COLORADO TITLE SETTING BOARD

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IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR PROPOSED INITIATIVE 2013–2014 #87

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**MOTION FOR REHEARING ON PROPOSED INITIATIVE 2013-2014 #87**

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On behalf of Mizraim Cordero and Scott Prestidge, registered electors of the State of Colorado, the undersigned counsel hereby submits to the Title Board this Motion for Rehearing on Proposed Initiative 2013-2014 #87 ("Initiative"), and as grounds therefore states as follows:

## I. THE MEASURE IMPERMISSIBLY CONTAINS SEVERAL SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE CONSTITUTIONAL AND STATUTORY SINGLE-SUBJECT REQUIREMENT.

Under article V, section 1(5.5) of the Colorado constitution and section 1-40-106.5, C.R.S., proposed ballot measures must contain only a single subject. "[T]he Board may not set the titles of a proposed Initiative, or submit it to the voters, if the Initiative contains multiple subjects." *Aisenberg v. Campbell (In re Title, Ballot Title, & Submission Clause 1990–2000 #104)*, 987 P.2d 249, 253 (Colo. 2000).

As reflected in the language of the Initiative, as well as in the colloquy between the proponents' attorney and the Board at the April 3 hearing, the Initiative impermissibly weaves together the following multiple subjects:

1. Overriding current statewide setback rules with an expanded statewide setback from all "occupied structures," as that term is defined in the Initiative (§ 2);

2. Depriving property owners of the rights and protections granted under sections 14 and 15 of the Colorado constitution (§ 3);

3. Limiting the use of hydraulic fracturing in "oil and gas development," as that term is defined in the Initiative (§ 2); and

4. Authorizing a homeowner to waive a setback as to the homeowner's home (§ 2).

These are separate and distinct subjects that violate the constitutional and statutory single-subject requirement. The Initiative thus fails to meet the jurisdictional threshold for the Board to set a title and, on rehearing, title setting should be denied.

## II. THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE AS DRAFTED CONFLICT WITH THOSE PREVIOUSLY SELECTED, CONTAIN IMPERMISSIBLE CATCH PHRASES, AND FAIL TO DESCRIBE THE PURPOSE OF THE INITIATIVE.

In the alternative, the title and ballot title and submission clause as drafted conflict with a title and ballot title and submission clause previously selected for a 2013-2014 proposed initiative. Moreover, the title and ballot title and submission clause are misleading and confusing because they contain impermissible catch phrases and fail to fairly express the true intent and meaning of the Initiative.

Here, the Initiative's title was set as follows:

> An amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least one half mile from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution.

The Initiative's ballot title and submission clause was set as follows:

> Shall there be an amendment to the Colorado constitution concerning a statewide setback requirement for new oil and gas wells, and, in connection therewith, requiring any new oil and gas well, including those using hydraulic fracturing, to be located at least one half mile from the nearest occupied structure; authorizing a homeowner to waive the setback for the homeowner's home; and establishing that the statewide setback is not a taking of private property requiring compensation under the Colorado constitution?

Pursuant to section 1-40-106(3)(b), ballot titles "shall not conflict with those selected for any petition previously filed for the same election." "Such a conflict exists where the titles fail to accurately reflect the distinctions between the measures, and voters comparing the titles would not be able to distinguish between the two proposed measures." *Paredes v. Corry (In re Title, Ballot Title, & Submission Clause 2007–2008 #61)*, 184 P.3d 747, 752 (Colo. 2008).

Here, the title and ballot title and submission clause conflict with the title and ballot title and submission clause previously selected for Proposed Initiative 2013–2014 #85 and Proposed Initiative 2013–2014 #86. When asked by the Board to explain the relationship between Proposed Initiative 2013–2014 #85, Proposed Initiative 2013–2014 #86, Proposed Initiative 2013–2014 #87, and Proposed Initiative 2013–2014 #88, the proponents' attorney described them as a "packet" of initiatives with "little tweaks" to each of them and characterized them as having an identical single subject: "I would say for all of #85 through #88, they create a setback requirement for new oil and gas wells from occupied structures." Thus, if the proponents' position is that these four initiatives are the same, then there is no disagreement that the titles conflict and it cannot be the case that voters will be able to distinguish between them.

In addition, the statute requires the title and ballot title and submission clause to "correctly and fairly express the true intent and meaning" of the proposed initiative. "[A] material omission can create misleading titles." *Garcia v. Chavez (In re Title, Ballot Title, &*

*Submission Clause 1999–2000 #258A)*, 4 P.3d 1094, 1098 (Colo. 2000). Titles are also prohibited from containing a "catch phrase" that unfairly prejudices the proposal in its favor because such catch phrases contravene section 1-40-106(3). *Id.*

For the following reasons, the title and ballot title and submission clause as drafted here are misleading and confusing:

1. The catch phrase "statewide setback" has an alliterative quality that masks its true, plain language meaning in a way that is likely to elicit support for the Initiative without contributing to public understanding of the effect of the Initiative;

2. Use of the term "new" is a vague catch phrase that is likely to prejudice the Initiative in its favor without contributing to public understanding of the reach of the Initiative;

3. The catch phrase "hydraulic fracturing" is politically charged and its inclusion is likely to appeal to voter emotion without contributing to public understanding of the relationship between the Initiative and hydraulic fracturing;

4. The title and ballot title and submission clause fail to describe the effect of the Initiative as an override of current statewide setback rules; and

5. The title and ballot title and submission clause fail to describe the type of oil and gas wells affected by the Initiative.

Hence, the title and ballot title and submission cause, as drafted, do not conform to the statutory requirements of section 1-40-106(3)(c) or to the case law construing the statute and require amendment consistent with these concerns.

## III. REQUEST FOR RELIEF TO GRANT THE MOTION FOR REHEARING AND TO REJECT THE MEASURE FOR LACK OF JURISDICTION OR, ALTERNATIVELY, TO AMEND THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE.

Because the Initiative contains multiple subjects, the Board lacks jurisdiction to set a title. To the extent the Board determines it has jurisdiction to set a title, the title and ballot title and submission clause, as drafted, conflict with those previously drafted, contain impermissible catch phrases, and fail to describe the purpose of the measure in ways that are misleading and confusing.

Accordingly and pursuant to section 1-40-107(1), C.R.S., the objectors request that this Motion for Rehearing be granted and that the Board reject the Initiative for lack of jurisdiction or, alternatively, amend the title and ballot title and submission clause consistent with the concerns set forth above.

Respectfully submitted this 10th day of April, 2014.

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