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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 OPENING 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 2,657 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 counsel, respectfully submits her Opening Brief in Case Nos. 2018SA113, 2018SA114, 2018SA115, and 2018SA116.[1]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Do the titles set by the Ballot Title Setting Board for the four proposed ballot measures at issue 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*)*?

2. Did the Ballot Title Setting Board err in concluding that the proposed ballot measures at issue contain only a single subject as required by Colo. Const. art. V, §1(5.5), and §1-40-106.5, C.R.S. (2017)?

STATEMENT OF THE CASE

Respondents John Brackney and Guillermo DeHerrera ("Proponents") are the designated representatives of the proponents of Proposed Initiatives 2017-2018 #178, #179, #180, and #181 (the "Proposed Initiatives"). The Proponents submitted their Proposed Initiatives to the Ballot Title Setting Board ("Title

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

Board") for the setting of titles and submission clauses pursuant to §1-40-106, C.R.S. (2017), on April 6, 2018.

The Title Board held a hearing on April 18, 2018, and determined the Proposed Initiatives each contained a single subject and set titles. On April 25, 2018, Petitioner filed a Motion for Rehearing regarding each measure, stating that the Proposed Initiatives violated the single subject requirement of Colo. Const. art. V, §1(5.5), and §1-40-106.5, C.R.S. (2017), and that the titles did 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). The Title Board held a rehearing on April 26, 2018, at which time it denied the Motions for Rehearing except for one requested revision to the titles. Petitions for Review regarding each of the Proposed Initiatives were filed with this Court on May 2, 2018, pursuant to §1-40-107(2), C.R.S. (2017).

SUMMARY OF THE ARGUMENTS

1. Each of the Proposed Initiatives would add a new article to the Colorado Constitution, superseding current law, that would constrain (and in fact reduce) in an ill-defined manner the authority of local governments to adopt regulations affecting oil and natural gas development within their jurisdictions. The

titles, however, suggest the opposite – that the measures would affirm and constitutionally protect that local government regulatory authority. Concurrently, while each measure would also impose new restrictions upon regulatory authority over oil and natural gas development at the state level as well, that additional purpose is not clearly presented in the titles. Finally, a prominent component of two of the measures addressing local authority to establish fees for inspection and monitoring of oil and natural gas development activities is wholly omitted from the titles for those measures.

2. The misleading nature of the titles points to the presence of more than one subject "coiled up in the folds" – and identifiable only through careful reading – of the measures themselves.

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.

In reviewing Title Board decisions, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #85)*, 328 P.3d 136, 141 (Colo. 2014). "The Title Board is vested with considerable discretion in setting

the title and ballot title and submission clause. [citations omitted]. We will reverse the Title Board's decision only if a title is insufficient, unfair, or misleading." *Id*.

"In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning." *Id*. "The title should 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). "The Title Board must 'set fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation.'" *Bentley v. Mason (In re Title, Ballot Title & Submission Clause for 2015-2016 #63)*, 370 P.3d 628, 634 (Colo. 2016), quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #256*, 12 P.3d 246, 256 (Colo. 2000). "[O]ur role is to ensure that the title fairly reflects the proposed initiative such that voters will not be misled into supporting or opposing the initiative because of 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 issue was preserved. Please see section II.B of the Motion for Rehearing submitted for each measure.

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.

Each of these Proposed Initiatives would add a new article to the Colorado Constitution addressing both state and local governmental authority to regulate oil and natural gas development activities within the state. The measures read substantially the same, except that two (#178 and #179) contain a "purposes and findings" section (omitted in the others), and two (#178 and #180) contain provisions imposing limits upon the authority of local governments to assess fees for inspection and monitoring of oil and gas development activities (omitted in the others). The titles for all four of the Proposed Initiatives read identically.

In two recent decisions, this Court addressed the interplay between state government regulatory authority and local government regulatory authority – at least as grounded in Colo. Const. art. XX, §6 – over various aspects of oil and gas development in the state. In *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573 (Colo. 2016), the Court concluded that a ban, imposed by a local home rule charter amendment, on hydraulic fracturing ("fracking") and the storage of fracking waste within city limits impacted a matter of mixed state and local regulatory concern. 369 P.3d at 580-81. Due to the conflicting "operational effect" of the local bans upon the state's exercise of its regulatory authority under the *Oil*

and Gas Conservation Act, Title 34 Article 60, C.R.S. (2017), this Court held that the local ban was preempted by the exercise of state authority. 369 P.2d at 581-85. In *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586 (Colo. 2016), the Court reached the same conclusion regarding a moratorium against fracking and waste storage imposed by a local ordinance. Both decisions focused upon the practical "operational" interplay of the overlapping regulatory structures, as distinguished from any express or implied language of state preemption (found by this Court to be absent).

Each of the Proposed Initiatives here – at a constitutional level – purports at the outset to "affirm" local regulatory authority. Each then qualifies this affirmation as (1) subject to a new express preemption arising from any "conflict" with state law, and (2) extending specifically (only?) to "certain surface aspects" of oil and natural gas development. It is unclear from the texts – and thus equally unclear from the titles that mirror the texts – whether this language simply reflects the Proponents' vaguely defined understanding of the status quo, whether it is intended to affirmatively confine local regulatory authority exclusively to "surface" aspects of oil and gas development, or whether it is intended to further restrict that local authority to "*certain* [undefined and unenumerated] surface aspects" ("certain" suggesting something less than the whole). The presumption

with new legislation – and assuredly with a proposed constitutional amendment – is that the intent at least is "to change the law." *Corsentino v. Cordova*, 4 P.3d 1082, 1091 (Colo. 2000); *Charnes v. Lobato*, 743 P.2d 27, 30 (Colo. 1987). In any event, neither the measures themselves, nor their titles, clearly apprise the voters what it is they are "affirming."

Whatever it is that the voters are being asked to "affirm," the indisputable purpose and intent of each measure is to constrain the scope of local government regulatory power over oil and natural gas development. It is at minimum a fencing in of some undefined perception of the local regulatory status quo – and far more likely an affirmative contraction of existing authority. The titles, however, ring differently – introducing the measures as "affirming the authority of local governments." This language communicates an approving endorsement of precisely the regulatory authority that the measures themselves would restrict. Rather than "affirm" local regulatory authority, a "yes/for" vote would constrict the scope of that authority. *Cf., In re Title, Ballot Title, Submission Clause & Summary re Initiative on Obscenity*, 877 P.2d 848, 850-51 (Colo. 1994). The purpose of the measures being the opposite of the message conveyed by the titles, the wording of the titles does not fairly reflect the purpose of the measures. The

titles certainly do not promote voter "understanding of the effect of a 'yes/for' or 'no/against' vote."[2]

Each of the measures then separately proceeds to restrict the power of *both* local governments *and* the state government to "unreasonably restrict" a property owner's access to surface and mineral interests, "be arbitrary or capricious," or impose conditions on access or development "that are not technically feasible or economically practicable." Except for the litigation-inviting "arbitrary or capricious" qualifier, this language is tracked in the titles – though confusingly in a run-on unpunctuated sentence with no clear signal that the measure (1) *further* restricts precisely the local government regulatory power theretofore otherwise defined and seemingly "affirmed," while (2) concurrently (and not incidentally) restricting the entirety of the state's regulatory authority as well."[3] Again, and

[2] Petitioner suggested, and suggests now, that a partial "fix" to this misleading nature of the titles might have been quite simple, perhaps just inserting the word "only" after "affirming" or before (or after) "to regulate" – anything to signal to the voters that the purpose of the measures is one of limitation, not endorsement.

[3] Again, at least a partial "fix" may not have been difficult – if nothing else, simply setting off these new limitations with a comma and a couple words, *e.g.*, "…, and, *further*, prohibiting *both* state and local governments from…." This would also have clarified the reference to "state" in the first (pre-"in connection therewith") line in the titles as not referring solely to jurisdictional allocations of local vs state authority but to the overall substance of those authorities – an important distinction.

complicating the issue noted above, the voter is left at best confused, and at worst affirmatively misled.

Finally, two of the Proposed Initiatives (#178 and #180) contain an entire subsection defining new parameters for, and limitations upon, the setting of fees by local governments to pay for inspections and monitoring activities. Any reference to these provisions has been completely omitted from the titles. While the Title Board may have viewed these subsections as trivial and not sufficiently important for any reference at all in the titles, they were evidently important enough to the Proponents to consume an entire dedicated subsection in the texts of these two constitutional measures. They, further, would alter existing law at least to the extent that the new "nondiscriminatory" and "fair and reasonable estimate of the *costs of the impacts*" language is accorded any independent effect. *Cf., e.g., Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989) ("The amount of a special fee must be reasonably related to the overall *cost of the service*") (emphasis added); *Tabor Found. v. Colo. Bridge Enterprises*, 353 P.3d 896, 901 (Colo. App. 2014). Petitioner respectfully submits these provisions merited some at least passing reference in the titles.

While the goal is not to set the best possible titles, this Court's "role is to ensure that the title fairly reflects the proposed initiative such that voters will not

be misled into supporting or opposing the initiative because of the words employed by the Title Board." *Hayes*, 369 P.3d at 569; *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90)*, 328 P.3d 155, 162 (Colo. 2014). As important as the words – particularly when tracking well-crafted and positioned language from the initiatives themselves – is the clarity of the manner in which the actual purpose of the measures is presented in the titles. The requirement, "whenever practicable," is to "avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear" to the voters. §1-40-106(3)(b), C.R.S. (2017). The titles here, while tracking and abbreviating the crafted language of the measures, are at best unclear – and at worst directly misleading – to the voters as to the effect of a "yes/for" or "no/against" vote.

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.

While "employ[ing] all legitimate presumptions in favor of the propriety of the Board's actions" – *Smith v. Hayes (In re Title, Ballot Title and Submission Clause for 2017-2018 #4)*, 395 P.3d 318, 320 (Colo. 2017) – this Court examines the wording of the measures and the titles "to determine whether the initiatives and their titles comport with the single subject and clear title requirements." *Johnson v. Curry (In re Title, Ballot Title and Submission Clause for 2015-2016 #132)*, 374

P.3d 460, 464 (Colo. 2016). "In conducting this limited inquiry, we employ the general rules of statutory construction and give words and phrases their plain and ordinary meaning." *Id*.

This issue was preserved. Please see section II.A of the Motion for Rehearing submitted for each measure.

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.

One of the two principal purposes of the single-subject requirement is "[to prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon the voters." §1-40-106.5(1)(e)(II), C.R.S. (2017). This Court has referred to this aspect of the single-subject requirement as intended to avoid "inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *Johnson*, 374 P.3d at 464 (Colo. 2016).

The Proposed Initiatives at issue here seem not, at first blush, to pose a single-subject issue – focusing exclusively as they do upon regulation of oil and gas development. Yet, the presentation of the measures themselves, reflected in the titles, very effectively directs the voters' focus to issues involving only local government regulatory authority – in fact leading with an "affirmation" directed

exclusively to that local authority. Then, tucked quietly at the end, the measures impose specific (and quite significant) restrictions upon regulatory authority at the state level as well. These restrictions certainly are not "implementation details" – and their imposition at the state level is important enough to be accorded clear presentation in the titles to the voters. The fact that we find their application to the state's authority peeking out from the folds – and thus poorly represented in the titles – suggests that we are confronting precisely one of the "practices intended by the general assembly to be inhibited" through enforcement of the single-subject requirement. §1-40-106.5(1)(e), C.R.S. (2017). The single-subject requirement itself, after all, has two components – "No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title." Colo. Const. art. V, §1(5.5).

CONCLUSION

For the reasons set forth above, 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 16thth day of May, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th 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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