DATE FILED: March 18, 2020 2:25 PM

COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding Pursuant to
§ 1-40-107(2), C.R.S. (2019)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2019-2020 #173 ("Setback Requirements for Oil and Gas Development")

Petitioner: John Justman,

v.

Respondents: Anne Lee Foster and Suzanne Spiegel,

and

Title Board: Theresa Conley, David Powell, and Jason Gelender.

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Case No. 2020SA72

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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 3,377 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/ Michael Kotlarczyk
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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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(2) Whether the Petitioner preserved a challenge to the title set by the Title Board.

(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 #173 to obtain the requisite number of signatures to place a measure on the ballot to enact a new statute, § 34-60-132, in Colorado's revised statutes. The proposed initiative seeks to create a statewide minimum distance (or setback) requirement for new oil and gas development. Record for Initiative #173, p 2, filed February 26, 2020

("Record"). The proposed initiative is identical to initiative 2017-2018 #97, which appeared on the 2018 ballot as Proposition 112. *Id.* at 4.[1]

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 #173 contained multiple subjects and that the fiscal abstract was deficient. *Id.* at 4-6. Petitioner did not challenge whether the title set by the Board was misleading or otherwise not clear. 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.

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[1] Proponents introduced several very similar measures, #173-177, all of which are now on appeal. Number 173 is identical to Proposition 112; #174 slightly changes the definition of "vulnerable areas"; #175 is the same as #174, except that it adds a homeowner waiver provision; #176 is the same as #174 except that it changes the setback distance; and #177 is the same as #175, but with the changed setback distance.

The analyses for these measures is the same, as are the briefs, with the exception of minor changes to account for the slight differences in the measures.

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

SUMMARY OF ARGUMENT

Petitioner's single-subject challenge was correctly rejected by this Court in an indistinguishable case. 2017-2018 #97 is identical to this measure, and opponents there unsuccessfully made the same single-subject arguments. The single subject of #173 is increasing the setback requirement for new oil and gas development. 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. There is no reason for the Court to deviate from its single subject determination from two years ago.

Petitioner also challenged the clear titles in his petition for review. But he expressly waived any challenge to the clear titles in the rehearing, and that challenge is not preserved for this Court.

Petitioner's challenge to the abstract is misplaced. Petitioner argues primarily that the Board should have adopted specific figures from a study conducted by an outside group in 2018. But the Board is not required to adopt specific numbers when the potential fiscal impacts are indeterminate, and can use qualitative statements in the abstract instead. And, the Board is certainly not required to adopt figures generated by an outside organization (which figures were also rejected by the Board in 2018).

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. 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.

Number 173 is identical to 2017-2018 #97, which this Court affirmed on single subject grounds. *See In re Title, Ballot Title & Submission Clause for 2017-2018 #97*, 2018SA31. That decision controls here. The Court should not reach a different result now and should affirm the Board's single subject determination.

Number 173's single subject is establishing a setback requirement for new oil and gas development. At the rehearing, Petitioner argued that the measure is effectively a ban on new oil and gas development in Colorado, and that the measure undermines the new local government control provisions enacted by SB 19-181. Neither of these arguments support departing from the Court's prior decision in 2017-2018 #97.

First, Petitioner's argument that the measure will be an effective ban on new oil and gas development is not grounds for rejecting it 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 argument about potential impacts if the measure is enacted is based on his own prediction of the measure's application, which cannot support a single subject challenge.

Second, Petitioner's argument that the measure would interact with and undermine the local control provisions of SB 19-181 also does not support finding multiple subjects. This argument mirrors those unsuccessfully made to this Court in opposition to 2017-2018 #97, where the petitioner argued that the measure would interfere with the relationship between state and local governments and changed the law as articulated in recent Supreme Court opinions. *See In re 2017-2018 #97*, 2018SA31, Pet. Op. Br. at 14-16.

Even if the Court had not already rejected these arguments, they are without merit. The measure would impact local government control over oil and gas development only as that control relates to setback requirements, the measure's single subject. The effects on local control are thus "necessarily and properly connected" to the measure's primary purpose of increasing setback requirements. *In re Title, Ballot Title & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶ 9 (quotations omitted). And, 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 #173 contains a single subject.

II. Petitioner waived any challenge to the title.

A. Standard of review and preservation.

Petitioner did not preserve an argument that the title is unfair and misleading. The motion for rehearing did not raise that challenge; instead, it challenged only the Board's single-subject determination and the abstract. Petitioner's counsel confirmed this at the rehearing, stating, "We did not challenge the clear title on this."[2] "Because [Petitioner] did not raise the issue before the Board [he] cannot now urge this contention as a grounds for reversing the Board." *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #265*, 3

[2] *Hearing Before Title Board on Proposed Initiative 2019-2020 #173* (Feb. 19, 2020), *available at* https://tinyurl.com/vhfnzh5 (statement at 7:40); *see also id.* at 14:30.

P.3d 1210, 1215-16 (Colo. 2000). Accordingly, the Court should not reach the merits of Petitioner's argument.

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 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.*

B. If the Court considers the challenge to the title, it should affirm.

Because Petitioner did not raise any objection to the title in his motion for rehearing or at the rehearing itself, the Board is uncertain of the grounds for any challenge to the title. However, the title for #173 is identical to the title set by the Board for 2017-2018 #97, which was affirmed by the Court. *See In re 2017-2018 #97*, 2018SA31. Accordingly, if the Court addresses this issue at all, it should affirm the title set by the Board.

III. 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. The Title Board pointed this out to Petitioner during the rehearing.[3] 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, p 6. At the rehearing, Petitioner focused on the lack of any specific numbers in the abstract, and argued that the abstract should have incorporated figures from a 2018 study.

Petitioner argued at the rehearing that the abstract was "indeterminate."[4] *See* § 1-40-105.5(3)(a) (abstract "must include an

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[3] *Hearing Before Title Board on Proposed Initiative 2019-2020 #173* (Feb. 19, 2020), *available at* https://tinyurl.com/vhfnzh5 (statement at 14:15).

[4] *Id.* at 13:00.

estimate of the effect the measure will have on state and local government revenues, expenditures, taxes, and fiscal liabilities"). But, as the Court has recently held, the lack of a precise numerical estimate does not violate the statute. "The abstract . . . need not contain 'hard numbers or other quantitative data' regarding an initiative's expected economic impact when precise estimates of fiscal or other impacts cannot be determined." *In re 2019-2020 #3*, 2019 CO 107, ¶ 34 (quoting *In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57, ¶¶ 23-24). When quantitative data is unavailable, "indeterminate qualitative impact statements" are permissible. *Id.*

Here, the abstract eschews the use of any concrete numbers and instead relies on qualitative statements. When asked by the Board what figures should be used in the abstract, Petitioners cited a 2018 study by the Common Sense Policy Roundtable examining the potential effect of 2017-2018 #97.[5] But the Board was under no obligation to use this

[5] *Hearing Before Title Board on Proposed Initiative 2019-2020 #173* (Feb. 19, 2020), *available at* https://tinyurl.com/vhfnzh5 (statement at 16:30).

study. First, the same study was presented in 2017-2018 #97, and the Court affirmed the Board's decision not to incorporate that study into the abstract. *See In re 2017-2018 #97*, 2018SA31. Additionally, as the Board noted, the 2018 study, even if otherwise valid, was out of date, particularly in light of legislative changes that have occurred since 2018, including the passage of SB 19-181.[6]

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 particular, the Board heard testimony from Chad Calvert, an employee with Noble Energy, and concluded that no change to the abstract was required. *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.").

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[6] *Hearing Before Title Board on Proposed Initiative 2019-2020 #173* (Feb. 19, 2020), *available at* https://tinyurl.com/vhfnzh5 (statement at 22:15).

Finally, once again, the abstract approved by the Title Board is similar to the abstract approved for 2017-2018 #97, which was affirmed by this Court. *Compare* Record, p 10 *with In re 2017-2018 #97*, 2018SA31, Pet. Op. Br. at Ex. 1.

IV. 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, Jr.*, 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 can be no appearance of impropriety. Number 173 is the same proposed initiative as 2017-2018 #97, and the title is identical. The fact that this Board set the exact same title for #173 as it did for 2017-2018 #97 thus removes even the appearance of impropriety.

CONCLUSION

The Court should affirm the decisions of the Title Board.

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

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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:

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