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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2021-2022) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #47 **Petitioners:** Steven Ward and Timothy E. Foster, **v.** **Respondents**: Paul Culnan and Patricia Nelson, **and** **Title Board**: Theresa Conley, Kurt Morrison, and Jerry Barry.	▲ **COURT USE ONLY** ▲ Case No. 2023SA162
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THE TITLE BOARD'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, I certify that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 1,986 words.

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.

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Petitioners' opening briefs center around a common theme: fracking is a complicated technology and a prohibition on future fracking permits could have far-reaching consequences for Colorado. But this doesn't render it an inappropriate subject for a citizen's initiative, or one incapable of having a clear title set. Proposed initiative 2023-2024 #47 is a short, easily understood measure that concerns one subject: prohibiting future fracking permits. The title clearly expresses this subject and should be affirmed.

I. Foster's arguments do not merit reversing the Title Board.

A. The Board did not err by using the word "fracking" in the title.

Foster devotes most of his brief to the title's use of the word "fracking." Foster and Ward agree that the title should not use the word "fracking." But their reasons why are vastly different and show why the Board's use of the word was appropriate.

Ward argues that "fracking" is a catchphrase. *See* Ward Opening Br. 15. Foster argues that "fracking" is jargon. *See* Foster Opening Br.

13. These can't both be true. A catchphrase is language that "appeal[s] to emotion" and "trigger[s] a favorable response to the proposal based not on its content but on its wording." *In re Title, Ballot Title, & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 26 (quotations omitted). Jargon, by contrast, is "technical terminology" that is often "obscure" and "confused unintelligible language." *See* "Jargon," Merriam-Webster's, https://www.merriam-webster.com/dictionary/jargon.

So which is it? Is "fracking" so emotionally fraught that it constitutes a catchphrase, as Ward argues? Or is it so technical and obscure that its meaning cannot be understood by non-specialists, as Foster argues? Or maybe it's "slang," as Foster argues at other points? *See* Foster Opening Br. 14.

In fact, it's none of these. As this court has recognized, "fracking" is the common way of referring to "hydraulic fracturing." *See City of Longmont v. Colo. Oil & Gas Ass'n*, 2016 CO 29, ¶ 1 ("Hydraulic fracturing, commonly known as fracking, is a process used to stimulate

oil and gas production from an existing well."). Foster argues that there is no settled definition of fracking, noting variety among dictionaries and the measure itself as to whether water, sand, or other liquids are injected. Foster Opening Br. 18. But this focus on specifics ignores the commonalities among fracking definitions—it is a method of extracting oil and gas by injecting fluid into rock. The lack of uniformity over what precise liquids are injected, or whether sand is also injected, are immaterial to voters' understanding of fracking.

Foster asks this Court to adopt a new test for titles: when a measure adopts a "new legal standard," and that new standard is "controversial," the standard must be expressly stated in the title. Foster Opening Br. 23. Such a test would be unworkable. Not only does it invite speculation as to what subjects are "controversial," but every change in the law proposed by initiative adopts a new legal standard with respect to the subject covered in the initiative. The question for the Board, and this Court, is always whether the title adequately describes the measure's central features, not whether it articulates all aspects of

the new "legal standard." As the Court has recognized, "[t]he Board is required to summarize the central features of a proposed initiative fairly, but it need not explain the meaning or potential effects of the proposed initiative on the current statutory scheme." *In re Title, Ballot Title, & Submission Clause for 2019-2020 #315*, 2020 CO 61, ¶ 26 (quotations omitted).

Foster purports to find support for his proposed test in *Matter of Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1990), but he misreads that case. The title there was deficient because it failed to inform voters that, in addition to requiring a waiting period before performing an abortion, it was also defining abortion to mean any termination of a pregnancy after fertilization. *Id.* at 242. Given the centrality of the question of when life begins to the abortion debate and the initiative's proposal to answer that question, that omission meant the titles did not "fully inform the signors of the initiative petition and the persons voting on the initiative." *Id.* Whether the injectant in fracking includes sand, water, or chemicals does not

have the same significance to the fracking debate such that the materials included in the fracking fluid could be considered a central feature of the measure.

Finally, Foster argues that the Board should have used the statutory definition of "fracking" in the title instead of the word "fracking." This argument suffers several flaws. First, it seeks to replace one word with 34 words, contrary to the Board's statutory directive to keep ballot titles "brief." § 1-40-106(3)(b). Second, despite Foster's professed concern about the use of jargon in the title, the statutory definition—referring to an "oil and gas extraction process in which fractures in rocks below the earth's surface are opened and widened by injecting proppants, water, and chemicals at high pressure," Record, p 4—uses much more specialized language than the current title and is not clearer to voters. Third, even if including the whole definition would have made for a better title, this Court does not consider whether the Board set the best possible title. To the contrary, the Board is "given discretion in resolving interrelated problems of

length, complexity, and clarity." *In re 2019-2020 #315*, 2020 CO 61, ¶ 26. The fundamental question is whether voters will understand the impact of a yes or a no vote. Here, by using the commonly understood word "fracking," voters will be able to understand the measure on which they are voting. The title satisfies the clear title standard.

B. The title's clarification that the measure will allow "permitted" fracking operations to continue is permissible.

Foster objects that the title states the measure will allow permitted oil and gas operations that utilize fracking to continue, even though the measure does not expressly say that. But as the Board argued in its opening brief, it is allowed to go beyond the language used in the initiative when explaining the scope of what the initiative does. *See In re Title, Ballot Title, & Submission Clause Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916, 921 (Colo. 1982) (even when "the specific wording [in the title] is not found in the text of the proposed statute[,] that does not preclude the Board from adopting language which explains to the signers of a petition and the voter how

the initiative fits in the context of existing law"). The Board identified a potential source of voter confusion—does the measure ban existing fracking operations?—and included language to remove that confusion. This was a prudent choice and well within the Board's discretion.

Foster incorrectly cites *In re Title, Ballot Title, & Submission Clause for 1999-2000 #255*, 4 P.3d 485 (Colo. 2000), to support his argument that the Board erred by including this language. All that case held was that the Board was "not *required* to explain the relationship between the Initiative and other statutes," not that it was barred from doing so. *Id.* at 498-99 (emphasis added). The Board's discretion in setting a title means it can choose to include language that it determines will contribute to voter understanding, even if that language is not required. The Board appropriately did so here.

C. The Board stands on its prior briefing for the remaining issues identified by Foster.

As to Foster's remaining two issues—the use of the word "phaseout" and the title's omission of #47's prohibition on new oil and gas facilities and locations—the Title Board stands on its prior briefing.

See Title Board Opening Br. 10-13. The Board thus asks the Court to affirm the title for the reasons stated in its opening brief.

II. Ward's arguments, to the extent they are fairly presented, do not merit reversing the Title Board.

As noted in the Title Board's opening brief, Ward's petition for review did not advise which of the numerous issues raised in Ward's motion for rehearing would be argued to this Court. *Id.* at 13, 16. The Board objects to this disclosure, as it puts the Respondents here in the position of having to guess as to what arguments will be made. The Proponents' opening brief, for example, responds to five single subject arguments, even though Ward's opening brief only advances three. Such an approach defeats the purpose of simultaneous briefing.

The Board nevertheless responds to these arguments below.

A. Ward's single subject arguments fail.

Ward's opening brief identifies three single subject objections, none of which merit reversal of the title.

First, Ward argues that the measure's definition of "fracking" and "hydraulic fracturing" creates a second subject because it will apply

beyond the scope of #47 itself. But no other statute in Colorado uses the term "fracking." And only three others use the term "hydraulic fracturing." Two statutes use the term in the context of a more specific definition (for "hydraulic fracturing treatment" and "hydraulic fracturing fluid" (§ 34-60-132) and for "hydraulic fracturing fluid" (§ 25-15-603)), and the third merely authorizes the Colorado Oil and Gas Conservation Commission to promulgate safety and environmental rules concerning the practice (§ 34-60-106). Ward has thus not shown that #47 will have far-reaching implications on Colorado statutes.

Ward nevertheless argues that several rules use the term "hydraulic fracturing," but he has not shown that #47's definition would change anything about how those rules operate. Even if it did, the Commission could adopt new rules if the measure somehow changed the intended scope or purpose of those rules. Nor is it appropriate for the Board or this Court to "speculate on the future effects the [i]nitiative may have if it is adopted." *In re Title, Ballot Title, & Submission Clause for 1999-2000 #256*, 12 P.3d 246, 257 (Colo. 2000). Instead, the Court

only asks whether the measure's inclusion of a definition of "fracking" is "necessarily and properly connected" to an initiative limiting future fracking. *In re Title, Ballot Title, & Submission Clause for 2013-2014 #76*, 2014 CO 52, ¶ 8. It plainly is.

Second, Ward argues that #47's requirement that the Commission adopt or repeal rules to give effect to the measure creates a second subject. Not so. These are implementation details that specify *how* the measure is to be implemented without affecting *what* it does. "[M]ere implementation details directly tied to the initiative's single subject will not, in and of themselves, constitute a separate subject." *In re Title Ballot Title, & Submission Clause for 2005-06 #73*, 135 P.3d 736, 739 (Colo. 2006). Here, the focus of the new rules is directly tied to the central purpose of the measure of discontinuing the issuance of new fracking permits. The measure itself says: "[T]he Commission shall promulgate rules to discontinue the issuance of new oil and gas permits that incorporate the use of fracking," before detailing areas for those rules to address. Record, p 4. This is not a second subject.

B. Ward's clear title objections are meritless.

Ward's chief clear title objection is that "fracking" is a catchphrase. This objection is addressed above.

Ward also argues that the title should state that the measure is creating a definition for "hydraulic fracturing" and that the measure will impact the Commission's rulemaking. Ward Opening Br. 7-8. These choices fall well within the Board's broad "discretion in resolving interrelated problems of length, complexity, and clarity" in the title. *In re 2019-2020 #315*, 2020 CO 61, ¶ 26. Including either of these matters in the title is unlikely to impact a voter's decision to sign a petition or vote for a measure concerning discontinuing fracking—in fact, voters would likely be unsurprised to learn that a measure addressing fracking defines "fracking" and will impact the Commission's rules concerning fracking.

CONCLUSION

The Court should affirm the title set by the Title Board.

Respectfully submitted on this 7th day of August, 2023.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S ANSWER BRIEF** upon the following parties electronically via CCEF, at Denver, Colorado, this 7th day of August, 2023, addressed as follows:

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