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<tr><td>SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203</td><td rowspan="3">DATE FILED: April 7, 2020 4:00 PM

▲COURT USE ONLY▲</td></tr>
<tr><td>Original Proceeding
Pursuant to Colo. Rev. Stat. §1-40-107(2)
Appeal from the Ballot Title Board</td></tr>
<tr><td>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #174

Petitioners: JOHN JUSTMAN

v.

Respondents: ANNE LEE FOSTER AND SUZANNE SPIEGEL

and

Title Board: THERESA CONLEY; DAVID POWELL; and JASON GELENDER</td></tr>
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<tr><td colspan="2">RESPONDENTS' RESPONSE BRIEF IN SUPPORT OF PROPOSED INITIATIVE 2019-2020 #174</td></tr>
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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 2,480 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:

X 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.AR. 32.

By: s/Martha M. Tierney

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

Anne Lee Foster and Suzanne Spiegel (jointly "Proponents" or "Respondents"), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Response Brief in support of the title, ballot title and submission clause (jointly, the "Titles") that the Title Board set for Proposed Initiatives 2019-2020 #173, #174, #175, #176 and #177 (collectively, the "Initiatives") and in response to the Opening Brief filed by Petitioner John Justman.

SUMMARY OF THE ARGUMENT

The Title Board properly exercised its broad discretion in determining the single subject, drafting the Titles, and accepting the fiscal abstracts for Initiatives #173, #174, #175, #176 and #177.

Each of the Initiatives contains a single subject by creating a statewide requirement for new oil and gas development of at least 2,500 feet [2,000 feet in #176 and #177] from the nearest occupied structure or vulnerable area. Initiatives #175 and #177 also allow a homeowner to waive the distance requirement for the homeowner's single-family principal residence. The remaining provisions, including the definition of terms used in the measures, and an allowance for the state or a local government to increase the setback distance, all flow from the measure's single subject.

The Initiatives do 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 Initiatives could have on other laws, or their application if enacted are not appropriate for review at this stage.

The fiscal abstracts comply with Colorado law and are neither prejudicial nor misleading. The Title Board properly deferred to Legislative Council's judgment in the absence of a compelling reason that the abstracts were inaccurate.

The Titles satisfy Colorado law because they fairly and accurately set forth the major features of the Initiatives and are not misleading. The Titles make clear that the measures authorize state and local governments to create minimum distance requirements in excess of 2,500 feet [2,000 feet in #176 and #177] for new oil and gas development from structures intended for human occupancy and any other area designated by the measure. For #175 and #177, the titles also clearly set forth the ability of a homeowner to waiver the distance requirement for the homeowner's single-family principal residence.

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 Titles, and the decisions of the Title Board should be affirmed.

ARGUMENT

I. The Initiatives Comply 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. Initiatives 2019-2020 #173, #174, #175, #176, and #177 Contain 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), each of the Initiatives contains a single subject:

establishing a statewide minimum distance requirement for new oil and gas development from occupied structures and vulnerable areas. The remainder of each measure contains a legislative declaration, definitions of terms used in the measure, a provision allowing the state or a local government to increase the minimum distance requirement, and in #176 and #177 only, an allowance for a homeowner waiver- all congruous and related to the single subject of the measure.

In his Opening Brief, Petitioner recycles largely the same single subject objections previously heard and rejected by this Court many times on similar, and in one case identical,[1] measures. *See In re Initiative 2017-2018 #97,* Order dated April 6, 2018, Case No. 2018SA31; *In re Initiative 2015-2016* #78, Order dated April 14, 2016, Case No. 2016SA70; *Cordero v. Leahy (In re Initiative 2013-2014 #85)*, 328 P.3d 136 (Colo. 2014); *Cordero v. Leahy (In re Initiative 2013-2014 #90)*, 328 P.3d 155 (Colo. 2014).

Petitioner asserts the additional subjects, beyond the setback requirement, are (1) the taking of property; (2) the alteration of the powers of local governments to control land use within their borders; (3) the repeal of local and administrative ordinances; and (4) the conflict with home rule authority. *See Pet. Opening Brf at*

[1] The text and title for Initiative #173 are identical to the text and title for Initiative 2017-2018 #97, which was previously reviewed, and the Title Board's title affirmed, by this Court. Order dated April 6, 2018, Case No. 2018SA31.

p. 22. This Court previously heard and rejected these arguments when reviewing similar measures establishing a minimum setback distance.

- On preemption: "[a]ny effect the Proposed Initiatives would have on Colorado's preemption doctrine does not constitute a separate subject." *In re Initiative #90*, 328 P.2d at 161.
- On home rule: "[t]he alteration of the existing power and authority of home rule and statutory cities to enact certain regulations pertaining to the central purpose of the initiative does not violate the single subject requirement." *Id.*
- On takings: "in determining whether a proposed initiative comports with the single subject requirement, we do not address the merits of the proposed initiative or predict how it may be applied if adopted by the electorate." *In re Initiative #90*, 328 P.2d at 161.
- On the effect on local and administrative ordinances: "[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 562, 568 n.2 (Colo. 2012)).

- On the merits of a measure: "in determining whether a proposed initiative comports with the single subject requirement, [this Court] do[es] not address the merits of the proposed initiative or predict how it may be applied if adopted by the electorate." *In re Initiative for 2013-2014 #90*, 328 P.3d at 161 (*quoting In re Title, Ballot Title & Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008)).

Here, each section of the Initiatives is tied to the central purpose of the measures: creation of a statewide minimum distance requirement of at least 2500 [2,000 for #176 and #177] feet from occupied structures and vulnerable areas. The Initiatives will pass or fail on their merits and do not run the risk of garnering support from factions with different or conflicting goals. *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 Initiatives. *In re Initiative 2001-2002 #43*, 46 P.3d 438, 442-43 (Colo. 2002). The plain language of the measures unambiguously proposes creating a statewide minimum distance requirement of 2,500 [2,000 for #176 and #177] feet from occupied structures and vulnerable areas, defines terms included in the measure, allows local governments to increase the size of the setback, and in #175 and #177 only, adds an allowance for a waiver by a homeowner for the owner's single-family principal residence.

The Initiatives comply with the single subject rule.

II. The Initiatives' 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.

Petitioner contends that the Initiatives' abstract fails to comply with the requirements of §1-40-105.5 and is misleading and prejudicial because it does not include quantitative data from a pair of studies conducted in 2018. *Pet. Opening Brf. p. 25.* Petitioner, through a representative from Noble Energy, sought inclusion in the abstract information from the 2018 studies, but conceded that he had not submitted the studies to Legislative Counsel for consideration with regard

to the Initiatives, because he knew that Legislative Council declined to use or rely upon the studies when drafting their abstract for Initiative 2017-2018 #97. *See* Audio of the February 19, 2020 Rehearing, ("Rehearing Audio"), at 18:10-18:40.[2] By way of explanation, the Noble Energy representative stated that Legislative Council indicated in 2018 for proposed Initiative #97 that they do not use dynamic modeling and only use static modeling. *See id.*

At the rehearing, the Title Board accepted Legislative Council's approach and declined to modify the abstract, noting that the abstract contains qualitative data based on currently available information, including the economic impacts of the Initiatives, and that the data contained in the studies is out of date. *See* Rehearing Audio at 21:30–22:50. Like in *Smith v. Hayes*, here the Title Board considered the testimony 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 is not a "clear case" where the Title Board's decision must be

[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

overturned. *Id.* at 324-25. This Court should affirm the Title Board's decision to accept the abstract as written.

III. The Initiatives Titles 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 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 on Initiatives #175 and #177 only.

B. The Title and Submission Clauses for #175 and #177 Are Not Misleading.

The Title for Initiatives #175 and #177 are clear and will not mislead voters. The Title Board's duty in setting a title is to summarize the central features of the proposed initiative; in so doing, the Title Board is not required to explain the meaning or potential effects of the proposed initiative on the current statutory scheme. *In re Initiative for 2013-2014 #85*, 328 P.3d at 144.

Initiatives #175 and #177 are identical to the other Initiatives (#173, #174, and #176) except that each also contains an allowance for a homeowner to waive the setback requirement for their principal residence. Petitioner asserts just one reason why the Title for Initiatives #175 and #177 are misleading. He claims that "the manner in which Proposed Initiatives Nos. 175 and 177 are drafted reflect a bias against multi-generational families" because they "may live in multiple dwellings on one property not owned by all family members." *Pet. Opening Brf., at p. 28-29.* Petitioner contends that the Titles for #175 and #177 are not clear because they do not advise multi-generational families how the waiver may or may not work for them. *Id.*

This argument must be rejected. 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. The Titles for #175 and #177 spell out the major features of the measures. "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 2007-2008 # 62*, 184 P.3d at 60; *Submission Clause, & Summary for Proposed Initiative on Educ. Tax Refund*, 823 P.2d 1353, 1355 (Colo. 1991) ("The board is not required to describe every nuance and feature of the proposed measure.").

The titles for Initiatives #175 and #177 alert the electorate that the setback waiver only applies to a homeowner's single-family principal residence. This language plainly eliminates the waiver option for properties containing multiple dwellings not owned by the same person, because it limits the waiver to a "homeowner's single-family principal residence."

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 each of the Initiatives 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. This Court should affirm the Title Board.

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 that the Court affirm the actions of the Title Board with regard to Proposed Initiatives 2019-2020 #173, #174, #175, #176, and #177.

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 #174** 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.