SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: May 16, 2022 6:17 PM
Original Proceeding Pursuant to § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2021-2022 #93 ("Percentage of Utility Rates Paid by Investor-Owned Utilities") **Petitioner:** Raymond Gifford **v.** **Respondents:** Jon Caldara and Jake Fogleman **and** **Title Board:** Theresa Conley, Ed DeCecco and Kurt Morrison	▲ COURT USE ONLY ▲
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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 3,257 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/ John S. Zakhem
John S. Zakhem

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SUMMARY OF THE ARGUMENT

Gifford focuses almost primarily on his perceived issues with the future implementation of the measure. However, any problems in the future interpretation or implementation of the measure, or its constitutionality, are beyond the functions assigned to the Title Board and outside the purview of this Court. The sole issue for this Court is whether the measure contains a single and clear subject that is not misleading or confusing to voters. It does.

The intentional omission of certain implementing details and delegation of authority to the Colorado Public Utilities Commission ("PUC") to establish the fair share standard do not make #93 incomprehensible or misleading. This simply reflects the Proponents' intent and tracks similar initiatives that passed muster and went to the voters.

ARGUMENT

I. Initiative #93 is Comprehensible without Payee Language, Like Many Previous Initiatives.

Gifford claims the Title Board could not understand #93 because it does not detail the recipient or beneficiary of the fair share payment. This conclusion, however, is belied by the record. *See* Hearing #93 [March 31, 2022] 10:07:51-10:08:28, https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20220507/

72/13100 (last visited May 8, 2022). The Title Board understood consumers would be the beneficiaries of such payment. This was also clear to the Director of Research of the Legislative Council, in preparing #93's Fiscal Summary[1], which states:

> By requiring investor-owned utilities to pay a percentage of all rates from their profits, *gas and electric rates for consumers may decrease* if all other rate-setting factors are held constant, *which would increase available money for consumers to spend elsewhere in the economy and decrease profits retained by investor-owned utilities*. The amount of any savings will depend on decisions made by the Public Utilities Commission and how it accounts for the required percentage paid from profits as part of the broader rate setting process for investor-owned utilities.

https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2021-2022/93FiscalSummary.pdf (emphasis added) (last visited May 13, 2022).

This fiscal summary, along with a fair and impartial analysis of the initiative, will be included in the Blue Book, which also serves to express the intent of the initiative. *See Colorado Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d 674, 682 (Colo. App. 2010), aff'd, 2012 CO 12, 269 P.3d 1248 ("If the language of a citizen-initiated measure is ambiguous, 'a court may ascertain the intent of the voters by considering

[1] A fiscal impact statement ensures the "fiscal implications of a proposed measure are given consideration and the electorate is fully informed." *In the Matter of Title, Ballot Title And Submission Clause, & Summary Pertaining to Proposed Tobacco Tax Amend. 1994*, 872 P.2d 689, 697 (Colo. 1994).

other relevant materials such as the ballot title and submission clause and the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature.'").

Very similar measures omitting payee details successfully made it on the ballot in prior years. Amendment 78, arising as an exemption to TABOR (Colo. Const., Art. X, Sec. 20), went to the voters just last year:

> Shall there be an amendment to the Colorado Constitution and a change to the Colorado Revised Statutes concerning money that the state receives, and, in connection therewith, requiring all money received by the state, including money provided to the state for a particular purpose, known as custodial money, to be subject to appropriation by the general assembly after a public hearing; repealing the authority to disburse money from the state treasury by any other means; requiring all custodial money to be deposited into the newly created custodial funds transparency fund and the earnings on those deposits to be transferred to the general fund; and allowing the state to retain and spend all custodial money and earnings and revenue on that custodial money as a voter-approved revenue change?

Similar to Initiative #93, Amendment 78 did not tell the voter how the monies in the new custodial fund would be spent or whom it would benefit. Amendment 78 would have transferred the power to appropriate "custodial funds" from the state treasurer to the state legislature, to be deposited in and spent from a new, vaguely-defined fund.

Amendment 78 would have required the legislature to establish a new process for spending these monies or to hold a special session. This process was not defined

in the proposed amendment, and would have allowed the legislature to fund different, unnamed programs to implement its purpose. https://leg.colorado.gov/sites/default/files/images/2021_blue_book_english.pdf. (Last visited May 13, 2022.) According to the amendment's Fiscal Impact Statement, the "overall impact of the measure on state revenue [would have been] unknown and depend[ent] on how the measure [was] implemented." *Id.* Vagueness in Amendment 78's implementing language was intentional, and did not make the measure "incomprehensible."

By giving the legislature broad implementation authority, Amendment 78 would have taken the power from the state treasurer and the governor (where custodial money often is spent without public input or accessible public records) in order to create more transparency. The Blue Book stated that Amendment 78 would have "allow[ed] for public participation and [would have] provide[d] for transparency in how funds are spent" by requiring that all state spending be directly allocated by the state legislature and requiring money to be spent as the voters approved.

Initiative #93 mimics this transparency goal of broad discretion in implementation, requiring the PUC to implement a fair share payment from investor-

owned utilities to ratepayers through public rulemaking.[2] While the voters did not pass Amendment 78, comprehensibility issues identical to #93 did not prevent it from going to the voters.

Another example is the enactment of TABOR itself, which requires voter approval of tax increases. TABOR passed in 1992, with the following ballot language:

> Shall there be an amendment to the Colorado Constitution to require voter approval for certain state and local government tax revenue increases and debt; to restrict property, income, and other taxes; to limit the rate of increase in state and local government spending; to allow additional initiative and referendum elections; and to provide for the mailing of information to registered voters?

Notably absent from the ballot language is any detail on how tax revenue would be refunded to voters. This vagueness was intentional, allowing Colorado to use "any

[2] The PUC has created a byzantine system where only those executing a confidentiality agreement are granted party status and allowed to review all filings by a utility to support a rate decision, participate in discovery, and examine witnesses. Participants in the so-called "public proceedings" of rate cases are not allowed to inspect all relevant cost information or participate meaningfully beyond a five-minute statement. *See generally,* C.R.S. § 40-6-109 (limiting participants in non-adjudicatory proceedings to those that the commission "may allow to intervene" or to those who "shall have become parties to the proceeding"). Even courts cannot meaningfully review rate decisions. *See, e.g., Pub. Serv. Co. of Colorado v. Pub. Utilities Comm'n of State*, 26 P.3d 1198, 1205 (Colo. 2001) ("The judiciary must refrain from any semblance of rate setting in deference to the lawfully empowered authority, here the [Commission]." (quoting *CF & I Steel, L.P. v. Public Utils. Comm'n*, 949 P.2d 577, 585 (Colo. 1997)).

reasonable method" for refunds. Payment to taxpayers depends solely on the amount of refund obligation and the "required reimbursement."[3]

In both prior initiatives, the details of payment were intentionally omitted from the language of the title, yet these titles were not found to be incomprehensible for purposes of setting title. Gifford's argument is without merit.

Gifford's speculation about the payee's identity is pointless. He contends the only "logical" conclusion is that the payee is the investor-owned utility itself. However, this conclusion goes directly against the measure's Fiscal Summary, which says that the result of the measure should be a decrease in gas and electric rates for consumers, "if all other rate-setting factors are held constant", which would in turn "decrease profits retained by investor-owned utilities." https://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2021-2022/93FiscalSummary.pdf. (Last visited May 16, 2022.) Similar to TABOR, the amount of savings will depend on future decisions made by a rulemaking authority,

[3]Notably, the Colorado constitution "does not require use of any particular refund mechanism, but allows the General Assembly to select 'any reasonable method of refunds[…], including temporary tax credits or rate reductions.'" https://leg.colorado.gov/sites/default/files/r21-97_history_of_tabor_refund_mechanisms.pdf (Last visited May 16, 2022.) "Further, the constitution does not require that excess revenue be refunded proportionately 'when prior payments are impractical to identify or return.'" *Id.*

here, the PUC. Voters understood TABOR's benefits; they can understand how they will benefit under #93.

Gifford contends that "it defies logic that a seller of a product would pay a portion of the purchase price of a product it is selling to" consumers. Gifford Opening Brief, at 7. However, this is logical in the context of the highly-regulated utility industry. While investor-owned utilities may supply gas and electricity to consumers, they certainly do not pay the full price of these commodities. At the rehearing, Gifford admitted that consumers currently pay 100% of the rates. Rehearing, April 28, 2022, 1:08:20-34, https://csos.granicus.com/player/clip/316?view_id=1&redirect=true. (Last visited May 16, 2022.) Nearly all costs of utility companies are passed on to consumers, in private rate cases where the general public is not allowed to participate. The goal of this measure is to shed light on this process, and to hold investor-owned utilities accountable for some of the costs that they typically pass on to consumers.

In addition to payment of costs, utility companies get a guaranteed rate of return, which was close to 14% last year in the midst of COVID. *Id.* at 1:21:31-49. With this information in mind, a voter can understand that the investor-owned utilities would be required to "pay" a portion of the fees normally passed on to consumers.

Gifford's concern about the PUC's ability to require utility companies to bear their "fair share" while also ensuring utility companies receive the benefit of "just and reasonable rates" is also unwarranted based on the clear language of the measure. The measure states the utility companies' payment of their "fair share" of rates would come from their "profits," not from any payment they receive from customers for just and reasonable rates. The Proponents' use of the word "profit" in the measure was intentional, to ensure that payment was coming from the treasury fund, and not from the pool of money that ratepayers pay into. Rehearing, April 28, 2022, 1:16:06-21, https://csos.granicus.com/player/clip/316?view_id=1&redirect=true. (Last visited May 16, 2022.)

Ratemaking and refunds to consumers are nothing new to the PUC. The PUC's authority to act was acknowledged without incident in Amendment 37, which was passed by the voters in 2004. This Amendment, "Renewable Energy Requirement," resulted in an amendment to the Colorado revised statutes concerning renewable energy standards for large providers of retail electric service, which, among other things, "provid[ed] incentives for utilities to invest in renewable energy resources that provide net economic benefits to customers...." Amendment 37 gave the PUC rulemaking authority to "establish major aspects of the measure," to ensure

a net economic benefit to consumers. According to the Union of Concerned Scientists, Amendment 37 would result in millions of savings for the consumer, *see* https://www.ucsusa.org/resources/colorado-renewable-energy-standard-ballot-initiative (last visited May 14, 2022); however, the details of how those savings would manifest were left to the PUC to decide. Similarly, here, Initiative #93 seeks to have the PUC implement a fair share standard, to ensure that investor-owned utility companies are paying their fair share of rates (and not simply profiting from Colorado's aggressive green initiatives), and that consumers are seeing economic benefits from these green initiatives as well.

The concept of "fair" or "fair share" is not new to the PUC, despite Gifford's arguments to the contrary. The sole requirement for PUC ratemaking[4] is that the end result be "fair". *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 601, 64 S. Ct. 281, 287, 88 L. Ed. 333 (1944) ("'[F]air value' is the end product of the process

[4] Indeed, the first step in setting rates is to determine the "rate base," which represents the total investment in, or *fair* value of, the facilities of a utility employed in providing its service. 1 A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 139 (1969) (emphasis added).

of rate-making;" expressly renouncing valuation of rate levels in terms of 'fair value' in favor of determining whether a 'fair end result' was reached).[5]

Arriving at "'just and reasonable' rates involves a balancing of the investor and the consumer interests." Sean P. Madden, *Takings Clause Analysis of Utility Ratemaking Decisions: Measuring Hope's Investor Interest Factor*, 58 Fordham L. Rev. 427, 440 (1989). The United State Supreme Court has acknowledged that "investor and consumer interests may so collide as to warrant the rate-making body in concluding that a return on historical cost or prudent investment though fair to investors would be grossly unfair to the consumers," and that "[t]he possibility of that collision reinforces the view that the problem of rate-making is for the administrative experts not the courts…." *Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am.*, 315 U.S. 575, 608 (1942). Initiative #93, by requiring investor-owned utility companies to pay their "fair" share, and leaving it to the PUC to implement

[5] "Utilities generally have a statutory obligation to serve the public," which duty "includes providing continuous service to all customers on equal terms at fair rates." Sean P. Madden, *Takings Clause Analysis of Utility Ratemaking Decisions: Measuring Hope's Investor Interest Factor*, 58 Fordham L. Rev. 427, 445 (1989). The proposition that a utility company is only entitled to a "fair" return for providing utilities to the public is the root of the "just and reasonable" standard discussed by Gifford. *Id.* at 446 (1989) (citing See John N. Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits On Utility Rate Regulation*, 65 B.U.L. Rev. 65, 72 n.27 (1985)).

that standard, is not creating a new concept in rate-making, but rather referencing a familiar standard to ensure consumers are protected in the process.

In fact, the regulated utility industry already employs a "fair share" cost standard for customers who install distributed generation, to ensure they "continue to contribute, in a nondiscriminatory fashion, their fair share to their utility's renewable energy program fund or equivalent renewable energy support mechanism even if such contribution results in a charge that exceeds two percent of such customers' annual electric bills." C.R.S. § 40-2-124. With the implementation of this charge, the PUC is required to "revise or clarify existing rules to establish" the fair share standard in accordance with article 4 of title 24. *Id.*

There is no reason to believe that the PUC could not figure out how to apply a "fair share" standard to these same utility companies, within this current regulatory structure. *See*, *e.g.*, https://www.dora.state.co.us/pls/efi/EFI_Search_UI.Show_Decision?p_session_id=&p_dec=7125, Details of Decision R05-0546 (Public Service Company of Colorado required to remit to its ratepayers, paying customers $36,666,67 in interest resulting from Quality Service Plan).

The fact that payee information and the definition of "fair share" are not in the Titles reflects the true intent and meaning of the Initiative, and cannot be said to

make the measure incomprehensible, as Gifford suggests. *In the Matter of the Title, Ballot Title, and Submission Clause Approved February 2, 1994, Re: the Proposed Initiated Constitutional Amendment Concerning Limited Gaming In the City of Antonito (Limited Gaming IV), as Determined on Motion for Rehearing*, 873 P.2d 733, 741-42 (Colo. 1994) (superseded by statute on other grounds, as stated in *Hayes v. Ottke*, ¶15, 293 P.3d 551, 557 (Colo. 2013)).

As with Amendments 78 and 37 and the enactment of TABOR, voters can make an intelligent decision about whether to support Initiative #93, based on the language of the measure, its fiscal impact statement, and the supporting information in the Bluebook. C.R.S. § 1-40-106.5(1)(e)(II). Further detail need not be included to make it clear and comprehensible for title-setting purposes. To find otherwise would result in an unworkable slippery-slope, requiring proponents of future initiatives to provide ever more specific constraints upon subsequent rulemaking authorities in order to satisfy speculation about payees or methodology. The Court should affirm the Title Board's decision to set the Titles for Initiative #93.

II. The Titles Adequately Describe the Fair Share Requirement for Investor-owned Utilities.

Contrary to Gifford's contentions, the Titles for Initiative #93 are clear enough to understand what the measure proposes and how it will affect voters. In

fact, the language in Initiative #93 is clearer and more succinct in this regard than Amendments 78 and 37, both of which made it to the voters.

Gifford does not bring a single subject argument, and does not otherwise contend that the Titles for the measure hold more than one meaning. The voters are not being asked to pay anything, and the measure will not result in additional taxes to the voter. Based on the clear language, the voters get to decide if the utility companies pay their fair share of rates from their profits. The details of such benefit were appropriately omitted to allow the PUC to implement the fair share standard in line with its obligation to ensure just and reasonable rates. Thus, payee details are not a central feature of Initiative #93 and need not be included in the measure to make it clear for title-setting purposes.

Gifford also contends the Titles are flawed because they fail to inform the voters that there may be a substantial delay in implementation of the measure. He points out that, based on the measure's language, it is possible that fair share payments may never materialize if a utility company does not seek a rate change. At a minimum, no fair share payments would be required for at least twelve months after the effective date of the measure.

This speculation on the future application of the measure is no different than the speculation surrounding the future application of Amendment 78 and TABOR;

the overall impact of which were unknown when they were placed on the ballot, and dependent on how the measures were implemented. Indeed, the future application of TABOR was dependent solely on the amount of refund obligation for a particular year and the "required reimbursement," which could not be determined ahead of time. Similar to TABOR, it is possible (though unlikely), that a payment or refund to the voters may never materialize under #93. However, this detail did not prevent TABOR from going to the voters, and it should not prevent #93's submission, either.

The fact that the PUC is given twelve months to implement the measure is not unusual. It is common in administrative law that a rulemaking authority is given ramp-up time to be able to implement rules with their own resources. For example, in Amendment 37, the time frame for implementation of renewable energy standards extended out for over ten years.

The timing vagueness of these amendments did not prevent them from going to the voters and it should not block Initiative #93. The effective date and future application of the fair share standard are not central features of Initiative #93.

The Court "will generally defer to the Board's choice of language unless the titles set contain a material and significant omission, misstatement, or mis-presentation." *In re Title, Ballot Title, & Submission Clause for 2019-2020 #*315, 2020 CO 61, ¶ 27. Since Gifford has not provided plausible grounds for any such

concerns with Initiative #93, the Court should defer to the Title Board's discretion in setting the Titles for this initiative.

CONCLUSION

The Court should reject Gifford's challenges to both the Title Board's ability to set title, and the language of the Titles, and affirm the actions of the Title Board.

Respectfully submitted this 16th day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the **RESPONDENTS' ANSWER BRIEF** was sent this 16th day of May, 2022, by Colorado Courts E-Filing System to the following:

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