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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 #108 ("Just Compensation for Reduction in Fair Market Value by Government Law or Regulation") **Petitioners:** Janette S. Rose, Susan McClain, and Georgiana Inskeep, v. **Respondents:** Michelle Smith and Chad Vorthmann, and **Title Board:** Suzanne Staiert, Glen Roper, and Jason Gelender	▲ COURT USE ONLY ▲
Attorneys for Respondents Michelle Smith and Chad Vorthmann 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 No.: 2018SA000042

RESPONDENTS' 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 1,961 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 Michelle Smith and Chad Vorthmann, registered electors of the State of Colorado, through their undersigned counsel, submit their Answer Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiatives 2017-2018 #108 through #113.

SUMMARY OF THE ARGUMENT

Proposed Initiatives #108 through #113 simply expand the situations in which a private property holder is entitled to compensation under the narrow area of takings law. There is no impermissibly broad umbrella topic (the narrow topic of takings law is, in fact, overinclusive). Nor are there second subjects coiled up in the folds. The measures do not hide their true intent: voters can read in the plain text exactly how the measures' would alter the text of the Constitutional taking provision to expand when the government owes compensation to a property owner.

Without a second topic to grasp on, Petitioners argue that the effects the measures would have on Colorado's takings jurisprudence somehow cause the measures to have multiple subjects, in large part

because they disagree with the policy the measures would create. This Court has consistently rejected Petitioners' strategy as irrelevant, and should here as well. Voters can decide for themselves whether they want to expand the situations in which a private party holder is entitled to compensation.

Moreover, the titles for Proposed Initiatives #108 through #113 correctly and fairly express the true intent and meaning of the measures by tracking the language they add to section 15 of article II of the Colorado Constitution. They are specific and to the point. Petitioners, in contrast, argue that the titles should be transformed into lengthy, detailed explanations so that voters know precisely how each measure would alter takings jurisprudence moving forward. While perhaps admirable, that is not the purpose of a title. The law demands, and voters merely want to see, a summary of the measures' central features, not a detailed explanation of the measures' potential effects on case law, before deciding whether to sign a petition to place the measures on the ballot.

Therefore, this Court should confirm the Title Board's decisions to deny Petitioners' Motions for Rehearing because the measures each contain a single subject and possess clear titles.

ARGUMENT

I. THE MEASURES' EFFECT ON TAKINGS JURISPRUDENCE AND POLICY IS IRRELEVANT TO THE SINGLE SUBJECT ANALYSIS.

Petitioners' argument for why Proposed Initiatives #108 through #113 violate the single-subject requirement is creative. They first define the measures' single subject narrowly as "substantially reducing the threshold level of regulatory intrusion upon private property interests necessary to trigger a right to compensation." Pet'r's Opening Br., at 2, 9–10. They then assert that the measures contain at least one of the following three separate subjects pertaining to the measures' likely effects on takings jurisprudence. First, Petitioners contend that the measures would "surreptitiously" alter takings case law by eliminating the requirement in case law that a taking requires a "unique" intrusion or burden upon the property in question. *Id.* at 11–12. Second, they contend that because three of the measures

(Initiatives #109, #110, and #112) define the term "damaged" in Section 15 of article II, they override what Colorado courts have determined "damaged" to mean absent a constitutional definition, and is thus another separate subject. *Id.* at 13–15. Third, they contend that four of the measures (Initiatives #110 – #113) would transform takings from a constitutional protection of property interests into a constitutional protection of interests in "uses," an effect they claim is yet another separate subject.[1] *Id.* at 15–17. In other words, Petitioners are arguing that because the measures would overturn takings case law in a few different ways, they contain multiple subjects.

The problem with these arguments is that, although they are informative of the current case law on takings and how these measures would change this law, they are beside the point. This Court has repeatedly stated that in evaluating measures under the single-subject requirement, "[t]he effects th[e] measure could have on Colorado . . . law if adopted by voters are irrelevant to our review of whether [the

[1] Contrary to Petitioners' argument, the texts of Initiatives #110 through #113 clearly indicate that they would add a property owner's "uses" to what cannot be taken by the government. This effect is not hidden.

measure] and its Titles contain 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 fact, this court has "never held that just because a proposal may have different effects . . . it necessarily violates the single-subject requirement." *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 256*, 12 P.3d 246, 254 (Colo. 2000).

Rather, the single-subject requirement is meant to protect against "disconnected or incongruous" subject matter with distinct and separate purposes that could cause voter surprise. *In re 2011-2012 # 3*, 274 P.3d at 565. The cases Petitioners cite in their Opening Brief provide good examples of measures with "disconnected" and "incongruous" subjects. For example, in *In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #84 and #85 (Outcelt v. Bruce)*, 961 P.2d 456, 460–61 (Colo. 1998), the Court stated that two initiatives violated the single-subject requirement because they would (1) reduce state and local taxes and (2) require the state to lower the amount it spends on state programs because the replacement of the monthly local government revenue affected by the tax cuts could only be made "within

all tax and spending limits." In other words, reducing taxes and lowering spending amounts on state programs are two distinct and separate purposes not necessarily or properly connected to each other. *See* C.R.S. § 1–40–106.5(1)(e)(I) (forbidding the practice of placing in one measure multiple subjects "having no necessary or proper connection"). Neither subject constitutes merely an effect the measure would have had on Colorado case law.

Similarly, in *In re Title, Ballot Title and Submission Clause for 2001-2002 #43 and #45*, 46 P.3d 438, 444–48 (Colo. 2002), this Court held that two measures "establishing a battery of procedures which govern the exercise" of the right to petition violated the single subject because they also include substantive changes that would (1) eliminate the single-subject requirement; (2) shield TABOR from repeal; and (3) exclude zoning matters that "reduce private property rights" from the right of referendum. These substantive changes embedded in a measure about procedural aspects of the right to petition were separate subjects because "[a]lthough each purpose is in some way related to the initiative or referendum process, there is no 'necessary connection

between them' and thus each 'must be accomplished through separate initiatives.'" *Id.* at 448 (quoting *In re Proposed Initiative on "Public Rights in Water II"*, 898 P.2d 1076, 1080 (Colo. 1995)).

Here, in contrast, the Initiatives each contain a single subject—just compensation for government takings—by modifying the situations under which a private party is entitled to just compensation through takings law. *See In re 1999-00 No. 256*, 12 P.3d at 253 (explaining that a measure contains only one subject when it "tends to effect or to carry out one general objective or purpose"). The measures' altering of takings case law is of no independent importance. In fact, the reason there is such nuanced takings jurisprudence stems from the lack of clarity in section 15 of article II and the absence of definitions specifying what "taking" and "damaged" mean. These measures simply make it clear what those terms and "compensation" mean under Colorado law.

Petitioners' arguments thus lead to absurd results never meant by the single-subject requirement. Under their test, for example, a measure reducing a crime from a felony to a misdemeanor would violate

the single-subject requirement because it would alter both the crime's sentencing and its corresponding jurisprudence. The same is true for a measure repealing article 15 of section II in its entirety, which also would eviscerate case law on the meaning of "taking" and "damaged." Yet, it would be illogical to say that either of those hypothetical measures violates the single-subject requirement. If a measure violates the single-subject standard each time it would have multiple, nuanced effects on a narrow issue of the related law's jurisprudence, then the single-subject requirement would simply have no meaning. *See* C.R.S. § 1-40-106.5(2).

At its core, Petitioners' arguments amount to no more than a detailed explanation for why the measures would not be good policy. *See* Pet'r's Opening Br., at 13 (imploring that the measures could cause a "free-for-all 'takings' scramble . . . in which 'government hardly could go on'"). Policy merit, though, is not a valid single-subject argument. In reviewing the Title Board's actions, this Court "do[es] not address the merits of the proposed initiative." *Matter of Title, Ballot Title and*

Submission Clause for 2015-2016 # 73, 369 P.3d 565, 567 (2016). This Court should continue to refrain from doing so here.

II. THE TITLES ARE NOT REQUIRED TO ADDRESS THE NUANCES OF TAKINGS LAW.

"The Title Board's duty in setting a title is to summarize the central features of a proposed initiative; in so doing, the Title Board is not required to explain the meaning of potential effects of the proposed initiative on the current statutory scheme." *In re Title, Ballot Title Submission Clause for 2013-2014 #90 and #93*, 2014 CO 63, ¶ 24.

Despite this clear statement from this Court, Petitioners contend that "the details and subtleties of 'takings' jurisprudence" and "the evolution and interpretations of *Colo. Const. art. II, § 15*" must be included in the measures' titles, even if they do not constitute separate subjects. Pet'r's Opening Br., at 21–22. In other words, Petitioners maintain that the measures' titles must include, among other things, discussion of "unique burden" component, the particularized meaning of the term "damaged," and the shift to protection of "uses" as opposed to property interests. *Id.* at 22–24.

We need not imagine what Petitioners' desired titles would look like—pages 8 through 17 of Petitioners' Opening Brief, which detail the takings case law, provides the answer. Such voluminous titles would ignore that the Title Board is required to set "titles [that] shall be brief." C.R.S. § 1-40-106(3)(b). They would cause a "'yes/for' or 'no/against' vote [on the measure to be] unclear." *Id.* And they would be unnecessary. The titles as drafted provide all the information voters need to understand what the measures would do to change the constitutional takings provision. The title for Initiative #112, which Petitioners contend has all three of the separate subjects or features that need to be explained in its title, explains exactly how the measure would expand the situations under which a private party is entitled to just compensation:

> An amendment to the Colorado constitution concerning government taking of private property and, in connection therewith, declaring that property is damaged when the enactment of a law, regulation, or regulatory condition limits or prevents the property from being used for a purpose that was allowed at the time the property owner acquired title, and requiring the compensation for the damage to equal the difference in the fair market value of the property before and after the effective date of the law, regulation, or regulatory condition.

It describes that the measure would amend the Colorado Constitution to provide that a private property owner is entitled to compensation, based on fair market value, for damage where a law or regulation limits or prevents a use allowed at the time the owner acquired title. No additional explanation is required.

CONCLUSION

Because the Initiatives each contain a single subject and possess fair and accurate titles, Respondents Smith and Vorthmann respectfully ask this Court to affirm the Title Board's denial of the Petitioners' Motions for Rehearing.

Respectfully submitted this 9th day of April 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2018, I electronically filed a true and correct copy of the foregoing **RESPONDENTS' ANSWER 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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