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SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	▲ COURT USE ONLY ▲
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 Initiative 2017-2018, #113 ("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, GLENN ROPER, and JASON GELENDER	
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PETITIONERS' 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 5,431 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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Petitioners Janette S. Rose, Susan McClain, and Georgiana Inskeep, through counsel, respectfully submit their Opening Brief in Case Nos. 18SA42, 18SA43, 18SA44, 18SA45, 18SA46, and 18SA47.[1]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Ballot Title Setting Board ("Title Board") erred in concluding that each of the proposed ballot measures at issue contains only a single subject as required by *Colo. Const. art. V, §1(5.5)*, and *§1-40-106.5, C.R.S. (2017)*.

2. Whether the Title Board erred in concluding that the titles set for each of the proposed ballot measures at issue correctly and fairly express the true intent and meaning of each measure as required by *§1-40-106(3)(b), C.R.S. (2017)*.

STATEMENT OF THE CASE

Respondents Michelle Smith and Chad Vorthmann ("Proponents"), as the designated representatives of the proponents of six proposed ballot initiatives pursuant to *§1-40-104, C.R.S. (2017)*, filed their measures with the Title Board concurrently on January 26, 2018. Titles were approved and set for all six measures on February 7, 2018. Petitioners filed motions for rehearing regarding all six measures on February 14, 2018, submitting that each of the proposed initiatives

[1] Briefing in each of these cases was ordered consolidated per the Court's separate Orders in each case of March 6, 2018.

violated the single subject requirement and that the titles did not correctly and fairly express the true intent and meaning of the measures. Rehearings were held on February 21, 2018, at which time the Title Board denied each of the motions in all pertinent respects. Petitions for Review regarding each measure were filed by the Petitioners with this Court on February 28, 2018, pursuant to *§1-40-107(2), C.R.S. (2017)*.

SUMMARY OF THE ARGUMENTS

The six proposed initiatives at issue seek to amend *Colo. Const. art. II, §15* ("*Taking property for public use – compensation, how ascertained*") in varying ways. Each presents a primary purpose – and subject – of substantially reducing the threshold level of regulatory intrusion upon private property interests necessary to trigger a right to compensation from the government under this section. Each initiative also wholly, and quite surreptitiously, eliminates the foundational understanding that a "taking" (of any kind) can only occur when the private property in question suffers a unique – as distinct from generally applicable – burden or intrusion. Additionally, three of the initiatives completely, and confusingly, alter the meaning and application of the independently operative "damage" clause of *Colo. Const. art. II, §15*. Finally, four of the initiatives, by their plain language, extend *Colo. Const. art. II, §15*'s protections beyond *property*

interests and into the altogether new arena of *interests in specific "uses*" – *i.e.*, particular businesses and other activities – incidentally allowable at one time on a property. Each of these additional purposes constitutes a separate subject.

As important, the titles set for each of the proposed initiatives, though reciting the deceptively simple language of each measure, fail to clearly, correctly, and fairly express the true intent and meaning of each measure. Only the reduction in the compensable threshold for regulatory intrusions is uniformly and clearly reflected. There is no indication in any of the titles that the fundamental requirement of some degree of uniqueness of burden or intrusion is being wholly eliminated as a foundational proposition for a "taking" to occur. The material and confusing alteration of the meaning of the "damage" clause in three of the measures is not expressed. And any allusion to the extension of *Colo. Const. art. II, §15*'s protections well beyond interests in property – and into protections for particular "uses" or business activities – in four of the measures is obscure at best. Each of these additional revisions materially changes existing law and settled constitutional understanding – and none of this is clearly and fairly reflected in the titles.

ARGUMENTS

I. The Proposed Initiatives Contain Multiple Subjects.

A. Standard of Review.

In reviewing Title Board decisions, the Court "employ[s] 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), quoting *Cordero v. Leahy (In re Title, Ballot Title and Submission Clause for 2013-2014 #90)*, 328 P.3d 136, 141 (Colo. 2014). "We will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.*, quoting *Cordero, supra*. Though neither addressing the merits nor potential applications of a proposed initiative, "we must examine their wording 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.*

B. The Single Subject Requirement.

Colo. Const. art. V, §1(5.5)'s requirement that a proposed initiative contain only a single subject serves two functions. "First, the single subject requirement 'is

intended to ensure that each proposal depends upon its own merits for passage.'" *Johnson*, 374 P.3d at 465, quoting *In re Proposed Initiative on Public Rights in Waters II*, 898 P.2d 1076, 1078 (Colo. 1995). As with the similar requirement applicable to bills passed by the General Assembly, this "prevents proponents from engaging in 'log rolling' tactics, that is, combining multiple subjects into a single initiative in the hope of attracting support from various factions that may have different or even conflicting interests." *Johnson*, *id*., citing *§1-40-106.5(e)(I), C.R.S. (2017).*

Second – and equally important – "the single subject requirement is intended 'to prevent surprise and fraud from being practiced upon voters' caused by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *Johnson*, *id*., quoting *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002). As noted in *In re 2001-2002 #43*, 46 P.3d at 442-43, the purpose is to "obviate the risk of 'uninformed voting caused by items concealed within a lengthy or complex proposal'" (quoting *Public Rights in Waters II*, 898 P.2d at 1079). As is clear from the Court's words, a measure can be "complex" without necessarily being "lengthy" – indeed a short and seemingly simple initiative, directed to a large and

moderately complex body of law, can harbor the most pernicious surprises "coiled up in [its] folds."

The six proposed initiatives at issue here pose the second – "coiled up in the folds" – concern. And they do it with remarkable sophistication, subtle variations among measures, and well-conceived depth of impact.

While this Court has not always found unanimity in its "single subject" rulings, its opinions reflect a sustained consensus disfavoring the precipitation of voter confusion or surprise. In *Outcelt v. Bruce (In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #84)*, 961 P.2d 456 (Colo. 1998), the Court disapproved two initiatives that would have lowered various state and local taxes while requiring the state to backfill lost local revenue within its own TABOR tax and spending limits – thus necessarily (though not explicitly) requiring the state to reduce or eliminate other unrelated state programs. The Court noted that "[v]oters would be surprised to learn that by voting for local tax cuts, they also had required the reduction, and possible eventual elimination, of state programs." 961 P.2d at 460-61.[2] In *Johnson supra*, the Court disapproved

[2] The Court notably distinguished a prior initiative in which the state's backfill requirement was *not* newly constrained by its own tax and spending limits. *Outcelt*, 961 P.2d at 459.

measures that would have restructured the state's redistricting and reapportionment processes while vesting a new "seemingly neutral" but inherently political role (albeit as part of those processes) upon the theretofore wholly apolitical Supreme Court Nominating Commission. 374 P.3d at 467.[3] The Court similarly disapproved initiatives purporting to liberalize initiative processes, while concurrently repealing the substantive single-subject requirement, while also embedding a provision specifically shielding *Colo. Const. art. X, §20* (TABOR) from the effects of that substantive repeal (described by the Court as "the epitome of a surreptitious measure"). *In re 2001-2002 #43*, 46 P.3d at 447.

On the one hand, the breadth of a measure does not necessarily indicate a multiplicity of purposes. *Milo v. Coulter (In re Title, Ballot Title & Submission Clause for 2013-2014 #129)*, 333 P.3d 101, 105 (Colo. 2014). Nor must a measure provide "a full accounting of potential effects" to avoid the risk of voter surprise. *Bentley v. Mason (In re Title, Ballot Title & Submission Clause for 2015-2016 #63)*, 370 P.3d 628, 632 (Colo. 2016). Yet, this Court has never countenanced the

[3] Dissenting in *Johnson*, Justice Boatright posed the countervailing consideration whether it would it would make sense to require that the second "subject" be proposed in a separate initiative, concluding it would not in that case. 374 P.3d at 484 (Boatright, J., dissenting). In the present case, notably, each of the additional subjects, in all six measures, could very easily and reasonably be proposed in separate measures.

deliberate embedding of unrelated purposes in a single measure in a manner likely to deceive or confuse the voting public. *Cf.*, *Howes v. Brown (In re Title, Ballot Title & Submission Clause for 2009-2010 #91)*, 235 P.3d 1071, 1088 (Colo. 2010) (Coates, J., dissenting). Nor would this Court be expected to approve an artfully crafted, albeit well-intentioned, embedding of disconnected purposes in a single measure to precisely the same effect (confusion or surprise) from the perspective of the voting public. The six measures at issue here present that problem.

C. Colo. Const. art. II, §15 and the Proposed Measures at Issue.

Adopted with statehood in 1876, *Colo. Const. art. II, §15* reads in its entirety as follows:

> Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners, of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested; and whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.

Except for the reference to property being "damaged" (the "damage" clause), "this court has interpreted the Colorado takings clause as consistent with the federal clause" – *U.S. Const. amend. V. Animas Valley Sand & Gravel v. Bd. of County Comm'rs*, 38 P.3d 59, 64 (Colo. 2001). In the absence of a formal condemnation

(or eminent domain) proceeding initiated by the government, inverse condemnation claims may be brought by owners of interests in property against the government – for a "taking" – resulting from "the government's physical occupation of the land or by regulation." 38 P.3d at 63. Regarding "regulatory takings," "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*, quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

1. The compensable threshold. Absent a "*per se* taking" – *i.e.*, physical encroachment or a regulatory intrusion that either (1) "does not substantially advance legitimate state interests" – *Animas Valley*, 38 P.3d at 64, quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992) – or (2) "denies an owner economically viable use of his land" – *Id.* – a property owner "can still prove a taking under a fact-specific inquiry." *Animas Valley*, 38 P.3d at 65, citing generally *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). Such a "fact-specific inquiry" – per this Court in *Animas Valley*, citing extensive United States Supreme Court precedent under *U.S. Const. amend. V* – "seems to contemplate a situation in which the property in question retains more than a de minimis value but, when its diminished economic value is considered in connection with other factors, the

property has effectively been taken from its owner. It provides a safety valve to protect the landowner in the truly unusual case." *Animas Valley*, 38 P.3d at 66.

It is the fact-specific scale of this "diminished economic value" that, by all appearances, is the primary subject to which all six of the proposed initiatives at issue here are directed. Currently, "[a]lthough the *Palazzolo* Court did not address what level of interference a government regulation must have caused to constitute a taking under a fact-specific inquiry, *a mere decrease in property value is not enough*. This is true because a landowner is not entitled to the highest and best use of his property. Reading *Palazzolo* together with the Court's prior precedent, it is apparent that *the level of interference must be very high*." *Animas Valley*, 38 P.3d at 65 (emphasis added).

Each of these proposed initiatives, by its clear language, would reduce the level of interference a government regulation must cause to require compensation from "very high" to a simple decrease in the property's fair market value.[4] That is a substantial purpose and subject of each of the measures.

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[4] In four of the measures – Nos. 110 (2018SA44), 111 (2018SA45), 112 (2018SA46), and 113 (2018SA47) – the reductions in fair market value would be the result of imposition of restrictions upon "uses allowable" at the time the owner acquired title.

2. Redefining the core concept of a "taking." Even more basic to *Colo. Const. art. II, §15,* and to "takings" jurisprudence generally, than the threshold of interference triggering a right to compensation from the government, is the seminal proposition that a "taking" requires a unique – rather than generalized – intrusion or burden upon the specific property in question. "Takings jurisprudence balances the competing goals of compensating landowners on whom a significant burden of regulation falls and avoiding prohibitory costs to needed government regulation." *Animas Valley*, 38 P.3d at 63. "The Takings Clause assures that the government may not force 'some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.*, quoting *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo. 2001), quoting *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994). Citing back to Oliver Wendell Holmes, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Animas Valley*, 38 P.3d at 63, quoting *Mahon*, 260 U.S. at 413.[5] *Accord*, *Murr v. Wisconsin*, __ U.S. __, 137 S. Ct. 1933, 1943 (2017) ("In

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[5] In the "damage" context (discussed below), *cf.*, *City of Northglenn v. Grynberg*, 846 P.2d 175, 179 (Colo. 1993) ("To recover in a damaging case, then, the owner must show a unique or special injury which is different in kind from, or not common to, the general public"); *Claassen v. City & County of Denver*, 30 P.3d 710, 714 (Colo. App. 2000); *Thompson v. City & County of Denver*, 958 P.2d 525,

all instances, the analysis must be driven 'by the purpose of the *Takings Clause*, which is to prevent the government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'"), quoting *Palazzolo*, 533 U.S. at 617-18, quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

The plain wording of each of the six initiatives at issue here completely, albeit subtly, eviscerates this seminal tenet of "takings" jurisprudence. No. 108 (Case No. 2018SA42) does so by addition of a new compensable category – separate from the established categories of "taken" or "damaged" – for any reduction "in fair market value by government law or regulation." Nos. 109-113 (Case Nos. 2018SA43 - 47) do so by "deeming" (or in the case of No. 109 redefining) the compensable categories of "taken" or "damaged" to leave no room for a uniqueness-of-burden requirement. According these words their plain and ordinary meaning, virtually every generally applicable "law," "regulation," or "regulatory condition" that may, however incidentally, have an effect of reducing the fair market value of someone's property – even if the restriction and impact is widely or universally experienced – becomes a compensable regulatory taking. In

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528 (Colo. App. 1998) ("The damage must be different in nature from, *and not merely greater in degree than*, that suffered by the general public") (emphasis added); *Aztec Minerals Corp. v. Romer*, 940 P.2d 1025, 1031 (Colo. App. 1996).

four cases (Nos. 110-113, Case Nos. 2018SA44 - 47) the reduction in fair market value would be specifically linked to restricting any theretofore allowable "uses" or "purposes" on the property – whether or not any specific property (or any property at all) had ever been so used. The resulting free-for-all "takings" scramble, under any of these measures, defines precisely the Holmesian nightmare – at the conceptual heart of "takings" jurisprudence – in which "government hardly could go on."

Each of these measures completely upends the core constitutional purpose underlying *Colo. Const. art. II, §15,* and "takings" law generally – to assure that "government may not force *some people alone to bear public burdens* which, in all fairness and justice, should be borne by the public as a whole." *Animas Valley*, 38 P.3d at 63 (emphasis added). This is a foundational (and very well coiled) conceptual shift – and a very different subject from a generalized adjustment to the magnitude of intrusion triggering a public obligation to provide uniquely directed compensation.

3. Altering the "damage" component of *Colo. Const. art. II, §15.* The first phrase of *Colo. Const. art. II, §15,* states that "Private property shall not be taken *or damaged* for public or private use . . . ." (emphasis added). "Damaged" – a term not found in *U.S. Const. amend. V* – has been held by this Court to have a

specific meaning. "This court has interpreted the 'damage' language in Colorado's takings clause to provide broader rights than does the federal clause but only insofar as it allows recovery to landowners whose land has been damaged by 'the making of . . . public improvements abutting their lands, but whose lands have not been physically taken by the government.'" *Animas Valley*, 38 P.3d at 63, quoting *Grynberg*, 846 P.2d at 179. "The 'damage' clause only applies to situations in which the damage is caused by government activity in areas adjacent to the landowner's land" – *e.g.*, on a severed subsurface mineral estate, through operation of an electric line on abutting property, improvement of an abutting street, expansion of an electric streetcar line on abutting property, or construction of a viaduct abutting a claimant's land. *Animas Valley*, 38 P.3d at 63. The term has not been applied in the context of a direct regulatory intrusion upon one's own property.

Notwithstanding the historical interpretation noted above, three of the proposed initiatives at issue – Nos. 109 (Case No. 2018SA43), 110 (Case No. 2018SA44), and 112 (Case No. 2018SA46) – redefine the term "damage" to apply to regulatory intrusions upon the owner's own property, directly reducing its fair market value (Nos. 109 and 110) or limiting or preventing previously allowable uses (No. 112). Gone, and apparently replaced, is the separate basis for claiming

compensation for government activities physically occurring on adjacent or abutting properties. Intended or not, this revision quietly alters, and by the plain language of the measures apparently replaces, an entire category of claims heretofore available. The alteration of the distinct "damage" concept manifests a separate purpose – and one completely non-apparent to all but the most quizzically focused voters.

4. Shift in subject from interests in property to interests in "uses." Finally, four of the proposed initiatives shift subtly away from providing a basis for compensation for regulatory intrusions upon *property interests*, to providing a basis for compensation for regulatory restrictions upon a class of "uses" – businesses or other activities – otherwise allowable upon a subject property.

Measure No. 111 (Case No. 2018SA45) most directly deems a property "to have been taken" – and the owner thus entitled to compensation – if a regulation "operates to reduce the fair market value of property *for uses allowable at the time the owner acquired title*" (emphasis added). Similarly, Measure No. 113 (Case No. 2018SA47) deems a property "to have been taken" whenever "a law, regulation, or regulatory condition . . . operates to reduce the fair market value of property *for uses allowable at the time the owner acquired title*" (emphasis added).

By any fair reading of these two measures, property would be deemed to have been "taken" – irrespective of the overall value of the *property* – whenever its value *for a particular "use" – i.e.*, a business or other activity theretofore "allowable" on the property – was reduced by a restriction specifically on that use. This would be the case even were the restriction on a particular "use" to be accompanied by an independent, or perhaps related, overall increase in the value of the property itself. Consider upscale zoning. These two proposed initiatives are directed explicitly to the protection of a class of "*uses*" – not to protection of *interests in property*.

Measures Nos. 110 (Case No. 2018SA44) and 112 (Case No. 2018SA46) similarly enshrine historic "uses" (No. 110) and "purposes" (No. 112) "allowable at the time the owner acquired title" – deeming the property "damaged" if those "uses" or "purposes" are restricted. While Measure No. 112 bases compensation upon a reduction in the property's overall (rather than use-specific) fair market value in the wake of the restriction, there is no requirement that the restriction have caused or contributed in any way to the reduction in value. Thus, a wholly independent (and perhaps generally experienced) decline in the property's value becomes compensable only because of a contemporary but unrelated restriction upon a specific category of once-allowable "uses." Again, it is the "uses" – not

property interests – that would be protected. Measure No. 110 subtly steps back a bit further by deeming the property "damaged" only by "use" restrictions that "reduce[] a property's fair market value" – thus at least requiring some causal nexus. Yet, there is no requirement that the use restriction be the sole, primary, or even a material cause of the reduction in value for which compensation is then mandated – only that it be contemporaneous and contributory. Again, it is a specific category of "*uses*" that is being protected – *not* an interest in *property*.

Each of these measures would transform an entire body of law grounded in the protection of (and compensation for intrusions upon) *interests in property* into a constitutional vehicle for the protection of interests in *businesses and other activities and "uses"* at one time allowable upon property. *Cf.*, *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999), with reference to the Due Process protections accorded property under *U.S. Const. amend XIV* ("But business in the sense of the activity of doing business, or the activity of making a profit is not property in the ordinary sense"). This is a distinct focus, a distinct purpose, and a distinct subject – incompatible with existing "takings" jurisprudence – quietly "coiled up in the folds" of these four measures.

5. Summary enumeration of the multiple subjects of the measures at issue. Summarizing the discussion above, Petitioners respectfully submit that the proposed initiatives at issue in these cases contain the following separate subjects:

Proposed Initiative 2017-2018 #108 (**Case No. 2018SA42**):

> Reducing the valuation threshold for compensation for regulatory takings (by addition of a new explicit category under *Colo. Const. art. II, §15*);
>
> Eliminating the unique-burden core constitutional purpose underlying *Colo. Const. art. II, §15*, and "takings" jurisprudence.

Proposed Initiative 2017-2018 #109 (**Case No. 2018SA43**):

> Reducing the valuation threshold for compensation for regulatory takings (by redefining the term "damaged");
>
> Eliminating the unique-burden core constitutional purpose underlying *Colo. Const. art. II, §15*, and "takings" jurisprudence;
>
> Alteration or elimination of the adjacent/abutting property basis for "damage" claims under *Colo. Const. art. II, §15.*

Proposed Initiative 2017-2018 #110 (**Case No. 2018SA44**):

> Reducing the valuation threshold for compensation for certain regulatory takings (by deeming the property "damaged");
>
> Eliminating the unique-burden core constitutional purpose underlying *Colo. Const. art. II, §15*, and "takings" jurisprudence;
>
> Alteration or elimination of the adjacent/abutting property basis for "damage" claims under *Colo. Const. art. II, §15.*

Transforming a constitutional protection of *property interests* into a constitutional protection against restrictions upon a time-specific category of *businesses and other activities and "uses"* allowable upon property.

Proposed Initiative 2017-2018 #111(**Case No. 2018SA45**) :

Reducing the valuation threshold for compensation for certain regulatory takings (by deeming the property "taken");

Eliminating the unique-burden core constitutional purpose underlying *Colo. Const. art. II, §15*, and "takings" jurisprudence;

Transforming a constitutional protection of *property interests* into a constitutional protection against restrictions upon a time-specific category of *businesses and other activities and "uses"* allowable upon property.

Proposed Initiative 2017-2018 #112 (**Case No. 2018SA46**):

Reducing the valuation threshold for compensation for certain regulatory takings (by deeming the property "damaged");

Eliminating the unique-burden core constitutional purpose underlying *Colo. Const. art. II, §15*, and "takings" jurisprudence;

Alteration or elimination of the adjacent/abutting property basis for "damage" claims under *Colo. Const. art. II, §15.*

Transforming a constitutional protection of *property interests* into a constitutional protection against restrictions upon a time-specific category of *businesses and other activities and "uses"* allowable upon property.

Proposed Initiative 2017-2018 #113 (**Case No. 2018SA47**):

Reducing the valuation threshold for compensation for certain regulatory takings (by deeming the property "taken");

> Eliminating the unique-burden core constitutional purpose underlying *Colo. Const. art. II, §15*, and “takings” jurisprudence;
>
> Transforming a constitutional protection of *property interests* into a constitutional protection against restrictions upon a time-specific category of *businesses and other activities and “uses”* allowable upon property.

II. The Titles to the Proposed Initiatives Do Not Correctly and Fairly Express the True Intent and Meaning of the Measures.

A. Standard of Review.

In reviewing Title Board decisions, the Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *Cordero,* 328 P.3d at 141. “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 our limited review of the Title Board's actions, we do not address the merits of the proposed initiatives nor suggest how they might be applied if enacted.” *Id.* at 142.

“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*, 333 P.3d at 105. While every detail of a

proposal need not be spelled out, "[t]he Title Board must 'set fair, clear, and accurate titles that do not mislead the voters through a material omission or misrepresentation.'" *Bentley*, 370 P.3d at 634, 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).

B. Application of the Clear Title Requirement to the Proposed Initiatives at Issue.

As discussed in Part I, above, Petitioners submit that each of the proposed initiatives at issue in these cases contain two or more separate and distinct purposes and subjects "coiled up in the folds" of the wording of each measure. These distinct purposes matter greatly, and – except to some degree for the reduction in the threshold level of regulatory intrusion upon an interest in property necessary to trigger an obligation for compensation by the government (present in each measure) – are not readily apparent from either the crafted wording of the measures themselves nor from the titles (that faithfully replicate the wording of the measures). A typical voter, with little time to swim through the details and

subtleties of “takings” jurisprudence or the evolution and interpretations of *Colo. Const. art. II, §15,* would have no way to garner from the titles, as set, the information necessary to make an informed decision as to the meaning of a “yes” or “no” vote.

Even were the Court to conclude that one or more of these proposed initiatives had been confined to a single subject, that does not resolve the issue of whether their true intent and meaning is clearly and fairly expressed in the titles. *Cf., Hayes*, 369 P.3d at 568-71. The fact that the titles track the wording used in the measures themselves is not sufficient to ensure that voters have adequate information “to determine intelligently whether to support or oppose such a proposal.” *Id*. at 570, citing *In re Title, Ballot Title, Submission Clause & Summary Pertaining to a Proposed Initiative on “Obscenity,”* 877 P.2d 848 (Colo. 1994). It is particularly important to ensure that the titles “alert voters to the fact that some of the proposed changes would significantly alter” present law. *Hayes*, 369 P.3d at 570.

Notably absent from all of the titles is any information or clue that each measure would by it terms (particularly its “deeming” clauses) eliminate the seminal “unique burden” component of the concept of a compensable “taking” of property. Please see the discussion in section I.C.2, above. To the extent that voters

may understand or have a sense that the government (*i.e*., the people) is constitutionally required to provide compensation to property owners uniquely impacted by generally-applicable (or not generally applicable) laws and regulations – balancing the general good and unique private burdens – they are given no information or clues by the titles that this balancing is being defined or "deemed" away in each measure. As capable as they may be of understanding the Holmesian dystopia of governmental paralysis that would result if "values incident to property could not be diminished without paying for every such change in the general law," they are given no hint from the titles that this is precisely what each of these measures would do.

It is certainly less likely that the average voter (including undersigned counsel until now) is aware of the particularized meaning of the term "damaged" as interpreted in *Colo. Const. art. II, §15.* Yet, the alteration of this term in three of the measures (Nos. 109, 110, and 112) – as discussed in section I.C.3 above – is significant. No information or clue as to this change, nor any information regarding the present law, is provided by the three pertinent titles. *Cf.*, *Hayes*, 369 P.3d at 570.

Finally, the shift in four of the measures (and most particularly in Nos. 111 and 113) from protection of interests in *property* to protection of interests in "*uses*"

(business and presumably other private value-producing activities) is reflected in the titles only to the extent of replicating the wording of the measures themselves. There is no allusion to the significant change these measures would bring to existing law. Please see the discussion in section I.C.4, above. These measures would thoroughly alter the focus of protections afforded by "takings" law generally and *Colo. Const. art. II, §15,* in particular. And the voters are given no clue in the well-crafted wording of the measures – replicated with nothing more in the titles – that this is happening. *Cf., Hayes*, 369 P.3d at 570; *In re Proposed Initiative on "Obscenity,"* 877 P.2d at 850-51.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request to Court to reverse the actions of the Title Board and to return these six proposed initiatives to their Proponents.

Respectfully submitted this 20th day of March, 2018.

s/Edward T. Ramey

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of March, 2018, a true and correct copy of the foregoing was filed and served via electronic mail and the Court's E-filing system upon the following:

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