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COLORADO SUPREME COURT 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Pursuant To C.R.S. § 1-40-107(2), C.R.S. (2017) Appeal from the Ballot Title Board In the Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #178, #179, #180, #181 ("Regulation of Oil and Gas Development") **Petitioner:** Janette S. Rose, v. **Respondents:** John Brackney and Guillermo DeHerrera and **Title Board:** Suzanne Staiert, Glen Roper, and Jason Gelender	▲ COURT USE ONLY ▲
Attorneys for Respondents John Brackney and Guillermo DeHerrera Jason R. Dunn, #33011 David B. Meschke, #47728 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Tel: 303.223.1100; Fax: 303.223.1111 jdunn@bhfs.com; dmeschke@bhfs.com	Case Nos.: 2018SA000113 2018SA000114 2018SA000115 2018SA000116

RESPONDENTS' OPENING 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 3,091 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 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 appellant, 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/ Jason R. Dunn

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Respondents John Brackney and Guillermo DeHerrera, registered electors of the State of Colorado, through their undersigned counsel, submit their Opening Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiatives 2017-2018 #178 through #181.

ISSUES PRESENTED FOR REVIEW BY PETITIONER

1. Whether the Title Board set titles that are fair, not misleading, and reflect the true meaning and intent of the proposed initiatives such that the general understanding of the effect of a "yes/for" or "no/against" vote will be clear.

2. Whether a second subject contained in the measure is not clearly expressed in the titles.

STATEMENT OF THE CASE

The Petitioner brings this original proceeding pursuant to section 1-40-107(2) as an appeal from a decision of the Title Board to deny Petitioner's Motions for Rehearing and set titles for Proposed Initiatives 2017-2018 #178 through #181 (the "Initiatives").

The four Initiatives at issue are different iterations of the same measure. Each would add an article to the Colorado Constitution clarifying the scope of state and local governmental authority over oil and gas development. In clarifying the scope, the measures all do the same two things:

1. affirm that local governments have the authority to regulate certain surface aspects of oil and gas development to protect public health, safety and welfare, and the environment, as long as the ordinances and regulations do not conflict with state law; and
2. provide that state and local governments cannot unreasonably restrict a property owner from accessing the owner's surface and mineral interests, be arbitrary or capricious, or otherwise impose conditions on access or development that are not technically feasible or economically practicable.

Initiatives #178 and #180 also include a provision specifying that local governments have the authority to set nondiscriminatory fees

based on a fair and reasonable estimate of the costs associated to pay for inspections and monitoring of oil and gas development. Initiatives #178 and #179 additionally contain a purposes and findings section that prefaces the measures' contents but otherwise have no legal effect.

Respondents John Brackney and Guillermo DeHerrera filed original drafts of the Initiatives with Legislative Council on March 23, 2018. Required review and comment hearings for the measures were held on April 6, 2018, pursuant to section 1-40-105(1). Based on comments at the review and comment hearings, Respondents filed amended and final versions of the Initiatives with the Title Board on April 6, 2018. The Title Board considered the Initiatives on April 18, 2018, determined that it possessed jurisdiction to set titles for them in a 3-0 vote, and set the titles.[1]

Petitioner subsequently filed Motions for Rehearing on April 25, 2018, for all of the Initiatives. In the motions, Petitioner argued that: (1) the Initiatives each contain several separate and distinct subjects in

[1] The Title Board also fixed a typographical error in the measures regarding a missing comma that is not the subject of an appeal.

violation of the single-subject requirement; and (2) the titles are misleading and do not correctly and fairly express the Initiatives' true intents and meanings.

At the Rehearing on April 26, 2018, the Title Board unanimously denied the Motions for Rehearing except for small clarifying changes made to the titles. Petitioner then filed petitions for review in this Court on May 2, 2018, requesting that this Court reverse the actions of the Title Board based on challenges to the measures' titles and, possibly, on single subject grounds.

SUMMARY OF THE ARGUMENT

Each of the Initiatives would add a new constitutional provision regarding the scope of state and local governmental authority over oil and gas development. They all specifically affirm local governments' authority to regulate certain surface aspects as long as any such ordinances and regulations do not conflict with state law, and provide that state and local governments cannot unreasonably restrict a property owner from accessing the owner's surface and mineral interests, be arbitrary or capricious, or otherwise impose conditions on

access or development that are not technically feasible or economically practicable. Because the measures are similar and contain identical main provisions, the Title Board drafted the same title for each measure.

The titles set by the Title Board track the language in the measures' text, specifically addressing the measures' purpose and their two main features. The titles each express that the measures: (1) concern the scope of state and local governmental authority to regulate oil and natural gas development; (2) affirm local governments' authority to regulate subject to conflict with state law; and (3) prohibit state and local governments from unreasonably restricting access to surface and mineral property or imposing unfeasible conditions on access or development. As a result, the titles correctly and fairly express the true intent and meaning of the measures. Voters know exactly what they would be voting for or against by reading the titles.

Moreover, the titles for Initiatives #178 and #180 do not need to include language regarding nondiscriminatory fees. Every feature of a measure does not have to be reflected in the measure's title. Because

the fees provisions are minor provisions in those measures, the Title Board possessed discretion not to include a clause addressing fees in the titles.

Finally, to the extent that Petitioner is challenging Initiatives #178 through #181 on single-subject grounds, the measures all contain the same subject. They each clarify in the Colorado Constitution the rights, obligations, and limits of state and local governments over oil and gas development. Their various provisions are all necessarily connected to this purpose.

Therefore, the Title Board has jurisdiction to set titles to the Initiatives because each measure contains a single subject, and the board set titles that correctly and fairly express the true intent and meaning of the measures. This Court should affirm the Title Board's actions.

STANDARD OF REVIEW

In reviewing a challenge to the Title Board's decision, the reviewing court "employ[s] all legitimate presumptions in favor of the propriety of the [Title] Board's actions." *In re Title, Ballot, Title and*

Submission Clause for 2009-2010 No. 45, 234 P.3d 642, 645 (Colo. 2010). The single-subject requirement of article V, § 1(5.5), should be construed liberally to avoid unduly restricting the initiative process. *In re Title, Ballot Title, and Submission Clause for 2007–2008 #61,* 184 P.3d 747, 750 (Colo. 2008). Thus, a reviewing court "only overturn[s] the Title Board's finding that an initiative contains a single subject in a clear case." *In re Title, Ballot Title, and Submission Clause for 2011–2012 #3*, 274 P.3d 562, 565 (Colo. 2012).

In setting a title for a ballot initiative, the Title Board "has considerable discretion," and a court "will only reverse the Title Board's designation if the title is 'insufficient, unfair, or misleading.'" *Id.* (quoting *In re Proposed Initiative 2009-2010 No. 45*, 234 P.3d at 648). In particular, the Title Board "is given discretion" regarding the "length, complexity, and clarity in setting a title." *Matter of Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 162 (Colo. 2014).

ARGUMENT

I. THE TITLES DRAFTED BY THE TITLE BOARD ARE FAIR AND NOT MISLEADING.

Petitioner's two grounds for review appear to challenge the Initiatives' titles on the bases that they are: (1) unfair, misleading, and fail to reflect the true meaning of the measures; and (2) that the titles for two of the measures do not include language regarding fees.[2] Neither are grounds to overturn the titles set by the Title Board, which has wide discretion in setting titles.

A. Each Initiative's Title Accurately and Fairly Describes the Measure by Mirroring the Language in the Text.

The Initiatives' titles track the language of the main features of the measures. The full title for all four measures states as follows:

> An amendment to the Colorado constitution concerning the scope of state and local governmental authority to regulate oil and natural gas development, and, in connection

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[2] *See* Pet'r's Pet. for Review, at 3 (stating that the two grounds for review are: "(1) the titles set by the Title Board are unfair, misleading, and do not reflect the true meaning and intent of the proposed constitutional amendment, with the result that the general understanding of the effect of a "yes/for" or "no/against" vote will be unclear; and (2) a second subject contained in the measure is not clearly expressed in the titles").

> therewith, affirming the authority of local governments to regulate certain surface aspects of such development so long as the regulation does not conflict with state law and prohibiting state and local governments from unreasonably restricting a property owner's access to the owner's surface or mineral property or imposing technically or economically unfeasible conditions on access or development.

The titles thus state both the measures' purpose or single subject—defining the scope of state and local governmental authority over regulation of oil and natural gas development—and their two main provisions, which concern local governmental authority over surface aspects and a prohibition on governmental restrictions over owners' property access to mineral and surface rights. In other words, the titles set by the Title Board inform voters what state and local governments can and cannot do as to regulation of oil and gas development. Therefore, the titles meet the constitutional requirements. *See* Colo. Const. art. V, § 1(5.5) (stating that an initiative's single subject shall be clearly expressed in its title); C.R.S. § 1-40-106(3)(b) (requiring that a title "shall correctly and fairly express the true intent and meaning" of the initiative).

Petitioner's arguments in her Motion for Rehearing and at the Rehearing for why the titles are misleading misconstrue the measure. Petitioner first argued that the measures clandestinely constrict local governments' ability to regulate oil and gas development, which Petitioner asserted is unclear from the title. Specifically, Petitioner contended that by affirming local governments' authority to regulate certain surface aspects of oil and gas development, the measures by implication disaffirm local governments' authority over other surface aspects. This interpretation is contrary to the plain text of the measures, which is silent on local governmental regulation of other surface aspects. Furthermore, even if the measures disaffirmed regulation of other surface aspects, the measures would not be altering the current state of the law. There cannot be anything clandestine about keeping the status quo. No disaffirming language is necessary in the titles.

Based on this premise, Petitioner then contended that by misrepresenting what the measures actually do (*i.e.*, by not mentioning that the measures constrict regulatory authority and thus keep this

intended consequent hidden), the titles mislead voters. Petitioner specifically claimed that voters would think they would be voting for measures that granted local governments more control over oil and gas regulation when, in fact, they would do the opposite. In support, Petitioner cited *In re Title, Ballot Title, Submission Clause & Summary Pertaining to a Proposed Initiative on "Obscenity"*, 877 P.2d 848 (Colo. 1994). In this case, this Court reversed the title set by the Title Board because although the measure would foreclose the possibility that free expression could be granted greater protection under the Colorado Constitution than under federal standards, the title would appear to most voters to represent an expansion of the right of free expression in Colorado. *Id.* at 851.

This argument, however, is based on the faulty premise that the measures disaffirm local government control over other surface aspects of oil and gas development and thus actually constrict regulatory authority in ways not clear in the text of the measures or their titles. Rather, the measures' limitations on local (and state) governmental authority over oil and gas development are spelled out in the titles. The

titles state that: (i) conflict with state law limits local governments' authority to regulate certain surface aspects of oil and gas development; (ii) state and local governments cannot unreasonably restrict a property owner's access to surface and mineral property; and (iii) state and local governments cannot impose technically or economically unfeasible conditions on access or development. Voters know exactly from the titles the main ways in which the measure would limit state and local governmental authority over oil and gas development and can vote "yes" or "no" accordingly. *See* C.R.S. § 1-40-106(3)(b) (a ballot initiative's title "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear").

Furthermore, unlike the title in *Obscenity* that suggested a vote for the measure would increase freedom of expression when in fact it would do the opposite, the titles here do not indicate or suggest that the measures would <u>increase</u> state or local government's regulatory authority over oil and gas. The titles simply state that the measures

address "the scope" of this authority. The titles then provide specific instances of what is included within this scope. Therefore, the concerns expressed by this Court in *Obscenity* have no application here.

B. The Provisions on Fees in Initiatives #178 and #180 Need Not Be Reflected in the Titles.

Petitioner's second ground for review is that "a second subject contained in the measure" is absent from the titles. Although it is unclear from the Petition for Review constitutes this "second subject," Petitioner argued in her Motion for Rehearing and at the Rehearing that the provision included in Initiatives #178 and #180 regarding fees was an impermissible second subject that must be included in the title.

A title "need not 'spell out every detail of a proposal.'" *Matter of Title, Ballot Title & Submission Clause for 2013-2014 #129*, 333 P.3d 101, 106 (Colo. 2014) (quoting *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000 #256*, 12 P.3d 246, 256 (Colo. 2000)). Furthermore, "[t]he Title Board need not set the 'best possible' title." *In re Title, Ballot Title, Submission Clause for 2011-2012 No. 45*, 274 P.3d 576, 582 (Colo. 2012).

Here, the provision in Initiatives #178 and #180 that permits local governments to set nondiscriminatory fees for inspections and monitoring for oil and gas development so long as they are a fair and reasonable estimate of the costs associated is minor. *See* Initiative #178, § 2(b); Initiative #180, § 1(b). The Title Board twice, once at the initial hearing and once at the Rehearing, debated including language regarding fees in the titles for these two measures. Both times, the Title Board declined to do so because they determined that the fee provision is not a significant piece of the measures and thus is not required to be included within the titles. *See Matter of Title, Ballot Title and Submission Clause for 2015-2016 #63*, 370 P.3d 628, 631 (Colo. 2000) (holding that a measure's title did not need to reference its enforcement provisions); *Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172, 179–180 (Colo. 2014) (stating that a title is sufficient when it "alert[s] the voter to the material elements and purposes of the initiative").

Although it may be debatable whether inclusion of a reference to the fees would make the titles for Initiatives #178 and #180 better, the

Title Board was within its discretion in excluding reference to the fees in setting them. This Court should likewise affirm the Title Board's decisions to set the titles as currently written.

II. THE INITIATIVES EACH CONTAIN A SINGLE SUBJECT.

Petitioner's Petition for Review states two grounds for review concerning the clear title requirement and does not include an explicit single-subject argument. However, the second ground's reference to a "second subject" foreshadows that Petitioner may contend on appeal that the measures contain multiple subjects. For that reason, and the fact that Petitioner argued that the Title Board lacked jurisdiction on single-subject grounds at the Rehearing, Respondents briefly address why the measures all contain a single subject.

A measure violates the single-subject requirement when it contains provisions that are "coiled up in the folds" and would cause voter surprise. *See In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 No. 43*, 46 P.3d 438, 442 (Colo. 2002) (articulating that the other danger is "voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision

'coiled up in the folds' of a complex initiative"). In contrast, if a measure "tends to effect or to carry out one general objective or purpose" and its subject matter is "necessarily or properly connected," then it contains a single subject. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 253 (Colo. 2000); *In re Title, Ballot Title, Submission Clause, & Summary Adopted March 20, 1996, by the Title Bd. Pertaining to Proposed Initiative 1996–6*, 917 P.2d 1277, 1280 (Colo. 1996).

Here, the measures' provisions all concern the scope of state and local governmental authority over oil and gas development. Specifically, the measures affirm existing law and confirm what is the scope of that authority. Whether the measures increase or decrease governmental regulatory authority over oil and gas development is irrelevant because every provision has the same topic—clarifying the rights, obligations, and limits of governments over this development.

Moreover, any potential effects the measure may have in creating new standards or restrictions are not before the Court on an appeal of the Title Board's decision. "The effects [a] measure could have on

Colorado [] law if adopted by voters are irrelevant to [the Court's] review of whether [a measure] contain[s] a single subject." *In re Title, Ballot Title, and Submission Clause for 2011-2012 #3*, 274 P.3d 562, 568 n.2 (Colo. 2012); *In re Initiative for 2013-2014 #90*, 328 P.3d 155, 160 (Colo. 2014) (same). Every measure changes the law and has the potential to be the impetus behind a new body of case law. Even if the measures would create new criteria for levying governmental fees apart from current case law or impose new restrictions on regulating property owners' access to surface and mineral interests, they do not violate the single-subject requirement. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 256*, 12 P.3d 246, 254 (Colo. 2000) (noting that this Court has "never held that just because a proposal may have different effects . . . it necessarily violates the single-subject requirement").

Therefore, these measures each contain a single subject. Petitioner's arguments, if any, should be rejected and the Title Board's findings as to single subject affirmed.

CONCLUSION

The Initiatives each contain a single subject and possess fair and accurate titles. Respondents Brackney and DeHerrera therefore respectfully ask this Court to affirm the Title Board's denial of the Petitioner's Motions for Rehearing.

Respectfully submitted this 16th day of May 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2018, I electronically filed a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** via the Colorado Courts E-Filing System which will send notification of such filing and service on all counsel of record:

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