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COLORADO SUPREME COURT
2 East 14th Avenue
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 Proposed Initiative 2017-2018 #97 ("Setback Requirement for Oil and Gas Development")

Petitioner: Neil Ray,

v.

Respondents: Ann Lee Foster and Suzanne Spiegel,

and

Title Board: Suzanne Staiert, Jason Gelender, and Glenn Roper

▲ COURT USE ONLY ▲

Case No.: 2018SA31

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TITLE BOARD'S ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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

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☒It contains 3,584 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

☒In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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 or 28.1, and C.A.R. 32.

s/ Matthew D. Grove
Matthew D. Grove

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Suzanne Staiert, Jason Gelender, and Glenn Roper, in their official capacities as members of the Title Board, by and through the Office of the Colorado Attorney General and undersigned counsel, submit the following answer brief.

The Title Board waived its opening brief, and with respect to Petitioner's arguments concerning the single-subject and clear title requirements, stands on the record created at the hearing for 2017-2018 #97. The Title Board submits this answer brief in order to explain its reasoning with respect to the remaining three issues raised in the Petitioner's opening brief – all of which stem from the fiscal impact statement and abstract required by § 1-40-107, C.R.S. – and to request guidance from this Court concerning the respective roles of the Board and Legislative Council Staff ("LCS"), as well as initiative proponents and opponents, in the process of creating the fiscal impact statement.

STATEMENT OF THE CASE AND FACTS

Taken together, the factual background outlined in the Petitioner's and Respondents' opening briefs adequately describe the history of this case. Petitioner did raise concerns with the adequacy of

the fiscal impact statement and abstract and requested that the Title Board remand the matter to LCS to improve upon the abstract that it published. The Title Board, heeding this Court's opinion in *In re Initiative for 2017-2018 #4*, 395 P.3d 318 (Colo. 2017), and the plain language of § 1-40-107, C.R.S., concluded that it lacked authority to do so, and that any changes to the abstract were the Title Board's statutory responsibility.

With this in mind, the Title Board heard from Natalie Mullis, fiscal director for LCS, about the information that LCS considered when drafting the fiscal impact statement and abstract, as well as some of the practical limitations that LCS faces when performing that exercise. Ms. Mullis explained that, contrary to the assertions in Petitioner's motion for rehearing and opening brief, LCS had in fact considered a wide range of materials when drafting the fiscal impact statement and the abstract, including the two studies (from the CU Leeds School of Business and the COGCC) that the Colorado Business Roundtable submitted for consideration (after the deadline had already passed). R.

Tr. 40:12-17.[1] She also noted that she had compared the fiscal note for #97 to fiscal notes created by LCS "during the legislative process on other setback measures in previous years," and that "the way we wrote the revenue impact and the expenditure impact" for pending bills in the General Assembly "was very similar to what we put into our initial fiscal impact statement and the abstract for this measure." R. Tr. 40:24-41:1; 41:7-10; *see also* § 1-40-105.5(2)(c)(I), C.R.S.

While Ms. Mullis made it clear that LCS "do[es]n't like to provide indeterminate impacts" in the fiscal impact statement or abstract, she also explained that this is a necessary outcome "when we cannot identify an assumption for how a policy change is going to change the behavior of an industry or any part of the economy." R. Tr. 43:18-21. If staff cannot "make an assumption for that in an accurate and unbiased way, then we have no starting point for putting numbers to it." R. Tr. 43:21-24. Here, Ms. Mullis explained, the CU study "ha[d] a different purpose than our fiscal note." R. Tr. 44:3-4. And just as importantly, it covered a different geographical area than #97 would if it were to be

[1] References to the transcript attached to Respondents' opening brief will utilize this format.

approved. R. Tr. 44:3-45:9. In order to "quantify" the impacts of how "oil and gas production would change [as a result of #97] and how that would flow through the economy," LCS would have been required to independently quantify that information and "put that through a model." R. Tr. 45:1-8. But LCS, Ms. Mullis explained, "just do[es]n't have the ability to do that in an unbiased and accurate way." R. Tr. 45:8-9.

After hearing Ms. Mullis's explanation, the Title Board considered and rejected Petitioner's argument that it should remand the fiscal impact statement and abstract to LCS. The Title Board did, however, share some of Petitioner's concerns about whether the fiscal impact and abstract as drafted by LCS would provide meaningful guidance to prospective petition signers. Thus, as contemplated by this Court's opinion in *2017-2018 #4*, the Title Board permitted the initiative proponent and a representative of the Colorado Policy Roundtable to speak further about what they believed the abstract

should and should not contain.[2] After a substantial give-and-take between these presenters and the members of the Title Board, the Board approved some modest changes to the abstract but, suffering from the same uncertainty that afflicted LCS in the initial draft, it did not add the detailed forecasts about impacts on oil and gas production and the broader state economy that Petitioner sought.

SUMMARY OF THE ARGUMENT

1) As a matter of statutory interpretation, the Title Board correctly concluded that it lacked authority to remand the abstract and fiscal impact statement to LCS. The plain language of § 1-40-105.5(2)(a) and § 1-40-107(1)(a)(III)(b), taken together, confirms that the Title Board may only "modify the abstract based on information presented at the rehearing," and that it may not order LCS to revise or reconsider the work that it has already done.

2) Section 1-40-105.5(6) states that: "[a]t the same time the[Legislative Council] director posts the initial fiscal impact

[2] Both Petitioner and Respondents describe these statements as "testimony." To be clear, however, none of the discussion was made under oath, nor did the Title Board attempt to apply any sort of evidentiary limitations on what was presented.

statement on the legislative council website, he or she shall also post on the website all fiscal impact estimates received." Failure to comply with this provision would not deprive the Title Board of jurisdiction over #97, but even if it were jurisdictional, § 1-40-105.5(6) was not violated here because the documents that Petitioner complains should have been posted on Legislative Council's website were not "fiscal impact estimates" for #97.

3) This Court's opinion in *2017-2018 #4* left the Title Board with substantial uncertainty about what it should do when faced with a fiscal impact statement or abstract that an objector claims is inadequate. While the Title Board believes that the abstract that it approved for #97 falls within the broad discretionary range that this Court acknowledged in *2017-2018 # 4*, it does have a number of concerns about the process, and respectfully requests additional guidance from this Court.

ARGUMENT

I. The Title Board did not have authority to remand the fiscal impact statement and abstract to Legislative Council Staff for revision.

Petitioner argues that the Title Board had authority to "send [#97's] fiscal impact statement and abstract back to Legislative Council," and that, accordingly, the Title Board erroneously concluded that it "can only modify the abstract based on information presented at the rehearing." Op. Br. at 34.

A. Standard of review.

Whether the Title Board had authority to remand the fiscal impact statement and abstract to LCS is a question of law. It is therefore subject to de novo review. *See, e.g., Matter of Title, Ballot Title, and Submission Clause for 2013-2014 #103,* 328 P.3d 127, 129 (Colo. 2014).

B. Argument

The Title Board respectfully disagrees. Section 1-40-105.5(2)(a) states that "the director's abstract that is included in the impact statement *is final, unless modified in accordance with section 1-40-107.*"

(emphasis added). Section 1-40-107(1)(a)(III)(b), in turn, provides that "[t]he title board may modify the abstract based on information presented at the rehearing," but nothing in that subsection or any other suggests that the Title Board may reject a fiscal impact statement or abstract as unsatisfactory and require the LCS to rewrite it. This Court suggested as much in *2017-2018 #4*, where, echoing these two statutes, it noted that "[t]he abstract included in the statement is final, 'unless modified in accordance with section 1-40-107.'" *In re Initiative for 2017-2018 #4*, 395 P.3d at 322 (quoting § 1-40-105.5(2)(a)).

Petitioner offers a number of policy reasons for their suggested interpretation of the governing statutes, but none of them justify divergence from the plain language of §§ 1-40-505.5 and -107. "If a statute is clear and unambiguous on its face, then [a reviewing court] need not look beyond the plain language." *Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004). While a court may "deviate from the plain language of a statute to avoid an absurd result," a result is considered absurd only in those "instances where a literal interpretation of a statute would produce a result contrary to the

expressed intent of the legislature." *Smith v. Exec. Custom Homes, Inc.*, 230 P.3d 1186, 1191 (Colo. 2010). Here, nothing in the statutes suggests that the General Assembly did not mean what it said when it declared that LCS's abstract is "final." This Court should therefore decline to deviate from the plain language of § 1-40-105.5(2)(a).

II. Legislative Council Staff was not provided with any "fiscal impact estimates," and thus was not required to post the materials that it received online.

Petitioner argues that the Title Board lacked jurisdiction to set a title for #97 because LCS did not post "the health impact studies the Proponents submitted" online (Op. Br. at 37), despite the fact that the last sentence of the abstract stated as follows: "Increasing the setback distance … to the extent less development improves health outcomes for affected residents, may increase productivity and reduce medical costs."

A. Standard of review.

Whether the Title Board had authority to remand the fiscal impact statement and abstract to LCS is a question of law. It is therefore subject to de novo review. *See, e.g., 2013-2014 #103,* 328 P.3d at 129.

B. Argument

Section 1-40-105.5 requires Legislative Council to post on its website all fiscal impact estimates received from the designated representatives of the proponents or other interested persons. *See* § 1-40-505.5(2)(a); § 1-40-505.5(6). The statute does not define "fiscal impact estimate," but the meaning of this phrase can be inferred from § 1-40-105.5(2)(b), which contemplates submission of a "fiscal impact estimate that includes an estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if it is enacted."

Petitioner argues that the website posting requirement in § 1-40-105.5(6) is jurisdictional, and that title could not be set unless all of the materials provided by the Proponents were posted on the Legislative Council website. This Court, however, has previously declined to hold that technical requirements imposed on Legislative Council are jurisdictional in nature. In *In re Title, Ballot Title and Submission Clause for 1999-2000 #255*, 4 P.3d 485 (Colo. 2000), for example, this Court considered whether the Title Board could set title where the

Office of State Planning and Budgeting missed its deadline for submitting the fiscal impact statement. The Court held that the deadline "must be viewed in the context of the people's fundamental constitutional right of initiative." *Id.* at 492. If the deadline at issue in *1999-2000 #255* "were considered jurisdictional, the staff of a government agency would have the power to delay progress on an initiative simply by" failing to comply with it. *Id.* "This would be inconsistent with the exercise of the constitutional right of the initiative." *Id.*

Similar reasoning applies here. Even assuming *arguendo* that the materials related to health outcomes, productivity, and medical costs amounted to "fiscal impact estimates," it would run counter to the constitutional right of the initiative to punish the proponents of #97 for LCS's failure to comply with the statutory requirements. Accordingly, this Court should decline to hold that the website posting requirement in § 1-40-505.5(6) is jurisdictional.

In any event, as is clear from the last sentence of the abstract, the documents that Petitioner complains should have been posted pursuant

to this statutory section were not "fiscal impact estimates." Nothing in the reference to "health outcomes for affected residents … productivity and … medical costs" suggests that the documents provided to LCS contained an estimate of the effect that #97 would have on government revenues, expenditures, taxes, and fiscal liabilities. As a consequence, even if the failure to comply with the website posting requirement of § 1-40-505.5(6) is capable of creating a jurisdictional bar to title setting as a general matter, the statute would not apply here because none of the documents qualified for the posting requirement.

III. The abstract satisfies statutory requirements.

Finally, because the abstract satisfies governing statutory requirements, Petitioner's challenge to it should be rejected. Nonetheless, the Title Board respectfully requests that the Court provide it with guidance for evaluating requests for modification of the abstract in future cases.

A. Standard of review.

This Court will "draw all legitimate presumptions in favor of the propriety" of an abstract set by the Title Board, and will "only overturn the Board's decision in a clear case. *2017-2018 # 4*, 395 P.3d at 323.

B. The fiscal impact statement and abstract were adequate.

Petitioner argues that the abstract is "legally inadequate because it does not contain an estimate and fails to comply with the requirements of § 1-40-105.5(3)." Op. Br. at 26. Specifically, Petitioner contends that the statutory reference to "an estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities" requires the abstract to include a number (or more specifically, a dollar amount), and that without such a numerical estimate the abstract is fatally flawed.

There are several problems with Petitioner's position. First, it overlooks the fact that, per Ms. Mullis, this particular fiscal impact statement was "substantially similar [in] form and content to what [LCS] provide[s] to the legislature during the legislative process." R. Tr. 40:21-23. This is important because it is exactly what the statute

requires. § 1-40-105.5(2)(c)(I) ("The initial fiscal impact statement must [b]e substantially similar in form and content to the fiscal notes provided by the legislative council of the general assembly for legislative measures pursuant to § 2-2-322, C.R.S."). And Petitioner did not contradict Ms. Mullis or argue to the Title Board that the fiscal impact statement for #97 failed this "substantially similar" requirement.

Second, Petitioner ignores the crux of the problem that Ms. Mullis identified: there was a lack of reliable information upon which LCS could confidently generate a numerical estimate for #97. Contrary to Petitioner's assertions, Ms. Mullis informed the Title Board that LCS did consider the CU Business School and COGCC studies, but because they covered a different geographical area than #97 proposes, were created for a different purpose than the fiscal note and abstract, and contained unsubstantiated assumptions, LCS concluded that they were insufficient for fiscal impact purposes. R. Tr. 40:12-17.

And while Petitioner claims that "[a]ll Legislative Council needed to do was find and utilize available data to create its estimates," this is

hardly a viable solution. It not only assumes that reliable, on-point data will be available in amounts sufficient for, and formats conducive to, creating economic forecasting models, but also that LCS will be able to locate it, and will—employing existing staff in the midst of an ongoing legislative session—have the resources that it needs to complete the task. Indeed, suggesting that all LCS needs to do is "find and utilize" such data vastly understates the problem. To date, no fewer than 184 initiatives have been filed during the 2017-2018 electoral cycle. And while some have been withdrawn, LCS has still prepared scores of fiscal impact statements for those initiatives that have proceeded through to title setting.

While it is true that members of the Title Board expressed concerns about whether the abstract as drafted by LCS would provide any meaningful information to prospective petition signers, it cannot be seriously disputed that an *inaccurate* fiscal impact forecast is far worse than an *indeterminate* one. Petitioner argues that LCS (or, in the alternative, the Title Board) should have relied on the COGCC and/or CU studies because they had the best and most recent data available.

Yet these studies did not cover the same geographic area that #97 purports to cover (because, unlike #97, they did not exclude federal land from the setback requirement), and Petitioner makes no effort to explain how that critical difference could have been accounted for when plugging the relevant numbers into the model that they assert LCS should have developed. Given the choice between providing potential petition signers with numbers that are simply not empirically supportable and a general statement that #97, if passed, would "potentially reduce[] future oil and gas development in the state, particularly in heavily populated counties" (as the original abstract stated), or "is likely to reduce future oil and gas development in the state" (as stated in the final version approved by the Title Board), LCS and the Title Board appropriately took the latter course. *See, e.g., In re Proposed Initiative on Trespass-Streams with Flowing Waters*, 910 P.2d 21, 26 (Colo. 1996) (holding that the Board "need not explain the fiscal impact of a proposed initiative if the impact cannot be determined from materials submitted to the Title Board due to uncertainties or variables inherent in the particular issue"); *see also Percy v. Hayes*, 954 P.2d 1063

(Colo. 1998) (faced with conflicting evidence regarding the fiscal impact, the board's determination that the proposed measure "may" have a negative fiscal impact on certain local governments was consistent with its statutory authority). In light of the substantial deference that this Court gave to the Title Board with respect to the abstract in *2017-2018 #4*, the abstract, as modified and approved by the Title Board here, should be affirmed.

C. The Title Board is in need of guidance with respect to the process for review and potential modification of the abstract.

Finally, although the abstract set for #97 should be affirmed, the Title Board is in need of guidance with respect to the abstract review process. The Board acknowledges that in *2017-2018 #4*, this Court stated in *dicta* that "[t]he Title Board … holds public rehearings at which it may hear testimony, take evidence, and inquire into information presented by various sources." 395 P.3d at 324. The rehearing in this case, however, revealed that this view suffers from a number of practical difficulties for which no solution is readily apparent. For example, this Court has previously held that "the Board

has no independent fact gathering ability." *Title, Ballot Title, and Submission Clause Concerning "Fair Fishing,"* 877 P.2d 1355, 1363 (Colo. 1994), but it is not entirely clear how this is to be squared with the statement in *2017-2018 #4* that the Board should "inquire into information presented by various sources." 395 P.3d at 324.

Moreover, while *2017-2018 #4* stated that the Title Board could "take evidence," the Title Board is not a court or any other type of judicial body. *See In re Proposed Amend. Entitled "W.A.T.E.R.*", 831 P.2d 1301, 1305-06 (Colo. 1992) ("When the Board holds a public meeting for the purpose of designating and fixing a title, ballot title and submission clause, and summary, it is not acting as an administrative agency functioning in an adjudicative capacity."). Nor does it have rulemaking authority. Thus it has no present ability to establish and/or enforce evidentiary rules. Furthermore, given the complex nature of economic forecasting, taking evidence on the abstract and fiscal impact statements will likely swiftly turn at least some Title Board rehearings into a battle of the experts—although that expert evidence may well be one-sided when an individual citizen, whether as a proponent or

opponent of a measure, faces well-heeled opposition. Then there is the matter of the Board's expertise. Simply put, it is not made up of professional economists, nor does it have an economist on staff, a problem that is exacerbated by the fact that the Title Board does not have the luxury of time to deliberate on the arguments raised in favor of amending the abstract or accepting what LCS has prepared—it must instead rule on motions for rehearing on the spot.

In this case, the two individuals who spoke to the Title Board about the fiscal impact statement and abstract and whether they were accurate or complete were (1) a designated representative for #97 and (2) a representative from the Colorado Policy Roundtable who presented in opposition to the measure. Although both speakers briefly outlined their qualifications, neither offered information that the Title Board, given its lack of expertise in economic analysis and forecasting, felt formed an adequate basis to significantly deviate from what LCS—and its nonpartisan team of experts—had prepared.

Although more guidance, whether from this Court or the legislature, is sorely needed, it is also clear that the Title Board

appropriately exercised its discretion by, like the LCS, declining to provide a numerical estimate for all of the potential impacts of #97. None of the information provided at the rehearing formed a reliable basis for inserting any specific numbers about oil and gas exploration or development, or the fiscal impact of those activities on state resources or revenue, into the abstract for the measure. Under these circumstances, the Title Board acted within its discretion by ultimately acceding to LCS's approach and speaking of the fiscal impact of #97 in more general terms. Whether or not it is able to clarify the Title Board's role in the process of reviewing and potentially modifying the abstract, the Court should affirm that the finished product in this case was a reasonable exercise of the Title Board's discretion.

CONCLUSION

The Title and revised abstract for #97 should be affirmed.

Respectfully submitted this 26th day of March, 2018.

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CERTIFICATE OF SERVICE

This is to certify that on March 26, 2018, I electronically filed a true and correct copy of the foregoing **TITLE BOARD'S ANSWER BRIEF** with the Clerk of the Court via the Colorado Courts e-Filing System, and arranged for service upon each of the following counsel of record listed below via the Colorado Courts e-Filing System:

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