SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: June 2, 2014 4:00 PM
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 2013–2014 #89 Petitioners: MIZRAIM S. CORDERO and SCOTT PRESTIDGE, as Registered Electors of the State of Colorado, and Respondents: CAITLIN LEAHY and GREGORY DIAMOND, and Title Board: SUZANNE STAIERT; DANIEL DOMENICO; and JASON GELENDER.	▲ COURT USE ONLY ▲
Attorneys for Petitioners: Richard C. Kaufman, No. 8343 Julie A. Rosen, No. 40406 Sarah K. Pallotti, No. 45077 Ryley Carlock & Applewhite 1700 Lincoln Street, Suite 3500 Denver, Colorado 80203 Phone: (303) 863-7500 Email: rkaufman@rcalaw.com; jrosen@rcalaw.com; spallotti@rcalaw.com	Case No. 14SA126
ANSWER BRIEF OF MIZRAIM S. CORDERO AND SCOTT PRESTIDGE	

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 _____ words.
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The brief complies with C.A.R. 28(k):

X 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 issues was raised on rule on.

□ For the party responding to the issue:
It contains under a separate heading, a statement of whether each party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

X I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/Richard C. Kaufman

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

I

I. SUMMARY OF THE ARGUMENT

The Ballot Title Setting Board and the Proponents of Initiative 2013-2014 #89 ("Initiative 89") assert the same principal arguments in response to Petitioners Cordero and Prestidge's Opening Brief.

First, both the Board and the Proponents assert the Board properly set the title with a single subject and both define the subject as the "public's right to Colorado's environment." In response to Petitioners' arguments that the proposal impermissibly contains four specific and separate subjects, the Board and the Proponents assert they are either subsumed within the single subject and therefore an integral part of that subject, or they characterize each one as an impermissible argument about the potential effect and impact of the initiative.

Second, the Board and the Proponents dismiss Petitioners' concerns the title is misleading and deceptive in contravention of the Colorado constitution and statutes. Both characterize Petitioners' concerns as an impermissible invitation to the Court to interpret Initiative 89.

In essence, the arguments set forth in the opening briefs submitted by the Board and the Proponents' attempt to eviscerate the core of Petitioners' arguments by characterizing each as beyond the scope of the analysis and review permitted in initiative cases. First, this standard would undercut this Court's ability to review

and render judgment on the Title board's decisions. Without the Court delving into either the merits or the prospective application of the initiative, an analysis under existing case law establishes that the Board did not have jurisdiction to set a title because the measure contains four distinct subjects. Second, the title does not sufficiently inform Colorado voters about the scope of the measure, and it contains impermissible catch phrases.

II. ARGUMENT

A. Initiative 89 Contains Four Distinct Subjects Which are Not Related or Necessary to Implement Its Primary Purpose

Both the Board and the Proponents assert Initiative 89 contains a single subject and purpose defined as the public's right to Colorado's environment. *See* Opening Brief of Title Board, p. 6; Opening Brief of Designated Representatives, p. 6. Within the confines of that statement, the Board and Proponents assert that each provision is necessary and related to that subject and purpose. However, any connection between a new public common property right, a constitutional public trust, local control of environmental law and a complete revision of established preemption law simply does not exist.

This Court has consistently rejected initiatives that have a broad theme but contain separate and distinct subjects and purposes. *In re Title, Ballot Title, and Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1076 (Colo. 2010); *In re Title, Ballot Title, & Submission Clause for Proposed Initiative 2001-2002 No. 43*,

46 P.3d 438, 442 (Colo. 2002). Even where separate subjects and purposes relate to a single broad theme, this Court has rejected such initiatives as a violation of the single-subject requirement. *In re Title, Ballot Title, and Submission Clause, & Summary for 1997-1998 No. 64*, 960 P.2d 1192, 1196 (Colo. 1998). To make the determination whether an initiative violates the constitutional single subject rule, the Court must examine the proposal. While stopping short of interpreting an initiative's prospective application, the Court's examination must be sufficient to analyze the relationship and meaning of the distinct purposes contained within an initiative. *In re Title, Ballot Title, & Submission Clause, for 2011-2012 No.* 3, 274 P.2d 562, 565 (Colo. 2012); *In re Title, Ballot Title & Submission Clause, for 2007-2008 No. 17 (New State Dep't. & Elected Bd. For Envtl. Conservation),* 172 P.3d 871, 874 (Colo. 2007).

In their opening brief, Petitioners focused on the distinct subjects contained in Initiative 89. Contrary to the arguments in the Board's opening brief, Petitioners did not request this Court analyze the application of Initiative 89 to future fact patterns that may arise. Instead, Petitioners simply identified the four distinct and separate subjects contained in Initiative 89. First, Initiative 89 purports to create a new property right in the environment for all Coloradans. Standing alone, that may be sufficiently related to "the public's right to Colorado's environment" to be within the single-subject rule. *In re Title, Ballot*

Title & Submission Clause, & Summary for Proposed Petitions, 907 P.2d 586, 590-91 (Colo. 1995). However, when coupled with the three remaining subjects, Initiative 89 violates the single-subject rule.

Second, Initiative 89 establishes a public trust over the new common property in the environment. Creating a public trust doctrine is not necessary to either creating the public's right to Colorado's environment or a common property right in that environment. It is a wholly separate purpose. *In re 43*, 46 P.3d at 442.

The separate purposes and subjects in Initiative 89 become most acute and obvious when the third and fourth subjects are reviewed. Section 2 of the initiative establishes a doctrine of local government control over the environment which is a separate purpose from the new common property right in section 1 of the initiative or the public trust doctrine in section 2. Local control is in no way a predicate for the public's right to the environment, and it is unrelated to the Proponents' definition of a common property right in the environment or a public trust. Local control is a separate subject because it is an attempt to rearrange authority and duties between the state government and county and city governments. Rearranging governmental authority is not germane to establishing the public's right to the environment. Because these purposes and subjects are

unrelated, Initiative 89 unconstitutionally includes more than one subject. *In re No. 64*, 960 P.2d at 1196.

The overhaul of Colorado's preemption scheme is the fourth subject included in Initiative 89. Contrary to the Board's opening brief, this Court has never specifically held that "local preemption of state law does not constitute a separate subject." *See* Opening Brief of Title Board at p. 16. The Board cites *Amundson v. Travis (In re Title, Ballot Title & Submission Clause)*, 962 P.2d 970 (Colo. 1998) in support of that rigid proposition. In fact, though the initiative in *Amundson* contained a preemption clause, the initiative was challenged under the single-subject rule because it provided for the reduction of both air and water pollution at commercial hog farms. *Id.* The *Amundson* petitioners did not challenge the initiative because of the preemption clause.

Initiative 89 is significantly different both because the preemption in section 3 of the measure overturns the preemption regime presently in Colorado's legal system and because it is not required to establish the public's right to the environment. The Board attempts to side step this issue by stating local government ordinances might preempt state statutes but not necessarily because the most restrictive between the two will preempt the other. While true, that begs the question as to whether this is a separate subject. The purpose of section 3 is to establish a new preemption system of law for environmental matters. This

purpose is not connected to or related to the establishment of a common property right in the environment or a public trust. Preemption is a separate subject that is not part of the primary purpose of Initiative 89. It is not dependent on that purpose and therefore the Board unconstitutionally set a title for a measure that contains more than one subject in violation of the Colorado constitution and statutes. *People ex rel. Elder v. Sours*, 31 Colo. 369, 403 (1903); *see also* Colo. Const. art. V, § 1(5.5); C.R.S. § 1-40-106.5(1)(a).

B. In Contravention of the Colorado Constitution and Applicable Statutes the Title Set by the Board is Confusing, Misleading and Fails to Reflect the True Intent of the Initiative

Again, in its opening brief the Board dismisses Petitioners' arguments as impermissible invitations to this Court to interpret the prospective application of Initiative 89 when Petitioners refer to the omissions in the title and the failure of the Board to include critical provisions in the title contained in Initiative 89. *See* Opening Brief of the Title Board, pp. 17-26. This argument should be rejected for the following reasons.

First, Initiative 89 and the title define Colorado's environment as "including its clean air, pure water, and natural and scenic values." As mentioned in Petitioners' Opening Brief, the term "including" means it is a partial list of a larger one. *See* BLACK'S LAW DICTIONARY (9th ed. 2009). The Board set a title that omits any mention of this issue. The Board side steps this issue by

asserting that Petitioners are requesting the Court either interpret the proposal or apply it prospectively or define the omissions. *See* Opening Brief of the Title Board, pp. 21-26. The Petitioners request nothing of the kind. This Court applies the general rules of statutory construction and gives the language in the initiative its plain meaning. *In re No. 17*, 172 P.3d at 874. It is clearly within the scope of the Court's review to look at the plain meaning of the words contained in the measure. *Id.* In the case of Initiative 89, the title sets forth a partial list of what is meant by the word "environment" but just as certainly, under the plain meaning doctrine, omits other items that may be included in the definition of the environment. The title fails to inform voters that this is only a partial list of what may be included in the definition of the environment. Petitioners are not requesting this Court interpret the initiative and fill in the blanks.

Rather, Petitioners assert the Board should have set a title that acknowledged that the definition of environment is only a partial list of what may be contained in Initiative 89. The title set by the Board failed to do so. This kind of omission impermissibly misleads and confuses voters in violation of the Colorado constitution and statutes. *See* Colo. Const. art. V, § 1(5.5); C.R.S. § 1-40-106(3)(b). Such a material omission requires the title for Initiative 89 be remanded to the Board for further consideration at its next meeting. *In re Title,*

Ballot Title, and Submission Clause for 1999-2000 No. 29, 972 P.2d 257, 268 (Colo. 1999).

In essence, by omitting the information outlined in the preceding paragraph, the Board impermissibly allowed the language "includes clean air, pure water, and natural and scenic values" to become a catch phrase. *In re Title, Ballot, and Submission Clause 1999-2000 No. 258*, 4 P.3d 1094, 1100 (Colo. 2000). "Clean air, pure water, and natural and scenic values" alone will lead voters to conclude these are the only items contained within the definition of environment in Initiative 89. Such words will subject Colorado voters to an emotional appeal that fails to acknowledge those words are not the full definition of "environment." Again, Petitioners do not request this Court to divine what other items may be included in the definition of environment. That kind of request is beyond the scope of review. *In re No. 43*, 46 P.3d at 443. What Petitioners do seek is a remand of Initiative 89 so the Board can revise the title to reflect the fact the definition of environment contains only a partial definition of what may be included.

Finally, by failing to acknowledge this partial definition, the title fails to inform Colorado voters of both the known and unknown impacts Initiative 89 will have if enacted by the electorate. Although defining the unknown impacts are beyond the scope of the Court's review, the title should acknowledge that

unspecified items are included in that definition. Without doing so, voters cannot know what the scope of the initiative is and whether or not they should vote yes or no. *In re Title, Ballot Title, and Submission Clause for 2009–2010 No. 24*, 218 P.3d 350, 356 (Colo. 2009).

III. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court hold Initiative 89 should be remanded to the Board with instructions to return it to the Proponents because it violates the single-subject rule. In the alternative, Petitioners request the Court find the title is confusing and misleading and remand the title to the Board for further action.

Respectfully submitted this 2nd day of June, 2014 by:

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/s/ Richard C. Kaufman
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CERTIFICATE OF SERVICE

I certify that on June 2, 2014, a true and correct copy of the above and foregoing **ANSWER BRIEF OF MIZRAIM S. CORDERO AND SCOTT PRESTIDGE** was filed and served via ICCES addressed to the following:

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