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SUPREME COURT OF COLORADO
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 Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 #46 (Concerning Oil and Gas Permits That Incorporate the Use of Fracking)

Petitioner:
Steven Ward

v.

Respondents:
Paul Culnan and Patricia Nelson

and

Title Board: Theresa Conley, Kurt Morrison, and Jerry Barry

▲ COURT USE ONLY ▲

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Case Number: 23SA161

PETITIONER'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 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 Colorado Appellate Rule 28(g).

It contains 1,454 words (opening brief does not exceed 9,500 words).

The brief complies with the standard of review requirements set forth in Colorado Appellate Rule 28(a)(7)(A).

For each issue raised by Petitioner, 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.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of Colorado Appellate Rules 28 and 32.

s/ Suzanne Taheri
Suzanne Taheri

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ARGUMENT

I. Concerning the Definition of "Fracking" or "Hydraulic Fracturing".

A. Expanding definitions outside permitting process results in second subject.

Proponents of Proposed Initiative 2023-2024 #46 ("Proposed Initiative") contend that including a definition for "fracking" is necessarily connected to the Proposed Initiative's single subject of discontinuing fracking permits. *See* Respondents' Opening Brief 17-18. The Proposed Initiative includes two new definitions that would apply and impact subjects that are not connected to the Proposed Initiative's single subject of discontinuing fracking permits. This is "the very kind of voter surprise against which the single-subject requirement seeks to guard-here" *In re Initiative 2021-2022 #16*, 489 P.3d 1217 (Colo. 2021).

The Proposed Initiative creates a new definition for the term "fracking" and then, separately, defines "hydraulic fracturing" which is a term that already exists in statute and rule. The Proposed Initiative could have been drafted to limit the application of these two definitions to the permitting process, but did not. Instead, as drafted, the new definitions will apply across Colorado Revised Statute Article 60 of Title 32, as well as state rules and regulations. These new definitions will have material impacts on subjects that expand far beyond the single subject of discontinuing fracking permits. This is precise basis upon which the Court ruled

the Title Board did not have jurisdiction to set title *In re Initiative 2021-2022 #16*, 489 P.3d 1217 (Colo. 2021).

Proponents offer a creative set of arguments that *In re Initiative 2021-2022 #16* is somehow distinguishable because that case involves a pre-existing definition of "sexual act to an animal" while the Proposed Initiative creates new definitions. *See* Respondents' Opening Brief 17-18. This is a distinction without a difference.

Proponents have acknowledged that "the oil and gas industry may use other definitions of fracking or hydraulic fracturing." *See* Respondents' Opening Brief 18. In other words, there are already operative definitions used by the industry. Proponents, whether through an amended definition or a new definition, are changing these existing operable definitions. Moreover, they change the definition in multiple areas of rule and code that have no connection to the purpose of the measure.

B. The new definition changes the application of hydraulic fracturing treatment.

Proponents claim that the Proposed Initiative does not alter the terms or application of the current definition of "hydraulic fracturing treatment" set forth in C.R.S. §34-60-132. Proponents argue that because the existing definition of

"hydraulic fracturing treatment" is more specific it will essentially override the Proposed Initiative's more general definition of "hydraulic fracturing". For this, they cite *People v. Martin*, 27 P.3d 846, 851-52 (Colo. 2001). ["If different statutory provisions are in conflict or cannot be harmonized, the specific provision controls over the general provision."]

But here, Proponents' argument fails based on the fact that there is no conflict and the respective definitions can be harmonized. C.R.S. §34-60-132(1)(o) and (p) state:

> **(o)** "Hydraulic fracturing fluid" means the fluid, including any base fluid and additives, used to perform a hydraulic fracturing treatment.
>
> **(p)** "Hydraulic fracturing treatment" means all stages of the treatment of a well by the application of hydraulic fracturing fluid under pressure, which treatment is expressly designed to initiate or propagate fractures in an underground geologic formation to enhance the production of oil and gas.

These definitions can be harmonized with the Proposed Initiative's definition of "hydraulic fracturing":

> "Fracking," otherwise known as "hydraulic fracturing," means 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 Part 1, p. 4, filed June 28, 2023)

The new definition will act to modify the application of the definitions in C.R.S. §34-60-132 to apply only when the "hydraulic fracturing" process is used,

as now defined. This will be a change in status quo that is disconnected from the single subject.

II. The Title fails to describe the change to the definition of "hydraulic fracturing."

As supported in Petitioner's Foster's brief, current definitions of "hydraulic fracturing" require the use of water in the process. In contrast, the definition in the Proposed Initiative does not require the use of water in the process. The Proposed Initiative misleads voters on the impacts of voting for or against the Proposed Initiative. The Proposed Initiative clearly represents to voters that supporting this measure will result in a ban on fracking but, in reality, it would only discontinue fracking processes that do not incorporate water.

In the past, the Court has overturned title setting when the Title Board failed to adequately capture the intent of an initiative. *In re Title, Ballot Title, Submission Clause, & Summary by the Title Bd.,* 877 P.2d 848 (Colo. 1994). [Holding that the average person would not understand that the proposed amendment would restrict free speech protections, not broaden them.]

Further, the Court has required definitions in the ballot titles for initiatives involving controversial issue. In a matter involving abortion, the Court ruled that the definition of the term "abortion" that was contained in the proposed initiative

must be included in the title. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1990).

III. All issues raised in the Motion for Rehearing are preserved for review.

Petitioner Ward appropriately preserved the arguments presented at the Motion for Rehearing for review by this Court because Ward's Petition for Review did not specify which arguments in the Motion for Rehearing would be raised with this Court. It is difficult to determine from the Title Board's opening brief whether the Board intends to challenge any of Ward's arguments based upon the alleged failure to preserve them for review, so Petitioner Ward will address preservation in order to protect those arguments from jurisdictional challenge.

Ward's Petition for Review includes two topics for review by this Court and references the Motion for Rehearing: "As outlined in the Motion for Rehearing, the Proposed Initiative contains multiple subjects and fails to describe the purpose and effects of the Proposed Initiative fairly or accurately." (Petition for Review, p. 3) As required by § 1-40-107(2), C.R.S. (2023), Petitioner filed a copy of the Title Board's record including his Motion for Rehearing with the Petition for Review.

Petitioner Ward preserved all single subject and clear title arguments for review when he presented them to the Title Board in his Motion for Rehearing.

The Motion for Rehearing served to notify the Title Board of Ward's objections to its ruling, and it was not necessary to repeat them in his Petition for Review.

The issues were additionally argued extensively at the Title Board and the record from argument in #44 from the prior title board hearing were incorporated into the record. *See Rehearing Before Title Board on Proposed Initiative 2023-2024 #46* (June 21, 2023), https://archive-video.granicus.com/csos/csos_c84dc6ef-07f3-4812-ad29-b5c904ef0dcf.mp3 (statement at 0:05:23).

A. Preservation for Review in Ballot Title Setting

The Court has addressed preservation for review in ballot title setting negatively in the past. Specifically, the Court will refuse to review a decision of the Title Board unless the matter is specifically addressed in the Motion for Rehearing. *See Brown v. Peckman (In re Title),* 3 P.3d 1210 (Colo. 2000) ("However, our review of the record reveals that these petitioners did not raise the issue they now bring either in their motion for rehearing or at the rehearing before the Board. The Board thus did not rule on the petitioners' "significantly--measurably" argument. Because they did not raise the issue before the Board they cannot now urge this contention as a grounds for reversing the Board.); *Kelley v. Tancredo (In re Proposed Ballot Initiative on Parental Rights)*, 913 P.2d 1127 (Colo. 1996) ("In this original proceeding, the petitioners contend that the Board lacked jurisdiction

to set title, ballot title and submission clause, and a summary because it held hearings on the Initiative outside the time frame mandated by section 1-40-106(1). However, the petitioners failed to raise this contention in their motion for rehearing, and, accordingly, we refuse to address the issue here.").

B. Preservation for Review in Matters Decided by Trial Courts

In appellate matters not associated with ballot title setting, the Court has ruled that an issue is preserved for review as long as the matter is addressed with the trial court: "We do not require that parties use "talismanic language" to preserve particular arguments for appeal, but the trial court must be presented with an adequate opportunity to make findings of fact and conclusions of law on any issue before we will review it." *State v. Melendez*, 102 P.3d 315, 322 (Colo. 2004).

CONCLUSION

Proposed Initiative 2023-2024 #46 contains provisions that violate the single subject requirement and Petitioner preserved his arguments for review. The Court should overturn the actions of the Ballot Title Setting Board.

Dated: August 7, 2023

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2023, a true and correct copy of the **PETITIONER'S ANSWER BRIEF** was served via the Colorado Court's E-Filing System to the following:

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