

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' 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). It contains 3,318 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.

STATEMENT OF ISSUES PRESENTED FOR REVIEW¹

1. Whether the Title Board erred in ruling that the measure contains a single subject as required by Article V, §1(5.5) of the Colorado Constitution and C.R.S. §1-40-105(4).
2. Whether the title set by the Title Board for the measure is unfair and misleading.
3. Whether the measure’s fiscal impact statement and abstract are misleading and prejudicial.
4. Whether the Title Board’s finding on the Petitioner’s Motion to Disqualify violated Petitioner’s due process rights.

¹ These issues are drawn, as best Respondents are able, from Petitioner’s “Issues Presented for Review” in his Petition for Review and from the positions asserted by Petitioner in his Motion for Rehearing.

STATEMENT OF THE CASE

This is an appeal from the Title Board's setting of the Title for Initiative 2019-2020 #178. On January 7, 2020, Proponents filed the Initiative with the directors of the Legislative Council and the Office of Legislative Legal Services. Pursuant to C.R.S. §1-40-105(2), the Offices of Legislative Council and Legislative Legal Services conducted a review and comment hearing on the Initiative as required by C.R.S. §1-40-105(1) on January 21, 2020.

Proponents filed the Initiative with the Secretary of State's office on January 24, 2020. At the Title Board hearing on February 5, 2020, the Title Board found that the Initiative contained a single subject, as required pursuant to article V, section 1(5.5) of the Colorado Constitution, and C.R.S. §1-40-106.5. The Title Board set the Title for the Initiative.

On February 12, 2020, Petitioner John Justman filed a Motion for Rehearing and a Motion to Disqualify the Chair of the Title Board, Theresa Conley, from serving on the Title Board to hear the Initiative. On February 19, 2020, the Title Board denied the Motion to Disqualify and denied the Motion for Rehearing in its entirety. Petitioner John Justman filed a Petition for Review pursuant to C.R.S. §1-40-107(2) on February 26, 2020.

STATEMENT OF FACTS

The title set for the Initiative by the Title Board correctly and fairly expresses the true intent and meaning of the Initiative and will not mislead the public. The title follows the Initiative's structure, using similar, and often identical, language.

Initiative #178 amends the Colorado Revised Statutes to create a minimum financial assurance of \$170,000 per oil and gas well for closure, cleanup and restoration costs.

The Title, as set for Initiative #178 at the hearing on February 5, 2020, reads:

A change to the Colorado Revised Statutes 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 abstract for the Initiative is clear and meets the requirements of the law.

The fiscal abstract for the Initiative reads:

State and Local Government Revenue and Expenditures. The measure is expected to decrease the amount of severance tax, royalty payments, and lease revenue that state and local government collects in the future, and the amount of state and local expenditures of that revenue.

Economic impacts. By increasing the costs of obtaining financial assurance for oil and gas wells, the measure is expected to decrease oil and gas activity, which will reduce industry employment and profits as well as rent and royalty income to mineral owners in affected areas. The measure will increase income to providers of

financial assurance and increase available mitigation funding for oil and gas wells.

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, which 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 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.

Article V, section 1(5.5) of the Colorado Constitution, and C.R.S. §1-40-106.5(1)(a), provide that a proposed initiative must be limited to “a single subject which shall be clearly expressed in its title.” “A proposed initiative violates this rule if its text relates to more than one subject and has at least two distinct and separate purposes not dependent upon or connected with each other.” *In re Initiative for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012). When reviewing a

challenge to the Title Board's decision, 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). The Court will "only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *Id.*

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

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. That is the entirety of the Initiative. The Initiative adds two sentences to an already-existing statute regarding financial assurance for oil and gas wells to pay for closure, cleanup and restoration of wells. The statute (C.R.S. §34-60-106(13)) already required a financial assurance for oil and gas wells to pay for closure, cleanup and restoration, the Initiative merely sets a minimum amount of that financial assurance. The text of the Initiative is short. One sentence is a declaration of the importance of requiring oil and gas operators to provide financial assurance to cover future closure, cleanup and restoration of oil and gas wells, and the other sentence sets that financial assurance at not less than \$270,000 per well.

The single-subject requirement functions to prevent two dangers: (1) "logrolling," or the practice of "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—[in order to] lead to the enactment of measures that would fail on their own merits"; and (2) voter surprise and fraud caused by the "passage of a surreptitious provision 'coiled up in the folds' of a complex initiative." *In re Initiative for 2011-2012 #3*, 274 P.3d at 566; *see also* C.R.S. §1-40-106.5(1)(e). The subject matter of a proposed initiative "must be necessarily and properly connected rather than disconnected or incongruous." *In re Initiative for 2013-2014 #90*, 328 P.3d at 159 (quoting *In re Initiative for 2011-2012 #3*, 274 P.3d at 565). But where a proposed initiative "tends to effect or to carry out one general objective or purpose," it presents only one subject. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246, 253 (Colo. 2000); *accord In re Initiative for 2013-2014 #90*, 328 P.3d at 159.

In reviewing the Title Board's actions, this Court construes the single-subject requirement liberally to avoid unduly restricting the initiative process. *In re Initiative for 2013-2014 #90*, 328 P.3d at 160.

Here, Petitioner contends that the Initiative violates the single subject requirement but does not specify these violations in his Petition. In his Motion for Rehearing, Petitioner argued that the Initiative violated the single subject requirement because it (1) repeals administrative rules in effect for financial assurance; (2) removes the authority of the Colorado Oil and Gas Conservation Commission; and (3) the intent of the Initiative is to cease oil and gas operations in Colorado. *See Exhibit 1 to Petition, Motion for Rehearing, p. 4, ¶B.*

Petitioner overstates the breadth of the Initiative. It does not broadly alter existing laws and rules, change agency authority or eliminate oil and gas operations in Colorado. Rather, the initiative affects those statutory and administrative provisions and operations only inasmuch as they directly relate to the subject matter of the initiative— 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. As this Court has repeatedly held, "[t]he effects this 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 at 568 n.2).

“In determining whether a proposed measure contains more than one subject, [the Court] may not interpret its language or predict its application if it is adopted.” *In re Initiative for 1999-2000 #255*, 4 P.3d 485, 495 (Colo. 2000).

Rather, the Court applies the general rules of statutory construction and accords the language of the measure its plain meaning. *See In re Initiative for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006).

Initiative #178 does not present either of the dangers the single-subject requirement seeks to prevent. 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 172, 177 (Colo. 2014).

Rather, the central purpose of the measure is 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 will pass or fail on its merits and does not run the risk of garnering support from factions with different or conflicting goals. *See id.* at 178.

The Initiative also fails to trigger the second danger of omnibus measures because voters will not be surprised by, or fraudulently led to vote for, any provisions “coiled up in the folds” of the Initiative. *In re Initiative 2001-2002 #43*,

46 P.3d 438, 442-43 (Colo. 2002). No such surprise would occur should voters approve 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. The Initiative is short and succinct, and its plain language is clear. *See In re Initiative for 2011-2012 #3*, 274 P.3d at 567.

Petitioner contends that the Initiative contains a separate subject because its “intent is to cease oil and gas operations in Colorado.” *See Exhibit 1 to Petition, Motion for Rehearing, p. 4, ¶B.3*. The crux of Petitioner’s argument is really that the Initiative is a bad idea. However, 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 a proposed initiative is a bad idea is not the test of whether it meets the single subject requirement.

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.

This Court has the authority to review an abstract prepared and submitted to the Title Board pursuant to C.R.S. §1-40-105.5. *Smith v. Hayes (In re Title, Ballot Title & Submission Clause for 2017-2018 #4)*, 395 P.2d 318 (Colo. 2017). The Court determined that it “should use the same standard to review an abstract as it does to review a title.” *Id.* at 323. The Court employs "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.*, *citations omitted*. The Court applies the same deferential standard in reviewing challenges to abstracts as it does in reviewing challenges to other Title Board decisions. *Id.*

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 but does not specify these violations in his Petition.

At the Rehearing on February 19, 2020, Petitioner argued that, because the abstract does not include any hard numbers or other quantitative data, it was misleading and failed to satisfy the requirements for abstracts set forth in section

1-40-105.5(3). Petitioner sought inclusion in the abstract of a calculation of \$270,000 multiplied by the number of wells in the state of Colorado. Proponents and the Title Board, in response, clarified that the \$270,000 financial assurance was not a requirement that each operator have to pay \$270,000 per well, but instead was a requirement that the operator have \$270,000 of assurance in the form of insurance or other coverage for each well, the cost of which would be far lower than \$270,000 per well. *See* Audio of the February 19, 2020 Rehearing, (“Rehearing Audio”), at 1:04:30-1:05:45.²

The Title Board determined that the abstract was not misleading or inherently prejudicial and relied on Legislative Council’s judgment to approve the fiscal abstract. *See id.* 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.

The Title Board is required to set a title that "consist[s] of a brief statement

² 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

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 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 purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose. *See id.*

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 title of each 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. 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 then the measure sets the minimum financial assurance at \$270,000 per well. The title captures the measure's text in a clear and straightforward manner.

The Petitioner filed a Motion for Rehearing on proposed initiative #178 in which he objected to the title because it “fails to advise voters of the percentage increase of financial assurance mandated by the measure;” and because it “fails to advise voters that the powers of the COGCC are significantly altered by the measure.” *See Exhibit 1 to Petition, Motion for Rehearing, pp. 4-5.*

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 at 497. 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). This is not such a case.

Although he did not raise the argument in his Motion for Rehearing and it does not appear specifically in his Petition for Review, at one point during the rehearing, Petitioner alleged that the words "financial assurance," "closure," "cleanup," and "restoration" could all be considered improper catchphrases. This is inaccurate. The title does not improperly contain a catchphrase that would improperly work in favor of the measure. These terms, apart from "cleanup," merely describe the proposal and are all used in the existing statute. The Title Board opted to use "cleanup" instead of "remediation" for ease of voter understanding. Phrases that merely describe the proposal are not impermissible catch phrases, while phrases that provoke emotion such that they distract from the

merits of the proposal are catch phrases. *Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 # 45)*, 234 P.3d 642, 649 (Colo. 2010).

The language to which Petitioner objects is not a catchphrase. A catchphrase consists of "words which could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment." *In re 1997-1998 # 105 (Payments by Conservation Dist. to Pub. Sch. Fund and Sch. Dists.)*, 961 P.2d 1092, 1100 (Colo. 1998). The use of the challenged words do not impermissibly create prejudice for passage of the proposed initiative. Indeed, the General Assembly used the term "financial assurance" in section 34-60-106(13) to direct the COGCC to ensure that there would be enough funding to plug, reclaim and remediate wells. The terms "close," "cleanup," and "restoration," are descriptive terms but are in no way slogans that will improperly work in favor of the measure. The Court should reject any assertion that the title contains an improper catchphrase.

IV. Petitioner's Motion To Disqualify Was Properly Dismissed.

At this juncture, the Proponents will defer to the Colorado Attorney General's arguments on behalf of the Secretary of State's designee, Theresa Conley, in response to the Motion to Disqualify argument. The Proponents have not observed any improper bias or conflict of interest on the part of Ms. Conley or

the Title Board under her leadership and assert that the Motion to Disqualify was properly dismissed.

CONCLUSION

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

Respectfully submitted this 18th day of March 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of March 2020 a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was filed and served via the Colorado Courts E-Filing System to the following:

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