

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 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 2019- 2020 #178 Petitioners: JOHN JUSTMAN v. Respondents: ANNE LEE FOSTER AND SUZANNE SPIEGEL and Title Board: THERESA CONLEY; DAVID POWELL; and JASON GELENDER	▲ COURT USE ONLY ▲
<i>Attorneys for Respondents</i> Martha M. Tierney, No. 27521 Tierney Lawrence LLC 225 E.16 TH AVE, SUITE 350 Denver, CO 80203 Phone: (720) 242-7577 E-mail: mtierney@tierneylawrence.com	Case No.: 2020SA67
RESPONDENTS' RESPONSE BRIEF IN SUPPORT OF PROPOSED INITIATIVE 2019-2020 #178	

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). It contains 2,067 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

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 (R.___, p.___), 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.

By: s/Martha M. Tierney

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Anne Lee Foster and Suzanne Spiegel (jointly “Proponents” or “Respondents”), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Opening Brief in support of the title, ballot title and submission clause (jointly, the “Title”) that the Title Board set for Proposed Initiative 2019-2020 #178.

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion in determining the single subject of the Initiative, drafting the title, and accepting the fiscal abstract. The Initiative, that adds just two sentences to existing law, contains a single subject of requiring an oil and gas operator to provide at least \$270,000 of financial assurance per well for closure, cleanup, and restoration of oil and gas wells.

The Initiative does not present either of the dangers attending omnibus measures - the proponents did not combine an array of disconnected subjects into the measure for the purpose of garnering support from various factions; and voters will not be surprised by, or fraudulently led to vote for, any surreptitious provisions coiled up in the folds of a complex initiative. Petitioner’s concerns about the effects that the Initiative could have on other laws, or its application if enacted are not appropriate for review at this stage.

The fiscal abstract complies with Colorado law and is neither prejudicial nor misleading. The Title Board properly deferred to Legislative Council’s judgment in the absence of a compelling reason that the abstract was inaccurate.

The Title satisfies Colorado law because it fairly and accurately sets forth the subject of the Initiative and is not misleading. The Title states clearly that the measure requires an oil and gas operator to provide at least \$270,000 of financial assurance per well for closure, cleanup, and restoration of oil and gas wells. The Title Board was not confused about the intent of the measure.

The Title Board is only obligated to fairly summarize the central points of a proposed measure, and, need not refer to every nuance and feature of the proposed measure. While a title must be fair, clear, accurate and complete, it is not required to set out every detail of an initiative. There is no basis to set aside the Title, and the decision of the Title Board should be affirmed.

ARGUMENT

I. The Initiative Complies with the Single Subject Requirement.

A. Standard of Review.

Petitioner correctly states that when reviewing a challenge to the Title Board, this Court “employ[s] all legitimate presumptions in favor of the propriety of the Title Board’s action.” *Cordero v. Leahy (In re Initiative for 2013-2014*

#90), 328 P.3d 155, 158 (Colo. 2014). Petitioner fails to mention that the Court will “only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *In re Initiative for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014). Proponents agree that Petitioner preserved this issue for appeal.

B. Initiative 2019-2020 #178 Contains a Single Subject.

In compliance with Article V, section 1(5.5) of the Colorado Constitution, and C.R.S. §1-40-106.5(1)(a), the Initiative contains a single subject: requiring an oil and gas operator to provide at least \$270,000 of financial assurance per well for closure, cleanup, and restoration of oil and gas wells. In his opening brief, Petitioner asserts the additional subjects, beyond the \$270,000 financial assurance, are (1) repeal of administrative rules enacted after passage of SB 19-181; (2) removal of the Colorado Oil and Gas Conservation Commission’s authority; and (3) a ban on all oil and gas operations in Colorado. *Pet. Opening Brf.*, pp. 16-17.

This Court has rejected similar arguments in the past. The Court has repeatedly held that “[t]he effects [a] measure could have on Colorado . . . law if adopted by voters are irrelevant to [a] review of whether [the proposed initiative] and its Titles contain a single subject.” *In re Initiative for 2013-2014 #90*, 328 P.3d at 160 (quoting *In re Initiative for 2011-2012 #3*, 274 P.3d 562, 568 n.2 (Colo. 2012)). Additionally, in determining whether a proposed initiative comports with

the single subject requirement, this Court “does not address the merits of the proposed initiative or predict how it may be applied if adopted by the electorate.” *In re Title, Ballot Title & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). Whether Petitioner believes that a proposed initiative is a bad idea is not the test of whether it meets the single subject requirement.

There is no threat of logrolling here because the proponents did not combine an array of unconnected subjects into the measure for the purpose of garnering support from groups with different, or even conflicting interests. *In re Initiative for 2013-2014 #89*, 328 P.3d at 177. Nor will voters be surprised by, or fraudulently led to vote for, any provisions “coiled up in the folds” of the Initiative because the plain language of the measure unambiguously proposes requiring an oil and gas operator to provide at least \$270,000 of financial assurance per well for closure, cleanup, and restoration of oil and gas wells. *See In re Initiative 2001-2002 #43*, 46 P.3d 438, 442-43 (Colo. 2002).

The Initiative complies with the single subject rule.

II. The Initiative’s Abstract Is a Correct Estimate, Is Not Misleading or Prejudicial, and Meets the Requirements of Colorado Law.

A. Standard of Review.

Petitioner correctly states that this Court has the authority to review an abstract submitted to the Title Board and that it “should use the same standard to

review an abstract as is it does to review a title.” *Smith v. Hayes (In re Title, Ballot Title & Submission Clause for 2017-2018 #4)*, 395 P.2d 318, 323 (Colo. 2017). In addition, the Court “gives great deference to the Title Board’s decisions regarding abstracts,” draws “all legitimate presumptions in favor of the propriety” of the Title Board’s decisions, and only overturns the Board’s decision “in a clear case.” *Id.*, at 323-324. Proponents agree that Petitioner preserved this issue for appeal.

B. The Abstract Satisfies the Statutory Requirements and Is Not Misleading or Prejudicial.

Here, Petitioner contends that the Initiative’s abstract fails to comply with the requirements of §1-40-105.5 and is misleading and prejudicial because it does not provide specific quantitative estimates of the impacts of Initiative #178.

Petitioner seeks inclusion in the abstract information about “the magnitude of GDP decline and job loss if the minimum financial assurance is put in place.” *Pet. Opening Brf. p. 24.*

At the Rehearing on February 19, 2020, the Title Board rejected Petitioner’s arguments and determined that the abstract was not misleading or inherently prejudicial and relied on Legislative Council’s judgment to approve the fiscal

abstract. See Audio of the February 19, 2020 Rehearing, (“Rehearing Audio”), at 1:04:30-1:05:45.¹

Like in *Smith v. Hayes*, here the Title Board considered the testimony and arguments offered at the Title Board hearing, the requirements of section 1-40-105.5(3), and other available evidence, and decided it should rely on Legislative Council’s judgement and approve the abstract. *Smith v. Hayes*, 395 P.2d at 324.

This Court should affirm the Title Board’s decision not to amend the fiscal abstract for the Initiative.

III. The Initiative’s Title Correctly and Fairly Express the True Intent and Meaning of the Measure.

A. Standard of Review.

Petitioner fails to recite the accurate standard of review when reviewing a title to ensure it is not misleading or unclear. The Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water,"* 910 P.2d 21, 24 (Colo. 1996). Titles and submission clauses should “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

¹ The audio of Title Board’s February 19, 2020 rehearing can be found at https://csos.granicus.com/MediaPlayer.php?view_id=1&clip_id=149

proposal." *In re Initiative for 2009-2010 # 24*, 218 P.3d 350, 356 (Colo. 2009) (quoting *In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). The Court will not rewrite the titles or submission clause for the Board and will reverse the Board's action in preparing them only if they contain a material and significant omission, misstatement, or misrepresentation. *In re Title, Ballot Title & Submission Clause for 1997-98 # 62*, 961 P.2d 1077, 1082 (Colo. 1998). Proponents agree that Petitioner preserved this issue for appeal.

B. The Title and Submission Clause Is Not Misleading.

The Title for the Initiative is clear and does not mislead the voters. "While titles must be fair, clear, accurate and complete, the Title Board is not required to set out every detail of an initiative." *In re Initiative for 2013-2014 #90*, 328 P.2d at 164. (citations omitted).

The text of the Initiative declares that oil and gas operators must be required to provide financial assurance sufficient to cover future closure, remediation, and restoration of oil and gas wells, and sets the minimum financial assurance at \$270,000 per well. The title captures the measure's text in a clear and straightforward manner.

Petitioner claims that the Title for Initiative #178 is misleading because (1) the measure is silent as to whether the financial assurance requirement pertains to

existing or only to new wells; (2) the measure does not provide for the manner in which the oil and gas companies must satisfy the requirement; and (3) the title misleads voters into believing the actual costs to close and remediate a well is \$270,000. Petitioner also suggests the Title Board was confused about the intent of the measure.

These arguments should be rejected. The Title Board heard testimony during the rehearing from Proponent Ann Lee Foster who testified to substantiate the \$270,000 financial assurance figure, stating that Proponents used that figure after reading about it in 2017 Government Accountability Office survey, sponsored in part by then-Congressman Jared Polis, and confirmed by a Pugh Institute study. *See Rehearing Audio*, at 54:38-55:31. The use of the term “assurance” comes directly from the existing statute and alerts the electorate that the measure requires an oil and gas operator to provide at least \$270,000 of financial assurance per well for closure, cleanup, and restoration of oil and gas wells.

The Title Board was not confused about the intent of the measure. Rather, it was Petitioner who was confused about how financial assurance works under the existing statute and as modified by the Initiative, and the Title Board explained it thoroughly and carefully. *See Rehearing Audio*, at 58:00–59:54.

The Title Board is “only obligated to fairly summarize the central points of a proposed measure and need not refer to every effect that the measure may have on the current statutory scheme.” *In re Initiative for 2013-2014 #90*, 328 P.2d at 164. (citations omitted). “The titles and summary are intended to alert the electorate to the salient characteristics of the proposed measure.” *In re Initiative for 1999-2000 #255*, 4 P.3d 485, 497 (Colo. 2000). The title for Initiative #178 alerts the electorate that the measure requires an oil and gas operator to provide at least \$270,000 of financial assurance per well for closure, cleanup, and restoration of oil and gas wells.

The Court is not to “consider whether the Title Board set the best possible title; rather, [its] duty is to ensure that the title “fairly reflect[s] the proposed initiative so 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 Initiative for 2007-2008 #62*, 184 P.3d at 58. Here, the Title of the Initiative succinctly captures the key features of the measure, is not likely to mislead voters as to the initiative's purpose or effect, nor does the title conceal some hidden intent. Only in a clear case should a title prepared by the Title Board be held invalid. *In re Title, Ballot Title & Submission Clause Pertaining to the Casino Gaming Initiative Adopted on April 21, 1982*, 649 P.2d 303, 306 (Colo. 1982).

IV. Petitioner's Motion to Disqualify Was Properly Rejected.

The Respondents have not observed any improper bias or conflict of interest on the part of Ms. Conley or the Title Board under her leadership, and adopt the arguments asserted by counsel for the Title Board demonstrating that the Motion to Disqualify was properly rejected.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board on Proposed Initiative 2019-2020 #178.

Respectfully submitted this 7th day of April 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April 2020 a true and correct copy of the foregoing **RESPONDENTS' RESPONSE BRIEF IN SUPPORT OF PROPOSED INITIATIVE 2019-2020 #178** was filed and served via the Colorado Courts E-Filing System to the following:

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In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.