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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

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In the Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #111 ("Taking Property for Public Use")

**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 ▲

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Case No.: 2018SA000045

# 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 3,199 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 Opening Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiatives 2017-2018 #108 through #113.

## ISSUES PRESENTED FOR REVIEW BY PETITIONERS

1. Whether Proposed Initiatives #108 through #113 comport with the constitutional single-subject requirement.

2. Whether the Title Board set titles that are fair, not misleading, and reflect the true meaning and intent of the proposed initiatives.

## STATEMENT OF THE CASE

The Petitioners bring this original proceeding pursuant to section 1-40-107(2) as an appeal from a decision of the Title Board to deny Petitioners' Motions for Rehearing and set titles for Proposed Initiatives 2017-2018 #108 through #113 (the "Initiatives").

Each of the six Initiatives makes similar amendments to section 15 of article II of the Colorado Constitution, which covers the taking of property for public use, how a taking is defined, and compensation if a taking occurs. Colo. Const. art. II, § 15. In particular the Initiatives add different language to that constitutional provision and, as a result, increase the scenarios under which an owner may be entitled to compensation for the reduction in value to private property. More specifically:

- Proposed Initiative #108 adds that private property cannot be "reduced in fair market value by government law or regulation" without just compensation;
- Proposed Initiative #109 adds that "[p]rivate property is damaged when a government law or regulation reduces the fair market value of the property by at least ten percent";
- Proposed Initiative #110 adds that "[p]rivate property shall be deemed damaged when a government law or regulation reduces a property's fair market value by prohibiting or restricting uses allowable at the time the owner acquired

title to the property. In that circumstance, just compensation shall equal the difference between the fair market value of the property before and after the effective date of the law or regulation";

- Proposed Initiative #111 adds that "[w]henever implementation by the State or any government entity or agency of any government law or regulation operates to reduce the fair market value of the property for uses allowable at the time the owner acquired title, the property shall be deemed to have been taken for use by the public";
- Proposed Initiative #112 adds that "[p]roperty will be deemed damaged whenever the State or any government entity or agency enacts any law, regulation or regulatory condition that limits or prevents property from being used for all of the purposes allowable at the time the owner acquired title. In that circumstance, just compensation shall equal the difference between the fair market value of the

property before and after the effective date of the law, regulation or regulatory condition"; and

- Proposed Initiative #113 adds that "[w]henever the State or any government entity or agency enacts a law, regulation or regulatory condition that operates to reduce the fair market value of the property for uses allowable at the time the owner acquired title, the property shall be deemed to have been taken for use by the public."

Respondents Michelle Smith and Chad Vorthmann filed original drafts of the Initiatives with Legislative Council on January 9, 2018. Required review and comment hearings for the measures were held on January 23, 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 January 26, 2018. The Title Board considered the Initiatives on February 7, 2018,

determined that it possessed jurisdiction to set titles for them in a 3-0 vote, and set the titles.[1]

Petitioners subsequently filed Motions for Rehearing on February 14, 2018, for all of the Initiatives. In the motions, Petitioners argued that: (1) the Initiatives each contain several separate and distinct subjects in 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 February 21, 2018, the Title Board unanimously denied the Motions for Rehearing.[2] Petitioners then filed petitions for review in this Court on February 28, 2018.

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[1] The Title Board also fixed a few typographical errors in Initiative #108 that are not the subject of an appeal.

[2] The Title Board denied the Motion for Rehearing for Initiative #109 except to the extent that the Board made a minor change to the title to replace the word "establishing" with "specifying." Respondents are not contesting this change made to Initiative #109's title. The Title Board denied the Motions for Rehearing on Initiatives #108 and #110 through #113 in their entireties.

## SUMMARY OF THE ARGUMENT

The Initiatives all concern one constitutional provision and a narrow area of the law: compensation for government takings of private property in section 15 of article II of the Colorado Constitution. Although the proposed additions to the constitutional provision vary by initiative, each initiative simply expands the situations in which a private party holder is entitled to just compensation under the narrow area of takings law. That is all they seek to change. Therefore, they each have a single subject.

Similarly, the Initiatives' titles correctly and fairly express the true intent and meaning of the measures. Each title tracks the language the relevant measure adds to section 15 of article II of the Colorado Constitution. In other words, in setting each of these titles, the Title Board followed a straightforward process designed to reflect the measure's language.

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 direction," 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 INITIATIVES EACH CONTAIN A SINGLE SUBJECT.

#### A. The Initiatives Merely Broaden the Scope of when Just Compensation Is Required under the Takings Provision.

Section 15 of article II of the Colorado Constitution is the source of takings law. As currently written, the section provides that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation." In other words, private property owners shall be justly compensated if their property is "taken" or "damaged." Colorado has developed case law specifying what is "taken" as opposed to what is "damaged" for purposes of just compensation. *See generally Animas Valley Sand & Gravel, Inc. v. Bd. of County Comm'rs*, 38 P.3d 59, 63 (Colo. 2001) (noting that, in the context of inverse condemnation, a taking occurs when a government deprives a private property owner

of the use of land through application of its laws or regulations); *id.* (explaining that the "'damages' clause only applies to situations in which the damage is caused by government activity in areas adjacent to the landowner's land").

The Initiatives seek to expand to situations where private landowners are compensated under takings law, although each measure does so differently. Initiative #108 adds that owners should receive just compensation if government law or regulation reduces the fair market value of their private property. In other words, this measure adds the reduction in fair market value by government law or regulation as a third category (in addition to "taken" or "damaged") where the owner may receive just compensation. In contrast, the other five Initiatives keep the categories at two ("taken" and "damaged") but redefine either "damaged" (Initiatives #109, #110, #112) or "taken" (Initiatives #111 and #113). The Initiatives utilize "fair market value" as a measure for assessing when an owner may receive just compensation (Initiatives #108, #109, #111, and #113), or as a measure for what is "just compensation" (Initiative #112), or both (Initiative #110).

These straightforward measures do not combine subjects that lack a necessary or proper connection, and there is nothing "coiled up in the folds" that would cause voter surprise. *See In Re Title, Ballot Title, and Submission Clause for 2011-2012 #3*, 274 P.3d 562, 566 (Colo. 2012) (explaining that one danger associated with omnibus measures is "combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions—that may have different or even conflicting interests—could lead to the enactment of measures that would fail on their own merits"); *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"). Rather, by either adding in another category that requires just compensation or redefining "damaged" or "taken," the Initiatives spell out everything these narrow measures would change. There are no hidden subjects buried within the texts of the measures.

Therefore, 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 Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 253 (Colo. 2000) (explaining that a measure contains only one subject when it "tends to effect or to carry out one general objective or purpose"). As one Title Board member stated at the Rehearing and the others agreed, the measures each have a single subject and simply "broaden the scope of when compensation is required and that's it."[3] That is all each of the Initiatives seeks to accomplish.

### B. Petitioners' Argument that the Initiatives Have Multiple Effects on Takings Case Law Is Irrelevant.

In their Motions for Rehearing and at the Rehearings, Petitioners argued that the Initiatives contain multiple subjects because they have at least two effects on current takings case law.

[3] *See* Audio of the February 21, 2018 Rehearing – Part 2, at 33:21. The audio of Title Board's February 21, 2018 rehearing can be found at https://www.sos.state.co.us/pubs/info_center/audioArchives.html.

Petitioners' argument, however, has no bearing on whether the Initiatives each contain a single subject and must be rejected. This Court has repeatedly stated that "[t]he effects [a] measure could have on Colorado [] law if adopted by voters are irrelevant to our 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).

Specifically, Petitioners argued that the Initiatives alter takings case law on what constitutes "taken" or "damaged" in two specific ways. Mot. for Rehearing, at 2. First, the measures' revisions of the definition of compensable "damage" to include depreciation in fair market value would change the separate "unique or special injury" limitation currently in Colorado case law. *Id.* Second, the measures alter what is "taken" in Colorado law by tying it to fair market value. *Id.* Petitioners correctly understand the measures' effects. While each measure alters Colorado case law differently, they each would precipitate a new body of case law based on new definitions. But this has nothing to do with

whether they each satisfy the single-subject requirement. All ballot initiatives seek to change the law.[4]

The Title Board instantly recognized that Petitioners' single-subject argument was based on the measures' effect on current takings law. In rejecting this argument, the board commented that Petitioners' argument is just about the "effects" of the measure, which are "narrow,"[5] and "the fact that there will be a new body of case law" "doesn't mean [there are] two subjects."[6] The board noted that "[t]hose kind of legal arguments, while correct and valid, don't make two subjects."[7]

Moreover, the Title Board rejected Petitioners' argument that the Initiatives' effects on takings case law are "coiled up in the folds" and would lead to voter surprise. The board reasoned that voters, who in general do not know the specifics of takings law, would not succumb to

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[4] *See* Audio of the February 21, 2018 Rehearing – Part 2, at 44:12 (Title Board noting that all measures seek to change the law).
[5] Audio of the February 21, 2018 Rehearing – Part 2, at 32:21–33:06.
[6] *Id.* at 33:30–34:00.
[7] *Id.* at 34:00–34:11.

surprise.[8] In fact, one board member stated that "voters would be surprised to learn that there is this body of case law."[9]

Petitioners' single-subject arguments should therefore be rejected and the Title Board's finding of a single subject affirmed.

## II. THE TITLES ACCURATELY AND FAIRLY DESCRIBE THE INITIATIVES, AND DO NOT VIOLATE THE CLEAR TITLE REQUIREMENT.

The Colorado Constitution states that an initiative's single subject shall be clearly expressed in its title. Colo. Const. art. V, § 1(5.5). 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." § 1-40-106(3)(b). It "shall correctly and fairly express the true intent and meaning" of the initiative. *Id.*

A title, however, "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

[8] *Id.* at 34:12–35:15.
[9] *Id.* at 34:16–34:23.

(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).

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

The Initiatives' titles track the exact language in the text of the measures. Initiative #108, which adds a third category of actions that require just compensation to private property owners, possesses the following title: "An amendment to the Colorado constitution requiring the government to award just compensation to owners of private property when a government law or regulation reduces the fair market value of the property." The other measures, which alter the definition of either "damaged" or "taken," have titles that merely state when property is "damaged" or "taken" by the addition of new language to section 15 of article II of the Colorado Constitution. By mirroring the language in the measures' texts, these titles are straightforward and accurate. As the Title Board commented at the Rehearings, the titles

describe each initiative's change to the law.[10] The Title Board did not need to do anything more in setting the titles.

### B. The Measures' Effects on Takings Case Law Should Not Be Included in the Titles.

Similar to their single subject argument, Petitioners argued in the Motions for Rehearing and during the Rehearing that the Initiatives' effects on takings case law should be included in the measures' titles. Mot. for Rehearing, at 2–3. Not only is this argument contrary to clear title requirement, which does not require every detail in a measure be incorporated in a title, but it would result in absurdly long and incomprehensible titles. *See In re Title, Ballot Title & Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991) ("The [Title] [B]oard is not required to describe every nuance and feature of the proposed measure.").

To include each Initiative's effect on takings case law would require the titles to clarify how each measure alters the definitions of "damaged" or "taken," or adds to them. If Petitioners had their wish, this explanation would mention obscure parts of the law, such as the

[10] Audio of the February 21, 2018 Rehearing – Part 2, at 45:44–46:00.

"unique or special injury" limitation upon compensable "damage" to property and the limitation that relieves the government from paying a property owner for the highest and best use of their property or for a gain of maximum profits. *Id.* Most voters, and especially those who are not lawyers, would not understand those statements. Adding them to the title therefore would increase rather than decrease confusion. *In re Title, Ballot Title, & Submission Clause for 2009–2010*, # 24, 218 P.3d 350, 356 (Colo. 2009) (noting that titles should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal"). It is simpler and clearer to limit the title to how the measure would change section 15 of article II of the Colorado Constitution. *See* § 1-40-106(3)(b) (noting that a title should be "brief," "express the true intent and meaning" of the initiative, and "unambiguously state the principle of the provision sought to be added, amended, or repealed").

### C. "Just Compensation" Is Not an Impermissible Catchphrase.

Finally, the phrase "just compensation" in the titles does not violate the clear title requirements as an impermissible catchphrase. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000, No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000) ("Catch phrases are words that work to a proposal's favor without contributing to voter understanding."). The phrase already is found in the current version of section 15 of article II of the Colorado Constitution and holds a distinct meaning as a term of art in takings law. *In re Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 61 (Colo. 2008) (approving the phrase "just cause" because it accurately describes an element of the measure and "sets forth a legal standard commonly used in the law"). It is common practice for the Title Board to fall back on the language in the text of the measure when in doubt. *See In re Title, Ballot Title, Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 650 (Colo. 2010) ("[P]hrases that merely describe the proposal are not impermissible catch phrases . . . .");

## CONCLUSION

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

Respectfully submitted this 20th day of March 2018.

BROWNSTEIN HYATT FARBER SCHRECK LLP

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## CERTIFICATE OF SERVICE

I hereby certify that on March 20, 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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