

<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 #78</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 3,606 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 #78 (“Initiative #78”).

STATEMENT OF ISSUES PRESENTED FOR REVIEW¹

1. Does Initiative #78 violate the single subject requirement by: (a) imposing a minimum setback requirement of 2,500 feet for any new oil and gas development facility from occupied structures; (b) imposing a minimum setback requirement of 2,500 feet for new oil and gas development facilities from areas of special concern, which include 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; (c) authorizing state or local governments to impose setback distances greater than 2,500 feet, and without limitation, for new oil and gas development facilities from occupied structures; and (d) creating a new classification of property called "areas of special concern?"

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 #78 unfair and misleading because it: (a) fails to reflect that the measure increases the current setback requirement for new oil and gas wells, production and processing facilities (b) fails to reflect the measure's declaration, by the people of Colorado, that oil and gas development has detrimental impacts on public health, safety, welfare, and the environment; (c) utilizes the term "oil and gas development facilities," a term that 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 associated wells, production, and processing facilities; (d) fails to provide notice of the property types included within the term "areas of special concern," and instead stating that the setbacks are in relation to any "other specified or locally designated area," which does not put the voters on notice of anything; and (e) fails to make clear that the measure authorizes state and local governments to impose setback requirements in excess of 2,500 feet and without limitation for new oil and gas development facilities from occupied structures?

STATEMENT OF THE CASE

This is an appeal from the Title Board's setting of the Title for Initiative #78. On January 8, 2016, Proponents filed Initiative #78 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 #78 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 #78 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 #78.

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 #78 amends the Colorado Constitution to create 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, defines terms used in the measure, allows local governments to increase the setback distance, and sets forth implementation details concerning enactment and enforcement.

The Title set by the Title Board correctly and fairly expresses the true intent and meaning of Initiative #78, and will not mislead the public. The Title follows Initiative #78'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 a statewide setback requirement for new oil and gas development facilities, and, in connection therewith, 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 nearest occupied structure or other specified or locally designated area and authorizing 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.

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion in drafting the title for Initiative #78. Initiative #78 contains a single subject by 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. 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, all flow from the measure's single subject.

Initiative #78 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 #78 could have on property 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 increases the current setback requirement for new oil and gas wells, production and processing facilities. 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 appropriately uses the term "oil and gas development facilities," which is contained in and defined by the measure. 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 makes clear that the measure authorizes 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 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.

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 #78 Contains a Single Subject.

Initiative #78 contains a single subject: 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. The remainder of the measure contains definitions of terms used in the measure, a provision allowing the state or a local government to increase the setback distance, and implementation details concerning enforcement - all congruous and related to the single subject of the measure. The text of Initiative #78 is short, and its provisions are directly tied to the measure’s central focus.

Initiative #78 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 #78 is tied to the central purpose of the measure: creation of a statewide setback requirement of at least 2500 feet from occupied structures

and areas of special concern. Initiative #78 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 #78 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 #78 because the plain language of the measure unambiguously proposes creating a statewide setback requirement of 2500 feet from occupied structures and areas of special concern, defines terms included in the measure, allows local governments to increase the size of the setback, and lays out procedures for implementing the constitutional amendment. Furthermore, Initiative #78 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 assert that the measure contains four subjects: (1) creating a minimum setback requirement of 2,500 feet for any new oil and gas development facility from occupied structures, *Petition*, p. 4, ¶1.a; (2) imposing a new, minimum setback requirement of 2,500 feet for new oil and gas development facilities from "areas of special concern," which include 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, *Petition*, p. 4-5, ¶1.b; (3) authorizing state or local governments to impose setback distances greater than 2,500 feet for new oil and gas development facilities from occupied structures, *Petition*, p. 5, ¶1.c; and (4) creating a new classification of property called "areas of special concern. *Petition*, p. 5, ¶1.d.

The first two subjects identified by Petitioners make up the single subject of the measure – creation of a statewide setback requirement for new oil and gas development facilities of 2500 feet from occupied structures and areas of special concern. 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. This does not create a second subject. Rather, the measure 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 at 495.

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.*

Next, Petitioners contend that by authorizing the state or a local government to impose setback distances greater than 2,500 feet for new oil and gas development facilities from occupied structures, Initiative #78 violates the single subject requirement. The central purpose of the initiative is to create a new statewide setback requirement of at least 2500 feet, thus, that the measure declares that the state or a local government may impose a larger setback from occupied structures is necessarily and properly connected to Initiative #78’s central purpose. *See In re Initiative for 2013-2014 #90*, 328 P.2d 155, 161 (Colo. 2014). The power to establish a greater setback distance 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.)

Similarly, while Petitioners assert that the measure creates a new classification of property called “areas of special concern,” this term applies only to the statewide setback requirement that would be established under Initiative #78 if passed by the voters, and is not a separate subject. Nothing in the measure indicates any broader reach of the "areas of special concern" term. Rather, this

term is necessarily and properly connected to—if not completely dependent upon—the statewide setback requirements that would be established under Initiative #78. Indeed, the "areas of special concern" provision is inoperative without reference to the setback requirement. *See In re Initiative for 2013-2014 #85*, 328 P.3d 136, 143 (Colo. 2014).

Initiative #78 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 #78 is clear and does not mislead the voters. The text of Initiative #78 creates 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. The remainder of the measure contains definitions of terms used in the measure, a provision allowing local governments to increase the setback distance, and implementation details concerning enforcement. The Title for Initiative #78 captures the measure's text in a clear and straightforward manner.

The Petitioners argue that the title set by the Title Board for Initiative #78 is misleading and confusing. First, they claim that the title fails to reflect that the measure increases the current setback requirement for new oil and gas wells, production and processing facilities. *Petition, p. 5, ¶2.a.* The title, however, makes clear 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 certain types of property. 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.

Second, Petitioners contend that the title for Initiative #78 “fails to reflect the measure's declaration, by the people of Colorado, that oil and gas development has detrimental impacts on public health, safety, welfare, and the environment.” *Petition*, p. 5, ¶2.b. 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 titles and summary are intended to alert the electorate to the salient characteristics of the proposed measure.” *In re Initiative for 1999-2000 #255*, 4 P.3d at 497. 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).

Third, Petitioners contend that the title for Initiative #78 “utilizes the term ‘oil and gas development facilities,’ a term that 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 associated wells, production, and processing facilities.” *Petition*, p. 5-6, ¶2.c. The text of Initiative #78 uses the term “oil and gas development facilities,” and defines it 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. “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 (Colorado Supreme Court found no error when Title Board did not include a definition of “gun show” in title of measure concerning background checks at gun shows). 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.

Fourth, Petitioners contend that the title for Initiative #78 “fails to provide notice of the property types included within the term ‘areas of special concern,’ and instead states that the setbacks are in relation to any ‘other specified or locally designated area.’” *Petition*, p. 6, ¶2.d. Initiative #78 creates a statewide setback requirement for new oil and gas facilities of at least 2500 feet from occupied structures and areas of special concern. “Area of special concern” is defined in the measure 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, 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 title. *See In re Initiative for 1999-2000 #255*, 4 P.3d at 497. 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 contend that the title for Initiative #78 “fails to make clear that the measure authorizes state and local governments to impose setback requirements in excess of 2,500 feet and without limitation for new oil and gas development facilities from occupied structures.” *Petition*, p. 6, ¶2.e. To the contrary, the title 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 to provide a concise summary of a proposed initiative, but “is not required to address every hypothetical effect the Initiative may have if adopted by the electorate.” *In re Initiative for 1999-2000 #255*, 4 P.3d at 497.

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 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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