DATE FILED: June 2, 2014 4:30 PM

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

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

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 #89 ("LOCAL GOVERNMENT REGULATION OF ENVIRONMENT")

Petitioners:

Douglas Kemper, Mizraim Cordero, and Scott Prestidge,

v.

Respondents:

Caitlin Leahy and Gregory Diamond,

and

Title Board:

Suzanne Staiert, Daniel Domenico, and Jason Gelender.

▲COURT USE ONLY▲

Case No. 2014SA126

JOHN W. SUTHERS, Attorney General
SUEANNA P. JOHNSON, Assistant Attorney General, Atty. Reg. No. 34840*
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, CO 80203
Telephone: 720-508-6155
FAX: 720-508-6042
E-Mail: Sueanna.Johnson@state.co.us
*Counsel of Record

ANSWER BRIEF OF THE TITLE BOARD

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 2,268 words.

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

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.

/s/ Sueanna Johnson

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. The Initiative contains a single subject. 2

A. The standard of review and preservation of the issue on appeal. 2

B. There are not multiple or distinct purposes contained in the measure. 3

II. The title for the Initiative is fair, clear, and accurate. 8

A. The standard of review and preservation of the issue on appeal. 8

B. The arguments raised by the Petitioners do not warrant reversal of the title set by the Title Board. 9

CONCLUSION 13

TABLE OF AUTHORITIES

PAGE

CASES

City of Aurora v. Acosta, 892 P.2d 264 (Colo. 1995) 2

Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45), 234 P.3d, 642 (Colo. 2010) 8, 9, 12

In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund, 913 P.2d 533 (Colo. 1996) 2

In re Title, 898 P.2d 1076 (Colo. 1995) ("In re Water II") 7

In re Title, Ballot Title & Submission Clause, 646 P.2d 916 (Colo. 1982) 11

In re Title, Ballot Title & Submission Clause, 908 P.2d 125 (Colo. 1995)) 12

In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256, 12 P.3d 246 (Colo. 2000) 8

Kelly v. Tancredo, 913 P.2d 1127, n. 3 (Colo. 1996) 11

Kemper v. Hamilton (In re Title, Ballot Title & Submission Clause 2011-2012 #3), 274 P.3d 562 (Colo. 2012) 4

Kemper v. Hamilton (In re Title, Ballot Title, and Submission Clause for 2011-2012 #45), 274 P.2d 576 (Colo. 2012) 6

Lovato v. Johnson, 617 P.2d 1203, 1204 (Colo. 1980) 4

Outcelt v. Bruce, 959 P.2d 822 fn. 2 (Colo. 1998) 10

Rice v. Brandon (In re Title, Ballot Title & Submission Clause), 961, P.2d 1092, (Colo. 1998) 12

Walker v. Van Laningham, 148 P.3d 391, 396 (Colo. App. 2006) 4

RULES

CRE 201 4

Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board (the "Title Board"), by and through undersigned counsel, hereby submit their Answer Brief.

STATEMENT OF THE CASE

The Title Board incorporates its Statement of the Case from its Opening Brief.

STATEMENT OF THE FACTS

The Title Board incorporates its Statement of the Facts from its Opening Brief. The Title Board continues to refer to Mizraim Cordero and Scott Prestidge as "Petitioner Cordero." When referring to the "Petitioners," this includes both Petitioner Cordero and Petitioner Kemper.

SUMMARY OF THE ARGUMENT

The measure does not contain multiple subjects. The public's right to Colorado's environment and the trusteeship imposed on the state and local governments is related to those entities enacting laws that are protective of the right recognized. At most, the preemption

provision and authority of local governments to enact environmental laws are implementing provisions of the measure.

The title is fair, clear, and accurate. The title as a whole adequately informs voters of the details of the measure. The Title Board is not charged with providing explanations of the potential effects of the measure in the title. And the phrase "clean air, pure water, and natural and scenic values" is not an impermissible catch phrase.

ARGUMENT

I. The Initiative contains a single subject.

A. The standard of review and preservation of the issue on appeal.

The Title Board concurs with the standard of review set forth by the Petitioners and Proponents with supplementation of statements made in its own Opening Brief at 8-9, except as noted herein. Petitioner Kemper cites to *In re Interrogatories Relating to the Great Outdoors Colo. Trust Fund,* 913 P.2d 533 (Colo. 1996) and *City of Aurora v. Acosta,* 892 P.2d 264 (Colo. 1995) to support that all language in an initiative is presumed to have a specific purpose and that no

words should be interpreted to render them useless. Both cases dealt with interpretation of constitutional amendments after they were passed by the voters, and so the standard of review is different. The Title Board disagrees that these two cases are part of the proper standard of review for a single subject analysis given the Court's limited role at this point in the initiative process. The Title Board agrees that the Petitioners preserved the issue for appeal.

B. There are not multiple or distinct purposes contained in the measure.

The Petitioners inappropriately look to the effects or scope of the measure to find a single subject violation. Their arguments should be rejected.

First, the Petitioners argue that the measure's creation of a "fundamental right" to Colorado's environment is distinct from the common property right recognized or the public trust doctrine established. #89 does not contain separate subjects, as it empowers the state and local governments to enact laws for the protection of the environment, an implementation provision that is necessary and

related to effectuate and exercise the right recognized in the measure. *See Kemper v. Hamilton (In re Title, Ballot Title & Submission Clause 2011-2012 #3),* 274 P.3d 562, 565 (Colo. 2012) (a measure contains a single subject if the matters encompassed are "necessarily and properly connected" to each other rather than "disconnected or incongruous.")

This Court recently affirmed on single subject grounds Proposed Initiative 2013-2014 #75 ("The Right of Local Self-Government") ("#75") on May 22, 2014 in Supreme Court case number 2014SA100.[1] #75 recognizes an inalienable right to local self-government, as well as authorizes local governments to enact laws on topics broader than regulation of the environment. The objectors to #75 argued that the inalienable right to local self-government is a distinct subject from expansion of local authority to enact local laws. This Court rejected the

[1] The entire briefing for #75 and order affirming the actions of the Title Board may be found on the Supreme Court's website page at http://www.courts.state.co.us/Courts/Supreme_Court/2013Initiatives.cfm. The Court may take judicial notice of related court proceedings. *See* C.R.E. 201; *see also Walker v. Van Laningham*, 148 P.3d 391, 396 (Colo. App. 2006) (the court took judicial notice of the contents of a related court proceeding); *Lovato v. Johnson*, 617 P.2d 1203, 1204 (Colo. 1980) (judicial notice may be taken at any stage of the proceeding, whether in the trial court or on appeal).

objectors' arguments for #75 to the extent it affirmed the actions of the Title Board, and it should do the same here.

Second, the Petitioners argue that #89 contains a separate subject, as the preemption provision allows local environmental laws to be more restrictive than state law. #75 also has a preemption provision that permits local laws to be more restrictive than state law, again concerning subject matter far broader than regulation of the environment. In fact, the preemption provision in #75 allows local laws to be more restrictive than laws passed by federal, state, or international entities. The objectors for #75 made similar arguments that the preemption provision in that measure constituted a separate subject. This Court rejected the objectors' arguments for #75 to the extent it affirmed the actions of the Title Board, and it should do the same here.

Finally, Petitioner Kemper focusses at length on how the measure, if adopted, would "completely alter the nature of Colorado's water rights, among other property rights." Pet'r Kemper Opening Brief at 11. He argues that Colorado has never recognized a public trust

doctrine, and refers to case law or constitutional provisions in California and Hawaii in which application of a public trust doctrine in those states required reallocation of property rights recognized under a prior appropriation water rights scheme. *Id.* at 12-14. The most revealing statement made by Petitioner Kemper, however, is: "Accordingly, Initiative #89's proposed public trust for environmental protection, and its accompanying declaration of 'common property,' would radically transform Colorado's scheme of priority-based water rights *if interpreted (as in California or Hawaii)* to subordinate existing appropriative water rights, regardless of priority, to the public's new common property right." *Id.* at 14. (emphasis added). The language "if interpreted" is telling, as this Court may not opine on how an initiative may be applied, and must confine its single subject review to the plain language of the measure. *See Kemper v. Hamilton (In re Title, Ballot Title, and Submission Clause for 2011-2012 #45)*, 274 P.2d 576, 581, fn. 2 (Colo. 2012).

Similarly, both Petitioners argue that the single subject of a "public right to Colorado's environment" is too broad a topic. They

argue that this topic is similar to the Court's holding where it found that "water" being the common characteristic in an initiative was too broad a topic to constitute a single subject. *In re Title,* 898 P.2d 1076, 1080 (Colo. 1995) ("*In re Water II*"). *In re Water II* dealt with an initiative that sought to establish a public trust doctrine, as well as contained election requirements for water conservation and water conservancy districts. The Court held that those topics were unrelated on grounds that "[t]he water conservation and conservancy districts have little to no power over the administration of public water rights or the development of a statewide public trust doctrine because such rights must be administered and defended by the state and not by the local district." *Id.*

Unlike *In re Water II*, the focal point of #89 *is* the state (or local governments), as trustees, to enact laws that enforce and protect the citizens' right to the environment as established by the measure. The provision that allows for local environmental laws to be more restrictive than state law furthers the central purpose of the measure and is related to ensure that the environmental right established is protected

to the fullest extent of the law. Therefore, the subject of the measure – while broad in scope and likely in impact – contains a single subject with implementing provisions reasonably related to that end. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256,* 12 P.3d 246, 254 (Colo. 2000) (breadth alone does not violate the single subject requirement if the provisions of a proposal are connected); *see also Earnest v. Gorman (In re Title, Ballot Title and Submission Clause for 2009-2010 #45)*, 234 P.3d, 642, 647 (Colo. 2010) (implementing provisions directly tied to the central focus of the initiative are not separate subjects).

II. The title for the Initiative is fair, clear, and accurate.

A. The standard of review and preservation of the issue on appeal.

The Title Board concurs with the standard of review set forth by the Petitioners and Proponents with supplementation of statements made in its own Opening Brief at 17-19. The Title Board agrees that the Petitioners preserved the issues raised for appeal, except as noted

herein. Petitioner Cordero argues that the title for #89 impermissibly includes a catch phrase. This issue was not raised in Petitioner Cordero's motion for rehearing before the Title Board, and therefore is not properly preserved.

B. The arguments raised by the Petitioners do not warrant reversal of the title set by the Title Board.

First, Petitioner Kemper argues that the statement of the single subject – "a public right to Colorado's environment" – is too vague and inadequate to encompass the "substantial change" brought about if the measure passed. All details about the measure need not be included in the statement of the single subject. *Earnest*, 234 P.3d at 647. In reading the title as a whole, the title adequately informs voters of the other provisions that Petitioner Kemper raises. *Id.* at 648 (the title will be upheld if the language of the title as a whole adequately conveys the meaning of the measure). Any effects the measure may have need not be part of the title – much less in the statement of the single subject.

Second, Petitioner Kemper argues that the title fails to inform voters that the public right to the environment is "fundamental."

Again, application of how the right might be interpreted or enforced is an inappropriate task for the Title Board or this Court. *Outcelt v. Bruce*, 959 P.2d 822, 825, fn. 2 (Colo. 1998) (the Court noted that it is neither appropriate nor possible to attempt to predict all the effects of an amendment in the pre-election phase). As such, the title properly discloses that a new right is established.

Third, Petitioner Cordero argues that the title should explain the effect the measure will have on current legal rights or relationships. For example, they argue that because "clean air, pure water, and natural and scenic values" would be the "common property" of all citizens, the title fails to inform voters of the "tectonic shift in the law as it overturns Colorado's priority-based water rights system[.]" Pet'r Cordero Opening Brief at 14. Similarly, Petitioner Cordero argues that the Title Board's statement of the preemption provision does not adequately inform voters that it "seeks to overturn years of well-established case law and statutory authority governing the preemption of state law." *Id.* at 16. Petitioner Cordero's issues with the title are not with the language employed by the Title Board, but rather with the

effect the measure may have on existing constitutional and statutory laws and doctrines. The Title Board, however, may not provide explanations to those effects; such analysis and arguments can be part of the campaigns for or against the measures. *In re Title, Ballot Title & Submission Clause,* 646 P.2d 916, 920 (Colo. 1982) (holding that not every effect of a measure must be put in a title, as such matters may be brought to the attention of the voters by public debate).

Finally, Petitioner Cordero argues for the first time that the title defines environment as "clean air, pure water, and natural and scenic values," which is meant to appeal to voters' emotions, and thus constitutes an impermissible catch phrase. Pet'r Cordero Opening Brief at 16-18. At the outset, it should be noted that the Title Board did not define "environment," but rather the language comes directly from the measure. This issue was not addressed in Petitioner Cordero's motion for rehearing or contained in the Petition for Review to this Court. This Court should decline to review this issue. *Kelly v. Tancredo,* 913 P.2d 1127, 1130, n. 3 (Colo. 1996) (this Court declined to hear an issue not raised in a motion for rehearing before the Title Board).

Assuming this Court reviews Petitioner Cordero's catch phrase argument, it should be rejected. The Court has held that it must "be careful to recognize, but not create, catch phrases." *Rice v. Brandon (In re Title, Ballot Title & Submission Clause),* 961, P.2d 1092, 1100 (Colo. 1998). In determining whether language constitutes a catch phrase, the Court requires a party to offer more evidence than "bare assertion that political disagreement currently exists." *Earnest,* 234 P.3d at 650 (*quoting In re Title, Ballot Title & Submission Clause,* 908 P.2d 125, 130 (Colo. 1995)). The language referred to by Petitioner Cordero is no different than statements, such as "management of growth," "preserve the social institution of marriage," or "protect the environment and human health," which were all rejected as catch phrases by this Court. *Earnest*, 234 P.3d at 650. Likewise, Petitioner Cordero puts forth no evidence to support the language is a catch phrase, other than the bald statement that there is a "great deal of public debate currently surrounding the issues addressed in Initiative 89." Pet'r Opening Brief at 17. As such, the language raised by Petitioner Cordero does not constitute a catch phrase. *See Earnest*, 234 P.3d at 650.

CONCLUSION

Based on the foregoing authorities and reasons, this Court should affirm the actions of the Title Board and approve the title for #89.

Respectfully submitted this 2nd day of June, 2014.

JOHN W. SUTHERS
Attorney General

/s/ *Sueanna P. Johnson*
SUEANNA P. JOHNSON, 34840*
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, on this 2nd day of June, 2014, I duly served this **ANSWER BRIEF OF THE TITLE BOARD** on all parties via ICCES, addressed as follows:

Martha Tierney, Esq.
Edward T. Ramey, Esq.
Heizer Paul LLP
2401 15th Street, Suite 300
Denver, CO 80202
Attorneys for Proponents

Stephen H. Leonhardt, Esq.
Alix L. Joseph, Esq.
Wenzel J. Cummings, Esq.
Burns, Figa & Will, P.C.
6400 Fiddlers Green Circle
Suite 1000
Greenwood Village, CO 80111
Attorneys for Petitioner Douglas Kemper

Richard C. Kaufman, Esq.
Julie A. Rosen, Esq.
Sarah K. Pollotti, Esq.
Ryley Carlock & Applewhite
1700 Lincoln Street, Suite 3500
Denver, CO 80203
Attorneys for Petitioners Mizraim Cordero and Scott Prestidge

/s/ *Sueanna Johnson*