents assert that the Initiative's single subject is: "creating a statewide setback requirement for new oil and gas development facilities of at least 2,500 feet from the nearest occupied structure or area of special concern." Resp'ts' Opening Br. 4.

The single subject, even as framed by the Proponents, contains at least three distinct topics:

1. Imposing a new 2,500-foot setback for new oil and gas development facilities from occupied structures (Initiative § 3);
2. Creating a setback for new oil and gas development facilities from "area[s] of special concern." (Initiative §§ 2(4), (3)); and

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

3. Authorizing governments, including local governments, to increase the setback requirement from occupied structures (Initiative §4).

Moreover, the Final Title is confusing and misleading and must not be forwarded to the voters. The Final Title inaccurately describes the Initiative as implementing a uniform "statewide setback;" when, in fact, it authorizes setbacks of varying lengths. Additionally, the Final Title omits key features of the measure. The Final Title fails to make clear the properties, places, and facilities implicated by the new setbacks, and it omits the Initiative's declaration that "oil and gas development, including the use of hydraulic fracturing, has detrimental impacts on public health, safety, welfare and the environment." *See* Final Title; Initiative § 1(a).

ARGUMENT

I. THE INITIATIVE VIOLATES THE SINGLE-SUBJECT REQUIREMENT.

A. Standard of Review.

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

B. The Initiative Contains Separate and Distinct Purposes under the Guise of Creating a Statewide Setback.

As demonstrated below and in Petitioners' Opening Brief, the Board was unable to accurately determine and state the single subject of Initiative #78. Typically, the Board states the single subject of a ballot initiative in the first clause of the measure's title, followed by the phrase "and, in connection therewith," which is then followed by a description of the other important provisions. *See e.g. Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 177,181 (Colo. 2014) (finding a single subject of "the creation of a public right to Colorado's environment" when the final title read "[a]n amendment to the Colorado constitution concerning a public right to Colorado's environment, and, in connection therewith …")*; see also In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 646, 651 (Colo. 2010) (finding a single subject of "preserving individuals' rights to choose their own health care arrangements," when the final title read "[a]n amendment to the Colorado Constitution concerning the right of all persons to health care choice, and, in connection therewith …"); *see also In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098, 1101 (Colo. 2000) (finding that "[t]he central focus of Initiative No. 258(A) is the instruction of all public school students using the English language," when the final title read "[a]n amendment to the Colorado

Constitution concerning English language education, and in connection therewith …").

Consistent with this practice, the Board characterized the single subject of Initiative #78 as an amendment "concerning a *statewide* setback requirement for new oil and gas development facilities." Final Title (emphasis added). In contrast, Proponents claim the central purpose of the measure is "the creation of a statewide setback requirement for new oil and gas development facilities of *at least 2,500 feet from occupied structures and areas of special concern*." Resp'ts' Opening Br. 8 (emphasis added).

Although more accurate than the Board's formulation, Proponents' description of the Initiative's single subject underscores the Initiative's constitutional flaws. Under the guise of "concerning a statewide setback," the Initiative attempts to accomplish at least three separate purposes: (1) increasing the existing setback from occupied structures to 2,500 feet (Initiative § 3); (2) Creating a new setback from "area[s] of special concern" (Initiative §§ 2(4)(3)); and (3) vesting governments, <u>including local governments</u>, with authority to increase the setback requirement from occupied structures without limitation (Initiative § 4).

The Board's single-subject clause does not reflect these distinct purposes. Moreover, the Board impermissibly used the umbrella term "statewide setback" in

order to impermissibly join these separate subjects. *See Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 333 p.3d 76, 79 (Colo. 2014) ("[P]roponents attempt to unite these separate subjects under the description … in the title and submission clause. We have previously found such umbrella proposals unconstitutional"). Therefore, the measure must not be forwarded to the voters. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 25*, 974 P.2d 458, 465 (Colo. 1999) ("if the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in its title … the initiative cannot be forwarded to the voters.")

C. Setbacks from "Occupied Structures" and from the Various Properties and Hydrologic Features Encompassed Within the Term "Area of Special Concern" Constitute Two Distinct and Separate Subjects.

The imposition of a 2,500-foot setback for oil and gas facilities from occupied structures is one distinct subject. The imposition of a 2,500-foot setback for oil and gas facilities from the thirteen unrelated properties and hydrologic features defined as areas of special concern is another distinct subject. The areas of special concern include, but are not limited to: "public and community drinking water sources, lakes, rivers, perennial or intermittent streams, creeks, irrigation canals, riparian areas, playgrounds, permanent sports fields, amphitheaters, public parks, and public open space." Initiative § 2(4).

Moreover, the types of properties included within the definitions of "area of special concern" and "occupied structure" are so disjointed that they cannot comprise one subject. The imposition of a setback from properties defined as occupied structures, as well as from the numerous properties and hydrologic features encompassed by the new term "area[s] of special concern," will create the exact "dangers" attendant to omnibus provisions that Proponents claim to avoid. Resp'ts' Br. 8–9. Contrary to Proponents' assertion, the Initiative improperly seeks support from groups with different and conflicting interests. *Id.* (citing *Matter of Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 177 (Colo, 2014)). Application of the setback to occupied structures is intended to elicit support from voters opposed to oil and gas development near residential areas.[2] However, the defined term "area of special concern" includes certain hydrologic features (*e.g.* "public and community drinking water sources, lakes, rivers, perennial or intermittent streams, creeks, irrigation canals, riparian areas") to garner support from voters who oppose oil and gas development near water resources based upon their belief that such development has detrimental

[2] *See Will Oil & Gas Operators Come Together with Local Homeowners in 2015*, Oil & Gas 360 (Dec. 23, 2014), http://www.oilandgas360.com/oil-gas-operators-local-homeowners-2015/ (describing the contentious issues related to oil and gas development in residential areas); Mark Jaffe, *Drilling at Edge of Windsor tests Colorado's Pledge to Reduce Conflict*, Denver Post (Dec. 14, 2014, 12:01 AM) (same).

impacts regardless of the proximity of such waters to populated areas.[3] Voters opposed to oil and gas development near residential areas might nevertheless support oil and activities in less populated areas, where internment streams or irrigation canals are present. Thus, the Initiative "push[es] voters into an all-or-nothing decision." *See* (Resp'ts' Opening Br. 7) (citing *Matter of Title, Ballot Title, Submission Clause, & Summary Pertaining to Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1079 (Colo. 1995)).

Additionally, the 13 disjointed properties and hydrologic feature to which the setback would apply are improperly "coiled up in the folds" of the measure's definition section. *See In re Title & Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 440 (Colo. 2002). Moreover, voters would be further surprised to learn that areas of special concern are not limited to the 13 items listed in the Proposed Initiative, because local governments may designate additional areas of special concern. Final Title (requiring "any new oil and gas development facility in the state to be located at least 2,500 feet from the nearest occupied structure *or other specified or locally designated area*") (emphasis added); Resp'ts' Br. 15 (noting that "[a]rea of special concern" is defined in the

[3] *See Weld County Water to be Tested for Effects of Oil, Gas Drilling over Time*, HuffPost Denver (July 13, 2013, 1:50 PM), http://www.huffingtonpost.com/2013/07/14/water-researchers-converg_n_3591574.html (describing a five-year project testing the effects of oil and gas industry activities on water in Weld County in response to concerns regarding Weld County's water sources).

measure to include (but not be limited to)….”). Therefore, to prevent inevitable voter surprise and fraud occasioned by the Proposed Initiative, the Court should remand this matter to the Board with directions to strike its final, ballot title and submission clause.

D. Granting Local Governments the Ability to Increase the Setback Requirement Defined in the Initiative is an Additional, Distinct Subject.

Proponents contend that creation of a setback from occupied structures and areas of special concern is the single subject of the Initiative. Resp’ts’ Opening Br. 10 (“The first two subjects identified by Petitioners make up the single subject of the measure”) (emphasis added). Proponents then attempt to expand the purported single subject to encompass the Initiative’s provision vesting governments, including local governments, with authority to increase the setback from occupied structures, without limitation. *Id.* at 11. This grant of authority is not an implementation provision “necessarily and properly connected to Initiative #78’s central purpose.” *Id.* Rather, it is a thinly veiled attempt to provide governments with authority to ban oil and gas activities. Pet’rs’ Opening Br. 9.

Logically, a measure with the purported single purpose of creating a statewide setback of 2,500 feet for new oil and gas development facilities from occupied structures and various other properties and hydrologic features cannot at the same time vest local governments with the authority to completely ban oil and

gas development from their jurisdictions. The constitutional mandate that citizen-initiated ballot measures contain a single subject prohibits Proponents from disguising a measure intended to expand local control over oil and gas development as a measure that purports to "concern a statewide setback for new oil and gas development facilities." For this additional reason, the Court should reverse Board's finding that Initiative #78 contains single subject.

II. THE FINAL TITLE AND SUBMISSION CLAUSE ARE UNCLEAR AND WILL MISLEAD VOTERS OF THE CENTRAL FEATURES OF THE MEASURE.

A. Standard of Review.

The Petitioners described the applicable standard of review in their Opening Brief, which is consistent with the standard set forth in the Proponents' Opening Brief. *Compare* Pet'rs' Opening Br. 15 *with* Resp'ts' Opening Br. 12.

B. The Final Title's Single-Subject Clause Is Inaccurate and Misleading.

Respondents' description of Initiative #78's single subject highlights the problem with the single-subject clause drafted by the Board. *See supra* § I.B. Proponents describe the central purpose of the initiative as creating "a new statewide setback requirement of <u>at least</u> 2500 feet" from occupied structures and areas of special concern. Resp'ts' Opening Br. 11 (emphasis in original). The Final Title, however, states that the Initiative's single subject concerns "a statewide setback requirement for new oil and gas development facilities." *See* Final Title.

Contrary to the single-subject described by the Proponents, the Final Title's single-subject clause indicates that the Initiative will authorize a uniform, statewide setback. *See supra* § I.B. However, the Initiative's central purpose is to authorize varying setbacks "of at least 2500 feet." Resp'ts' Opening Br. 11 ("The power to establish a greater setback distance is part of the central purpose of the measure"). Accordingly, the Board should have drafted the Final Title's single-subject clause to reflect this "central purpose."

C. The Board's Failure to Describe the Initiative's Defined Terms "Area of Special Concern" and "Oil and Gas Development Facility" Will Mislead Voters.

Proponents attempt to justify the Title Board's failure to accurately describe the meaning of "oil and gas development facility" and "area of special concern" by citing "the requirement of brevity." Resp'ts' Opening Br. 15. However, the requirement of brevity must yield to another important purpose the Proponents cited in their Opening Brief: "voter protection through reasonably ascertainable expression of the initiative's purpose." *See* Resp'ts' Opening Br. 12. The Final Title's reference to areas of special concern as "other specified or locally designated area[s]," does not provide a reasonably ascertainable expression of the Initiative's purpose – that new oil and gas development facilities be located at least 2,500 feet from 13 specific properties and waters, in addition to other later-designated areas. Moreover, the Final Title does not alert voters to the measure's

drastic effects on future oil and gas development: prohibiting development within the vast majority of lands currently available and sterilizing the underlying mineral resource. Pet'rs' Opening Br. 23–24.

Similarly, the Final Title's inclusion of "oil and gas development facility" does not provide sufficient context regarding the types of oil and gas operations affected by the Proposed Initiative (*e.g.* the drilling of oil and gas wells). Accordingly, the average voter will not understand that the Initiative is primarily intended to prevent drilling of new oil and gas wells. Pet'rs' Opening Br. 21.

The Title Board could have provided clarification while still adhering to the requirement of brevity. Petitioners provided examples in their Motion for Rehearing that would accomplish this task, citing broad categories of properties and hydrologic features from which the setbacks would apply and briefly describing the oil and gas operations at issue. *See* Motion for Rehearing, attached to Petition for Review filed Feb. 24, 2016, Ex. A. Petitioners suggested that the Board should revise the Final Title to reference "other specified areas, including certain water sources, water bodies, and public places" and to make clear that the setback applied to "new oil and gas associated wells, production and processing facilities." *Id.*

In response, Proponents oppose Petitioners' suggestions "to avoid any confusion with a partial definition." *See* Resp'ts' Opening Br. 15. However,

voters would better understand areas affected by the Initiative if the Final Title referenced at least a partial definition of the specified areas and facilities implicated by the measure. In contrast, the Final Title's reference to "other specified or locally designated area[s]" adds extra words with no additional value. Additionally, use of the term "oil and gas development facilities" does not provide the voters with basic understanding of how the Initiative will impact future oil and gas operations in Colorado.

In *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 255*, the Court affirmed the Title Board's condensed definition of a term, because it could satisfy the requirement of brevity while clearly setting forth the measure's terms. *In re Initiative for 1999-2000 #255*, 4 P.3d, 485, 497 (Colo. 2000). In that case, the Court held that an abbreviated definition of "gun show vendor" was sufficiently brief and was not misleading to voters. *Id.* Similarly, the Title Board should have included condensed versions of the defined terms "area of special concern" and "oil and gas development facility" in the Final Title for Initiative #78.

Proponents further argue that "[t]itles are not required to include definitions of terms unless the terms 'adopt a new or controversial legal standard which would be of significance to all concerned' with the Initiative." Resp'ts' Opening Br. 15 (citing *Matter of Title for 1999-2000 #255*, 4 P.3d at 497 (Colo. 2000)). The terms

"area of special concern" and "oil and gas development facility" are new legal standards – neither term is included within Colorado's statutory framework, nor is recognized within the oil and gas industry. *See.* Pet'rs' Opening Br. 25; *see also* Howard R. Williams & Charles J. Meyers, *Manual of Oil and Gas Terms* (16th ed. 2015) ("area of special concern" and "oil and gas development facility" are not included). Because the central focus of this measure "is to create a new statewide setback requirement of at least 2500 feet," the new legal standard defining properties and facilities to which the setback applies is significant and should have been included in the Final Title. *See* Resp'ts' Opening Br. 11 (emphasis in original). The Board's failure to provide any description of the properties and type of oil and gas facilities affected by the measure deprives voters of the necessary information to understand the effect of a "yes" or "no" vote. *See In re Title, Ballot Title, Submission Clause, Summary for 1999-2000 No. 29*, 972 P.2d 257, 267–68 (Colo. 1999); *Matter of Proposed Initiative on Parental Notifications of Abortions for Minors*, 794 P.2d 238, 241–42 (Colo. 1990). Therefore, the Final Title should not be forwarded to the voters.

D. The Final Title Fails to Inform Voters of the Initiative's Declaration on Behalf of the People of Colorado that Oil and Gas Development has "Detrimental Impacts on Public Health, Safety, Welfare, and the Environment."

In error, the Board omitted any reference to the Initiative's declaration that oil and gas development "has detrimental impacts on public health, safety, welfare,

and the environment" from the Final Title. Final Title; Proposed Initiative §1(a). Proponents contend that the declaration only gives "context to the reasons for the constitutional amendment [and] is not a central feature of the measure." Resp'ts' Opening Br. 14. As described above and in Petitioners' Opening Brief, the Initiative's declaration provides much more than context for the measure – it significantly alters the underlying public policy for the state's regulation of oil and gas development. Pet'rs' Opening Br. 26–27. Moreover, the oil and gas industry has a substantial presence in Colorado and contributes to the state's economic well-being.[4] Thus, Proponents' contention that Colorado voters need not be alerted to the fact that a "yes" vote in favor of the Initiative includes a constitutional finding that oil and gas development "detrimentally impacts public health, safety, welfare, and the environment" is absurd. Therefore, the Board's failure to include this central feature of the measure renders the title defective.

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

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

remand this matter to the Title Board with direction to return the Initiative to the Proponents. In the alternative, Petitioners request that the Court remand the matter to the Title Board with the instructions to amend the Title consistent with the concerns set forth above.

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

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CERTIFICATE OF SERVICE

I certify that on April 5, 2016, a true and correct copy of the above and foregoing **PETITIONERS' ANSWER BRIEF IN SUPPORT OF PETITION FOR REVIEW OF PROPOSED INITIATIVE 2015-2016 #78 ("MANDATORY SETBACK FOR OIL AND GAS DEVELOPMENT")** was electronically filed with the Court and served via ICCES upon:

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