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SUPREME COURT OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. §1-40-107(2)
Appeal from the Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020, #176

Petitioner: JOHN JUSTMAN

v.

Respondents/Proponents: ANNE LEE FOSTER and SUZANNE SPIEGEL

and

Ballot Title Board: THERESA CONLY, DAVID POWELL, and JASON GELENDER

▲ COURT USE ONLY ▲

Supreme Court Case No.: 20SA69

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PETITIONER'S ANSWER BRIEF

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 4,105 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
Suzanne Staiert
Attorney for the Petitioner

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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 Initiatives 2019-2020 Nos. 173 - 177 (each unofficially captioned as "Setback Requirements for Oil and Gas Development").

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 case: 2020SA67.

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 Rehearings on Proposed Initiative Nos. 173, 174, 175, 176 and 177 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 15-17. 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 15. 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 16. Therefore, Petitioner Justman is confounded by the Title Board's characterization of "existing safeguards" which ensure its proceedings are free from bias. The Title Board asks this Court to ignore its failure

[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).

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 Motions for Rehearing. There is no basis 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. It is also nonsensical 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 Nos. 173, 174, 175, 176 and 177. 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 Motions 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 Court should reject in its entirety this portion of the Title Board's argument as not being properly before the Court.

[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.

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 prejudgment was present. And in this instance, the Title Board's failure to fully consider the Motions to Disqualify interferes with this legitimate expectation. Failing to fully consider the Motions 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 17. 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. PROPOSED INITIATIVES 2019-2020 NOS. 173-177 CONTAIN 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 measures are a statewide minimum distance requirement for new oil and gas production, the measures contain multiple additional subjects. These impermissible separate subjects for Proposed Initiative Nos. 173 - 77 include:

(a) stripping local government authority granted in S.B. 19-181 to regulate oil and gas operations in a reasonable manner in no less than seven areas: land use, location and siting, impacts to public facilities and services; water quality and source, noise, vibration, odor, light, dust, emissions and air quality, land disturbance, reclamation procedures, cultural resources,

emergency preparedness and coordination with first responders, security, and traffic and transportation impacts; financial securities, indemnification, and insurance as appropriate to ensure compliance with the regulations of local government; all other nuisance-type effects of oil and gas development; and regulate the use of land and protection of the environment. *See* C.R.S. 29-20-104.

(b) The initiatives' setback requirement is effectively a ban on new and gas development;

(c) The initiatives' setback requirement is a taking of property;

(d) The initiatives alter the powers of local governments to control land use within its borders;

(e) The initiatives remove the state's power to permit an efficient rate of production, subject to the protection of public health, safety, and welfare, the environment and wildlife resources;

(f) The initiatives repeal local ordinances that have been enacted in response to S.B .19-181; and

(g) The initiatives repeal administrative rules that have been passed by the state in response to S.B. 19-181.

In addition to the seven impermissible separate subjects enumerated above, Proposed Initiatives Nos. 175 & 177 also include repeals of current rules related to setback waivers.

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 measures, which are all captioned "Setback Requirements for Oil and Gas Development," include either a 2,000-foot[4] or 2,500-foot[5] setback from "occupied structures"[6] and "vulnerable areas."[7] In addition, Proposed Initiatives Nos. 175

[4] Proposed Initiatives Nos. 176 and 177 provide for 2,000 foot setbacks.
[5] Proposed Initiatives Nos. 173, 174, and 175 provide for 2,500 foot setbacks.
[6] Proposed Initiatives Nos. 173 – 177 define "occupied structure" as any building or structure that requires a certificate of occupancy or building or structure intended for human occupancy, including homes, schools, and hospitals.
[7] Proposed Initiatives No. 173, defines "vulnerable areas" as playgrounds, permanent sports fields, amphitheaters, public parks, public open space, public and community drinking water sources, irrigation canals, reservoirs, lakes, rivers, perennial or intermittent streams, and creeks, and any additional vulnerable areas

and 177 include a "waiver" of the setback requirement for a homeowner's principal residence only if it is a single family dwelling.

The setback requirement is the subject most likely to garner voters' sole attention as it affirmatively creates a defined legal requirement. The purpose of the setback requirement is clear: to curtail almost all oil and gas development in the state, whether drilling of new wells or reentry of existing wells. *See* Audio of Feb. 19, 2020 Rehearing at 14:58 – 15:39. When Petitioner Justman discussed the purpose of the setback requirement, Respondents failed to make clear otherwise. *See id.* at 23:55 – 24:31.

The measures contain other multiple subjects separate from the setback requirement, enumerated above. These multiple subjects include taking of property, altering the powers of local governments to control land use within their borders, and the repeal of local ordinances and administrative ordinances enacted in response to S.B.19-181.

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designated by the state or a local government. Proposed Initiatives Nos. 174 – 177 define "vulnerable areas" as playgrounds, permanent sports fields, amphitheaters, public parks, public open space, public and community drinking water sources, irrigation canals, reservoirs, lakes, rivers, creeks, Superfund sites as designated by the United States Environmental Protection Agency, and soil that is known to be contaminated with toxic pollutants, hazardous waste, or radioactive material.

Other subjects are "coiled up in the folds" of the measure. Because the measures gives counties the power to set larger setbacks, and these greater restrictions govern even if they conflict with a home rule city's lesser restriction, the measures override home rule municipalities' ability to govern themselves free from state and county restrictions. For example, a county could decide that it wants a setback that has the effect of prohibiting new oil and gas development within the entire county, and the home rule cities within the county have no ability to override those restrictions, as they otherwise would under current law. This is a separate and distinct subject that bears no necessary and proper connection to the existing setback regulation.

The additional subjects described above and contained within the Petitioner Justman's Motion for Rehearing implicate the very "dangers" the single-subject requirement is designed to prevent. First, they are "coiled up in the folds" of the measure. A voter who supports the measures because he or she supports increased setbacks may be unaware that the measures result in the shuttering of almost all oil and gas development. And, a voter who supports the measure because he or she supports increased setbacks may be unaware that the measures additionally remove control away from home rule municipalities. These subjects are buried in the measures, are not explicitly stated, or both. Second, the measures could garner

support from different and competing factions and thus cause the measures to pass on their own even though their multiple subjects might not have been able to pass separately. There is no reason to presume that voters who may support the 2,000-foot or 2,500 foot setback would additionally vote for a scheme where home rule municipalities lose their land use authority provided in S.B. 19-181, or to repeal local ordinances and administrative rules promulgated under S.B. 19-181. In other words, the measure could gain support from the anti-fracking groups along the Front Range who want local control over fracking, anti-local control groups who desire a uniform statewide setback of 2,000-foot or 2,500-foot setback, and pro-oil and gas development groups on the eastern plains and West Slope who do not mind the setbacks because they have less effect in rural areas but favor local control. Such measures, which can pass only by combining subjects that appeal to different factions, violate the single-subject requirement.

III. PROPOSED INITIATIVES NOS. 173-177's FISCAL IMPACT STATEMENTS AND ABSTRACTS FAIL TO COMPLY WITH THE REQUIREMENTS OF SECTION 1-40-105.5 BY PROVIDING VOTERS WITH NO MEANINGFUL INFORMATION, AND ARE MISLEADING AND PREJUDICAL

The General Assembly provided for a robust fiscal impact statement and a meaningful abstract to be included in the initiative process. This reflected the General Assembly's intent to provide voters with fiscal impact information earlier

in the initiative process so that voters have the same fiscal information available during the initiative process that legislators have in the Bluebook for legislative bills.

Notwithstanding the clear intent behind the abstract requirement, the Legislative Council's analysis in the abstract of the fiscal and economic impacts of the measures provides no meaningful discussion on the percentage of lands which would be eliminated by the setbacks, the reduction in jobs, and the implication to Colorado's GDP. Legislative Council had access to two studies which informed Coloradans on the impacts of increased setbacks. First, Petitioner Justman presented testimony on a 2018 study titled "Increasing the Oil and Gas Setback Requirement to 2,500-feet in Colorado: An Economic and Fiscal Impact Analysis."[8] Second, two years ago, information was provided to the Legislative Council by the Respondents to Initiative 2017-2018 No. 97. Even so, the abstracts only included vague references.

The 2018 study and readily available information before the Legislative Council clearly defines the fiscal and economic impacts, including the loss of an average of 104,000 jobs annually over the next 15 years, GDP declines of an

[8] The Title Board and Respondents mischaracterize this 2018 Study. This study was not presented in Initiative 2017-2018 #97 proceedings. *See* Audio of Feb. 19, 2020 Rehearing at 15:27 – 15:40; 17:44 – 17:49.

average of $14 billion, and an average of $8.3 billion in real income losses by Coloradans.

The abstracts and Financial Impact Statements 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 measures' fiscal impact, and are misleading and prejudicial. Even so, the Title Board argues that this Court may not entertain arguments from Petitioner Justman on the entire fiscal impact statement. Title Board's Opening Br., at 10-11. However, because the abstract is drawn from the fiscal impact statement, the Court may consider the failure of the financial impact statement to meet the requirements set forth by Colorado's General Assembly.

Section 1-40-105.5(3), C.R.S. outlines the requirements of the abstract which 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."

The abstracts fail to provide any estimates, merely stating that severance tax, royalty payments, and lease revenue that state and local government will collect in the future "is expected to decrease." Pet. For Review, at 15 (No. 173), 16 (No. 174), 17 (No. 175), 16 (No. 176) and 17 (No. 17). This is not an estimate.

Also, the abstract states that "[l]ower oil and gas production will constrain regional economic activity by reducing industry employment and profits, and reducing rent and royalty income to mineral owners." *Id*. The abstract is silent on impacts on demand for associated services. This is also not an estimate. Therefore, the Title Board should have modified the abstracts to include estimates provided in the 2018 study or other studies readily available to the Legislative Council. Lastly, the abstracts also failed to include a statement of the measures' economic benefits for all Coloradans, simply stating that "larger setbacks will preserve property values for homeowners." *Id*.

This Court has affirmed the Title Board's approval of an abstract where Legislative Council testified that it could not provide quantitative estimates. *See In the Matter of the Title, Ballot Title and Submission Clause for 2017-2018 No.4*, 395 P.3d at 324. Here, the Legislative Council has been provided with not one but two studies which provide quantitative estimates. 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 losses if the setbacks are 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.

IV. THE TITLES OF PROPOSED INITIATIVES NOS. 175 AND 177 DESCRIBING THE "HOMEOWNER WAIVER" ARE MISLEADING

Petitioner Justman does not challenge the titles as unfair and misleading for Proposed Initiatives Nos. 173, 174, and 176. Petitioner Justman preserved his right to challenge the titles of Proposed Initiatives Nos. 175 and 177 which allow homeowners to "waive this [setback] requirement for their principal residence only if it is a single-family dwelling." *See* Section (3), Proposed Initiatives Nos. 175 and 177. The titles in Proposed Initiatives Nos. 175 and 177 are unfair and misleading.

The Title Board must consider the public confusion that might be caused by misleading titles and reject initiatives that cannot be understood clearly enough to allow the setting of a clear title.

The manner in which Proposed Initiatives Nos. 175 and 177 are drafted reflect a bias against multi-generational families which will create confusion for some Coloradans. Some multi-generational families reside in one dwelling and other multi-generational families may live in multiple dwellings on one property not owned by all family members. These types of primary residence situations are not reflected in the titles, and operation of this provision may not serve as an actual waiver for these families and others. As currently written, the title violates the clear title requirement.

V. THE TITLE BOARD'S AND RESPONDENTS' RELIANCE ON THIS COURT'S DECISION IN 2017-2018 INITIATIVE #97 IS MISPLACED

The Title Board and Respondents suggest that because the titles in Proposed Initiatives Nos. 173, 174, 175, 176, and 177 are identical or similar to 2017-2018 Initiative #97, the Court must affirm the title set by the Title Board. Title Board's Opening Br., at 3, 5-7; Respondents' Opening Br., at 3. However, the Title Board and Respondents ignore the implications of the unprecedented changes in the regulatory landscape of oil and gas development as result of Senate Bill 2019-181. The Governor signed S.B. 19-181 into law on April 16, 2019, after title was set for Initiative 2017-2018 No. 97. S.B. 19-181 "ensures that oil and gas development and operations in Colorado are regulated in a manner that protects public health,

safety, welfare, the environment and wildlife resources." Changes to regulations include local government authority and siting. *See* "S.B. 19-181" at https://cogcc.state.co.us/sb19181.html#/overview. Central to these measures, S.B. 19-181 allows local governments to fix setbacks more stringent than the state's setback requirements. Because the regulatory landscape has changed considerably, reliance on previous decisions made by this Court on similar measures is misplaced.

CONCLUSION

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

In the alternative, Petitioner respectfully requests this Court reverse the Title Board's setting of Title for Proposed Initiatives Nos. 173 – 177, return the Proposed Initiatives to the Proponents, and hold that:

1. The measures violate the single-subject requirement, and thus the measures should return to the Proponents because the Title Board lacked the authority to set title;

2. The measures' financial impact statements and abstracts 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 titles for Proposed Initiatives Nos. 175 and 177 are misleading and thus violate 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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