SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT DATE FILED: January 18, 2018 JAN 08 2018 OF THE STATE OF COLORADO Cheryl L. Stevens, Clerk
Original Proceeding Pursuant to C.R.S. § 1-40-107 (2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2017-2018 #70 ("Severance Taxes on Oil and Gas") **Petitioners: Andrew J. O'Connor and Mary E. Henry,** **v.** **Respondent: Jeff Wasden,** **and** **Colorado Ballot Title Setting Board: Suzanne Staiert, Sharon Eubanks and Glen Roper.**	▲ COURT USE ONLY ▲
Petitioners: Andrew J. O'Connor and Mary E. Henry 1220 W. Devonshire Court Lafayette, CO 80026 Phone Number: (303) 882-1693 Email: oconnorandrew@hotmail.com	**Case Number: 17-SA-286**

OPENING BRIEF

Andrew J. O'Connor and Mary E. Henry, Petitioners of Ballot Initiative 2017-2018 #70, hereby submit this Opening Brief and as grounds therefore states as follows:

I. THE MOTION FOR REHEARING SHOULD HAVE BEEN DENIED BECAUSE THE TITLE BOARD HAD JURISDICTION AND THE TITLE, SUMMARY AND THE SUBMISSION CLAUSE REFLECTED INTENT OF THE INITIATIVE

The Title Board should have denied the Motion for Hearing because the title and submission clause set by the Title Board on November 15, 2017, because they were sufficient and fairly express the true meaning and intent of the proposed state law. The proposed initiative clearly reflected the intent of the initiative. It is well established in Colorado that it is in the

interest of public policy for the Title Board to confer jurisdiction on citizen ballot initiatives. Provisions relating to the initiative should be liberally construed to permit, if possible, the exercise by the electors of this more important privilege. *Brownlow v. Wunch,* 103 Colo. 120, 83 P.2d 775 (1938); *Say v. Baker,* 137 Colo. 155, 322 P.2d 317 (1958).

The Motion for Rehearing should have been denied because the respondent impermissibly argued that the Title Board's function is to interpret the initiative. It is not the function of the Supreme Court in the review proceeding, nor is it the board's function, to determine the meaning of the language of the initiative. *Spelts v. Klausing,* 649 P.2d 303 (Colo. 1982). Furthermore, the Motion for Rehearing should have been denied because it impermissibly argues about the merits of the proposed initiative. The Court will not address the merits of the proposed initiative nor interpret the meaning of proposed language. It is beyond the scope of the court's review to interpret or construe the language of a proposed initiative. *In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 11227 (Colo. 1996). The Motion for Rehearing should have been denied because it erroneously raised a myriad of possible future problems and ignores the limitation of review which is whether the intent of the initiative is properly reflected. On review, the Supreme Court can only consider whether the titles, summary, and submission clause reflects the intent of the initiative, not whether they reflect all possible problems that may arise in the future in applying the language of the initiative. *In re Proposed Initiative on Transf. of Real Estate*, 200 Colo. 40, 611 p.2d 981 (1982).

The Title Board's action on November 15, 2017, in setting title and Ballot Initiative 2017-2018 #70, are presumed to be valid by operation of law. In fact, a proposed ordinance is clothed

with the presumption of validity and its constitutionality will not be considered by the courts by means of a hypothetical question, but only after enactment. *City of Rocky Ford v. Brown*, 133 Colo. 262, 293 P.2d 974 (1956). No discretion rests with administrative officials to pass on the validity of an act proposed by the people. *City of Rocky Ford v. Brown*, 133 Colo. 262, 293 P.2d 974 (1956). The burden of proving procedural noncompliance rests with the petitioner, not with the proponents of the initiative. A presumption exists that the secretary of state properly determined the sufficiency of the filing of a petition to initiate a measure. *In re Petition on Campaign and Political Finance*, 877 P.2d 311 (Colo. 1994). The respondent failed to meet its burden of proof and accordingly, the Motion for Rehearing should have been denied and it was erroneous for the Title Board to grant same.

II. THE MOTION FOR REHEARING SHOULD HAVE BEEN DENIED BECAUSE THE TITLE BOARD HAS JURISDICTION AND THE PROPOSED MEASURE IS DEFINITE, CLEAR AND UNDERSTANDABLE

The language of Initiative 70 is definite, clear and understandable and is different and distinct from the language of Initiative 20. Initiative 70 is not an updated version of Initiative 20 despite the petitioner's material misrepresentations to the contrary. Accordingly, any and all references and comparisons to Initiative 20 are irrelevant and are a distraction and should not be considered by the Title Board. The Motion for Rehearing the petitioner impermissibly argues claim preclusion and law of case principles. In fact, Section 1-40-107 provides a special statutory process that overrides claim preclusion or law of case principles. Consequently, the title board and Supreme Court must review an initiative challenged under this section even if its language is identical to the language of a previous initiative. *In re Ballot Title 2005-2006 No. 55,* 138 P.3d 273 (Colo. 2006).

Pursuant to Section 1-40-105 (1.5) C.R.S., the petitioners attended review and comment hearings on April 7, 2017, July 19, 2017, August 23, 2017, September 7, 2017, September 22, 2017 and October 25, 2017. The petitioners attended said hearings, reviewed comments and worked with Legislative Council Staff and made suggested edits and corrections and on October 25, 2017, petitioners submitted the final version of Initiative 2017-2018 # 70. On October 26, 2017, the Directors of the Office of Legislative Services and Legislative Council sent petitioners a waiver letter pursuant to Section 1-40-105 (2) C.R.S., notifying them that Proposed Initiative 2017-2018 # 70 did not raise any additional comments and that another review and comment hearing was not necessary. Where changes in final version of initiative submitted to Secretary of State were in direct response to substantive questions and comments raised by directors of the legislative council and the office of legislative legal services, the petitioners of the initiative were not required to resubmit the initiative to the directors. I*n re Ballot Title 1999-2000 No. 256,* 12 P.3d 246 (Colo. 2000). The respondent failed to meet its burden of proof and accordingly, the Motion for Rehearing should have been denied and it was erroneous for the Title Board to grant same.

III. THE MOTION FOR REHEARING SHOULD HAVE BEEN DENIED BECAUSE PROPOSED INITIATIVE 2017-2018 #70 COMPLIES WITH THE SINGLE-SUBJECT REQUIREMENT PURSUANT TO SECTION 1-40-106.5 C.R.S.

The Motion for Rehearing should have been denied because Proposed Initiative 2017-2018 #70, contains a single-subject which is Severance Taxes on Oil and Gas pursuant to 1-40-106 C.R.S. Proposed Initiative 2017-2018 #70, is simply a severance tax on oil and gas and provides details relating to its implementation. The single-subject requirement is not violated simply because it an initiative with a single, distinct purpose spells out details relating to its implementation. As long as the procedures specified have a necessary and proper relationship to

the substance of the initiative, they are not a separate subject. *Matter of Ballot Title 1997-98 No. 74,* 962 P.2d 927 (Colo. 1998); *In re Ballot Title 199-2000 No. 255*, 4 P.3d 485 (Colo. 2000). Again, the stated purpose of Proposed Initiative 2017-2018 #70 is to raise severance taxes on hydraulic fracturing (fracking) operations in Colorado: nothing more, nothing less.

Why does Colorado subsidize the World's most profitable industry? The oil and gas industry pollutes our air, land and water, devastates the safety, health and welfare of Colorado communities, in 2017, incinerated two Coloradans in Firestone, insists on putting fracking wells next to schools and homes over the objections of concerned parents, children and communities and refuses to pay its fair share. In Colorado, the oil and gas industry pays an effective severance tax of only 1.9% through ad valorem deductions and stripper well exemptions. In fact, the oil and gas industry pays no severance taxes on 75% of the State's oil and gas wells. In neighboring states of Wyoming and New Mexico, oil and gas industry pays 5.5 % and 6.9% respectively in severance taxes; however, Colorado leaves billions on the table and between 2002 and 2006, Colorado failed to assess $1.3 billion in severance taxes. The additional revenue that Proposed Initiative 2017-2018 #70, will bring into Colorado's coffers will be used to redress the negative health, social and environmental impacts of fracking and fund elementary education in Colorado which now rivals Mississippi at the bottom of the public investment ladder.

TABOR does not apply here nor do "deBrucing" concerns despite opposing counsel's material misrepresentations to the contrary. Proposed Initiative 2017-2018 #70, does not raise tax rates on the public nor does it increase spending limits because it only raises taxes on oil and gas in order to redress the negative health, social and environmental impacts of fracking and fund

elementary education. The petitioner intentionally conflates TABOR and "deBrucing" which are inapplicable and irrelevant to Proposed Initiative 2017-2018 #70. Furthermore, the petitioner impermissibly attempts to interpret and construe the language of Proposed Initiative 2017-2018 #70 and erroneously attempts to predict possible problems that may arise in the future. On review, the supreme court can only consider whether the titles, summary, and submission clause reflects the intent of the initiative, not whether they reflect all possible problems that may arise in the future in applying the language of the initiative. *In re Proposed Initiative on Transf. of Real Estate*, 200 Colo. 40, 611 p.2d 981 (1982). The respondent failed to meet its burden of proof and accordingly, the Motion for Rehearing should have been denied and it was erroneous for the Title Board to grant same.

IV. THE MOTION FOR REHEARING SHOULD HAVE BEEN DENIED BECAUSE THE TITLE IS NOT MISLEADING NOR DOES IT CONTAIN AN IMPERMISSIBLE CATCH PHRASE

The Motion for Rehearing should have been denied because the Title of Proposed Initiative 2017-2018 #70, is not misleading nor does it contain an impermissible catchphrase despite the petitioner's material misrepresentations to the contrary. In fact, the description more than adequately conveys to a voter the extent of the severance tax increase on the oil and gas industry. The Text of Proposed Initiative 2017-2018 #70 reads that: *"State taxes shall be increased $470,800.00 annually by a change to the Colorado Revised Statutes concerning the severance tax on oil and gas extracted in the State, and, in connection therewith, increasing the severance tax by 5 percent points..."* Said language fairly and succinctly advises the import of the proposed law. The purpose of the title-setting process is to ensure that both the persons reviewing an initiative petition and the voters are fairly and succinctly advised of the import of

the proposed law. *In re Proposed Initiative on Education Tax Refund,* 823 P.2d 1353 (Colo. 1991); *Matter of Title, Ballot Title & S. Clause*, 872 P.2d 689 (Colo. 1994). It is opposing counsel that is attempting to mislead by falsely implying that this measure raises taxes on Coloradans when the truth of the matter is that it only raises taxes on the oil and gas industry.

The Proposed Initiative 2017-2018 #70 provides for *"medical care and treatment to people suffering negative health impacts proximately caused by oil and gas production."* Said language is not an impermissible catch phrase despite opposing counsel's material misrepresentations to the contrary. In fact, said language clearly states the intention to the initiative to require that the oil and gas industry fund medical care for the harm, destruction deaths that their lethal industry causes to Coloradans and communities negatively impacted by oil and gas production. In a similar case, the Court found that the *"Right of health care choice"* is not an impermissible catch phrase because the phrase is a descriptive term that presents to voters in a straightforward manner. *In re Title Board Title, Sub. Cl. For 2009-2010 No. 45*, 234 P.3d 642 (Colo. 2010). Similarly, the above referenced language is necessary to describe the negative health impacts caused by fracking operations. In fact, fracking results in air, water and soil contamination; species extinction; ozone depletion; climate change and necessitates medical treatment for skyrocketing cases of asthma, cancer, immune system diseases, cognitive deficiencies, miscarriages and birth defects. So, while the profits from fracking go to the oil and drilling companies, the costs of cleanup, adverse environmental and health consequences will be borne by the people of Colorado. Again, it is opposing counsel that is attempting to mislead and deflect by falsely stating that the above referenced language contains an impermissible catchphrase. The Title in Proposed Initiative 2017-2018 #70 is clear

and it fairly and sufficiently advises voters about the import of the severance tax. A sufficiently clear title enables the electorate whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal. *In re Ballot Title 2011-2012*, No. 45, 2012 CO 26, 274 P.3d 576. The respondent failed to meet its burden of proof and accordingly, the Motion for Rehearing should have been denied and it was erroneous for the Title Board to grant same.

V. THE MOTION FOR REHEARING SHOULD HAVE BEEN DENIED BECAUSE THE ABSTRACT ADEQUATELY DESCRIBES THAT THE OIL AND GAS INDUSTRY WILL BEAR THE SEVERANCE TAX INCREASE AND PROPERLY DETAILS THE ECONOMIC IMPACTS THEREBY COMPLYING WITH SECTION 1-40-105.5 (3)

The Motion for Rehearing should have been denied because the Abstract of Proposed Initiative 2017-2018 #70, adequately describes that the oil and gas industry will bear the severance tax increase and properly details the economic impacts thereby complying with Section 1-40-105.5 (3). In fact, the abstract is very clear and is not misleading under Section 1-40-107 (1)(a)(II)(B), despite the petitioner's material misrepresentations to the contrary. The petitioner impermissibly argues about the meaning or application of the severance tax. The Board is not required to consider and resolve potential or theoretical disputes or determine the meaning or application of proposed amendment. *Matter of Title, Ballot Title & S. Clause*, 875 P.2d 207 (Colo. 1994).

The abstract is not misleading because it does not mention elimination of the tax credit. The petitioner impermissibly argues about potential economic impacts and possible interpretations of the language of Proposed Initiative 2017-2018 #70. It is not function of the Board to disclose every possible interpretation of the language of the initiative. *In Re Prop. Init.*

"Fair Fishing", 877 P.2d 1355 (Colo. 1994). The respondent failed to meet its burden of proof and accordingly, the Motion for Rehearing should have been denied and it was erroneous for the Title Board to grant same.

CONCLUSION

Based upon the foregoing, petitioners Andrew J. O'Connor and Mary E. Henry, respectfully request that this Court reverse the erroneous action of the Title Board granting Motion for Rehearing and remand back to the Title Board and grant any such further relief that the Court deems appropriate.

Respectfully submitted this 7th day of January, 2018.

/s/ Andrew J. O'Connor and Mary E. Henry
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of January 2018, a true and correct copy of **OPENING BRIEF** was emailed and/or deposited in the United States Mail, first-class postage prepaid and addressed to the following:

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