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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2018) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #178 (“Oil and Gas Operator Financial Assurance”) **Petitioner**: John Justman, **v.** **Respondents**: Anne Lee Foster and Suzanne Spiegel, **and** **Title Board**: Theresa Conley, David Powell, and Jason Gelender.	▲ **COURT USE ONLY** ▲
PHILIP J. WEISER, Attorney General EMILY BUCKLEY, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6403 FAX: (720) 508-6041 E-Mail: emily.buckley@coag.gov Registration Number: 43002 *Counsel of Record *Attorneys for the Title Board*	Case No. 2020SA67

THE TITLE BOARD'S 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, I certify that:

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

> It contains 4,003 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).

> The brief contains, under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

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/ Emily Buckley
EMILY BUCKLEY, #43002
Assistant Attorney General

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether the Title Board correctly determined that Proposed Initiative 2019-2020 #178 contains a single subject.

(2) Whether the title is misleading and fails to advise the voters of the central purpose of the measure.

(3) Whether the abstract fails to comply with § 1-40-105.5, C.R.S. (2019).

(4) Whether the Title Board erred by declining to rule on Petitioner's "motion to disqualify."

STATEMENT OF THE CASE

Proponents Anne Lee Foster and Suzanne Spiegel seek to circulate #178 to obtain the requisite number of signatures to place a measure on the ballot to amend § 34-60-106 in Colorado's revised statutes. The proposed initiative seeks to require an oil and gas operator to provide at least $270,000 of financial assurance per oil and gas well for closure, cleanup, and restoration of oil and gas wells. Record for Initiative #178, p 2, filed February 26, 2020 ("Record").

The Board concluded that the measure contained a single subject

and proceeded to set a title at its February 5, 2020 meeting. *Id.* at 3. Petitioner John Justman filed a timely motion for rehearing, arguing that #178 contained multiple subjects, that the fiscal abstract was deficient, and that the title was misleading. *Id.* at 4-5. Petitioner also filed a "motion to disqualify" against the Secretary of State's designee on the Title Board, Theresa Conley, based on statements she allegedly made on social media when she previously worked for an environmental organization.

On February 19, 2020, the Board denied the motion for rehearing in its entirety. *Id.* at 6. The Board discussed, but declined to rule on, the motion to disqualify, and Ms. Conley did not recuse from the rehearing.

SUMMARY OF ARGUMENT

The Board's actions in setting #178 should be affirmed. The single subject of #178 is requiring an oil and gas operator to provide at least $270,000 of financial assurance per oil and gas well for closure, cleanup, and restoration of oil and gas wells. The provisions of the measure that Petitioner challenges on single subject grounds are either necessarily

and properly connected to that subject, or constitute impermissible speculation about the possible effects of the measure.

Petitioner also challenged the clear titles in his petition for review. The title set by the Board is not misleading and does not contain an impermissible catchphrase.

Petitioner's challenge to the abstract is misplaced because it misstates the purpose of the initiative and is directed to the merits of the initiative, a matter outside the jurisdiction of the Board.

Finally, Petitioner's attempt to disqualify the designee of the Secretary of State was improper. The statute specifies the grounds on which an objector can seek rehearing of a measure, and the appearance of impropriety by a Board member is not one of those grounds. Further, inviting such challenges to the Board's narrow work of setting titles on proposed initiatives would open the door to a flood of challenges both before the Board and to this Court. And, to the extent a motion to disqualify could be heard, it cannot be based, like it was here, on statements made in a previous job on a matter of public concern.

ARGUMENT

I. Standards governing titles set by the Board.

The Court does not demand that the Board draft the best possible title. *In re Title, Ballot Title and Submission Clause for 2009-10 #45* ("*In re #45*"), 234 P.3d 642, 645, 648 (Colo. 2010). The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will read the title as a whole to determine whether the title properly reflects the intent of the initiative. *Id.* at 649 n.3; *In re Proposed Initiative on Trespass-Streams with Flowing Water,* 910 P.2d 21, 26 (Colo. 1996). The Court will reverse the Board's decision only if the title is insufficient, unfair, or misleading. *In re #45*, 234 P.3d at 648.

The Court will "employ all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title and Submission Clause for 2009-10 #91,* 235 P.3d 1071, 1076 (Colo. 2010). Only in a clear case should the Court reverse a decision of the Title Board. *In re Title, Ballot Title and Submission Clause Pertaining to Casino Gambling Initiative*, 649 P.2d 303, 306 (Colo. 1982).

Section 1-40-106(3)(b), C.R.S., establishes the standards for setting titles, requiring they be fair, clear, accurate, and complete. *See In re Title, Ballot Title, and Submission Clause for 2007-08 #62,* 184 P.3d 52, 58 (Colo. 2008). The statute provides:

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes/for" or "no/against" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed…within two weeks after the first meeting of the title board. …Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and, shall be in the form of a question which may be answered "yes/for" (to vote in favor of the proposed law or constitutional amendment) or "no/against" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

§ 1-40-106(3)(b), C.R.S.

To avoid misleading the electorate, a title must not contain a political catch phrase. A catch phrase consists of "words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *In re Title, Ballot Title and Submission Clause for 1999-2000 #258(A),* 4 P.3d 1094, 1100 (Colo. 2000). The Board's "task is to recognize terms that provoke political emotion and impede voter understanding, as opposed to those which are merely descriptive of the proposal." *Id.*

Catch phrases "form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment" that may create prejudice for or against the proposal. *In re Title, Ballot Title and Submission Clause for 1999-2000 #227 and #228*, 3 P.3d 1, 6–7 (Colo. 2000) (internal quotations omitted). This Court determines whether a catch phrase exists "in the context of contemporary political debate." *Id.* at 7. The party asserting the

existence of a catch phrase must offer "convincing evidence" of its existence beyond the "'bare assertion that political disagreement currently exists over' the challenged phrase." *Id.* (quoting *In re Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995)).

II. The proposed initiative contains a single subject.

A. Standard of review and preservation.

When this Court reviews "the Title Board's single subject decision, [it] employ[s] all legitimate presumptions in favor of the propriety of the Title Board's actions. [It] will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." *In re Title, Ballot Title, & Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶ 8 (quotation omitted). The Title Board agrees that Petitioner preserved the single subject issue by raising it in the motion for rehearing.

B. The single subject requirement is met.

The single subject of #178 is requiring an oil and gas operator to provide at least $270,000 of financial assurance per oil and gas well for closure, cleanup, and restoration of oil and gas wells.

At the rehearing, Petitioner argued that the single subject test is not met because (1) the measure's true purpose is to put Coloradan oil

and gas companies out of business; and (2) the $270,000 of assurance provided for in the measure is misleading because it exceeds the average cost of plugging and removing oil and gas wells in Colorado.

Both arguments go to the merits of the measure, and neither weighs in favor of rejecting the measure on on single-subject grounds. "In determining whether a proposed initiative comports with the single subject requirement, [the Court does] not address the merits of a proposed initiative, nor [does the Court] interpret its language or predict its application if adopted by the electorate." *In re Title, Ballot Title, & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 59 (Colo. 2008) (quotations omitted). Petitioner's first argument concerns the potential impacts if the measure is enacted based on his own prediction of the measure's application, which cannot support a single subject challenge. And Petitioner's second argument is also merit-based because it concerns whether the requirement of $270,000 is prudent because that figure exceeds the average cost of plugging and removing

oil and gas wells in Colorado today.[1] Further, to the extent Petitioner argues that other collateral effects of the measure create multiple subjects, "the 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 Title, Ballot Title & Submission Clause for 2013-2014 #90,* 2014 CO 63, ¶ 17 (quotations omitted). Therefore, the Board correctly found that #178 contains a single subject.

III. The title set by the Board is not misleading and does not contain a catch phrase.

A. Standard of review and preservation.

When considering a challenge to a title, the Court should not "consider whether the Title Board set the best possible title." *In re Title, Ballot Title & Submission Clause for 2019-2020 #3*, 2019 CO 107, ¶ 17. Rather, the Court only "ensure[s] that the title fairly reflects the

[1] At the rehearing, Chad Calvert of Noble Energy testified Noble Energy's average cost of plugging and removing vertical oil and gas wells in Colorado is $90,000 to $100,000. *Hearing Before Title Board on Proposed Initiative 2019-2020 #178* (Feb. 19, 2020), *available at* https://tinyurl.com/vhfnzh5 (statement at 48:20-49:05).

proposed initiative such that voters will not be misled into supporting or opposing the initiative because of the words that the Title Board employed." *Id.* The Board agrees that Petitioner preserved his challenge to the title of #178.

B. The title accurately describes the financial assurance required by the measure.

The Board's title for #178 is not misleading. Number 178 requires an oil and gas operator to provide at least $270,000 of financial assurance per oil and gas well for closure, cleanup, and restoration of oil and gas wells. The title designated by the Board is as follows: "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." Record at p 3. Petitioner's motion for rehearing argued that the title is misleading because it (1) "fails to advise voters of the percentage increase of financial assurance mandated by the measure;" and (2) "fails to advise voters that the powers of the [Colorado Oil and Gas Conservation

Commission ("COGCC")] are significantly altered by the measure." Record at pp 4-5.

Both arguments are without merit. First, the measure does not alter "the percentage … of [mandated] financial assurance," instead it requires a floor of $270,000 of financial assurance per well for closure, cleanup, and restoration of oil and gas wells. Because the title references the $270,000 assurance floor, it is not misleading. As to Petitioner's second argument, again the title plainly requires oil and gas operators to provide at least $270,000 financial assurance per well. It is clear from the title that the measure does not allow the Colorado Oil and Gas Conservation Commission to adjust the mandatory required financial assurance.

C. "Assurance" is not a catch phrase.

At the February 19, 2020 rehearing, Petitioner argued that "assurance" is a catchphrase.[2] That argument is unavailing. The term "assurance" refers to financial coverage that provides remuneration for

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[2] *Hearing Before Title Board on Proposed Initiative 2019-2020 #178* (Feb. 19, 2020), *available at* https://tinyurl.com/vhfnzh5 (statement at 51:51-52:19).

a future event. The title's use of the term assurance is consistent not only with the measure, but also with existing law.

First, assurance is not a catch phrase because it describes the proposed initiative. "Phrases that merely describe the proposed initiative are not impermissible catch phrases." *In re Title, Ballot Title, and Submission Clause for 2013-14 #85* ("*#85*"), 328 P.3d 136, 146 (Colo. 2014). The phrase "assurance" accurately reflects the purpose of the initiative and contributes to voter understanding, without casting the initiative in an impermissibly provocative or qualitative light.

Second, the language "assurance" was drawn directly from the text of the proposed initiative. Record at p 2. By hewing the title to the text of the proposed initiative, the Board set a title that is simultaneously clear and accurate, and free of emotion-evoking language. *See In re #85*, 328 P.3d at 146.

Third, Petitioner has not demonstrated the phrase "assurance" would cause prejudice or voter confusion. "The purpose of the catch-phrase prohibition is to prevent prejudice and voter confusion, not to forbid the use of language that proponents of the initiative might also

use in their campaigns." *In re #45,* 234 P.3d at 650 (internal citations omitted). The phrase "assurance" is not misleading because it commonly appears in relevant existing law. Section 34-60-106 uses the term "assurance" five times, and portions of § 34-60-106 detail the types of financial assurance an operator may submit to the COGCC. *See* § 34-60-106(13)(a)-(f). Further, COGCC's rules define "financial assurance" and use the terms "financial assurance" or "assurance" sixty-nine times. *See generally* 2 CCR 404-1. Petitioner here submitted no evidence to meet the burden of showing prejudice or voter confusion.

And *fourth*, the phrase "assurance" is hardly the sort of emotion-provoking language that this Court has found rises to the level of an impermissible catch phrase. *See Matter of the Title, Ballot Title and Submission Clause for 1999-2000 #258A*, 4 P.3d 1094 (Colo. 2000) (concluding "as rapidly and effectively as possible," used in initiative requiring children be taught in English, was improper catch phrase); *Say v. Baker*, 322 P.2d 317, 320 (1958) (holding "Freedom to Work" was properly excluded from title as a catch phrase). Rather, #178's title as set by the Board constitutes a fair, clear, accurate, and complete

description of what the proposed initiative seeks to accomplish. The title "fairly reflects the proposed initiative," and should be affirmed. *In re 2019-2020 #3*, 2019 CO 107 ¶ 17.

IV. The Board correctly denied the motion for rehearing as it concerns the abstract.

A. Standard of review and preservation.

The Court applies "the same deferential standard in reviewing challenges to abstracts as [it does] in reviewing challenges to other Title Board decisions." *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶ 21. Accordingly, the Court "draw[s] all legitimate presumptions in favor of the propriety of the Title Board's decision" and will overturn the Board's decision "only in a clear case." *In re 2019-2020 #3*, 2019 CO 107 ¶ 13.

The Board agrees that Petitioner preserved his challenge to the abstract. However, the Board does not agree that Petitioner preserved a challenge to the entire fiscal impact statement, of which the abstract is only a part. The statute permits a registered elector "who is not satisfied with the abstract" to "file a motion for rehearing" on the ground that the abstract contains an incorrect estimate, is misleading

or prejudicial, or does not comply with § 1-40-105.5(3). *See* § 1-40-107(1)(a)(II); *see also In re 2017-2018 #4*, 2017 CO 57, ¶ 19 ("[T]his court has the authority to review an abstract prepared pursuant to section 1-40-105.5."). However, the statute does not allow an elector to challenge the fiscal impact statement as a whole. Accordingly, the Court may consider Petitioner's challenge to the abstract, but cannot consider the fiscal impact statement as a whole.

B. The Board acted appropriately by approving the abstract.

Petitioner's motion for rehearing asserts cursory objections to the abstract, arguing that it is indeterminate, violates § 1-40-105.5(3), and is misleading and prejudicial. Record, pp 4-5; *See* § 1-40-105.5(3)(a) (abstract "must include an estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities"). At the rehearing, Petitioner argued that the abstract should have estimated the fiscal impact on the state by employing a formula of multiplying $270,000 per well in Colorado, for a total of

impact of $16,200,000,000.[3] Petitioner also argued that because the initiative would force oil and gas businesses to leave Colorado, there would actually be less money available for well clean up and restoration.[4]

Petitioner's first argument misstates the purpose of the initiative, which is to provide a form of insurance to the State *if operators do not* clean up and restore oil and gas wells. Multiplying $270,000 by the number of wells in Colorado would not produce an accurate revenue impact to the State. Petitioner's second argument—that passage of the initiative would drive oil and gas operators out of Colorado—again goes to the merits of the initiative, which the Board may not consider. The clear intent of the measure is to increase the amount of money available to clean up and close wells, and the abstract correctly reflects that intent.

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[3] *Hearing Before Title Board on Proposed Initiative 2019-2020 #178* (Feb. 19, 2020), *available at* https://tinyurl.com/vhfnzh5 (statement at 1:03:43-1:04:30; 1:05:50-1:07:00).

[4] *Id*.

Accordingly, this is not a "clear case" where the Court should overturn the Title Board's decision. The Board heard and considered the evidence and arguments presented by Petitioner, and found them wanting. *In re 2017-2018 #4*, 2017 CO 57, ¶ 22 ("The Title Board is . . . in a better position than this court to weigh the merits of evidence regarding the accuracy of an abstract.").

V. The Board does not have to rule on a motion to disqualify, and Ms. Conley was not required to recuse.

A. Standard of review and preservation.

This Court has not previously ruled on a motion to disqualify a member of the Title Board and such a procedure is not allowed by statute. Accordingly, no standard of review for such a motion is discernible from the case law. In general, the decisions of the Title Board are reviewed under a "deferential standard" and are reversed only in a "clear case." *In re 2017-2018 #4*, 2017 CO 57, ¶ 21.

The Board agrees that the motion to disqualify was presented to the Title Board before the rehearing. For the reasons given below, the

Board does not agree that the motion was required to be ruled on by the Board or that the merits of the motion are before the Court now.

B. The Board properly declined to rule on the motion to disqualify.

Colorado's statutes set forth the bases on which a voter may request the Title Board reconsider its decisions: if an elector disagrees with the Board's single-subject determination; the titles and submission clause; the abstract; or the determination of whether a petition proposes a constitutional amendment that only repeals a provision of the state constitution. § 1-40-107(1)(a). An appearance of impropriety on the part of one of the Board members is not a permitted basis for rehearing. Accordingly, the Board was not required to consider the merits of the motion to disqualify.

This conclusion is supported by the fact that the Title Board is not a judicial or quasi-judicial body. "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." *In re Proposed Amend. Entitled "W.A.T.E.R.,"* 831 P.2d 1301, 1306 (Colo. 1992). "Far from

being designed either to further the adjudication of legal rights and duties or to implement a rulemaking function," the Board's enabling statutes "create a specific process and distinctive procedures applicable only to the unique functions of the Board." *In re Title, Ballot Title & Submission Clause for 2019-2020 #74*, 2020 CO 5, ¶ 22 (quoting *W.A.T.E.R.*, 831 P.2d at 1306). Motions to disqualify are not part of these distinctive procedures and are not appropriate for the non-judicial role played by the Board.

Motions to disqualify are also incongruous with the narrow charge of the Title Board. The Title Board is tasked only with determining whether a proposed initiative contains a single subject, and if it does, setting a clear title. § 1-40-106, -106.5. The Board does not consider the merits of a proposed initiative; if the proposed initiative contains a single subject, the Board must set a title. *Id.*; *see also In re 2017-2018 #4*, 2017 CO 57, ¶ 6 (the Court does not reach the merits either). Therefore, because the Board's role is so limited, it is not surprising that the General Assembly did not authorize motions to disqualify particular designees.

Not only is the Board's role limited, it also operates with numerous procedural safeguards. The Board makes decisions by majority vote, so no single member can control the proceedings. Any registered elector can request a rehearing of the Board's decisions. § 1-40-107(1). And this Court serves as a final check on any decision of the Board. § 1-40-107(2). Creating an additional, burdensome procedure that allows motions to disqualify would only create delay without providing a meaningful safeguard for the Board's decisions.

Finally, permitting dissatisfied parties to challenge particular designees could have serious implications on the Board's work. Those supporting and those opposing initiatives will be incentivized to dig through past statements, social media posts, and prior work of the designees sitting on the Title Board in an effort to disqualify board members they may not like, or at least to generate an appealable issue for this Court to decide. And, if such motions are permitted, this Court will routinely be asked to decide whether particular Board members should recuse from particular matters. There is simply no reason why the Board and this Court should be burdened by such motions when

they are not contemplated by either the statutes or the structure of the Board.

C. Recusal was not required here.

Even if the Court were to consider the merits of a motion to disqualify, it should deny the motion here. The motion is based on social media posts made by a Board member in a previous job that involved advocacy on certain environmental issues. Even when an individual is acting in an adjudicative capacity, which Board members are not, this Court has recognized that a "decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to the dispute, if there is no showing that the decision maker is incapable of judging the particular controversy fairly on the basis of its own circumstances." *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 763 P.2d 1020, 1028 (Col. 1988). Federal authorities are similar. *See, e.g.*, *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1564-65 (D.C. Cir. 1991) (the Assistant Director of NOAA was not required to be disqualified from a decision banning the use of drift gillnets based on his prior role as a "strong advocate" for the ban of drift

gillnets or for his public comments in support of the ban after being appointed); *accord Laird v. Tatum*, 409 U.S. 824, 831 (1972) (memo. of Rehnquist, J.) ("[N]one of the former Justices of this Court since [enactment of the judicial disqualification statute] have followed a practice of disqualifying themselves in cases involving points of law with respect to which they had expressed an opinion or formulated policy prior to ascending to the bench."). Prior social media posts thus do not create grounds for disqualification of the Secretary of State's designee. Finally, in this particular context, there is no appearance of impropriety.

CONCLUSION

The Court should affirm the decisions of the Title Board.

Respectfully submitted on this 18th day of March, 2020.

PHILIP J. WEISER
Attorney General

/s/Emily Buckley

EMILY BUCKLEY, 43002*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **THE TITLE BOARD'S OPENING BRIEF** upon the following parties or their counsel electronically via CCEF, at Denver, Colorado, this 18th day of March, 2020, addressed as follows:

Suzanne Staiert, Esq.
MAVEN LAW GROUP
1800 Glenarm Place, Suite 950
Denver, CO 80202
sstaiert@mavenlawgroup.com
Attorney for Petitioners

Martha M. Tierney
Tierney Lawrence LLC
225 East 16th Avenue, Suite 350
Denver, CO 80203
mtierney@tierneylawrence.com
Attorney for Respondents

s/ Leslie Bostwick
Leslie Bostwick