DATE FILED: July 18, 2023 3:03 PM

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 Petitioners: 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 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).

Choose one:

X It contains 9,396 words.

☐ It does not exceed 30 pages.

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

X 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, 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.A.R. 32.

s/ Mark Grueskin

Mark Grueskin

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Typically, in a challenge concerning whether a newly defined term in an initiative should be included in its ballot title, one party will disagree that the record reflects that the measure contains a new and potentially controversial legal standard.

Here, Proponents advocate for Initiative #46, which ends permitting of certain oil and gas locations and facilities as of December 31, 2030. Through testimony and exhibits presented to the Title Board, Proponents established that their measure's definition of "fracking" is: (a) a new legal standard; and (b) a controversial one. To be clear, Proponents were not seeking to include their new definition of "fracking" in this title, but their testimony and exhibits made the case for it nevertheless.

The Title Board erred by using "fracking" in the title because, in the Board's view, it is a term that has entered common parlance. But the fact that a term has gained use as jargon, without any clarity of what it means or whether it reflects Initiative #46's new legal standard, represents error. The applicable standard for informing voters about new definitions that will be controversial is governed by a standard established by this Court more than 30 years ago. The Title Board should not have deviated from it, and this Court should order the Board to adhere to it as to the title for Initiative #46.

In addition, the Board chose to describe certain legal matters that are not in the text of the initiative itself. For instance, the Board stated that permitted hydraulic fracturing activities would be allowed to continue. There is no such provision in the measure. It also used misleading terminology, describing the purpose of the measure as "the phase-out of new oil and gas operation permits" when the measure does not phase out the new permits; it phases out the granting of such permits. And finally, even though the measure specifically "prohibits" certain oil and gas activities, the title is silent in that regard. Consistent with this Court's precedent, the title should at least, reflect the fact that this is a measure that prohibits this permitting.

Therefore, Objector Foster asks for an order from this Court that would direct the Title Board to correct these errors.

STATEMENT OF ISSUES PRESENTED

1. Whether the Title Board erred by using jargon in the titles when the term at issue – "fracking" – has no commonly understood meaning but is defined in Initiative #46 (although not in the titles) using a new, controversial legal standard that voters should know in order to cast informed votes on this measure.

2. Whether the Title Board erred by setting misleading titles for Initiative #46 in stating this measure "allow[s] permitted oil and gas operations to continue," when there is no such provision in Initiative #46.

3. Whether the Title Board erred by setting misleading titles for Initiative #46 in stating the measure requires "the phase-out of new oil and gas operation permits," when the initiative does not phase out the duration of new permits but only limits the granting of such permits.

4. Whether the Title Board erred by setting misleading titles by failing to inform voters of Initiative #46's express prohibition of any new "oil and gas facilities" and any new "oil and gas locations" instead of incorrectly referring to "discontinuing" permits for "oil and gas operations."

STATEMENT OF THE CASE

A. Statement of Facts

Paul Culnan and Patricia Nelson ("Proponents") proposed Initiative 2023-2024 #46 ("Initiative #46" or "#46"). They filed this initiative with the legislative offices for staff review and then with the Title Board for title setting.

The purpose of Initiative #46 is to prohibit the Colorado Energy & Carbon Management Commission ("Commission"[1]) from granting oil and gas facility permits and oil and gas location permits that incorporate the use of "fracking" after December 31, 2030. *See* Certified Record at 4-5 (hereafter "R.") (Proposed section

[1] Witnesses and/or counsel for Proponents referred to the Commission by its former acronym, "COGCC," which appears in this brief when quoting those persons.

34-60-106(20.5)(a)). In the interim, the Commission is to set forth "an iterative and consistent reduction in permits approved each year during that period." *Id.*, Proposed section 34-60-106(20.5)(b).

In addition, the Commission is to repeal rules related to the issuance of new permits that incorporate the use of "fracking." *Id.*, Proposed section 34-60-106(20.5)(b). Further, Initiative #46 requires existing rules to be amended to prevent modification, and require expiration of all previously issued permits that incorporate the use of "fracking" if drilling operations have not begun by December 31, 2033. *Id.*, Proposed section 34-60-106(20.5)(c). The stated purpose of these changes is to "prohibit" oil and gas facilities and oil and gas locations that use "fracking." *Id.*, Proposed sections 34-60-106(20.5)(e) and 29-20-104(1)(h)(II). Initiative #46 also instructs the Office of Future Work to "explore transition strategies" for persons employed in the oil and gas industry. *Id.*, Proposed section 8-83-604.

Initiative #46 defines "fracking" as follows:

> "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."

Id., Proposed section 34-60-103(4.7). As Proponents stated through counsel before the Title Board, there is no other definition of "fracking" in Colorado law – not in any statute or Commission regulation. "It's not currently defined in the Oil and Gas

Act. It's not currently defined in the rules of the COGCC."[2] "Fracking" is thus defined in statute for the very first time in this initiative.

Notably, this is not the first initiative that Proponents filed in this election cycle. Earlier in 2023, they filed Initiatives #44 and #45 for which the Title Board set titles on May 3 and revised them on May 17 after considering motions for rehearing. The Board's titling decision was appealed to this Court, but Proponents withdrew both initiatives by letter from their counsel to the Secretary of State on May 29.[3] Subsequently, the appeal to this Court was dismissed as well.

Other than some superficial wording changes, Initiative #44 was different from Initiative #46 in only one way. Initiative #44's prohibition on permitting applied to "oil and gas operation permits,"[4] whereas #46 prohibits permitting where the activities subject to the permit would utilize "fracking." Initiative #44 did not mention or otherwise use the term "fracking."

---

2 https://csos.granicus.com/player/clip/393?view_id=1&redirect=true&h=7a1561966ccb1f8c25e167ea1638f7cd (58:03-11) ("Rehearing Audio Recording").

3 https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/44-45Withdrawal.pdf (last viewed on July 17, 2023).

4 https://www.coloradosos.gov/pubs/elections/Initiatives/titleBoard/filings/2023-2024/44Final.pdf (last viewed on July 17, 2023).

As Proponents established at the rehearing, "hydraulic fracturing [is] used in 95 percent of new wells." R. at 513. Thus, there is virtually no functional difference between Initiatives #44 and #46 – except that the latter uses the slang, more politically charged term, "fracking."

B. Nature of the Case, Course of Proceedings, and Disposition Below

A review and comment hearing was held before the Offices of Legislative Council and Legislative Legal Services. Proponents then filed a final version of Initiative #46 with the Secretary of State for submission to the Title Board.

A Title Board hearing was held on May 17, 2023, at which time the Board set title for the Initiative. On May 24, 2023, Petitioner Timothy E. Foster ("Petitioner" or "Foster") filed a Motion for Rehearing, alleging that the Board erred in setting the title for Initiative #46 by using "fracking" to describe the measure resulting in a confusing title. Petitioner also argued that the Board erred by setting a title that failed to inform voters of key elements of the Initiative and that the title would mislead voters.

Also on May 24, Steven Ward filed a motion for rehearing, alleging single subject and clear title violations. R. at 71-79. Finally, Proponents filed their own motion for rehearing, claiming that the titles incorrectly omitted their statement of the measure's intent: "to protect land, air, and water." R. at 80-83.

A rehearing was held before the Board on June 21, 2023, two weeks later than usual because one of the Proponents was unavailable on June 7. At that hearing, Foster raised each of the issues that were addressed in his Motion for Rehearing and filed three exhibits, including Exhibit C to rebut Proponents' representations in hearings on Initiative #44 that "fracking" was the term most used and understood by Spanish-speaking individuals. *See* R. at 69-70.

The Board denied all motions for rehearing, finalizing the following ballot title and submission clause:

> Shall there be a change to the Colorado Revised Statutes concerning discontinuing the issuance of new oil and gas operation permits that utilize fracking by December 31, 2030, and, in connection therewith, requiring the phase-out of new oil and gas operation permits that utilize fracking; allowing permitted oil and gas operations that utilize fracking to continue; and requiring the state to explore transition strategies for impacted oil and gas workers who may transition to other employment?

R. at 3.

Foster and Ward filed Petitions for Review with the Court on June 28, 2023, which was seven days after the Board denied the motions for rehearing.

SUMMARY OF ARGUMENT

Initiative #46 prohibits the state from issuing any permits for oil and gas extraction facilities and locations after December 31, 2030, if the permit holder can, under that permit, "utilize fracking." "Fracking" is a term never before defined by

Colorado statute or agency rule. As well-known academics in this state have written, it is a term that people interpret very differently. As Proponents here demonstrated, it is a term that various dictionaries define quite differently. Given that, when "fracking" appears in the ballot title for Initiative #46, voters could easily think it applies to very different technologies, even though it is defined – for the first time in any Colorado law – by this measure.

As it has done when there have been other new, controversial standards of even familiar terms, the Title Board should have included the new legal standard associated with this term in the ballot title. But it didn't. Instead, it rested on the assumption that voters, recognizing a term that is more jargon than legal definition, should be able to intuit what it means.

The Title Board failed to treat the title as this Court insists that it must – as a vehicle for understanding for voters, whether they are familiar or unfamiliar with the subject matter of the measure. By looking to whether voters may have heard or read the word, "fracking," instead of whether voters know what this new standard actually means, the Board failed to fulfill its central mission as to this measure – setting a fair, clear title that will inform voters, not mislead them.

The Board erred in other ways, as well. It stated in the title that the measure allows permitted activities to continue. But the measure never says that. And where

it does speak to continuation of existing rules, they relate to environmental protection, not commercial activity. The Board cannot know if a bill will get passed by the 2024 legislature and signed by the Governor that will negate the point of this representation about Initiative #46.

The titles also say that #46 requires the phrase-out of new permits. But that reference suggests that the permits themselves will be phased out, when the measure only phases out the granting of permits rather than the duration of such permits. This is a substantive misstatement that requires correction.

Finally, the titles fail to state, as the measure does, that this measure will "prohibit" permits for oil and gas locations and facilities. As this Court has noted in one recent decision about local government attempts to suspend all hydraulic fracturing operations in that city, a measure that takes even five years out of the useful life of a permit-holder is a prohibition, not a regulation. The Court should rely on that ruling here to find that this title is deficient and misleading to voters.

LEGAL ARGUMENT

I. The titles set by the Title Board are misleading because they omit a new, controversial legal standard – the definition of "fracking."

A. Preservation of issue below; standard for review.

Objector Foster preserved this issue below. R. at 7-11 (Argument I.A).

This Court will defer, in the first instance, to the Board when it "resolv[es] the interrelated problems of length, complexity, and clarity in setting a title and ballot title and submission clause" and "summarize[s] the central features of a proposed initiative." *In re Title, Ballot Title and Submission Clause for 2013-2014 #90*, 2014 CO 63, ¶24, 328 P.3d 155, 162. All "legitimate presumptions" are accorded to the Board's actions. *Id.*

Nevertheless, the title "must fairly reflect 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." *Id*., ¶25. Although they need not include "every detail of an initiative," the "titles must be fair, clear, accurate and complete." *In re Title, Ballot Title & Submission Clause, & Summary for 2007-2008 No. 62*, 184 P.3d 52, 60 (Colo. 2008). The Title Board must be reversed when "the titles are insufficient, unfair or misleading." *Id.*

B. The Title Board used slang to frame this issue for voters even though that term has no legal definition or readily discernible meaning, other than in Initiative #46.

1. Proponents used jargon – "fracking" – to make their measure more attractive to voters, and the Title Board erred by using this vague slang term in the titles for Initiative #46.

Initiative #46 proposes to prohibit the issuance of permits that "incorporate the use of fracking" by the end of 2030. R. at 3, Proposed section 34-60-103(20.5).

"Fracking" is slang for "hydraulic fracturing," a point that is apparent from the definition included in Initiative #46 through an "otherwise known as" clause:

> **"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."

R. at 4 (emphasis added). Of course, the actual definition of the activity at issue is what follows the highlighted language above: "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." *Id.*

From publicly available academic sources, the Title Board knew that the use of "fracking" in the titles would be inherently confusing. The Motion for Rehearing cited work done by Professor Patricia Limerick of the University of Colorado, along with two of her colleagues.[5]

> Unconventional oil and gas development is not an easy subject for productive conversation. It demands the use of technical language… Even the most fundamental terms can lead conversationalists into muddles; in some instances, **participants in the unconventional oil and gas debate use the exact same words in very different ways (for a case study, head straight to hydraulic fracturing)**. Yet members of

[5] Prof. Limerick's professional qualifications, including serving as the director of the Center for the American West, are well-established. *See* https://www.colorado.edu/center/west/about/patty-limerick (last viewed July 12, 2023). Her co-authors for the material cited here are Prof. Adrianne Kroepsch and Will Rempel of the University of Colorado.

> the public simply must talk about unconventional oil and gas development. **Voters have been making, and will continue to make, decisions about when and where energy extraction should take place.**[6]

Professor Limerick warned that "fracking" and "hydraulic fracturing" are often misunderstood unless the speaker (or the writer) provides meaningful context about what is being addressed.

> In public debates about unconventional oil and gas extraction, the terms "**hydraulic fracturing" and "fracking" are used in multiple, and sometimes conflicting, ways**. **The confusion this causes has the potential to derail conversations and stall communication**. Some people use "hydraulic fracturing" and "fracking" to mean the particular and specific technique used to fracture oil-and-gas-bearing formations far below the surface. Others use the terms to mean the whole process of constructing and operating a well, plus maintaining and operating surface facilities like compressors, storage ponds, and pipelines. **This disconnection in meaning can cause participants in the same conversation to talk past each other**.[7]

Prof. Limerick's closing admonition is a useful framework for considering ballot titles dealing with this topic. "Clear use of terms is key to making

---

[6] Limerick, P., Kroepsch, A., and Rempel, W., "A Glossary for Citizen-Explorers Bravely Entering the Controversy over Hydraulic Fracturing https://www.colorado.edu/center/west/projects-publications/energy-mining/hydraulic-fracturing-glossary#Hydraulic%20Fracturing (last viewed July 12, 2023) (emphasis added); *see* R. at 8.

[7] *Id.*

conversations on hydraulic fracturing (or 'fracking') productive and meaningful."[8] In its own way, this caution embodies this Court's standards for ballot titles. "[T]he clear title requirement seeks to accomplish two overarching goals: prevent voter confusion and ensure that the title adequately expresses the initiative's intended purpose." *In re Title, Ballot Title & Submission Clause for 2015-2016 #156,* 2016 CO 56, ¶11, 413 P.3d 151, 153.

This standard is not met where the title "force[s voters] to speculate" about what an initiative actually addresses, even if the title "substantially tracks language found in the initiative itself." *Id*., 2016 CO 56, ¶¶ 14-15, 413 P.3d at 154. As demonstrated below, the Board's use of jargon that Proponents included in their measure failed to result in a clear title.

2. Proponents' report on common usage of "fracking" establishes that this term is jargon, and there is no general understanding of the word that is consistent with the definition in Initiative #46.

Proponents commissioned a report on how "fracking" has entered the vernacular of voters. R. at 1060-80 (*"Fracking"* by Dr. Robert Leonard). But their report establishes that Initiative #46's use of "fracking" is a political buzzword and

[8] *Id.*

inconsistent with those dictionary definitions and thus certain to be misunderstood as part of this ballot title.

a. *"Fracking" is slang that will not give voters critical information about Initiative #46.*

The Leonard report surveys several dictionaries,[9] in part to assess if "fracking" is slang. R. at 1061-65. The report concludes, "'Fracking' appears in dictionaries and it is not labelled as slang." *Id*. at 1080. Problematically for Proponents, a close review of several of the sources the Leonard report relied on establishes just the opposite.

According to the dictionary definitions cited, the "formal" version of "fracking" is actually "hydraulic fracturing."[10] "The word *fracking*… was created

[9] Dr. Leonard's report cites six different dictionary definitions from Collins English Dictionary, Dictionary.com, Encyclopedia Britannica, MacMillan English Dictionary, Merriam Webster, and Oxford English Dictionary. *See* R. at 1063-64.

[10] Oxford English Dictionary ("fracking), available at https://www.oxfordlearnersdictionaries.com/us/definition/english/fracking (last viewed July 15, 2023).

by shortening 'fracturing.'"[11] It originated by means of a "[s]hortening and alteration" of "hydraulic fracturing."[12]

Even though Proponents contend "fracking" is not slang, one of the definitions cited points out it is, in fact, a "buzzword." [13] A "buzzword" is "a word that is current and in sudden and increasing use," even one that may not be officially defined.[14] Another of the dictionaries cited by Leonard defines "buzzword" as "an important-sounding usually technical word or phrase often of little meaning used chiefly to impress laymen."[15] Needless to say, a ballot title should not contain terms "of little meaning used chiefly to impress laymen." Instead, the goal of the ballot

---

[11] Merriam Webster Dictionary ("fracking"), available at https://www.merriam-webster.com/dictionary/fracking#:~:text=fracking%20%E2%80%A2%20%5CFRACK%2Ding%5C,as%20oil%20or%20natural%20gas (last viewed July 15, 2023) (emphasis in original).

[12] Dictionary.com ("fracking"), available at www.dictionary.com/browse/fracking (last viewed July 15, 2023).

[13] MacMillan English Dictionary ("fracking"), available at https://www.macmillandictionary.com/us/dictionary/american/fracking (last viewed July 15, 2023).

[14] *Id.* ("buzzword"), available at https://www.macmillandictionary.com/us/buzzword/ (last viewed July 15, 2023).

[15] Merriam Webster Dictionary ("buzzword") https://www.merriam-webster.com/dictionary/buzzword#:~:text=buzz%C2%B7%E2%80%8Bword%20%CB%88b%C9%99z%2D%CB%8Cw%C9%99rd,a%20voguish%20word%20or%20phrase (last viewed July 15, 2023).

title is to inform lay persons of the substance of the laws they are being asked to adopt.

Even though it is left to an initiative's proponents to choose the verbiage in their measure, it is clear that a buzzword such as "fracking" does not provide the important information required by voters. The Title Board's job is to make the substance of an initiative, however worded, understandable rather than chatty.

b. *"Fracking" is not generally understood to be the specific technology addressed by the prohibitions of Initiative #46.*

As noted above, Initiative #46's definition of "fracking" includes multiple elements: (1) fractures (2) made in rocks below the earth's surface (3) that are opened and widened (4) by injecting (5) proppants (defined as "materials inserted or injected into an underground geologic formation during a hydraulic fracturing treatment that are intended to prevent fractures from closing" by C.R.S. § 34-60-132(s))[16] (6) water (7) and chemicals (8) at high pressure." R. at 4.

Dr. Leonard's report cites six different dictionary definitions to show that "fracking" is a defined term. R. at 1063-64. The definitions are taken from Collins

[16] "'Proppants' means materials inserted or injected into an underground geologic formation during a hydraulic fracturing treatment that are intended to prevent fractures from closing." C.R.S. § 34-60-132(s).

English Dictionary,[17] Dictionary.com,[18] Encyclopedia Britannica,[19] MacMillan English Dictionary,[20] Merriam Webster,[21] and Oxford English Dictionary.[22] *Id.* A

[17] "Fracking is a method of getting oil or gas from rock by forcing liquid and sand into the rock." Collins English Dictionary ("fracking"), available at https://www.collinsdictionary.com/us/dictionary/english/fracking#:~:text=Fracking%20is%20the%20process%20of,that%20it%20will%20release%20gas (last viewed July 15, 2023).

[18] "fracking - 1. hydraulic fracturing." Dictionary.com ("fracking"), available at https://www.dictionary.com/browse/fracking (last viewed July 15, 2023).

[19] "Fracking is the injection of a fluid at high pressure into an underground rock formation to open fissures and allow trapped gas or crude oil to flow through a pipe to a wellhead at the surface. This technique is used in natural gas and petroleum production." Encyclopedia Britannica ("fracking"), available at https://www.britannica.com/technology/fracking (last viewed July 15, 2023).

[20] "fracking - 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." MacMillan English Dictionary ("fracking"), available at https://www.macmillandictionary.com/us/dictionary/american/fracking (last viewed July 15, 2023).

[21] "fracking: the injection of fluid into shale beds at high pressure in order to free up petroleum resources (such as oil or natural gas)." Merriam Webster Dictionary ("fracking"), available at https://www.merriam-webster.com/dictionary/fracking#:~:text=fracking%20%E2%80%A2%20%5CFRACK%2Ding%5C,as%20oil%20or%20natural%20gas) (last viewed July 15, 2023).

[22] "fracking 1. the process of forcing liquid at high pressure into rocks, deep holes in the ground, etc. in order to force open existing cracks (= narrow openings) and take out oil or gas." Oxford English Dictionary ("fracking"), available at https://www.oxfordlearnersdictionaries.com/us/definition/english/fracking (last viewed July 15, 2023).

close look at these sources of supposed common meaning and understanding are inconsistent with one another and vary in major ways from the definition in Initiative #46.

None of the cited dictionary definitions refer to the injection of "chemicals" as a constituent element of "fracking," although that is a key aspect of the definition in #46. None of them refer to the injection of "proppants," although one refers only to "forcing sand" into the rock containing oil or gas. Only two of the six refer to "injection," and two refer to "high pressure" element of injection. Some of them are substantively at odds with the #46 definition, which treats this extraction process as "fracking" only if it uses "water;" four of the measures refer either to any "liquid" or "fluid" – `going far beyond the definition in #46.

Thus, the dictionary definitions that were used to suggest a common understanding of "fracking" in the titles actually establish Initiative #46 contains a new definition that is at odds with the common sources of voter understanding that were before the Board. As discussed below, "fracking" is a term that lights a political fuse but does not have a single, readily understood meaning.

3. <u>The initiative's unique definition of "fracking" must be clear to voters through the ballot title.</u>

Where a term is defined in a way that is inconsistent with what voters understand it to mean and is likely to be a linchpin in determining whether voters

support or oppose the measure, the titles must include that definition. As this Court has long held, a definition that "adopts a legal standard that is new and likely to be controversial, even though limited in application to the implementation of the proposed" measure, must be made part of the titles. *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

At the time this Court decided *Parental Notification of Abortions for Minors*, the concept of "abortion" was hardly new. Seventeen years earlier, *Roe v. Wade*, 410 U.S. 113 (1973), had been announced, and abortion was a sensitive political issue for at least that amount of time. But the 1990 initiative defined "abortion" as any means used to terminate a pregnancy "at any time after fertilization." 794 P.2d at 241-42. In other words, the required parental notification requirement in the proposed amendment was triggered at the moment of conception. This Court reasoned that "voters are entitled to know of this new standard" for what constituted an abortion, and its omission meant that the titles "do not fairly reflect the contents of the proposed initiative." *Id*. at 242.

The Court's justification for requiring an important definition to be included in the titles was straightforward. "[T]he Board must act with utmost dedication to the goal of producing documents which will enable the electorate, **whether familiar or unfamiliar** with the subject matter of a particular proposal, to determine

intelligently whether to support or oppose such a proposal." *Id*., citing *In re Proposed Initiative Concerning "State Personnel System,"* 691 P.2d 1121, 1123 (Colo. 1984) (internal quotation marks omitted) (emphasis added).

The caution that ballot titles should be equally insightful for voters "whether familiar or unfamiliar with the subject matter of a particular proposal" is a standard that the Court continues to apply, decades after it was announced. *In re Title, Ballot Title & Submission Clause for 2019–2020 #315*, 2020 CO 61, ¶25, 500 P.3d 363, 369. Importantly, the Court has applied this test when it considers ballot titles for proposed initiatives dealing with oil and gas development. *See In re Title for 2013-2014 #90, supra*, 2014 CO 63, ¶23. The Court even cited this test when deciding whether a measure that specifically "include[ed] hydraulic fracturing" was properly titled. *In re Title, Ballot Title and Submission Clause for 2013-2014 #85, #86, #87, and #88*, 2014 CO 62, ¶18, 328 P.3d 136, 143 (initiative that addressed all oil and gas development, "including hydraulic fracturing," was titled appropriately by referring to the broad category of "oil and gas development" that would be understood by voters).

The standard, adopted in *Parental Notification of Abortions for Minors, supra*, applies here. "Fracking" as defined in this measure and referred to in the titles represent a new legal standard that is likely to be controversial, the meaning of which

would be important to voters, particularly those who are unfamiliar with this measure.

a. *This proposed statutory definition of "fracking" is a new legal standard.*

Proponents made clear that there is no definition of "fracking" in Colorado law. "It's not currently defined in the Oil and Gas Act. It's not currently defined in the rules of the COGCC."[23] Thus, Proponents conceded below that there is no legal standard for "fracking" that would or could be known by voters. As a result, this initiative's definition of that term is a new legal standard under *Parental Notification of Abortions for Minors.*

Further, and as demonstrated above, if voters were to turn to common dictionary definitions, they would find conflicting meanings, none of which reflect the new standard used in Initiative #46. And this is not a matter of mere semantics. Initiative #46's definition is very specific, identifying the use of "water" (not all fluids or liquids), "proppants" (not just "sand" as in one dictionary definition), and "chemicals" (about which every dictionary definition is silent), among its other

[23] Rehearing Audio Recording at 58:03-11 (https://csos.granicus.com/player/clip/393?view_id=1&redirect=true&h=7a1561966ccb1f8c25e167ea1638f7cd).

specific and unique elements. Thus, there is no singular source in voters' hands that would establish the meaning of "fracking" as used here.

b. *This new legal standard is likely to be controversial.*

There are several reasons why Initiative #46's definition of "fracking" is almost certainly going to be controversial, consistent with *Parental Notification of Abortions for Minors*.

First, Proponents and the Title Board have already stated that this is a topic that is defined by controversy. The Leonard report submitted by Proponents notes that "fracking" is a "controversial technology" and refers to the manner of conducting it as a "controversial environmentally damaging technique." R. at 1073-74.

The Title Board has also taken the position in previous ballot title matters that "fracking" is controversial. In its Opening Brief to this Court in *In re #85, #86, #87, and #88, supra,* the Title Board made two critical observations: (a) the proponents of those four measures had agreed before the Title Board that "fracking" was a loaded term; and (b) in refusing to include "hydraulic fracturing" in the titles, the Board stated that either term – "fracking" or "hydraulic fracturing" – would trigger voter responses based on emotional reactions, not a basic understanding of the initiative. According to the Title Board,

> The fact that the **Proponents acknowledged that including the word 'fracking' would be objectionable** underscores that hydraulic fracturing – while the technical term – nonetheless has the potential to invoke a **pejorative association that may appeal to voters on the basis of emotion rather than further understanding of the measure**.

R. at 65.[24] This Court affirmed the Board's decision to exclude such a term from the titles. *In re #85, #86, #87, and #88, supra*, 2014 CO 62, ¶38, 328 P.3d at 147.

Of course, ballot titles are not *per se* problematic just because they address controversial topics. The question for this Court is whether a new legal standard, adopted as part of the initiative, would be controversial.

Using that test as a starting point, the new legal standard in Initiative #46 contains elements that will make the standard itself controversial, apart from the controversy generally associated with the technology. Specific elements of this definition of "fracking" are certain to be issues about which voters would require notice through the ballot title because the titles, as currently set, conceal these elements. As a starting point, the prohibitions on new permits under Initiative #46

[24] Before the Title Board, counsel for those proponents (from the same law firm that represents Proponents here), stated, "[S]hould we put 'fracking' in there or not? We certainly didn't want it. I mean that's a catchphrase with bells and whistles on it." (Apr. 14, 2014, Title Bd. Hr'g, Part 4, Initiative #85, at 1:11:25 to 1:11:30, which recording is available at https://www.sos.state.co.us/pubs/info_center/audioArchives.html.)

that are triggered by "fracking" apply only to operations that use water rather than any other fluid or liquid.

Proponents themselves highlighted the controversy associated with water as it relates to "fracking." Proponents urged the Title Board to include the wording, "to **protect** land, air, and **water**" in the title. The Board rejected this wording as a potential effect of the measure rather than as its change to the Colorado Revised Statutes. Proponents filed a motion for rehearing to renew this claim, R. at 81-82, but the Board denied that motion. R. at 3.

Then, at the rehearing, Proponents filed studies and obtained witness testimony. These reports documented controversies over water use in "fracking" as Proponents defined it in #46. *See, e.g.*, R. at 492 ("Demand for water to use in U.S. fracking operations has more than doubled since 2016"); 533 ("Texas and Colorado are now petitioning the EPA to allow release of fracking wastewater into rivers and streams and to allow its use for irrigation and watering livestock"); 614 ("Driving this discussion is the growing scarcity of fresh water supplies in many drought-prone regions of the United States"); 625 ("'There is potential for these withdrawals to cause water stress'"); 650 ("'The research builds on previous reviews identifying 'three main potential stressors to surface waters: changes in water quantity (hydrology), sedimentation, and water quality'"); 1078 ("each instance of hydraulic

fracturing or fracking, includes anywhere from 2 million to 12 million gallons of water") (citations omitted).

An environmental scientist testifying for Proponents made a particularly notable point to the Title Board. She concluded her testimony by stating, "It's important that voters know, in a state like Colorado, dealing with all kinds of water shortages anyway, that fracking has an impact on water."[25] Thus, because the legal standard that Initiative #46 uses for "fracking" includes only water as the liquid used in this process, this element will almost certainly be a locus of controversy and must be disclosed in the ballot title.

This Court has repeatedly recognized public sensitivity to water availability. "Colorado cherishes its water as a scarce and valuable resource." *Mt. Emmons Mining Co. v. Town of Crested Butte*, 40 P.3d 1255, 1257 (Colo. 2002); *see Bd. of County Comm'rs v. Denver Bd. of Water Comm'rs*, 718 P.2d 235, 239 (Colo. 1986) ("The effects of drought on water supply in Colorado are well known. The impact of drought on municipalities has resulted in lawn watering restrictions, moratoriums on service, and other restrictions on use to conserve water"); *see also Kobobel v. State Dep't of Natural Res*., 249 P.3d 1127, 1134-1135 (Colo. 2011) ("Given the

[25] Rehearing Audio Recording at 1:35:45-55 (https://csos.granicus.com/player/clip/393?view_id=1&redirect=true&h=7a1561966ccb1f8c25e167ea1638f7cd) (statement of Prof. Sandra Steingraber).

demand for water, there can never be a guarantee that there will be enough water to satisfy all claims to this scarce resource"). When the state's water is at issue, then, it is unsurprising there can be an "intensity of… controversy" among those with a stake in the matter. *In re Rules & Regulations Governing Use, Control, & Protection of Water Rights*, 674 P.2d 914, 921 n.12 (Colo. 1983).

As Objectors made clear at the rehearing, there are alternative hydraulic fracturing technologies that do not rely on the use of water. Studies were cited that review technologies using, for instance, carbon dioxide, liquid petroleum, or emulsion-based fluids rather than water. *See* R. at 10. Before the Title Board, Proponents neither questioned nor disputed the accuracy of the fact that certain hydraulic fracturing technologies are not water-based.

Voters, who might think Initiative #46 addresses all methods of oil and gas hydraulic fracturing, would not know from the title that this measure does not – and because of its "fracking" definition, cannot – do so. Even a "yes" vote for this measure to stop "fracking" leaves open the door to these alternative technologies in voters' counties, cities, or neighborhoods. A clear ballot title, incorporating the "fracking" definition, would inform voters who might think they are prohibiting future permits for all types of "fracking" in the state.

That the use of water will trigger Initiative #46's limitations on the granting of permits is an important, and clearly controversial, fact for voters to understand through the ballot title. Other elements of the "fracking" definition –the use of chemicals, proppants, and high-pressure injection of these and other materials – are also likely to be controversial elements of this new legal standard. As such, voters show know about all of these aspects of Initiative #46 through the ballot title.

c. *This new legal standard should be understood by voters, whether they are familiar or unfamiliar about the meaning of "fracking."*

In deciding whether voters will understand what "fracking" means, Prof. Limerick's earlier cited caution about the use of this terminology is key: "'hydraulic fracturing' and 'fracking' are used in multiple, and sometimes conflicting, ways. The confusion this causes has the potential to derail conversations and stall communication." *See* fn. 2, *supra*.

One Board member stated that "fracking" is "more of a common term now."[26] That may be true, but that does not mean "fracking" is understood to have a meaning that comports with #46's definition. Another Board members said "there is a

[26] Rehearing Audio Recording at 1:41:41-47 (https://csos.granicus.com/player/clip/393?view_id=1&redirect=true&h=7a1561966ccb1f8c25e167ea1638f7cd).

common understanding of 'fracking' similar to the definition in the measure."[27] Yet, that statement does not reflect record evidence, provided in the Leonard report, that the most common definitions – and thus likely voter understandings – of this word are dramatically inconsistent.

This is the crux of the Board's mistake. The Board confused the commonality of usage of a term with the legal consideration with which it was required to comply: is the initiative creating a new legal standard that will be controversial and therefore relevant to voters in understanding what the measure before them would do? If so, that standard must be set forth in the title. Board members were aware of this specific test for including certain definitions in ballot titles, as it was set forth in Foster's Motion for Rehearing. R. at 10. But the Board opted, incorrectly, to craft this title with what it believed to be a familiar word rather than the accurate legal standard from Initiative #46.

Particularly when dealing with a topic that can breed confusion, the Title Board must produce titles "which will enable the electorate, **whether 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*

[27] *Id*. at 1:43:19-30.

for Minors, supra, 794 P.2d at 242 (emphasis added). Given the new legal standard used by Initiative #46 that, as pointed out above, purposely excludes various forms of hydraulic fracturing that do not use water, the Board erred by refusing to replace jargon with an understandable statement of what this new legal standard for "fracking" constitutes.

4. Initiative #46's use of the word "fracking" does not permit the Board to use it in the titles because the word is a generic and misleading reference to a specific process.

The fact that Initiative #46 uses "fracking" does not justify the title's use of the term. This rationale for title wording has long been rejected by the Court.

In *In re Title, Ballot Title, Submission Clause, & Summary Pertaining to a Proposed Initiative on "Obscenity*," 877 P.2d 848 (Colo. 1994), the title and submission clause "read, virtually word for word, the same as the Initiative." Still, "this fact does not establish that the title and submission clause fairly and accurately set forth the major tenets of the Initiative." *Id*. at 850. The Court identified the "pertinent question" as whether voters would understand what a "yes" or "no" vote would achieve. It was thus no defense that the titles "merely repeat the language contained in the Initiative itself." *Id.* The Court looked to whether voters, "be they familiar or unfamiliar" with the measure itself, would fully comprehend the reach of the measure, *id.*, and it found the title would not provide that level of insight.

In the same manner, voters cannot discern from this ballot title what forms of fracking this measure prohibits and what forms of fracking it will continue to allow to be permitted. As such, this title cannot be presented to voters without amendment to provide the context they need.

5. This Court's use of the word "fracking" in its decisions does not mean it is a term whose meaning for purposes of Initiative #46 will be understood by voters.

Proponents justified the use of "fracking" in the titles because this Court has used it in decisions relating to hydraulic fracturing.[28]

As discussed above, the standard is not whether the voter who scours this Court's opinions will understand what is meant by "fracking." The question is whether voters who are familiar *or unfamiliar* with the subject matter will know the key elements of the measure they are asked to approve.

The Court had to describe the elements of "fracking" to provide context for its decisions relating to this technology. To do so, it relied on what it considered to be authoritative sources – an oil and gas law treatise and an appellate decision from Texas. Neither is a common point of reference for most voters.

> Hydraulic fracturing, commonly known as fracking, is a process used to stimulate oil and gas production from an existing well. *See* Patrick

[28] Rehearing Audio Recording at 54:05-56:35; (https://csos.granicus.com/player/clip/393?view_id=1&redirect=true&h=7a1561966ccb1f8c25e167ea1638f7cd).

> H. Martin & Bruce M. Kramer, *The Law of Oil and Gas* 14-15 (9th ed. 2011). Viscous fluid containing a proppant such as sand is injected into the well at high pressure, causing fractures that emanate from the well bore. *Id*. at 15. The pressure is then released, allowing the fluid to return to the well. *Id*. The proppant, however, remains in the fractures, preventing them from closing. *Id*. When the fluid is drained, the cracks allow oil and gas to flow to the wellbore. *Coastal Oil & Gas Corp. v. Garza Energy Tr.*, 268 S.W.3d 1, 7 (Tex. 2008). First used commercially in 1949, the process is now common worldwide. *Id*.

City of Longmont v. Colo. Oil & Gas Ass'n, 2016 CO 29, ¶1, 369 P.3d 573, 576.

Two points merit consideration about the Court's use of "fracking" in its decisions. First, the Court effectively pointed out that "fracking" is jargon ("Hydraulic fracturing, **commonly known as fracking**…"). And second, even if a voter were aware of this Court's prior decisions, those decisions provide no assistance to the voter in understanding the initiative because Initiative #46 incorporated a different definition. Specifically, the definition used by the Court identifies "viscous fluid"[29] – not water – as the liquid that is used in "fracking." Thus, a voter looking Court decisions to decipher a title that uses "fracking" without more

[29] "Viscous" is defined as "of a glutinous nature or consistency; sticky; thick; adhesive." Dictionary.com ("viscous"), available at https://www.dictionary.com/browse/viscous (last viewed on July 15, 2023). One does not need to be a chemist to know that water is not "glutinous," "sticky," "thick," or "adhesive."

specificity could get the wrong impression about what permits would be prohibited by Initiative #46.

Thus, this Court's use of a term to explain its decision over a litigated matter does not justify the Board's use of that term when setting a title to explain the issue to voters unfamiliar with it.

6. The Title Board erroneously rejected a ballot title that would have provided voters with understanding of the new legal standard.

At rehearing, Objector Foster proposed a change to the titles to include the measure's definition of "fracking":

> 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, and materials intended to prevent fractures from closing[30] ~~by December 31, 2030~~, and, in connection therewith, requiring the phase-out of such new oil and gas operation permits ~~that utilize fracking~~; allowing permitted oil and gas operations ~~that utilize fracking~~ to continue; and requiring the state to explore transition strategies for impacted oil and gas workers who may transition to other employment?

R. at 10.

[30] Initiative #46's definition of "fracking" lists injections of "proppants, water, and chemicals." As "proppants" is defined by the statute to be amended by #46 as "materials inserted or injected into an underground geologic formation during a hydraulic fracturing treatment that are intended to prevent fractures from closing," C.R.S. § 34-60-132(s), that definition is used here to provide clarity to voters.

A title worded in this way would make the actual meaning of "fracking," under Initiative #46, clear to voters. As such, they would understand the actual process that will be prohibited after December 31, 2030, rather than what they could glean from a definition that is available through public sources that are misleading when considering this measure.

II. The titles are misleading because they affirmatively state Initiative #46 will "allow[] permitted oil and gas operations that utilize fracking to continue" when there is no such provision in Initiative #46.

A. Preservation of issue below; standard for review.

Objector Foster preserved this issue below. R. at 11 (Argument I.C).

"The title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106(3)(b). One way of achieving this end is to avoid prognostications about the downstream impacts of the measure. Neither the Board nor the Court are concerned with "the legal interpretation or potential effect" of an initiative. *In re #85, #86, #87, and #88, supra*, 2014 CO 62, ¶24. The purpose of a ballot title is not to address "the initiative's possible interplay with existing state… laws." *Id*., ¶25 (citations omitted).

B. The title incorrectly tells voters that the measure will "allow[] permitted oil and gas operations that utilize fracking to continue."

Initiative #46 requires Commission rules that prohibit permits after December 31, 2030, for certain oil and gas operations (those that use hydraulic fracturing) and "transitioning the Commission's duties to primarily the monitoring, plugging and remediating of facilities permitted prior to December 31, 2030." Proposed section 34-50-106(20.5)(a)-(c), (e). No provision in Initiative #46 actually allows operations that could not be newly permitted to continue to operate. Yet, the titles state that they do.

The Title Board overstepped its bounds by setting forth what it deemed to be an effect of this initiative: that companies holding permits that would use hydraulic fracturing could continue to operate. Nothing in this measure says that. There was no cause for the Board to include it, and the Board erred by doing it. *See In re Title, Ballot Title & Submission Clause and Summary for 1999-2000 #255*, 4 P.3d 485, 498-499 (Colo. 2000) (title for initiative requiring background checks for sales at gun shows did not need to refer to other state laws concerning record-keeping requirements where those background checks are conducted).

In fact, in an initiative that states its purpose is to "discontinue" permitting authority of the Commission, the only legal authority this measure expressly

continues is "the continuation of commission rules ensuring the protection of public health, safety, welfare, the environment, and wildlife for all existing oil and gas operations." Proposed section 34-60-106(20.5)(d). Thus, the ballot title substantively misstates what the measure does in terms of continuing certain authority. In such cases, the title cannot be affirmed. Where an initiative dealt with proposed limits to permits for extraction activities and "the text of [the initiative] is contrary to the language of the titles," the Court held "the titles are misleading." *In re Title, Ballot Title & Submission Clause for Initiative 1999-2000 #215*, 3 P.3d 11, 16 (Colo. 2000) (titles incorrectly suggested that measure prohibited expanding physical operations of existing mines regardless of conditions of existing permits, whereas measure actually prohibited only modification of permits for expansion).

In the same way, Initiative #46 does not include any affirmation of the continued operation of any hydraulic fracturing operation that currently has a permit. To the contrary, its provisions are geared to "[e]nding the expansion of oil and gas operations using fracking in an orderly and planned manner…, and prioritizing permit reductions in disproportionately impacted communities." R. at 4 (Section 1 of Initiative #46). Commission rules are required under section 3 of the measure, but none of those rules must or can address "allowing permitted oil and gas operations that utilize fracking to continue." *Id.* at 4-5.

Finally, the Title Board must always exercise caution in wording a ballot title. But when a statutory measure is proposed, as this one was, with another full session of the General Assembly intervening between title setting and the election, the Board should be even more judicious in wording a ballot title. It cannot know what legislation might be adopted during the period leading up to the election. It is possible that the legislature could restrict current oil and gas operations utilizing hydraulic fracturing as of a future date. If that were to occur, the titles (informing voters that certain permitted operations would continue) would be inconsistent with the text of Initiative #46, and they would also conflict with the then-applicable law. This is an unacceptable risk of the Board's using an initiative's potential effects, rather than its actual legal changes, in the title.

Therefore, this title should be returned to the Board for correction.

III. The titles are misleading because they refer to a "phase-out of new oil and gas operation permits" when Initiative #46 addresses the granting of such permits, not their duration.

A. Preservation of issue below; standard for review.

Objector Foster preserved this issue below. R. at 11-12 (Argument I.D).

The Title Board is directed to "avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106(3)(b). "[T]he clear title requirement seeks to accomplish two overarching goals:

prevent voter confusion and ensure that the title adequately expresses the initiative's intended purpose." *In re Title, Ballot Title & Submission Clause for 2015-2016 #156*, 2016 CO 56, ¶11, 413 P.3d 151, 153. In other words, the title must be clear enough that voters know what they are being asked to authorize or prohibit.

B. The use of the vague reference to "phase-out of new oil and gas operation permits" makes this title unclear to voters.

The title states that this measure "requir[es] the phase-out of new oil and gas operation permits." This vague reference will confuse voters.

The common meaning of "phase-out" is "to stop using something gradually in stages over a period of time."[31] As a result, voters will think that #46 imposes limited durations on any new permits granted. But #46 does something quite different. It requires adoption of rules to limit Commission authority to *grant* permits rather than changing how long new permits can be used.

Much like *In re #215, supra*, the issue is the confusion created by the Board's vague wording. In that matter, the objectors to the ballot title argued that the title language would "imply" that the measure would change mine permitting in a way it

[31] Oxford English Dictionary ("phase out"), available at (https://www.oxfordlearnersdictionaries.com/us/definition/american_english/phase-out#:~:text=phase%20somethingout&text=to%20stop%20using%20something%20gradually,phased%20out%20by%20next%20year (last viewed July 15, 2023).

did not. 3 P.3d at 16. The Court agreed, finding that "[v]oters… **could construe** the titles as indicating" the initiative would change permitting for mines in ways that its express wording did not reflect. *Id.* (emphasis added). And as such, the title was misleading and had to be readdressed by the Title Board.

A ballot title "shall unambiguously state the principle of the provision sought to be added, amended, or repealed." C.R.S. § 1-40-106(3)(b). Where it leaves key concepts open to multiple, conflicting interpretations, it fails to meet this standard. As such, the Board should clarify its ambiguous reference to "phasing out" and be explicit that the measure's restrictions relate to the granting of permits.

IV. The titles are misleading because they fail to state, as Initiative #46 does multiple times, that permits for certain oil and gas facilities and locations would be "prohibited" by this ballot measure.

A. Preservation of issue below; standard for review.

Objector Foster preserved this issue below. R. at 12 (Argument I.F).

A ballot title need not be perfect, and this Court will not stew over whether the Board set the best possible title. That said, the Board and the Court must ensure "that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the board." *In re Title, Ballot Title & Submission Clause for 1999-2000 #29,* 972 P.3d 257, 266 (Colo. 1999) (citations omitted). In short, "the Title Board's chosen language must not mislead the voters."

Id. The Court reverses the Title Board where a ballot title reflects a "material ambiguity or concealed intent." *Id.* at 267.

B. The title should say what the measure says: Initiative #46 prohibits oil and gas facilities and oil and gas locations that utilize hydraulic fracturing technology.

This title is couched as a mere break in the process of permitting for certain oil and gas operations. "Shall there be a change to the Colorado Revised Statutes concerning **discontinuing** the issuance of new oil and gas operation permits that utilize fracking by December 31, 2030, and, in connection therewith,…." R. at 3 (emphasis added).

But the measure itself refers to the legal changes as a series of prohibitions.

- "**prohibit the modification and require the expiration of all previously issued permits** that incorporate the use of fracking by December 31, 2033, if drilling operations have not commenced by that date;"
- Commission's duties to include permitting of "any new oil and gas facilities and oil and gas locations that are not **prohibited by section 34-60-106(20.5)**;" and

- amending authority of local governments as to location and siting of permitted operations "except for those oil and gas facilities and oil and gas locations **prohibited by section 34-60-106(20.5)**."

R. at 5.

"Discontinuing" may be a watered down way of portraying the prohibition of new oil and gas facilities and locations. But that does not mean it is an accurate description of what this measure seeks to accomplish. That legal conclusion is supported by a recent non-ballot title decision of this Court.

In *City of Fort Collins v. Colo. Oil and Gas Ass'n*, 2016 CO 28, 369 P.3d 586, the Court assessed a five-year moratorium on the use of hydraulic fracturing in Ft. Collins. The City argued that a municipal moratorium was not an outright ban but more of a recess from allowing this otherwise legal activity. The Court strongly disagreed. "[T]he fracking moratorium at issue here is for five years. We view such a lengthy moratorium as different in kind from a brief moratorium that is truly a 'temporary time-out'…. Fort Collins's moratorium is **not merely a regulation; it is a prohibition**, and one that lasts for five years." *Id*., ¶¶35, 37.

Here, Proponents cannot even argue that their measure is not a prohibition on the licensing of these facilities and locations. Their measure is explicit that it is. And even if it did not, *City of Fort Collins* makes it clear that ending the Commission's

permitting authority is clearly a prohibition of any new oil and gas facilities or any new oil and gas locations after December 31, 2030.

A second misstatement in the title, also raised in the motion for rehearing under this argument, is that the title refers to discontinuing issuance of "new oil and gas operation permits." R. at 12. The titles should be specific and must be accurate as to the measure's undisputed "prohibition" on permitting of oil and gas "facilities" and "locations." As a matter of existing law, "oil and gas operations"[32] are defined differently than "oil and gas facilities"[33] or "oil and gas locations."[34] "Operations" relate to the conduct of exploration. "Facilities" and "locations" are the specific

[32] "'Oil and gas operations' means exploration for oil and gas, including the conduct of seismic operations and the drilling of test bores; the siting, drilling, deepening, recompletion, reworking, or abandonment of an oil and gas well, underground injection well, or gas storage well; production operations related to any such well including the installation of flow lines and gathering systems; the generation, transportation, storage, treatment, or disposal of exploration and production wastes; and any construction, site preparation, or reclamation activities associated with such operations. C.R.S. § 34-60-103(6.5).

[33] "'Oil and gas facility' means equipment or improvements used or installed at an oil and gas location for the exploration, production, withdrawal, treatment, or processing of crude oil, condensate, exploration and production waste, or gas." C.R.S. § 34-60-103(6.2).

[34] "'Oil and gas location' means a definable area where an oil and gas operator has disturbed or intends to disturb the land surface in order to locate an oil and gas facility." C.R.S. § 34-60-103(6.4).

equipment and land area where the drilling activities are to occur. In essence, the Title Board used the wrong legal term to describe the actual permits – and the actual oil and gas development activity – affected by Initiative #46. A misstatement such as this makes a title clearly misleading and requires correction. *In re #215*, *supra*, 3 P.3d at 16.

Therefore, the Board erred, and its title must accurately state the prohibitions imposed by Initiative #46.

CONCLUSION

The issue of hydraulic fracturing is fraught. It has become no less so since this Court decided that even the technical term for "fracking" did not need to appear in a ballot title in 2014. The title for this measure should provide the clarity that the new legal standard in Initiative #46 imposes.

In the same way, the Board's misstatements and omissions in the titles concerning the substance of this measure should be corrected. If that happens, the voters of Colorado can knowledgably pass upon the question of whether this is a policy they endorse.

For these reasons, the title for Initiative #46 should be returned to the Board for correction.

Respectfully submitted this 18th day of July, 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 PETITIONERS

CERTIFICATE OF SERVICE

I, Nathan Bruggeman, hereby affirm that a true and accurate copy of the **PETITIONER FORSTER'S OPENING BRIEF** was sent electronically via Colorado Courts E-Filing this day, July 18, 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 Nathan Bruggeman