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SUPREME COURT 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 Initiatives 2017-2018, #178, #179, #180, and #181 ("Regulation of Oil and Gas Development") **Petitioner:** JANETTE S. ROSE **v.** **Respondents/Proponents:** JOHN BRACKNEY and GUILLERMO DEHERRERA **and** **Ballot Title Board:** SUZANNE STAIERT, GLENN ROPER, and JASON GELENDER	**▲ COURT USE ONLY ▲**
Attorneys for Petitioner: Edward T. Ramey, #6748 Martha M. Tierney, #27521 Tierney Lawrence LLC 225 East 16th Avenue, Suite 350 Denver, CO 80203 Telephone: 720-242-7585; 720-242-7577 Email: eramey@tierneylawrence.com; mtierney@tierneylawrence.com	Supreme Court Case Nos. 2018SA113 2018SA114 2018SA115 2018SA116
PETITIONER'S ANSWER BRIEF	

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 2,220 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/Edward T. Ramey*

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Petitioner Janette S. Rose, through her undersigned counsel, respectfully submits her Answer Brief in Case Nos. 2018SA113, 2018SA114, 2018SA115, and 2018SA116.[1]

SUMMARY OF THE ARGUMENT

The three opening briefs in these consolidated cases illustrate the discordance in the parties' understandings of the purposes and intent of the four proposed ballot measures at issue. The titles reflect this state of affairs, leaving the voters to guess their way through this ambiguity with insufficient information – and misleading guidance – as to the effect of a "yes/for" or "no/against" vote. This is contrary to the directives of §1-40-106(3)(b), C.R.S. (2017).

The same ambiguity poses the prospect of a second subject, "coiled up in the folds" of the measures and effectively obscured by the titles. This is contrary to the directives of Colo. Const. art. V, §1(5.5), and §1-40-106.5(1)(e)(II), C.R.S. (2017).

[1] These four cases were consolidated per Order of Court dated May 4, 2018.

ARGUMENT

I. The Titles Do Not Fairly Express the True Meaning and Intent of the Proposed Constitutional Amendments Such That the General Understanding of a "Yes/For" or "No/Against" Vote Would Be Clear to The Voters as Required by §1-40-106(3)(b), C.R.S. (2017).

A. Standard of Review and Preservation of Issue.

Petitioner adopts the discussion of these matters in Section I.A of her Opening Brief and concurs with the discussions in the Opening Briefs of the Respondents/Proponents and the Title Board.

B. The Titles Do Not Fairly Express the True Meaning and Intent of These Proposed Constitutional Amendments Such That the General Understanding of a "Yes/For" or "No/Against" Vote Would be Clear to the Voters.

In her Opening Brief, Petitioner noted the ambiguity of the "affirmation" of local government regulatory authority at the outset of each of the four proposed initiatives – and each of their titles. Pointing to the qualifying phrase "certain surface aspects" of oil and natural gas development, Petitioner queried whether the affirmation was intended simply to reflect Proponents' vaguely defined understanding of the current scope of local government regulatory authority; whether it was intended to confine that authority – by limited constitutional affirmation – consistent with that understanding; or whether it was intended to confine or restrict that authority – again by limited constitutional affirmation –

exclusively to "surface" activities or impacts of development or to some undefined subset of those activities or impacts (*i.e.*, "certain" aspects suggesting something less than the whole). Petitioner raised these questions both to (1) express her confusion as to what it was she was being asked to "affirm," and (2) note that – whatever the intended scope of the affirmation – the wording of the titles unfairly suggested a primary purpose of *endorsement* of local regulatory authority while the measures would in fact *constitutionally restrict* that authority.

The Respondents/Proponents acknowledge that there are indeed "other surface aspects" of oil and natural gas development that are not included with the "certain surface aspects" being constitutionally "affirmed." Resp. Op. Br. p. 10. Offering no clarity as to the respective scopes of the favored "certain" and the omitted "other" – though stating specifically that they are indeed "affirming" one and being "silent" as to the other (Id.) – Respondents submit that they are merely subjecting *both* "aspects" of local regulatory authority to the same (1) state law preemption and (2) explicitly specified new limitations (on both state and local authority) enumerated later in their measures. Resp. Op. Br. pp. 11-12. This, of course, could have been done without any distinction between "certain" and "other" "aspects" at all, and with no categorical affirmation – rendering those provisions completely superfluous. Yet each measure, and each title, leads with

the purportedly irrelevant restricted affirmation – variously described by the Respondents as "not altering the current state of the law" (Resp. Op. Br. p. 10) and "chang[ing] the law and ha[ving] the potential to be the impetus behind a new body of case law" (Resp. Op. Br. p. 17).

The Title Board disregards the limited nature of the lead-in affirmation altogether, reading the measures as simply affirming local regulatory authority over "surface aspects" (both the "certain" and the "other") of oil and natural gas development, subject only to state law preemption and the new explicit limitations upon both state and local authority specified later in the measures. TB Op. Br. pp. 10-11. Though the Respondents/Proponents themselves acknowledge that the affirmation is a limited one, the Title Board presents – and apparently understands – the measures to be an unqualified affirmation of the *status quo* subject only to the newly specified limitations.

The problem is not so much that the Respondents cannot present measures like these to the voters, but that the titles must clearly inform the voters as to the effect of a "yes/for" or "no/against" vote. §1-40-106(3)(b), C.R.S. (2017). The central argument of both the Respondents and the Title Board in their Opening Briefs is that the only new limitations these measures would impose upon local government regulatory authority would be those explicitly specified after the

affirmations in the measures and their titles. Resp. Op. Br. pp. 11-12; TB Op. Br. pp. 9-10. But that is not the case. The initial restriction of the affirmation itself to "certain surface aspects" (whatever that may mean) is a new and separate qualification. "We strive to give effect to every word of a constitutional provision." *TABOR Found. v. Reg. Transp. Dist.*, 2018 CO 29 (Colo. Apr. 23, 2018), at *24; *Havens v. Bd. of County Comm'rs*, 924 P.2d 517, 523 (Colo. 1996). If we accord those words any meaning whatsoever, each of these measures would at least constrain – and quite likely reduce – the scope of local regulatory authority constitutionally affirmed prior to and independent of imposition of the further explicit limitations enumerated later in the measures.

The titles are, further, directly misleading. Opening with the affirmation, the titles give the impression of endorsing local regulatory authority per the *status quo*, subject only to conformity with state law and the additional specified limitations upon both local and state authority. The Title Board's own opening brief confirms that this is precisely how it understands the measures – discounting the effect of the critical qualification of the prominent "affirmation." With the present titles, voters can easily be expected to do the same.[2]

[2] The parties quibble over the applicability of this Court's guidance in *In re Title, Ballot Title, Submission Clause & Summary re Initiative on Obscenity*, 877 P.2d 848 (Colo. 1994). Though acknowledging that their prominent affirmation applies

This Court has offered several options to address interpretive quagmires such as this. First, in situations where "the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters." *Outcelt v. Bruce (In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25),* 974 P.2d 458 ,465 (Colo. 1999).

Alternatively, if the purpose of the proposed initiative can be sufficiently fleshed out – notwithstanding imprecision or ambiguities in its language – it may be presented to the voters so long as the title (1) will "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to intelligently determine whether to support or oppose such a proposal" – *Milo v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129),* 333 P.3d 101, 105 (Colo. 2014) – and (2) "fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of

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only to the undefined "certain" – and not the "other" – "surface aspects," the Respondents accord no independent meaning to their qualifying language. The Title Board even omits the qualifying term at the critical juncture of its discussion (p. 10). Both argue that *Obscenity* is inapposite as "the title set in that case omitted the critical provision." TB Op. Br. p. 10. In fact, the title in *Obscenity* perfectly tracked the language of the measure and omitted nothing. It was solely the resulting misleading nature of the title – suggesting a protection of rights that were in fact (and admittedly there) being constricted – that led this Court to reject that title.

the words employed by the Title Board" – *Hayes v. Spalding (In re Title, Ballot Title and Submission Clause for 2015-2016 #73)*, 369 P.3d 565, 569 (Colo. 2016). This may require the titles to contain limited additional or explicatory information – *cf., Obscenity, ftn. 2, supra* – or reorganization and presentation of information in a manner designed to promote voter understanding – *cf., In re Proposed Initiative on Limited Gaming in Antonito*, 873 P.2d 733, 741-42 (Colo. 1994) (requiring a title to clearly inform the voters that the measure affected more than one city). In the present case, as suggested in footnotes 2 and 3 of Petitioner's Opening Brief, a lot could have been done with very few words. Without at least a few minimal adjustments of this nature, the information provided by the titles is incomplete and confusing at best. Worse, the titles are affirmatively misleading as to the effect of the measures upon local government regulatory authority, and thus as to the effect of a "yes" or "no" vote.

In her Opening Brief at page 9, Petitioner also noted the complete omission from two of the titles (Nos. 178 and 180) of any reference to the prominent provision in those measures establishing new parameters and limitations applicable to assessment of fees by local governments to pay for inspections and monitoring activities. Respondents claim these are "minor provisions" (Resp. Op. Br. p. 6) that the Title Board viewed as "not a significant piece of the measures" (Resp. Op. Br.

p. 14). The Title Board, with virtually no comment in its Opening Brief, apparently concurs. Petitioner is less certain. These provisions were important enough to the Respondents/Proponents to merit dedication of an entire subsection and approximately twenty percent of the text of the subject initiatives. They are couched (and thus further defined) as part of local regulatory authority over "certain aspects" of oil and natural gas development. They require fees to be "nondiscriminatory" – a concept the intended application of which is not immediately apparent in this context. While directed "to pay for inspections and monitoring" to ensure permit compliance, their reasonableness is measured in part by "costs of the impacts." *Cf., Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36 (Colo. May 21, 2018), at *26. And whatever all of this may mean, these two initiatives would ask us to constitutionalize these parameters. Petitioner submits that they at least merit a reference in the titles.

II. The Misleading Nature of the Titles Points to the Presence of More than One Subject "Coiled Up in the Folds" of the Measures Themselves.

A. Standard of Review and Preservation of Issue.

Petitioner adopts the discussion of these matters in Section II.A of her Opening Brief and concurs with the discussions in the Opening Briefs of the Respondents/Proponents and the Title Board.

B. The Misleading Nature of the Titles Points to the Presence of More than One Subject "Coiled Up in the Folds" of the Measures Themselves.

As Petitioner acknowledged on page 11 of her Opening Brief, these measures can certainly be viewed as addressed to a single subject – government regulation of oil and natural gas development. Yet their focus out of the blocks – commencing with a directed qualified "affirmation" exclusively of "certain surface aspects" of *local* regulatory authority – by all appearances involves the state's authority only by way of jurisdictional clarification and formalization of preemptive effect. From here, however, each of the measures proceeds to impose explicit and substantial restrictions upon the separate regulatory authority of the *state* government as well. This may be less a question of multiple subjects than of crafted drafting and awkward transitions in the titles, though the effect is to obscure a significant component of these measures from all but the attentive reader.

This Court has emphasized that one component of the single subject requirement is to avoid "inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374 P.3d 460, 464 (Colo. 2016). The point at which a "surreptitious provision" qualifies as a separate "subject" certainly

can be debated. But for the crafting of these measures and their titles we would likely not be suggesting that here. It is precisely that crafting, however, that gives rise to the concern.

CONCLUSION

For the reasons set forth above and in her Opening Brief, Petitioner respectfully requests the Court to reverse the actions of the Title Board and to return these four Proposed Initiatives to their Proponents.

Respectfully submitted this 30th day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of May, 2018, a true and correct copy of the foregoing was filed and served via the Court's E-filing system upon the following:

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