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SUPREME COURT, STATE OF COLORADO **2 East 14th Avenue** **Denver, Colorado 80203**	
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #78 **Petitioners:** SHAWN MARTINI and SCOTT PRESTIDGE v. **Respondents:** BRUCE MASON and KAREN DIKE and **Title Board:** SUZANNE STAIERT; JASON GELENDER; and FREDERICK R. YARGER	▲COURT USE ONLY▲
Attorneys for Respondents Martha M. Tierney, No. 27521 Tierney Lawrence LLC 2675 Bellaire Street Denver, CO 80207 Phone: (303) 356-4870 E-mail: mtierney@tierneylawrence.com	Case No.: 16SA71

RESPONDENTS' ANSWER BRIEF IN SUPPORT OF 2015-2016 INITIATIVE #78

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 4,267 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.AR. 32.

By: s/Martha M. Tierney

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Bruce G. Mason and Karen Dike (jointly "Proponents" or "Respondents"), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Answer Brief in support of the title, ballot title and submission clause (jointly, the "Title") that the Title Board set for Proposed Initiative 2015-2016 #78 ("Initiative #78") and in response to the Opening Brief filed by Petitioners Shawn Martini and Scott Prestidge.

SUMMARY OF ARGUMENT

The single subject of Initiative #78, as accurately captured in its title, is the creation of a 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. The Title Board properly exercised its broad discretion in drafting the title for Initiative #78. The remaining provisions, including the definition of terms used in the measure, an allowance for the state or a local government to increase the setback distance, and implementation details concerning enactment and enforcement, are all closely tied to the central focus of the measure.

The Proponents of Initiative #78 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 #78 could have on mineral rights, 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 #78 and is not misleading. The title does not need to state in more detail than it already does that the measure establishes a setback requirement for new oil and gas wells, production and processing facilities. The Title appropriately uses the term "oil and gas development facilities," which is contained in, and defined by, the measure. The title makes clear that the measure authorizes the state and local governments to create setback requirements in excess of 2,500 feet for new oil and gas development facilities from occupied structures. The title uses the term "other specified or locally designated area," instead of "area of special concern" for purposes of clarity and brevity. Finally, 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 Board is only obligated to fairly summarize the central points of a proposed measure, and need not include every definition or 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. There is no basis to set aside the Title, and the decision of the Title Board should be affirmed.

ARGUMENT

I. INITIATIVE #78 CONTAINS A SINGLE SUBJECT.

A. Standard of Review and Preservation of the Issues.

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

B. Initiative 2015-2016 #78 Contains a Single Subject and Is Not an Umbrella Proposal.

The single subject of Initiative #78, as accurately captured in its title, is the creation of 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. The remainder of the measure contains definitions of terms used in the measure, a provision specifying that local governments may increase the setback distance, and implementation details concerning enforcement - all connected to the central focus of the measure. "Implementation details that are 'directly tied' to the initiative's 'central focus' do not constitute a separate subject." *In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000).

Petitioners contend that Initiative #78 is an umbrella proposal that unites separate subjects, but the measure does not present either of the "dangers" attendant to such omnibus measures. *In re Initiative 2001-2002 #43*, 46 P.3d 438, 442-43 (Colo. 2002). Initiative #78 does not combine an array of unconnected subjects into the measure for the purpose of garnering support from groups with different, or even conflicting interests. *In re Initiative for 2013-2014 #89*, 328 P.3d at 177. Nor will Initiative #78 surprise or confuse voters through 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. Each part of Initiative #78 is tied to

the single subject of the measure: creation of a statewide setback requirement of at least 2500 feet from the nearest occupied structure or area of special concern.

Similarly, voters will not be surprised by Initiative #78 because the plain language of the measure unambiguously proposes creating a statewide setback requirement of at least 2500 feet from occupied structures and areas of special concern, defines terms included in the measure, allows the state or local governments to increase the size of the setback from occupied structures, and lays out procedures for implementing the constitutional amendment. "[I]f the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law." *In re Initiative for 2013-2014 #89,* 328 P.3d at 177 (*quoting In re Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1079 (Colo. 1995)).

Previously, the types of "umbrella" proposals that this Court has rejected include disparate proposals with broad common themes such as "water," *In re Public Rights in Waters II,* 898 P.2d at 1080, or "revenue changes," *In re Amend TABOR 25,* 900 P.2d 121, 125-26 (Colo. 1995). Conversely, the single subject of Initiative #78: Establishing a statewide setback requirement for oil and gas development facilities from occupied structures or areas of special concern, is not similarly general or far-reaching, and does not run afoul of the single subject requirement.

C. Initiative 2015-2016 #78 Contains a Single Subject that Sets a Minimum Setback, and Allows the State and Local Governments to Increase the Setback from Occupied Structures.

Petitioners assert that Initiative #78 contains a second subject because it allows the state and local governments to increase the minimum setback distance from occupied structures. *Pet. Op. Br., p. 9.* The central objective of the initiative, however, is to create a new minimum statewide setback requirement of at least 2500 feet. The power to establish a greater setback distance is part of the central purpose of the measure.

Petitioners speculate that if the state or a local government increases the minimum setback, Initiative #78 may "entirely eliminate oil and gas operations in a particular jurisdiction," and Petitioners complain that Initiative #78 "does not require the government to act 'reasonably' when imposing a setback greater than 2,500 feet." *Pet. Op. Br., p. 9.* Petitioners' point here is really that Initiative #78 is a bad policy choice that may lead to serious and undesirable consequences from their perspective. In determining whether a proposed initiative comports with the single subject requirement, however, it is not appropriate to address the merits of the proposed initiative or predict how it may be applied if adopted by the electorate. As this Court has made clear, "[w]hether a proposed initiative is a "bad idea" is not the test of whether it meets the single subject requirement. *In re*

Initiative for 2013-2014 #90, 328 P.2d 155, 161 (Colo. 2014). Similarly, Petitioners' concerns about the effects that Initiative #78 could have on existing laws or regulations regarding well location, well spacing, safety measures, drilling, etc., are not appropriate for review in this title proceeding. *See In re Initiative for 2013-2014 #89*, 328 P.3d at 178 ("Not only is the effect of an initiative outside of the scope of our review, but the mere fact that an initiative may create a change does not mean that it violates the single subject requirement.")

Petitioners also suggest, somewhat inconsistently, that the proviso allowing the state or a local government to increase the minimum setback distance poses the prospect of both "surprise" and "logrolling," two of the concerns to which the single subject requirement is directed. §1-40-106.5(1)(e)(I), (II), C.R.S. (2015). With regard to "surprise," the proviso is plainly stated in the measure and clearly and prominently reflected in its title. With regard to "logrolling" (which belies surprise), it is quite difficult to envision co-option of independent advocates of (a) 2,500 foot minimum setbacks and (b) allowing the state or a local government to increase the 2,500 foot minimum setback from occupied structures. If a voter does not favor allowing a state or local government to increase a minimum setback requirement from occupied structures, she will not vote for an initiative adopting minimum setback requirements that incorporates that allowance; if a voter does not

favor setback requirements, she will not vote for a measure that not only enacts them but allows the state or a local government to increase the setback from occupied structures.

D. Identifying the Types of Property from which the Minimum Setback Applies Does Not Create a Second Subject.

Petitioners next contend Initiative #78 contains multiple subjects because it identifies more than one type of property from which the minimum setback applies. *Pet. Op. Br., p. 11.* Initiative #78 identifies occupied structures and areas of special concern as the types of property from which the statewide setback requirement applies, and defines these terms in the text of the measure. Initiative #78 has a single distinct purpose – creation of a statewide setback requirement of at least 2500 feet for new oil and gas development facilities from certain types of property. "An initiative with a single, distinct purpose does not violate the single-subject requirement simply because it spells out details relating to its implementation." *In re Initiative for 1999-2000 #255*, 4 P.3d 485, 495 (Colo. 2000). As long as the procedures specified have a "necessary and proper relationship to the substance of the initiative, they are not a separate subject." *Id.*

Here, again, Petitioners assert that requiring the minimum setback from both occupied structures and areas of special concern poses the prospect of "logrolling," by seeking to attract support from various factions which may have different or

conflicting interests. *Pet. Op. Br., p. 12.* Once again, it is quite difficult to envision co-option of independent advocates of (a) 2,500 foot minimum setbacks from occupied structures and (b) 2,500 foot minimum setbacks from areas of special concern as they are defined in Initiative #78. If a voter does not favor a minimum setback requirement from areas of special concern, she will not vote for an initiative adopting a minimum setback from occupied structures that also includes a minimum setback from areas of special concern; if a voter does not favor setback requirements from occupied structures, she will not vote for a measure that not only enacts them but also includes a minimum setback from areas of special concern.

Initiative #78 seeks to create a minimum setback requirement of at least 2,500 feet and provides two types of property from which the setback applies. Because these provisions are all related to the accomplishment of a single purpose, Initiative #78 will pass or fail on its own merits and does not run the risk of garnering support from factions with different or conflicting goals. *See In re Initiative for 2013-2014 #89,* 328 P.3d at 178.

E. <u>This Court's Decision in Initiative 2013-3014 #85 Is Persuasive Here</u>.

Petitioners contend that this Court should ignore its recent decision in *In re Initiative for 2013-2014 #85,* 328 P.3d 136, 143 (Colo. 2014), because Initiative

#78 is materially different from the 2014 measures. *Pet. Op. Br., p. 13.* While the measures are not identical, this Court's decision in *In re Initiative for 2013-2014 #85* is on point and persuasive here. In that case, this Court reviewed a series of setback measures and titles that used similar language setting a minimum setback of 1,500 feet, and found that they contained a single subject. *In re Initiative for 2013-2014 #85*, 328 P.3d at 143. The operative language in the grant of authority for Initiative for 2013-2014 #85 was as follows:

> Section 2. Grant of authority. The people of the state of Colorado hereby establish a statewide setback that all new oil and gas wells requiring a state or local permit, including those using hydraulic fracturing, must be located at least one thousand five hundred feet from occupied structures.

The operative language in the grant of authority for Initiative for 2015-2016 #78 is as follows:

> Section 3. Grant of authority. The people of the state of Colorado hereby establish that all new oil and gas development facilities, including those that use hydraulic fracturing, must be located at least two thousand five hundred feet from an occupied structure or area of special concern.

Both measures set a minimum setback requirement of "at least" a specified distance, and both measures identify the types of property from which the setback applies. Both measures contain provisions that are necessarily and properly

connected to the setback requirements of the proposed initiatives, and each contains a single subject. *See id.*

II. THE TITLE FOR INITIATIVE #78 FAIRLY AND ACCURATELY INFORMS VOTERS OF THE TRUE INTENT AND MEANING OF THE MEASURE.

A. Standard of Review and Preservation of the Issues.

Here, again, Petitioners only partially set forth the appropriate standard of review for a clear title analysis employed by this Court when reviewing the Title Board's action. Petitioners appear to agree with the Proponents that the Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water*," 910 P.2d 21, 24 (Colo. 1996). Also that the title must be sufficiently clear to "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Initiative for 2009-2010 #24*, 218 P.3d 350, 356 (Colo. 2009) (citations omitted). Petitioners fail to mention that the Title Board's language should be rejected "only if it is so inaccurate as to clearly mislead the electorate." *In re Initiative for 2007-2008 #61*, 184 P.3d at 752. Proponents agree that Petitioners preserved for appeal the issue of clear title.

B. The Term Statewide Setback in the Title for Initiative #78 Is Not Misleading.

Petitioners contend that the title for Initiative #78 is misleading because it includes the term "statewide setback," which they argue signals it is a uniform setback. *Pet. Op. Br., pp. 16-17.* To the contrary, when viewed as a whole, the short title of Initiative #78 clearly states that the measure is "changing setback requirements to require any new oil and gas development facility in the state to be located at least 2,500 feet" from the specified types of property. The title for Initiative #78 also clearly states that the measure "authoriz[es] the state or a local government to require new oil and gas development facilities to be located more than 2,500 feet from the nearest occupied structure." 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 #78 are clearly spelled out in its title.

Petitioners' reliance on *In re Proposed Initiated Constitutional Amend. Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d 963, 966 (Colo. 1992), is not persuasive here. In that case, an initiative proposed to authorize limited gaming in Idaho Springs and uniform regulation of gaming in all places where gaming was already permitted, which included Central City, Black

Hawk and Cripple Creek. This Court invalidated the title, finding inclusion of the term "statewide" misleading because the amendment was intended to have only limited geographical application to four cities. *Id.* at 969-70. Such is not the case here. Initiative #78, in contrast to the measure at issue in *Town of Idaho Springs*, does apply to the entire state of Colorado and is not limited geographically to a particular area. Indeed, that governmental entities within Colorado might choose to require setbacks of different lengths within their geographic borders than those of their neighbor, does not render the title for Initiative #78 misleading. 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). The title for Initiative #78 clearly alerts petition signers and voters alike to the key features of the measure, including that it "authoriz[es] the state or a local government to require new oil and gas development facilities to be located more than 2,500 feet from the nearest occupied structure."

C. The Term "Oil and Gas Development Facilities" in the Title for Initiative #78 Is Not Unclear or Misleading.

Petitioners object that the title for Initiative #78 "utilizes the term 'oil and gas development facilities,' because they contend it has no common meaning and fails to provide notice that the measure's definition of oil and gas development facilities applies to oil and gas wells. *Pet. Op. Br., pp. 21-22.* Their primary objection seems to be that there is no other source of information informing voters that "oil and gas development facility" includes "oil and gas wells." *Id.*

The text of Initiative #78, however, defines "oil and gas development facilities" as "the site of oil and gas wells, pits and wells for the disposal of associated waste products, including underground injection wells, and associated production and processing facilities." This definition accurately reflects the common sense meaning of the term. Moreover, when construing an initiative, this Court applies the general rules of statutory construction. *See In re Initiative for 2005-2006 #75,* 138 P.3d at 271. Accordingly, it is appropriate to look to the plain meaning of the words "development," and "facility." Merriam-Webster defines "development" as "the act or process of creating something over a period of time," or "causing something to become larger." "Development" Merriam-Webster.com. Merriam-Webster, n.d. Web. 4 Apr. 2016. Merriam-Webster defines "facility" as "something (such as a building or large piece of equipment) that is built for a

specific purpose." "Facility" Merriam-Webster.com. Merriam-Webster, n.d. Web. 4 Apr. 2016. When the language of the title for Initiative #78 is viewed in light of these definitions, there is no ambiguity that the common sense definition of "oil and gas development facility" in this context means a piece of equipment or a building or structure that causes oil and gas to be created. "Titles 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. *In re Initiative for 1999-2000 #255*, 4 P.3d at 497. The Title Board was within its discretion when it did not include the definition of "oil and gas facilities" in the title for Initiative #78.

D. Failure to Include the Term "Increase" in the Title for Initiative #78 Does Not Render It Misleading.

Next, Petitioners contend that the title for Initiative #78 is misleading because it fails to include the term "increase." Here again, what Petitioners are really arguing is that Initiative #78 might have detrimental effects on oil and gas development in Colorado, which they believe is a bad idea. They cite to current Oil and Gas Commission regulations and an affidavit about how the measure could impact land available for surface locations. *Pet. Op. Br., pp. 23-24.* Yet, the title for Initiative #78 clearly advises readers that it is "changing" setback requirements, requiring a setback of "at least 2,500 feet" and allowing the state or a local

government to require new oil and gas development facilities to be located "more than" 2,500 feet from the nearest occupied structure. The titles and summary are intended to alert the electorate to the salient characteristics of the proposed measure. They are not intended to address every conceivable hypothetical effect the Initiative may have if adopted by the electorate. *In re Initiative for 1999-2000 #255*, 4 P.3d at 497. Initiative #78 meets this test.

E. The Title of Initiative #78 Need Not Include the List of Properties Included in the Definition of "Area of Special Concern."

Petitioners contend that the title for Initiative #78 is misleading because it fails to include the entire list of property types encompassed within the term 'area of special concern,' and instead states that the setbacks are in relation to any 'other specified or locally designated area.'" *Pet. Op. Br., pp. 24-25.* The text of Initiative #78 defines "area of special concern" to include (but not be 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." In order to satisfy the requirement of brevity, and to avoid any confusion with a partial definition given the non-exhaustive list, the Title Board used the term "other specified or locally designated area" in the titles, which is not clearly misleading and, thus, was within their discretion in setting the titles. The "Title Board is given

discretion in resolving interrelated problems of length, complexity, and clarity in setting a title." *In re Initiative for 2013-2014 #85*, 328 P.3d at 144.

Petitioners' suggestion that the Title Board should have included some partial list or some broad categories of property and hydrologic features might have rendered the title misleading. Instead, the Title Board's use of the term "other specified or locally designated area" alerts the reader that a government can specify an area other than an occupied structure to which the setback will apply. The Title Board is not required to provide specific explanations of the measure or discuss its every possible effect. 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. The Title Board's language should be rejected "only if it is so inaccurate as to clearly mislead the electorate." *In re Initiative for 2007-2008 #61*, 184 P.3d at 752.

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

The Petitioners claim that Initiative #78's title is misleading because it fails to contain a declaration that oil and gas development "has detrimental impacts on public health, safety, general welfare, and the environment." *Pet. Op. Br., pp. 26-27.* Here, Petitioners focus on the effects of Initiative #78 on the Oil and Gas Conservation Act, and how the proposed measure will be a significant policy

change from current law. These arguments are not relevant to this Court's review of the title for Initiative #78. The Title Board is not required to provide specific explanations of the measure or discuss its every possible effect. *See In re Initiative for 2013-2014 #90*, 328 P.2d at 164. Rather, a title should "focus on the most critical aspects of the proposal, not simply to restate all of the provisions of the proposed initiative." *In re Initiative for 1999-2000 #235(a)*, 3 P.3d 1219, 1225 (Colo. 2000).

Petitioners arguments about other measures that have since been withdrawn, and the purposes of an issue committee that was filed prior to the withdrawal of an earlier measure containing a ban on oil and gas development, are not relevant to this Court's analysis here, and only serve to highlight Petitioners' improper focus on the effects of Initiative #78, rather than on the issue of whether the Title Board has met its obligations to set a clear title. Neither the Title Board nor this Court may "address the merits of a proposed initiative, nor . . . interpret its language or predict its application if adopted by the electorate." *In re Initiative for 2007-2008 #62*, 184 P.3d at 58.

Here, the Title of Initiative # 78 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 #78.

Respectfully submitted this 5th day of April, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2016 a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF IN SUPPORT OF 2015-2016 INITIATIVE #78** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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