DATE FILED: August 7, 2023

COLORADO SUPREME COURT 2 East 14th Ave. Denver, CO 80203	
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 Initiative 2023-2024 #46 **Petitioners:** Timothy E. Foster and Steven Ward **v.** **Respondents:** Paul Cunlan and Patricia Nelson **and** **Title Board:** Theresa Conley, Jeremiah Barry, and Kurt Morrison	▲***COURT USE ONLY***▲
Attorneys for Petitioner Timothy E. Foster: Mark G. Grueskin, #14621 Nathan Bruggeman, #39621 Recht Kornfeld, P.C. 1600 Stout Street, Suite 1400 Denver, Colorado 80202 303-573-1900 (telephone) 303-446-9400 (facsimile) mark@rklawpc.com nate@rklawpc.com	*Case Number: 23SA161*

PETITIONER FOSTER'S ANSWER 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).

Choose one:

X It contains 5,641 words (5,512 words in the brief and 129 words in Attachment 1).

☐ It does not exceed 30 pages.

The brief complies with C.A.R. 28(k).

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.A.R. 32.

s/ Mark Grueskin
Mark Grueskin
Attorney for Petitioner Timothy E. Foster

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

> The word "fracking" comes to resemble the famous Rubin's vase optical illusion, where a single black-and-white image looks like a vase to one person, but another sees two faces in profile. Like a Rorschach test, different audiences see different things. The confused language surrounding fracking is a major reason for the deep distrust in which each side of the debate holds the other.[1]

In setting titles for Initiative #46, the Board used Proponents' jargon ("fracking") that voters will not understand to mean a very specifically defined oil and gas extraction process is unique in requiring, among other things, the use of water and chemicals. Given the many definitions cited by Proponents to support the common usage of "fracking," it is clear that the meaning of this word shapeshifts depending on the person who reads it. As hydraulic fracturing technologies vary substantially in how they are conducted and what materials they use, voters could easily vote to support or oppose Initiative #46 based on a fundamental misunderstanding of this initiative and its scope because of its title.

For instance, voters may vote "yes" for #46, believing they are supporting a total cessation of hydraulic fracturing, regardless of the technology used. Or they may vote "no," fearing this measure is more all-encompassing than its key definition

[1] Raimi, D., *The Fracking Debate: The Risks, Benefits, and Uncertainties of the Shale Revolution* 25 (Columbia University Press 2017).

requires it to be. In either event, this title can and likely will mislead voters about the initiative's actual breadth.

Only this Court can ensure that voters who read the title for #46 are not misled about the meaning of the measure's key term, as it is used in the title, or forced to make false choices, based on differing interpretations of that word. Put differently, only this Court can require the setting of a ballot title so voters are knowledgeable about two silhouettes rather than mistakenly conjuring the image of a vase.

SUMMARY OF ARGUMENT

Abortion and "fracking" don't have a lot in common. But as a matter of ballot title jurisprudence, they share the fact that initiatives that restrict them must be fairly stated for voters. That means including in the titles the new definition of key terms when a measure creates a new, controversial standard that can affect whether voters cast ballots knowledgeably. There is no dispute that "fracking" as defined in this initiative is new, and the controversy around its elements was firmly established by Proponents.

In a break with its past practice, the Board included in the title one reference to a provision that does not exist in the measure ("allowing permitted oil and gas operations that utilize fracking to continue"), another reference that is so vague as to make voters think that the fewer permits authorized in the future will also be

shortened in duration ("requiring the phase-out of new oil and gas operation permits that utilize fracking"), and a final reference that substantively and materially misstates which permits are to be affected ("oil and gas operations" vs. "oil and gas facilities" and "oil and gas locations") as well as the fact that such facilities and locations will be "prohibited" under the measure's terms.

The Court should direct the Board to correct these errors before voters are presented with the chance to be misled.

LEGAL ARGUMENT

I. The title is unclear because "fracking" is a defined term in Initiative #46, but the title does not notify voters about the new, controversial standard proposed.

The opening briefs of the Title Board and Proponents did not directly respond to Objector Foster's key argument: that the "fracking" definition in Initiative #46 is a new and controversial standard that must be reflected in the titles, consistent with this Court's precedent requiring titles to define key terms from an initiative. This issue was raised in the Motion for Rehearing, R. at 10, in comments of counsel to the Board, Rehearing Audio Recording[2] at 11:28-40; 1:54:55-55:55, and in the list of advisory issues in Foster's Petition for Review. Petition for Review at 3

2 https://csos.granicus.com/player/clip/393?view_id=1&redirect=true&h=7a1561966ccb1f8c25e167ea1638f7c

("Whether the Title Board erred by including the term 'fracking' in the titles, a term that is… defined in Initiative #46 but not in the titles even though it incorporates a new legal standard that would be significant to voters…").

The Title Board agreed that Objector Foster preserved all issues for appeal. Board Op.Br. at 6. Proponents did not contest preservation. *See* Proponents Op.Br. at 19-20.

In their Opening Briefs, the Title Board and Proponents argued "fracking" is defined by several dictionaries, has been used by this Court, and is used in the initiative itself. Board Op.Br. at 7-8; Proponents Op.Br. at 22-23. As such, both parties contend that voters fully understand what "fracking" is under Initiative #46.

A. The Title Board and Proponents confuse "common usage" and "common understanding."

The Title Board defends its title because "'[f]racking' is a commonly used term to describe the process of hydraulic fracturing in oil and gas development." Board Op.Br. at 7. Proponents contend "'fracking' is the term most commonly used by the general public," citing the Leonard Report they commissioned and presented to the Board. Proponents Op. Br. at 22. Both may be correct that "fracking" is becoming part of the common vernacular, but that is beside the point.

The question is not whether "fracking" gets used today. The question is whether there is *common understanding* of "fracking" as defined in Initiative #46.

Titles do not need to be specific about the meaning of a term in an initiative if it is already "within the **common understanding** of most voters." *In re Title, Ballot Title & Submission Clause Pertaining to "Governmental Business*," 875 P.2d 871, 877 (Colo. 1994) (emphasis added).

Mere recognition of a word, however, is not enough. Voters must know what it means, particularly where a measure's key word, as here, is subject to inconsistent interpretations. Definitions reflecting everyday usage are pertinent only if a term has a clear "meaning [that] comports with **the common dictionary definition** of" that word. *In re Title, Ballot Title & Submission Clause for Initiative 1999-2000 #215*, 3 P.3d 11, 15 (Colo. 2000) (emphasis added); *see In re Title, Ballot Title & Submission Clause Pertaining to "Taxation III*," 832 P.2d 937, 941 (Colo. 1992) (term was "commonly defined" and therefore title was not misleading).

Neither the Board nor Proponents contend there is any common definition of "fracking." They did not identify one in their Opening Briefs. Nor did they point to any dictionary definition that reflects the meaning of "fracking" under Initiative #46. Initiative #46's proposed definition is materially different than definitions that Proponents referenced before the Board..[3] Where a word is recognizable but it is

[3] *See* R. at 8-10; Foster Op.Br. at 17, n. 17-22 and 30-31. In drafting this Answer Brief, the undersigned discovered that Macmillan Dictionary has recently been taken

defined by an initiative to create a standard that is new[4] and controversial, the title must inform voters so they know if the measure warrants their support or opposition. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

The Board and Proponents may assert that this definition is not notable enough to warrant inclusion in the title. But it is the hub of the wheel that is Initiative #46. Moreover, there is no dispute this word has never been defined by Colorado law and Initiative #46's definition changes the tests for what constitutes hydraulic fracturing. Finally, Proponents documented the controversy associated with "fracking" as their measure defines it. *See* Foster's Op.Br. at 24-26.

Thus, the ballot title's use of "fracking" will not generate common understanding about the type of "fracking" will be ended due to Initiative #46. Because this is a new, controversial standard, the title must include this definition.

---

down as an online resource. That definition, referenced in fn. 20 in the Foster Opening Brief, was previously saved by the undersigned. *See* Attachment 1 hereto.

[4] As early as their Review and Comment hearing before legislative staff, Proponents knew that using "fracking" in a statute was unprecedented. According to staff, "'Hydraulic fracturing' is the preferred term in statute while 'fracking' does not appear anywhere in existing Colorado statutes." April 28, 2023 Review and Comment Memorandum on 2023-2024 #46 at 2 (question 2); http://leg.colorado.gov/sites/default/files/initiatives/2023-2024%2520%252346.002.pdf (last viewed August 7, 2023).

B. "Fracking" is so much broader than the definition in the initiative text that its use in the title undermines voter comprehension of the proposed changes to statute.

Proponents contend that "usage of the term 'fracking' adds to voter understanding of this measure." Proponents' Op.Br. at 22. Without clarification, this term will lead voters to think that *all* forms of hydraulic fracturing will be denied state permits after 2030. Therefore, the current wording of this title does not add to voter understanding; it substantively misleads the reader.

When Initiative #46 was presented to the Offices of Legislative Legal Services and Legislative Council for a review and comment hearing, legislative staff made it clear that "fracking" was unprecedented terminology in state law. According to staff, "'Hydraulic fracturing' is the preferred term in statute while 'fracking' does not appear anywhere in existing Colorado statutes."[5]

Proponents responded to staff's request to use "hydraulic fracturing" rather than "fracking,"[6] "Yeah, we're aware of that, but the average person doesn't know

[5] April 28, 2023 Review and Comment Memorandum on 2023-2024 #46 at 2 (question 2); http://leg.colorado.gov/sites/default/files/initiatives/2023-2024%2520%252346.002.pdf (last viewed August 7, 2023).

[6] May 11, 2023 Review and Comment Hearing on Initiative 2023-2024 #46 (11:05:14-28) https://sg001-harmony.sliq.net/00327/Harmony/en/PowerBrowser/PowerBrowserV2/20230501/72/14601#info_

– maybe not know – what 'hydraulic fracturing' is, and most people do know what 'fracking' is. So we'd like it to be in the petition so that when people are reading the petition, they know what it's about."[7]

Here, Proponents admit the title should stand on its own, capable of laying out for voters the changes in law the measure aims to address. It should be obvious "so that when people are reading the petition, they know what it's about." To achieve that end, a title must include language that is clear and meaningful. But the current title does not meet Proponents' own test.

These concerns reflect the fundamental role played by a ballot title. The title must be worded to assure "that in the haste of an election the voter will not be misled into voting for or against a proposition by reason of the words employed." *Dye v. Baker*, 354 P.2d 498, 500 (1960). It is an important device to allow voters, "whether

---

[7] It is worth noting that, in a previous appeal to this Court, counsel took a very different position about "hydraulic fracturing." Not only was "hydraulic fracturing" defined by government agencies and industry sources, "it is the term generally recognized by the public as representing the operation to which it refers." Respondents/Cross-Petitioners' Answer Brief, *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #85, #86, #87, and #88* (Case No. 14SA116) at 13-14, available at . https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/initiatives/2013-14/14SA106/10%20-%20Answer%20Brief%20-%20Respondents-Cross%20Petitioners.pdf.

familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *Parental Notification of Abortions for Minors, supra,* 794 P.2d at 242.

Based on this title, voters will think that adopting Initiative #46 means an end to permitting of all hydraulic fracturing after 2030. That conclusion will be wrong.

For example, Initiative #46 will not affect hydraulic fracturing that uses carbon dioxide rather than water.[8] This technology has been around since the early 1960's and is currently used in oil and gas operations in Canada and the United States.[9]

The same is true for a number of other waterless fracturing alternatives. Emulsion-based fluids can "completely eliminate the use of water."[10] Using a foam as fracturing fluid can also mean no water is consumed in fracturing; such a foam

---

[8] Alternatives to water-based fracking and the specific process that uses carbon dioxide were both addressed in Foster's Opening Brief as well as the Motion for Rehearing. *See* Foster Op.Br. at 28; R. at 10 (citing https://pubs.acs.org/doi/pdf/10.1021/acsomega.1c01059 at 1 ("CO2 is used as the fracturing fluid to replace water").

[9] An additional study was referenced in the Motion for Rehearing. R. at 10 (https://publications.jrc.ec.europa.eu/repository/handle/JRC103643 at 9, 10 ("Liquid CO2 as fracturing fluid is already commercially used in many unconventional applications… in Canada and the US")).

[10] *Id.* at 8.

can be acid-based, alcohol-based, or CO2-based.[11] Using nonflammable propane to facilitate fracturing means "no water" and "no chemical additives" are used.[12]

This Court repeatedly has found that misstatements about an initiative's expanse violate the clear title requirement. In *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the Town of Idaho Springs,* 830 P.2d 963, 970 (Colo. 1992), for example, the Court held that titles were misleading because the measure was limited in its reach (applying only to four named cities), but the titles portrayed the initiative's reach to be "statewide" in scope. Similarly, in *In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted April 17, 1996*, 970 P.2d 798 (Colo. 1996), an initiative proposed an enhanced vehicle emissions program. The ballot title was misleading because it failed to inform voters that the new program only applied in six counties of the state. "[T]here is a significant risk that voters statewide will misperceive the scope of the proposed Initiative." *Id*. at 803.

Here, without disclosing the elements of the new "fracking" definition, this title poses the danger that voters "will misperceive the scope" of Initiative #46. They will have every reason to think that any new site that would use any hydraulic

---

[11] *Id*. at 3-7.

[12] *Id.* at 5.

fracturing technology will not be permitted after 2030. In fact, only those sites that use water, chemicals, and proppants will be so restricted, and alternative hydraulic fracturing technologies will still be available for use throughout Colorado beyond December 31, 2030.

A ballot title that creates unwarranted voter expectations is misleading. Here, the title's overstatement stems from reliance on proponents' preferred (but inaccurate) jargon. Because this title overpromises what the enacted law can actually achieve, it should be corrected before Initiative #46 proceeds to the petitioning or to the election itself.

C. Titles are set in light of accepted rules for statutory construction, and those rules require a standard other than "common usage" for a technical or particular term such as "fracking."

Proponents state that this Court regularly looks to rules of statutory construction to determine the clarity and legal sufficiency of ballot titles. Proponents' Op.Br. at 8. This statement is correct, but the rules of statutory construction argue for making the title clear about "fracking" as a term that has a technical or particular meaning due to the proposed statutory definition.

"[W]e employ the usual rules of statutory construction." *In re Title, Ballot Title & Submission Clause, and Summary for Initiative 1997-1998 #30*, 959 P.2d 822, 825 (Colo. 1998). Those rules require the reading of words "in context" and

construing terms "according to the rules of grammar and common usage." *Id*. (citing C.R.S. § 2-4-101). However, "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." *Id*. Thus, common usage is a relevant yardstick *except* where a term is given a specialized meaning by the express language of the statute.

These rules of statutory construction apply in determining if the title clearly and fairly informs voters about the text of the measure. *See, e.g., In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶31, 328 P.3d 155, 163. They also apply when the Court evaluates single subject compliance. *1997-1998 #30, supra*, 959 P.2d at 825.

Words that have "a technical or particular meaning" need not be uncommon or even terms that are outside the grasp of most voters. For instance, applying the standard regarding words with a technical or particular meaning, "landowner" was held to require construction according to the statutory definition, meaning that a "landowner" need not be a person who actually owns land. *See Pierson v. Black Canyon Aggregates, Inc*., 48 P.3d 1215, 1219-21 (Colo. 2002) (independent contractor who did not own the land was nonetheless a "landowner" because it controlled land for a period of time). Thus, words used in everyday conversation can be terms that have a highly particularized meaning under a statute.

If the premises liability statute at issue in *Pierson* had been proposed as an initiative, that ballot title would have needed to reflect the new statutory definition of "landowner." Otherwise, voters would have had no reason to think persons who had no ownership interest in the land were "landowners" under such a measure just because they had legal responsibility for the real property's condition or the activities conducted thereon. In other words, voters would not know that the standard to be adopted was different from the term they were used to hearing, reading, or speaking.

In the same way, when a proposed initiative requiring parental notification of minors' abortion procedures defined "abortion" in a way that was inconsistent with prevailing thought and legal interpretation, "abortion" needed to be defined in the ballot title. *Parental Notification of Abortions for Minors, supra*, 794 P.2d at 242. The fact that word was recognizable to voters was irrelevant. The proposed initiative defined it in a particular way that was at odds with the meaning voters otherwise associated with it.

Here, voters might have heard, read, or said the word, "fracking," but all of the record evidence (undisputed, given that it was introduced by Proponents) points to the fact voters would not know its specialized meaning under Initiative #46. And the current ballot title provides no information to guide them provide a basis for understanding so they can vote knowledgably.

With "fracking," the problem of voter confusion is compounded because the definition of "fracking" in Initiative #46 contains certain elements (the use of water and the use of chemicals, for example) that are not generally in dictionary definitions that the Board and Proponents insist will give this term ready understanding.[13] The fact that there is no common meaning of this term should be a warning sign that, without more clarity in the title itself about what the meaning of "fracking," the Board's current title will cause voter confusion.

D. The definition of "fracking" is not a mere detail or aspect of implementation of Initiative #46.

Proponents argue that the definition of "fracking" is just one of the measure's details, important only as it relates to implementation or enforcement of this measure. Proponents' Op.Br. at 9. That is not the case. What constitutes "fracking" is not a minor component or implementation detail of the measure; it determines the substantive scope of the initiative. To argue that voters do not need to know the

[13] The only reference that exists to "water" and "chemicals" from any of these sources is found in the Collins Dictionary, but it is not found in the first, general definition or in the second, British English definition. It is found in the third category of definitions under "in the Oil and Gas Industry" in the second of four alternative definitions, referencing "large amounts of water, usually with sand and lubricant chemicals added to it." Available at https://www.collinsdictionary.com/us/dictionary/english/fracking#:~:text=Fracking%20involves%20pumping%20large%20amounts,the%20rock%20and%20releases%20gas (last viewed Aug. 7, 2023).

substantive scope of a measure is to argue, in effect, that voters do not know what a measure does.

To contend that translating vague jargon into meaningful language for voters is a mere detail or implementation aspect is to ignore the core function of a ballot title. The title must "contain sufficient information to enable voters to **determine intelligently** whether to support or oppose such a proposal." *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24, ¶33, 369 P.3d 565, 570 (emphasis added). A title is legally inadequate where "it is **so general** that it does not contain sufficient information to enable voters to determine intelligently whether to support or oppose the initiative." *Id.* at ¶34 (emphasis added).

Here, this title does not identify for voters what is to be prohibited by this proposal other than by using a word that has no common meaning. The Board failed to adopt a title that succinctly explains what process this measure covers. It could have used a few words from the proposed "fracking" definition to provide this context. Objector Foster proposed a means of amending the title to do this.[14] Using

[14] R. at 10. The Board declined to use this wording.

> Shall there be a change to the Colorado Revised Statutes concerning discontinuing by December 31, 2030 the issuance of new oil and gas operation permits that utilize ~~fracking~~ an oil and gas extraction process in which fractures in rocks below the earth's surface are opened and widened by injecting, at high pressure, water, chemicals,

undefined slang produces a title that is "so general" as to be uninformative and even misleading to voters.

The information that allows voters to know what they are authorizing or prohibiting is not a mere detail. It is much more than an issue of implementing Initiative #46. It goes to the central premise of this measure. As such, the Board must revisit and correct a key gap left in the wording of this title.

> E. The text of Initiative #46 incorporates a slang term, subject to conflicting interpretations, but that does not justify using that misleading term in the titles.

According to the Title Board, "the measure itself uses the word 'fracking' to describe the object of its regulation [and is] how #46 refers to what is being regulated." Board Op.Br. at 8. The Board cites this Court's decision in *In re Title, Ballot Title and Submission Clause for 2013-2014 #85*, 2014 CO 62, ¶32, 328 P.3d 138, 146, where the use of "statewide setback" was "an accurate description of what the Proposed Initiatives would do."

The Court explained in *#85* why the use of a term from the initiative text was acceptable. "This phrase neither evokes emotion nor engenders voter confusion." *Id*. The same cannot be said of "fracking" which will engender voter confusion.

> and materials intended to prevent fractures from closing ~~by December 31, 2030~~, and, in connection therewith,….

The significant variation in the dictionary definitions upon which Proponents rely documents the voter confusion associated with the word, "fracking." Further, as the Board knew, Professor Patricia Limerick, a noted policy analyst at the University of Colorado, identified the confusion that is inherent to this term. *See* Foster Op.Br. at 11-13. Her observation that "fracking" has inconsistent meanings, creating "confusion" that can "derail conversations and stall communication," *id*. at 12, is borne out by other academics who have studied this issue.

> [T]he concept [of fracking] is still being defined in the public imagination, and both pro- and antifracking advocates have sought to define the word to suit their purposes. As a result, it can sometimes be confusing, even for experts, to determine what someone means when they use the word "fracking."[15]

These neutral policy observers make an important point: even familiar terminology isn't necessarily clear wording.

Rather than defer to the jargon that proponents put in their measure, the Court should, and undoubtedly will, independently evaluate the word in question and the record before the Board to determine if that language will confuse voters about the measure and its reach.

[15] Raimi, D., *The Fracking Debate, supra,* at 23.

II. The titles incorrectly state that Initiative #46 allows for continuation of existing oil and gas operations, even though the measure contains no such provision.

The Title Board editorialized about Initiative #46 in the titles. After summarizing new limits on the granting of licenses, its title sought to assure voters that the measure will "allow[] permitted oil and gas operations that utilize fracking to continue." In making that assertion, the Board went too far.

The Board and Proponents defend the title's reference to a provision of law that does not exist in Initiative #46. The three arguments they advance in support of that component of the title are addressed individually below.

First, the Board states that Initiative #46 "does provide for the continuation of existing oil and gas operations" because it applies only to the cessation of granting new oil and gas permits that use hydraulic fracturing. Board Op.Br. at 9. As such, the Board says, "It necessarily follows that the measure will have no effect on existing operations." *Id*. In other words, because Initiative #46 is about new permitting, the Board maintains this measure authorizes continued operations under existing permits that are not addressed by #46.

The Board's determination of what "necessarily follows" was an interpretative undertaking that goes beyond its statutory authority. "[A] question of interpretation… is beyond the scope of the Title Board's duties when setting a title."

2013-2014 #90, supra, 2014 CO 63, ¶34, 328 P.3d at 164 (holding the Board was correct not to interpret "ability to enact limits" as equivalent of "ability to prohibit" and to reflect the same in the titles). This excess violates a basic tenet of title setting: "neither we nor the Board may go beyond ascertaining the intent of the initiative's drafters so as to interpret the meaning of the language proposed or to suggest how it will be applied if adopted by the electorate." *In re Proposed Constitutional Amendment under Designation "Pregnancy"*, 757 P.2d 132, 134-35 (Colo. 1988). Opening this door will require titles to summarize how measures interplay with other laws, a task neither the Board nor the Court should assume.

Second, the Board argues that this clause is "a clarification of the measure's scope" without which "a voter may be uncertain as to whether the measure would ban all fracking." Board Op.Br. at 9. The single subject statement in the title is "concerning **discontinuing the issuance of new** oil and gas operation **permits** that utilize fracking by December 31, 2030." R. at 3 (emphasis added). Voters, reading the words about restrictions on "new… permits" would not read into that phrase a "ban [of] all fracking."

The only phrase in the title that implies an end to hydraulic fracturing states the measure requires "the phase-out of new oil and gas operation permits that utilize fracking." Objector Foster specifically challenged this wording as being so vague

that voters will think #46 addresses limits on the *duration* rather than the *granting* of permits. Foster Op.Br. at 37-38; *see infra* at 20-21. If the Board created voter confusion in one phrase of the title, that is the language that needs to be changed. If it didn't, then "allowing permitted oil and gas operations that utilize fracking to continue" is unnecessary to assure voters that the measure's stated purpose is not to ban that practice and thus misleading.

Third, Proponents argue the phrase in question is "a way to educate voters about provisions of the measure." Proponents' Op.Br. at 24-25. Proponents do not identify any provision of the measure that provides for continuance of existing operations about which voters are to be educated. Nor could they. Such a provision does not exist in Initiative #46.

These arguments do not justify the Board's departure from its obligation to avoid projecting what could happen regarding other laws. Yet, that is exactly what the Board did here to portray a regulatory condition that was not reflected in the language of the initiative itself. The Court should correct the Board's misstep.

III. The titles are misleading by referring to a "phase-out of new… permits," because Initiative #46 only phases out the granting of permits, not the duration of permits themselves.

The title states that new permits will phase-out. But the terms of new permits are not artificially shortened by Initiative #46. It is the *granting* of the new permits

that will change, not their duration. This vague description will confuse voters. In analyzing this statement in the title, "[t]he pertinent question is whether the general understanding of the effect of a 'yes' or 'no' vote will be unclear from reading the title." *In re Title, Ballot Title, Submission Clause, & Summary Pertaining to a Proposed Initiative on "Obscenity,"* 877 P.2d 848 (Colo. 1994), citing C.R.S. § 1-40-106(3)(b).

This title phrasing will confuse voters given the title's representation that Initiative #46 achieves two goals. First, it "discontinu[es] the issuance of new oil and gas operation permits" as of December 31, 2030. R. at 3. And second, it "require[es] the phase-out of new oil and gas exploration permits." *Id.* Voters will logically link the discontinuance of "new permits" with the phase-out of those same "new permits," concluding that any new permits that are granted will be of a limited duration. This isn't what the measure does, and it is unreasonable to think that voters will view the changes for "new permits" separately.

The Board argues the "phase-out" phrasing is accurate because there will be "a reduction in permits each year." Board Op.Br. at 4. If the title made that statement, it would be accurate. But the title used vague language about a phase-out of new permits, and, as a result, voters' understanding about the effect of their vote on this measure "will be unclear from reading the title." *Obscenity, supra*, 877 P.2d at 850.

As noted above, reading the related references in the title together, it is difficult to avoid this conclusion. The Court should direct the Board to correct this error.

IV. The title should state – as Initiative #46 does multiple times – that new oil and gas facilities and locations will be "prohibited."

The Board and Proponents argue the title, which addresses ending permitting of "oil and gas operations," did not need to refer to oil and gas "facilities" and "locations." Board Op.Br. at 12; Proponents' Op.Br. at 27.

Neither party disputes, however, that the measure's prohibitions address permitting of new oil and gas "facilities" and "locations" rather than "operations." *See, e.g,* Proposed section 29-20-104(1)(h)(II) (local governments cannot authorize "oil and gas facilities and oil and gas locations that are prohibited by section 34-60-106(20.5)"). Each of these three terms—"facilities," "locations," and "operations"—is defined separately and differently. C.R.S. § 34-60-103(6.2), (6.4), (6.5). These three distinct definitions were identified in the Motion for Rehearing and discussed in the Opening Brief. R. at 12 ("the measure is specific that it applies to 'oil and gas facilities' and 'oil and gas locations' which have specific definitions that are different than 'oil and gas operations.' Compare C.R.S. § 34-60-103(6.2), (6.4), and (6.5)"); Foster Op.Br. at 41-42.

As such, the Board directed voters to refer to the wrong defined term to determine the expanse of this initiative. This type of misstatement is reversible error.

For example, where titles directed voters to the wrong categories of judges affected by the measure "due to a contradiction between the titles and the text of the Initiative," the title was required to be corrected. *In the Matter of the Title, Ballot Title, Submission Clause, and Summary for 1999-2000 #104*, 987 P.2d 259 (Colo. 1996). That same rule must apply here.

Neither the Board nor Proponents address the Board's failure to use "prohibit" to refer to the change in permitting authority. The text of Initiative #46 makes repeated references to the fact that this new law will "prohibit" certain oil and gas locations and facilities. *See* Foster Op.Br. at 39-40. The Motion for Rehearing clearly raised this issue. R. at 12 ("The title is couched as a discontinuation of permitting… But the measure itself refers to the legal changes as a prohibition…. The titles should be specific as to the measure's undisputed 'prohibition' on permitting of oil and gas 'facilities' and 'locations'"). And the parties were on notice that this issue was to be raised on appeal. Foster Petition for Review at 4 (listing in advisory list of issues, "Whether the Title Board erred by setting misleading titles by failing to mention Initiative #46's express, twice-stated prohibition of" new oil and gas locations and facilities).

The Board and Proponents are likely to argue that "discontinuing" permitting is almost as accurate as prohibiting these facilities. But the Board's Opening Brief

summarized this proposed change in law, but it did not use "discontinuing." Instead, it admitted that Initiative #46 works as a future prohibition. "The portion of the measure concerning 'facilities' and 'locations' follows naturally from that **prohibition**…. [T]he title reasonably focuses on the measure's **prohibition** on future fracking permits." Board Op.Br. at 12-13 (emphasis added).

Moreover, as Foster raised in the Opening Brief, Foster Op.Br. at 40-41, and before the Title Board, Rehearing Audio Recording at 1:55:58-57:47, this Court was clear that a lesser step than discontinuing permitting – there, a moratorium – was actually a prohibition. *City of Fort Collins v. Colo. Oil and Gas Ass'n*, 2016 CO 28, ¶¶35, 37, 369 P.3d 586. In Initiative #46's title, voters deserve this same clarity.

The Board should correct the title's substantive, material misstatements about what this measure actually changes.

CONCLUSION

This title will mislead voters. It doesn't need to. The Court should ensure that a measure as controversial as this one is fairly framed for the electorate.

Respectfully submitted this 7th day of August, 2023.

s/ Mark G. Grueskin
Mark G. Grueskin, #14621
Nathan Bruggeman, #39621
RECHT KORNFELD, P.C.
1600 Stout Street, Suite 1400
Denver, CO 80202
Phone: 303-573-1900
Facsimile: 303-446-9400
mark@rklawpc.com
nate@rklawpc.com
Attorneys for Petitioner Timothy E. Foster

CERTIFICATE OF SERVICE

I, Erin Mohr, hereby affirm that a true and accurate copy of **PETITIONER FOSTER'S ANSWER BRIEF** was sent electronically via Colorado Courts E-Filing this day, August 7, 2023, to the following:

Counsel for the Title Board:
Michael Kotlarczyk
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203

Counsel for Proponents:
Martha Tierney
Tierney Lawrence Stiles LLC
225 E. 16th Avenue, Suite 350
Denver, Colorado 80203

Counsel for Objector Steven Ward:
Suzanne M. Taheri, #23411
West Group Law & Policy
6501 E. Belleview Ave, Suite 375
Englewood, CO 80111

/s Erin Mohr

fracking DEFINITIONS AND SYNONYMS

NOUN UNCOUNTABLE

US /ˈfrækɪŋ/

Or **hydrofracking**

US /ˈhaɪdroʊfrækɪŋ/

DEFINITIONS1

1. 1

a method of mining in which cracks are created in a type of rock called shale in order to obtain gas, oil, or other substances that are inside it

Fracking was the likely cause of some small earth tremors that happened during shale gas drilling.

Synonyms and related words

+

FEATURED AS A BUZZWORD!

The term **fracking** is based on the word *fracture*, which first occurred as a verb in the early seventeenth century and relates to Latin *fractus*, participle of verb *frangere* meaning ‘to break’. The activity noun **fracking** describes the process but there’s also some evidence for a transitive verb **frack**, usually appearing in the passive form or as a participle adjective **fracked**.