COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 30, 2017
Original Proceeding Pursuant to § 1-40-107 (2), C.R.S.(2016) Appeal from the Ballot Title Board	FILED IN THE SUPREME COURT MAY 30 2017 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #20 ("Severance Taxes on Oil and Gas") **Petitioners:** Andrew J. O'Connor and Mary E. Henry, v. **Respondent:** Chad Vorthman, **and** **Colorado Ballot Title Setting Board:** Suzanne Staiert, Shannon Eubanks and David Blake.	▲COURT USE ONLY ▲
Attorney for Petitioner: Andrew J. O'Connor 1220 W. Devonshire Court Lafayette, CO 80026 Phone Number: (303) 499-4585 Fax Number: (303) 499-4585 Email: oconnorandrew@hotmail.com	Case No: 2017SA85

PETITIONERS' ANSWER BRIEF

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 3,731 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 appellants, 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/ Andrew J. O'Connor

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Petitioners Andrew J. O'Connor and Mary E. Henry, hereby submit their Answer Brief and in support thereof states as follows:

SUMMARY OF THE ARGUMENT

On April 28, 2017, the Petitioners were denied due process and a fair rehearing on Initiative 2017-2018 #20. The Title Board acted wrongfully and unconstitutionally in violation of Const. Colo., art II, §25, and Const. U.S., amendments V, XIV, including, but not limited to, acting in an arbitrary and capricious manner by moving the location of the rehearing from the Secretary of State's Office to the Supreme Court Building after Susan Straiert, Deputy Secretary of State publicly defamed and character assassinated Petitioners in The Denver Post by falsely portrayed them as a security threats thereby denying Petitioners due process and a fair and impartial rehearing. The aforementioned misconduct by Ms. Staiert and the Title Board, was unconstitutional and violated Const. Colo., art II, §25 and Const. U.S., amendments V, XIV, the Colorado Rules of Professional Conduct as well as §1-40-106 (1) C.R.S. (2016) and said misconduct demonstrated bias and prejudice against Petitioners denying them due process and a fair rehearing.

The Title Board further erred by reversing itself on April 28, 2017, by voting against jurisdiction and refusing to set title despite the fact that on April 19, 2017, they voted in favor of jurisdiction and set title with the same exact wording; consequently said wrongful and unconstitutional actions denied Petitioners due process and a fair and impartial hearing in violation of both State and Federal law. Because Petitioners where denied due process, this Court must to reverse the Title Board's denial of jurisdiction and

refusal to set title on the initiative after the rehearing and hold that that the actions of the Title Board were wrongful and unconstitutional in violation of Const. Colo., art II, §25 and Const. U.S., amendments V, XIV.

LEGAL ARGUMENT

Petitioners Andrew J. O'Connor and Mary E. Henry seek to circulate Initiative 2017-2018 #20, in order to obtain the required number of signatures to place the measure on the ballot. Initiative 2017-2018 #20, is a proposed severance tax on oil and gas extraction, elimination of the ad valoreum tax deduction and stripper well exemption in order for oil and gas industry in Colorado to pay their fair share of taxes in line with surrounding States. Fracking in an inherently dangerous, deadly and toxic industry which does not belong anywhere near homes and schools. On April 17, 2017, an uncapped, abandoned gas line exploded and destroyed a home in Firestone, Colorado, killing two innocent people and seriously injuring two family members. On May 25, 2017, a fracking worker was killed and three other workers were seriously injured when a gas tank exploded near Mead, Colorado which is less than four miles from the deadly home explosion in Firestone, Colorado. Despite these horrific tragedies, the oil and gas industry continues to frack near neighborhoods and schools. The oil and gas industry has declared war on the people of Colorado by fracking in neighborhoods and near schools. Profits from fracking are measured in dollars and losses in lives. Fracking is commercial terrorism and is conducted for the benefit of the very few in the oil and gas industry, at the expense of the very many ordinary people in Colorado. Out of the deadly and toxic fracking industry a few people make huge fortunes and yet the oil and gas industry is merciless and gives no quarter and it refuses to stop fracking near homes and schools and will not even pay its

fair share in taxes. In New Mexico and Wyoming, gas and oil pay around 6.5% in severance taxes; however, in Colorado they pay an effective severance tax of 1.5% by manipulating the ad valoreum tax deduction and stripper well exemption.

During the recent legislative session, Colorado Republican legislators acted as lackeys for the oil and gas industry by refusing to keep fracking wells at least 1000 feet from schools and playgrounds refusing to protect our children. The Secretary of State's Office, through the irresponsible and unconstitutional actions of The Title Board in the present case, have also acted as lackeys for the oil and gas industry by denying Petitioners due process and a fair hearing in order to keep Petitioner's severance tax off the ballot. In Colorado, the fix is in and the deck is stacked against the people and in favor of oil and gas and this most deadly industry because of corruption and bribes in the legislature and at the Secretary of State's Office.

The science is clear, hydraulic fracking companies in Colorado release into the air and inject into the ground, solutions containing known carcinogens endangering Coloradoan's health. In March of 2012, Physicians for Social Responsibility called for a moratorium on fracking in order to protect human health and the environment. In June 2015, New York State banned fracking because of threats to the environment and significant public health risks. 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 and deadly environmental and health consequences will be borne by

the people of Colorado. Why should the people of Colorado subsidize the World's most profitable business and allow oil and gas industry to frack near homes and schools?

On April 19, 2017, the Title Board conducted its initial public hearing on the initiative and accepted jurisdiction and set title. The Title Board properly found that the initiative satisfied the single subject requirement of Article V, § 1(8) of the Colorado Constitution and C.R.S. § 1-40-105 (4) and set title. Respondent made specious arguments regarding lack of jurisdiction, substantive changes and misspellings, all of which were summarily rejected by the Title Board. On April 26, 2017, Respondent filed motion for rehearing which contained and repeated the same exact arguments that were summarily rejected by the Title Board. On April 28, 2017, the Title Board denied petitioners due process and fair rehearing and inexplicably reversed itself unanimously declining jurisdiction and refused to set title on the initiative despite the fact the wording in said initiative did not change and erred as follows:

I. The Title Board acted improperly and unconstitutionally when they moved the rehearing from the Secretary of State's Office to the Supreme Court Building citing bogus "security concerns" and falsely portraying Petitioners as a security threats thereby denying Petitioners due process and a fair hearing in violation of Const. Colo., art II, §25 and Const. U.S., amendments V, XIV

On April 25, 2017, Suzanne Staiert, Deputy Secretary of State and one of the three members on the Title Board, gave an interview to Denver television station KUSA, in which she falsely accused Petitioners of being dangerous and security threats. Ms. Staiert told KUSA that the rehearing would have to be delayed in order to find a space in a secure building with metal detectors stating: *"From this point on, that will be a security obligation that we are obligated to take."* Accordingly, the following questions must be

asked of the Title Board:

a. Why was the location of the rehearing moved from the Secretary of State Office to the Supreme Court Building?

b. What exactly were the *"security concerns"* and were said security concerns reasonably based in order to justify moving the location of the rehearing?

c. Why did the new location have to be a *"secure government building?"*

d. What evidence did Ms. Staiert base her conclusion on that Petitioners were a security threat thereby necessitating removing the hearing to a secure government building?

e. If Ms. Staiert believed that Petitioners were a security threat then how could Petitioners receive a fair hearing and why didn't she recuse herself from the rehearing?

The Title Board wrongfully exercised arbitrary power in this case. It is well established in Colorado that the exercise of arbitrary power by any department or government, or agency thereof, is inconsistent with democracy. *People v. Harris,* 104 Colo. 386, 91 P.2d 989 (1939).

At a minimum, Ms. Staiert should have recused herself from sitting on the Title Board on the rehearing after making improper public comments falsely portraying Petitioners as being dangerous and a security threat and accusing them of committing a crime and then demonizing Petitioners by moving the rehearing from the Secretary of State's Office to the Supreme Court Building. Under the aforementioned circumstances, it was impossible for Petitioners to receive a fair and impartial rehearing. The Title Board acted wrongfully and unconstitutionally including, but not limited to, acting in an arbitrary and capricious manner by denying Petitioners due process, denying Petitioners a fair and impartial rehearing and by adopting gas and oil's demonization of the Petitioners

and publicly defaming and character assassinating Petitioner. Ms. Staiert and the Title Board violated Const. Colo., art II, §25 and Const. U.S., amendments V, XIV, the Colorado Rules of Professional Conduct as well as C.R.S. § 1-40-105 (4) and demonstrated bias and prejudice against Petitioners by moving the site of the rehearing, refusing to consider Petitioners' motions and then reversed itself and voted against jurisdiction and refused to set title despite the fact that they voted in favor of jurisdiction and to set title on April 19, 2017.

II. On April 26, 2017, Petitioners properly challenged Ms. Straiert's and the Board's improper and unconstitutional actions of denying Petitioners due process and a fair hearing in violation of Const. Colo., art II, §25 and Const. U.S., amendments V, XIV, and said issues were properly raised and preserved when Petitioners filed Objections to Moving Rehearing from Secretary of State's Office in Violation of Section 1-40-106(1), C.R.S.

In The Title Board's Opening Brief, the Title Board states that Petitioners filed four pleadings prior to the rehearing and admits that they *"did not expressly rule on any of these objections or motions either before and during the rehearing."* If this is not an express admission of denying Petitioner's due process and a fair hearing then I don't know what is. The Title Board inanely argues that *"Proponents did not request rulings on or argue their objections and motions at the rehearing*" thereby attempting to justify denying petitioners due process and a fair hearing. The Title Board goes on to state that the *" Boards' position is that this issue was expressly raised by Proponents in their Objections to Moving Rehearing from Secretary of State's Office in Violation of Section 1-40-1206 (1) C.R.S. and was* ***impliedly denied*** *(emphasis added) by the Board when it proceeded to conduct the April 28 rehearing at the Ralph L. Carr Colorado Judicial Center."* This argument is as inane as it is disingenuous and it is outrageous for the

Colorado Attorney General's Office to make and counsel for the Title Board should be sanctioned for bring such a bad faith argument in violation of the Colorado Rules of Professional Conduct.

Section 1-40-106 (1) C.R.S. states that public meetings are to be held before the Secretary of State's Office; consequently, it is a violation of Section 1-40-106 (1) C.R.S., to hold a public meeting involving rehearing on a ballot initiative at any other place than the Secretary of State's Office. The purpose of the initiative and referendum is to expeditiously permit free exercise of legislative powers by the people. *Matter of Title, Ballot Title & S. Clause,* 872 P.2d 689 (Colo. 1994)

It was a violation of Section1-40-106 (1) C.R.S., to move a public meeting on a rehearing from the secretary of State's Office to the Ralph Carr Building, without reasonable notice or substantial justification because it deprived the Petitioners and public of reasonable notice of the change of venue and opportunity to attend and access said public meeting; consequently, said public meeting must be held at the Secretary of State's Office, as it always has been, pursuant to Section 1-40-106 (1) C.R.S. *Brownlow v. Wunch*, 103 Colo. 120, 83 P. 2d 775 (1938). Moving the rehearing from the Secretary of State's Office to the Ralph Carr Building substantially prejudiced the Petitioners and the public and deprived the public the opportunity to attend as there was substantial public interest in Ballot Initiative 2017-2018 #20. Also, by demonizing the Petitioners as security threats and moving the location of the rehearing on the false pretense that Petitioners posed security threats prejudiced the Petitioners' case and gave Respondent's a competitive advantage. The Secretary of State's Office refused to or was unable

to articulate a credible reason or substantial justification for moving the rehearing from the Secretary of State's Office to the Ralph Carr Building and accordingly said arbitrary and capricious action violated Const. Colo., art II, §25 and Const. U.S., amendments V, XIV, Colorado Rules of Professional Conduct and Section 1-40-106 (1) C.R.S.

On April 26, 2016, Petitioner filed: Objections to Moving Rehearing from Secretary of State's Office in Violation of Section 1-40-106(1) C.R.S.; Motion for Telephone Hearing; Motion for Continuance and Motion to Dismiss Frivolous Motion for Rehearing and Request for Sanctions. The Title Board denied Petitioners due process and a fair rehearing by refusing to address said motions and then obtusely argues that they *"impliedly denied"* said motions. Again, this argument is outrageous and disingenuous and brought in bad faith and counsel for the Title Board should be sanctioned for professional misconduct.

III. The Title Board erred when it found that it lacked jurisdiction over Initiative 2017-2018 #20 and refused to set title despite the fact that on April 20, 2017, they voted in favor of jurisdiction to set title because they denied Petitioners due process and fair and impartial rehearing in violation of Const. Colo., art II, §25 and Const. U.S., amendments V, XIV

On April 7, 2017, the Title Board acted properly in granting jurisdiction and setting title on Ballot Initiative 2017-2018 #20 and rejected Respondent's counsel's arguments that any substantive changes were made. In their Motion for Rehearing, Respondent's counsel improperly re-litigated issues that they lost on April 7, 2017. Counsel for Respondent's Motion for Rehearing was basically an appeal of the Title Board action of April 7, 2017, granting jurisdiction and setting title on Ballot Initiative 2017-2018 #20. Respondents counsel's Motion for Rehearing failed to set forth, in a manner consistent with Section 1-40-107, C.R.S., nor a coherent assertion of lack of jurisdiction and error by the Title

Board supported by legal authority. The Petitioners substantial complied with the requirements of Section 1-40-107, C.R.S., and the Title Board acted properly on April 7, 2017, by granting jurisdiction and setting title on Ballot Initiative 2017-2018 #20.

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). Furthermore, the Title Board's action on April 7, 2017, and Ballot Initiative 2017-2018 #20, 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).

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 proponents of the initiative were not required to resubmit the initiative to the directors. *In re Ballot Title 1999-2000 No. 256*, 12 P.3d 246 (Colo. 2000). On April 7, 2017, the Title Board acted properly in granting jurisdiction and setting title on Ballot Initiative 2017-2018 #20. Counsel's Motion for Rehearing failed to set forth, in a manner consistent with Section 1-40-107, C.R.S., 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). Due process takes

precedence over legislation. In the present case, The Title Board's denial of due process is so egregious that the Court cannot consider any arguments by Respondent and Title Board which ignore violations of Const. Colo., art II, §25 and Const. U.S., amendments V, XIV. It is well established under Colorado law that the requirements of due process of law under both the United States and Colorado Constitutions take precedence over statutory enactments of the general assembly. *White v. Davis,* 163 Colo. 122, 428 P.2d 909 (1967).

CONCLUSION

Petitioners Andrew J. O'Connor and Mary E. Henry, therefore ask this Court to reverse the Title Board's denial of jurisdiction and refusal to set title on the initiative after the rehearing and hold that: (1) that the actions of the Title Board were wrongful and unconstitutional in violation of Const. Colo., art II, §25 and Const. U.S., amendments V, XIV; (2) the Title Board acted unconstitutionally, arbitrarily and capriciously by denying Petitioners due process and a fair and impartial rehearing and demonstrated bias and prejudice against Petitioners by the actions of Suzanne Staiert, Deputy Secretary of State in publicly accusing Petitioners of a crime, of being dangerous and a security threat and further demonized Petitioners by moving the rehearing from the Secretary of State's Office to the Supreme Court Building; and (3) by refusing to consider Petitioners' motions the Title Board, denied Petitioners due process and a fair rehearing and in violation of Const. Colo., art II, §25 Const. U.S., amendments V, XIV; and grant any such further relief as the Court deems appropriate.

Respectfully submitted on May 30, 2017.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of May 2017, a true and correct copy of **PETITIONERS' ANSWER BRIEF** was emailed to the following:

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