

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203</p>	<p>DATE FILED: April 7, 2020 3:57 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020, #178</p> <p>Petitioner: JOHN JUSTMAN</p> <p>v.</p> <p>Respondents/Proponents: ANNE LEE FOSTER and SUZANNE SPIEGEL</p> <p>and</p> <p>Ballot Title Board: THERESA CONLY, DAVID POWELL, and JASON GELENDER</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Supreme Court Case No.: 20SA67</p>
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<p>PETITIONER’S ANSWER BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all the 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 applicable word limits set forth in C.A.R. 28(g) or 28.1(g).

It contains 3,114 words. (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with C.A.R. 28(b) and/or C.A.R. 28(c).

For each issue raised by the respondents, the brief contains under a separate heading before the discussion of the issue, a concise statement of whether the petitioner agrees with the respondents' statements concerning the standard of review with citation to authority 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/ Suzanne Staiert
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Petitioner, John Justman, registered elector of the State of Colorado, through his undersigned counsel, submits his Answer Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2019-2020 No. 178 (unofficially captioned as “Oil and Gas Operator Financial Assurance”).

ARGUMENT

I. THE TITLE BOARD IMPROPERLY CONSIDERED PETITIONER’S MOTION TO DISQUALIFY, CALLING INTO QUESTION THE IMPARTIALITY OF THE ENTIRETY OF THE TITLE BOARD’S REHEARING PROCEEDINGS

As argued in Petitioner Justman’s Opening Brief, Petitioner Justman has a legitimate expectation to an impartial Title Board.¹ A fair tribunal is a basic requirement of due process. And recusal is necessary when the probability of actual bias on the part of the decisionmaker is “too high to be constitutionally tolerable.”

Petitioner Justman understands that he is provided limited and narrowly-construed procedural opportunities for Title Board rehearing and this Court’s review. And, Petitioner Justman also understands this Court presumes the validity

¹ Petitioner raises the same issue in the following concurrent cases: 20SA72, 20SA71, 20SA70, 20SA69, and 20SA68.

of the Title Board's decision. But these legal tenants do not extinguish the Petitioner's legitimate expectation of fairness and impartiality.

The Title Board failed to properly consider the Petitioner's timely Motion to Disqualify and therefore the entirety of the Title Board's Rehearing on Proposed Initiative No. 178 must be called into question.

A. The Title Board's unique functions and narrow charge do not exempt it from having to provide Petitioner Justman with procedural due process.

Petitioner Justman recognizes the unique functions and narrow charge described by the Title Board in its Opening Brief. Title Board Opening Br., at 18-19.

However, Petitioner Justman urges this Court to reject the Title Board's suggestion that because of its unique functions and narrow charge that it is somehow exempt from ensuring that the Title Board is impartial.

The requirement of neutrality in proceedings is not suspended simply because a tribunal is unique, special or has a narrow charge. Nor is the requirement suspended because the Title Board's organizing statute is silent on procedural due process. Petitioner Justman is unaware of any exemption provided by the Due Process Clause to tribunals with a narrow charge or unique functions. And

notably, Colorado's General Assembly did not provide an exemption to the Title Board in requiring procedures to ensure fairness and impartiality.²

The Title Board also appears to suggest that the only type of board that must ensure neutrality is one that acts as an administrative agency in an adjudicative capacity. Title Bd.'s Opening Br., at 18. However, the Title Board's sole function is to make sure the initiative process is fair and impartial. *See* C.R.S. § 2-40-101(2). The Title Board would be unable to meet its fundamental charge without ensuring procedural due process. Petitioner Justman should be able to present his case with assurance that the arbiter is not predisposed to find against him.

B. The Title Board cannot cure its failure to provide Petitioner Justman with procedural due process by relying upon its Rehearing procedures as safeguards to protect from bias.

The Title Board suggests it is exempt from ensuring fairness and impartiality. Title Bd.'s Opening Br., at 19. Therefore, Petitioner Justman is confounded by the Title Board's characterization of "existing safeguards" which ensure its

² *See* C.R.S. § 24-3.7-102(d) "Best Practices for State Boards and Commissions" (requiring written policies or bylaws and annual training on identifying and managing conflicts of interest). The General Assembly provided exemptions for certain boards and commissions, but did not provide an exemption for the Title Board. *See* C.R.S. § 24-3.7-102(d)(1).

proceedings are free from bias. The Title Board asks this Court to ignore its failure to consider Petitioner Justman's timely Motion to Disqualify and accept "existing safeguards" in its place. The Title Board relies on three "procedures." First, Title Board asks this Court to accept its "majority vote" as protection from bias.

However, Petitioner Justman finds no support in procedural due process law to support such a notion. Instead, procedural due process law requires a biased member to recuse herself to allow the remaining members to consider the matter free from her influence. It only takes one biased member of a tribunal to taint a proceeding. Procedural due process does not suggest that Petitioner Justman should simply trust that the remainder of the tribunal balances out that biased member through a majority vote. The troublesome nature of this suggestion is compounded by the fact the member who is alleged to be biased serves as the Chairperson of the tribunal.

Next, the Title Board seeks to assure this Court that fairness and impartiality is guaranteed because the statute allows any registered elector to request a rehearing. However, Petitioner Justman has not alleged that his procedural due process rights were frustrated due to an inability to request a rehearing. Instead, Petitioner Justman seeks an impartial tribunal to consider his Motion for Rehearing. It is

nonsensical to suggest that a right to request a rehearing cures any bias of a member of the Title Board.

Lastly, the Title Board seeks to shift its obligations to provide procedural due process by suggesting this Court will safeguard against it. There is no basis to suggest that a party appearing before the Title Board must have his allegations of bias addressed for the first time through an appeal to this Court.

The Title Board's reliance on "numerous procedural safeguards" flies in the face of fundamental tenants of procedural due process. The Petitioner is entitled to a fair and unbiased decision maker, and even one biased member on the Title Board is sufficient to deprive the Petitioner of procedural due process.

C. Title Board is barred from attempting to cure its deficiency by arguing the merits of the Motion to Disqualify when it failed to fully consider the Motion

At the February 19, 2020 Rehearing, the Secretary of State's designee and chairperson of the Title Board, first dispensed with the Motion to Disqualify filed in Proposed Initiative No. 178. Without allowing Petitioner Justman to present his evidence, and without deliberation or a vote of the Title Board, the Chairperson, who was the subject of the Motion to Disqualify, concluded the Motion had no basis in statute or rule, was "procedurally improper," and therefore "fails." Audio of the February 19, 2020 Rehearing, at 05:47.

Now, for the first time, the Title Board asks this Court to dismiss the Motion to Disqualify on its merits, even though the Title Board did not allow Petitioner Justman to present his evidence. Further, the Title Board mischaracterizes the nature of the evidence Petitioner Justman sought to present. At the Rehearing, the Petitioner was prepared to offer evidence of bias but was not provided the opportunity.³ This included the anti-oil and gas industry nature of the Chairperson's previous employment, her role as a former lobbyist, and her anti-oil and gas communications during and after her previous employment. *See* Motion to Disqualify, at 1.

Petitioner Justman is left to wonder if the Title Board's determination that recusal was not required in its Opening Brief is further evidence of procedural due process violations and/or existing bias. The Title Board is barred from inviting this Court to draw conclusions on the merits of the Motion to Disqualify in the absence of any evidence. By failing to allow Petitioner Justman to present his case, the Title Board waived its right to argue the merits of the Motion to Disqualify. This

³ Petitioner is also concerned that since the Rehearing, the Secretary of State's designee, the subject of the Motion to Disqualify, has attempted to hide or destroy evidence which supports the alleged bias by removing from the public view anti-oil and gas industry social media posts.

Court should reject in its entirety this portion of the Title Board's argument as not being properly before the Court.

While there is a presumption of honesty and integrity owed to the Title Board, the Petitioner must be provided with the opportunity to overcome this presumption and demonstrate that actual bias and prejudice was present. And in this instance, the Title Board's failure to fully consider the Motion to Disqualify interferes with this legitimate expectation. Failing to fully consider the Motion sets a precedent which would foreclose on any question of bias, including whether a member of the Title Board could vote on a measure in which she is the proponent or if a proponent of a ballot initiative has a legitimate expectation to an impartial title board. It is an unconscionable conclusion which demands review. Petitioner asks that the Court remand the measure back to the Title Board for full consideration of Petitioner's Motion to Disqualify.

D. The Title Board's invitation to this Court to reject the longstanding tenants of procedural due process is contrary to the U.S. Constitution and Colorado law.

"[O]ur system of law has always endeavored to prevent even the probability of unfairness." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (citation omitted).

However, in this instance, the Title Board invites this Court to reject all parties' procedural due process rights because the Title Board and this Court should not be

“burdened.” Title Bd.’s Opening Br., at 20. The Title Board suggests that procedural due process rights must be cast aside because parties would be “incentivized” to file specious claims. *Id.* This suggestion amounts to the Title Board’s denying Coloradans of their due process rights and thereby amending the U.S. Constitution. Petitioner Justman is disheartened by the Title Board’s position on longstanding and fundamental procedural due process rights. Petitioner Justman urges the Court to reject the Title Board’s suggestion that parties before it have no right to due process.

II. THE TITLE BOARD FAILED TO CORRECT THE MISLEADING TITLE WHICH WILL CREATE PUBLIC CONFUSION, IN VIOLATION OF THE CLEAR TITLE REQUIREMENT

Proposed Initiatives No. 178 contains a minimum financial assurance requirement of \$270,000 per well. The measure is silent as to whether the requirement pertains to existing or only to new wells and does not provide for the manner in which oil and gas companies must satisfy the requirement. It also misleads voters into believing that actual costs to close and remediate a well is \$270,000.

The Title Board ignored the public confusion that will be caused by this misleading title and failed to reject an initiative that cannot be understood clearly enough to allow the setting of a clear title. As described in Petitioner Justman’s

Opening Brief, on three separate occasions, a member of the Title Board agreed with Petitioner Justman's counsel that the measure was confusing because it does not make explicit as to whether the minimum financial assurance requirement will be assigned to existing or only to new wells. Audio Recording of Feb. 19, 2020 Rehearing, at 58:53 – 58:54, 59:47 – 59:56, and 1:03:22 – 1:03:29.

In their Opening Briefs, the Title Board and Respondents do not address the Title Board member's confusion concerning to which wells the financial requirement will be assigned. Title Board's Opening Br., at 10-11; Respondents' Opening Br., at 11-12. The Respondents' clarification at the Rehearing that the measure applies to new wells only is insufficient to cure this confusion. The Title Board has a duty to cure this defect.

In addition, Petitioner Justman provided evidence that the costs to close, cleanup and restore a well range from \$90,000 to \$100,000 per vertical well and an additional \$20,000 per horizontal well. However, the measure would provide a minimum requirement for \$270,000, which is more than double of the actual costs. Because the \$270,000 financial assurance is more than double the actual costs of remediating a well, the amount must also cover other purposes, *i.e.*, a penalty. Because the title only attributes the \$270,000 financial assurance for remediation

only, the title is misleading. As the measure is currently written, the title violates the clear title requirement.

III. THE TITLE BOARD FAILED TO REJECT PROPOSED INITIATIVE 2019-2020 NO. 178 WHICH CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT

The Respondents bear the ultimate responsibility for formulating a clear and understandable proposal for the voters to consider. Although the Respondents contend that the single subject of their measure is a minimum financial assurance of \$270,000 per oil and gas well, as Petitioner Justman presented in his Opening Brief, the measure contains multiple additional subjects. These impermissible separate subjects for Proposed Initiative No. 178 include:

- a. Repeal of administrative rules in effect related to financial assurances under S.B. 19-181;
- b. Removal of Colorado Oil and Gas Conservation Commission's authority;
and
- c. Ban on all oil and gas operations in Colorado.

The single subject requirement guards against two dangers associated with omnibus initiatives. First, combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions that may have different or even conflicting interests could lead to the

enactment of measures that would fail on their own merits. Second, the single subject requirement helps avoid voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex initiative.

The purpose of the financial assurance requirement is clear: to shutter almost all oil and gas development in the state. The measure contains other multiple subjects separate from the financial assurance requirement. These multiple subjects include repealing administrative rules and removing the General Assembly’s direction that Colorado Oil and Gas Conservation Commission (“Commission”) revisit the area of financial assurance as enacted in S.B. 19-181. These other subjects are “coiled up in the folds” of the measure. Repealing administrative rules and eliminating the General Assembly’s direction to the Commission are separate and distinct subjects that bear no necessary and proper connection to the existing financial assurance regulation.

There is no reason to presume that voters who may support the \$270,000 minimum financial assurance would additionally vote for a scheme which would shutter Colorado’s oil and gas production, repeal the General Assembly’s direction to the Commission under S.B. 19-181 and administrative rules promulgated under

S.B. 19-181. Such measures, which can pass only by combining subjects that appeal to different factions, violates the single-subject requirement.

IV. THE TITLE BOARD FAILED TO CORRECT THE PROPOSED INITIATIVE NO. 178's FISCAL IMPACT STATEMENT AND ABSTRACT AS REQUIRED BY SECTION 1-40-105.5, C.R.S., PROVIDING VOTERS WITH NO MEANINGFUL INFORMATION, AND ARE MISLEADING AND PREJUDICIAL

Section 1-40-105.5(3), C.R.S. outlines the requirements of the abstract that must be provided by the Legislative Council of the General Assembly. The abstract must include “[a]n estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities if the measure is enacted.” *Id.* at 105.5(3)(a).

The General Assembly provided for a robust fiscal impact statement and a meaningful abstract to be included in the initiative process. The Legislative Council’s analysis in the abstract of the fiscal and economic impacts of the measures provides no meaningful discussion of, for example, the decrease in the amount of severance tax, royalty payments, and lease revenue; reduction of jobs; or the implications to Colorado’s GDP, to name just a few relevant topics. As reflected in the Rehearing testimony, Legislative Council could use current financial assurance information along with the number of oil and gas wells to provide a robust analysis. Rather, the abstract included vague references.

The Legislative Council had before it the 2018 study titled “Increasing the Oil and Gas Setback Requirement to 2,500-feet in Colorado: An Economic and Fiscal Impact Analysis” in addition to economic analysis it was provided in 2016 in the Proposed Initiative 2017-2018 No. 97 process. The Legislative Council had before it clearly defined fiscal and economic impacts, including the loss of an average of 104,000 jobs annually over the next 15 years, GDP decline of an average of \$14 billion, and loss of \$8.3 billion in real income by Coloradans.

The abstract and Financial Impact Statement fail to comply with the requirements set forth in Section 1-40-105.5, C.R.S. because they provides voters with no meaningful information on the measure’s fiscal impact and are misleading and prejudicial. Therefore, the Title Board should have modified the abstract to include estimates provided in the 2018 study, other studies readily available, or other available data.⁴

Lastly, the abstract also fails to include a statement of the measure’s economic benefits for all Coloradans, simply stating that the measure will

⁴ The state has recently examined the number of existing orphan wells and worked with legislators and stakeholders to determine the need for an orphan well fund. Data is readily available from this process to inform Legislative Council on the impacts of a minimum financial assurance for all wells.

“increase income to providers of financial assurance and increase available mitigation funding for oil and gas wells.”

This Court has affirmed the Title Board’s approval of an abstract where legislative council testified that it could not provide quantitative estimates. But here, the Legislative Council has been provided with specific economic analyses which provide quantitative estimates. Additional data is available to Legislative Council from other state agencies. Absent quantitative estimates, the Title Board erred in determining it had jurisdiction to set title for the measures.

As discussed above, the abstracts do not include actual estimates and instead provide vague generalities which fail to fully inform voters. The abstracts fail to express the magnitude in GDP decline and job loss if the minimum financial assurance is put in place. The vague generalities serve to mitigate the measures’ actual effects. And voters are left with nothing meaningful before deciding whether to sign a petition. As a result, the abstract is incomplete and misleading.

Because the abstract is misleading and prejudicial under Section 1-40-107(1)(a)(II)(B), C.R.S., the Title Board’s decision to set title must either be set aside for lack of jurisdiction or remanded back to the Title Board to allow the correction of deficiencies.

CONCLUSION

Petitioner Justman respectfully requests the Court determine that the Title Board's finding on the Petitioner's Motion to Disqualify violated Petitioner's due process rights, any title setting determinations made by the Title Board are void, and remand the Motion to Disqualify for a full and fair hearing on the merits of the Motion.

In the alternative, Petitioner Justman respectfully requests this Court reverse the Title Board's setting of Title for Proposed Initiative No. 178, return the Proposed Initiative to the Proponents, and hold that:

1. The measure violates the single-subject requirement, and thus the measure should return to the Proponents because the Title Board lacked the authority to set title;
2. The measure's financial impact statement and abstract do not comply with section 1-40-105.5(3), and are misleading and prejudicial, and thus must be returned to Legislative Council for redrafting and reconsideration by the Title Board;
3. The title for Proposed Initiative No. 178 is misleading and thus violates the clear title requirement.

Respectfully submitted this 7th day of April 2020.

MAVEN LAW GROUP

/s/ Suzanne Staiert

Suzanne Staiert

Attorney for the Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on 7th day of April, 2020 a true and correct copy of the **PETITIONER'S ANSWER BRIEF** was served via the State of Colorado's ICCES File and Serve e-filing system, email and United States mail, postage prepaid, properly addressed to the following:

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