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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 #103 ("PUBLIC TRUST RESOURCES")

Petitioners:

Mizraim Cordero, Scott Prestidge, and Douglas Kemper,

v.

Proponents:

Phillip Doe, Barbara Mills-Bria, and Sandra Toland,

and

Title Board:

Suzanne Staiert, Daniel Domenico, and Jason Gelender.

▲COURT USE ONLY▲

Case No. 2014SA137

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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 3,025 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

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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 Petitioners Mizraim Cordero and Scott Prestidge collectively as "Petitioner Cordero." When referring to the "Petitioners," this includes both Petitioner Cordero and Petitioner Kemper.

On May 16, 2014, Ms. Barbara Mills-Bria submitted the Proponents' Opening Brief following her request that was granted to file it one day late. Because the Proponents' Opening Brief was only signed by Ms. Mills-Bria, Petitioner Cordero filed a motion to strike on grounds she is not a licensed attorney who may represent the other Proponents. In an order dated May 22, 2014, the Court struck the Proponents'

Opening Brief, but gave them leave to file an amended brief that was to be signed by all the Proponents by May 27, 2014. On May 22, 2014, Sandra Toland submitted an amended Opening Brief signed by her and Ms. Mills-Bria. An email from Mr. Phillip Doe was attached in which he indicated that Ms. Toland had authority to sign on his behalf, as he was currently in Germany.

On May 23, 2014, Petitioner Cordero again filed a motion to strike on grounds that Ms. Toland, as a non-attorney, may not sign on behalf of Mr. Doe. The Court denied Petitioner Cordero's motion, and accepted the May 22, 2013 brief, with an order that Mr. Doe file his signature page upon return to the country. As of the filing of this Answer Brief, Mr. Doe had not yet filed his signature page.

SUMMARY OF THE ARGUMENT

There is no explicit statutory prohibition against substitutions of designated representatives. This Court liberally construes statutes concerning the initiative process in order to further, not hamper, that right. The Title Board properly accepted the withdrawal of Barbara

Mills-Bria and the substitution in her stead of Sandra Toland, and consequently had jurisdiction to proceed at the rehearing on #103.

The measure contains a single subject, as the implementation provisions are directly connected to the state, as a trustee, to enforce, administer and defend the public trust doctrine. Arguments that support the finding of multiple subjects concern the effect or scope of the measure, which is beyond this Court's review.

The title for #103 is fair, clear, and accurate. The statement of the single subject accurately reflects the purpose of the measure. The issues raised by the Petitioners inappropriately look to the effects or scope of the measure in an attempt to argue the title is misleading. This Court should uphold the actions of the Title Board.

ARGUMENT

I. The Title Board had jurisdiction to set the title for #103.

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

The Title Board concurs with the standard of review set forth by the Petitioners with supplementation of statements made in its own

Opening Brief at 9-10. The Proponents did not provide a standard of review. The Title Board agrees that the Petitioners preserved the issue for appeal.

B. The statutes governing initiatives and referendum do not prohibit substitution of a designated representative.

The Petitioners raise two arguments with respect to the substitution of the designated representative that should be addressed, and rejected. First, Petitioner Kemper argues the Title Board lacked authority to accept Ms. Toland's executed affidavit because § 1-40-106(4)(b), C.R.S., requires that, "[t]he designated representative shall sign and file the affidavit with the secretary of state at the *first* title board meeting at which the designated representative's ballot issue is considered." Pet'r Kemper Opening Brief at 11. The word "first" can be interpreted to mean the *first* meeting at which the substituted designated representative attends. This interpretation complies with the requirement that there be two designated representatives (§ 1-40-104, C.R.S.), the requirement that the designated representatives attest to their understanding of the initiative process and responsibilities (§ 1-

40-106(4)(d), C.R.S.), and the requirement mandating attendance of both representatives at the Title Board's meetings (§ 1-40-106(4)(a), C.R.S.).

This interpretation also effectuates the intent of the General Assembly. In *Hayes v. Ottke (In re Title, Ballot Title & Submission Clause for Proposed Initiative 2011-2012 Nos. 67, 68, and 69)*, 293 P.3d 551, 558 (Colo. 2012), the Court noted that the Title Board's actions were not justified to set title when both designated representatives were not present even though not setting title would mean the initiative could not be placed on the 2012 ballot. *Hayes* relied on the provision in § 1-40-106(4)(d), C.R.S., that states the Title Board, "may consider the ballot issue at its next meeting, but the requirements of this subsection 4 shall continue to apply." The mandatory attendance requirement that holds the initiative over for a later election cycle when both designated representatives are present at the Title Board meeting is reasonable and does not hamper the right of initiative. A technical and rigid construction of the statute prohibiting substitutions of the designated representative, on the other hand, would lead to the absurd result that

proponents may need to re-start the entire initiative process again, or more problematic, may be unable to proceed at all in the event, for example, one of the designated representatives is incapacitated and unable to participate. *See AviComm, Inc. v. Colorado PUC*, 955 P.2d 1023, 1031 (Colo. 1998) (the intent of the legislature will prevail over a literal interpretation that would lead to an absurd result). The General Assembly's requirement that two designated representatives be present at the Title Board hearing was effectuated with the substitution.

Second, Petitioner Cordero argues that the Title Board's action in allowing the substitution of Ms. Mills-Bria "can only be framed as equitable motivations." Pet'r Cordero Opening Brief at 12. While not explicitly stated in the record, the Title Board's determination that there is no statute prohibiting substitution of a designated representative is in line with the Court's precedent that statutory provisions concerning the initiative process should be liberally construed to facilitate and not hamper this right. *See Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996); *see also Armstrong v. Davidson*, 10 P.3d 1278, 1283 (Colo. 2000) (absent a statutory prohibition, the intent of the

General Assembly in advancing the right of initiative is furthered by allowing proponents to circulate petitions after the Title Board acts but during appellate review, as there is no prejudice to the electorate). No prejudice to either the Petitioners or the public at large is alleged here. The Title Board had jurisdiction to proceed with the rehearing for #103.

II. 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 with supplementation of statements made in its own Opening Brief at 17-18, except as noted herein. The Proponents did not provide a standard of review. 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 issues raised 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.

Petitioner Kemper focusses at length on how the measure, if adopted, would "completely alter the nature of Colorado's water rights." Pet'r Kemper Opening Brief at 17. 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 17-20. The most revealing statement made by Petitioner Kemper, however, is: "Accordingly, Initiative #103'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 20. (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).

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

[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).

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 the implementing provisions that expand local authority to enact local laws. 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. The common property right and public trust established in #103 with implementation provisions that authorize the state to defend, enforce, or protect that right is no different than the recognition of the right to local self-government recognized in #75 with implementation provisions to enforce or exercise that right.

Similarly, both Petitioners argue that the single subject "public trust in environmental resources" 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.*

Here, the creation of a public trust doctrine and establishment of a common property right to the environment are connected to the implementation of the state's responsibility to "administer" and "defend" that doctrine. The state, as trustee, is required to protect the environmental and natural resources from "substantial impairment" regardless of any prior approval of any federal, state or local permit connected to a public action or commercial dealing. Likewise, the state as a fiduciary must ensure that the best available science governs whether public trust resources are being substantially impaired, thus necessitating criminal penalties for manipulating data or records or scientific reports in an attempt to use public trust resources for profit.

Unlike *In re Water II*, the focal point of #103 *is* the state (or the people as beneficiaries of the trust) to enforce, protect, and administer the public trust doctrine that is established by the measure. 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) ("*In re #45*") (implementing provisions directly tied to the central focus of the initiative are not separate subjects).

III. The title for the initiative is fair, clear, and accurate.

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

The Title Board concurs with the standard of review set forth by the Petitioners with supplementation of statements made in its own Opening Brief at 25-26. The Proponents did not provide a standard of

review. The Title Board agrees that the Petitioners preserved the issues raised for appeal, except as noted herein. Petitioner Cordero argues that the title for #103 impermissibly includes a catch phrase. This issue was not raised in Petitioner Cordero's motion for rehearing, 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.

Petitioner Kemper argues that the statement of the single subject fails to notify voters of the threat of the taking of current property rights, the creation of an inalienable right, and a new crime. All details about the measure need not be encompassed in the single subject. *In re #45*, 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).

Next, Petitioner Kemper argues that the phrase "regardless of any prior federal, state, or local approval" is vague, and fails to sufficiently inform voters of the "threat of a taking if the initiative were enacted

into law." Pet'r Kemper Opening Brief at 28. Petitioner Kemper focusses on the *potential effect* in order to argue the title is misleading, which is inappropriate. *See In re Title, Ballot Title and Submission Clause for 2007-2008, #57*, 185 P.3d 142, 145 (Colo. 2008) ("*In re #57*") (neither the Court nor the Title Board may interpret a measure or "construe it future legal effects.") The language employed by the Board adequately informs voters of the retroactive effect of the measure.

As raised in his Petition for Review, Petitioner Cordero stated that the term "common property" was not defined in the measure, which will lead to voter confusion. Cordero Petition for Review at 3. In the Opening Brief, however, Petitioner Cordero argues that the title fails to mention the creation of a "common property" right. Pet'r Cordero Opening Brief at 20-21. Petitioner Cordero argues the "impact" of this provision cannot be "understated," as it would "overturn Colorado's century-old priority-based water rights system[.]" *Id.* at 21. This argument again improperly focusses on the merits and effect of the measure, and should be rejected. *In re #57,* 185 P.3d at 145.

Finally, Petitioner Cordero argues for the first time that the words "clean air, clean water, and the preservation of the environment and natural resources" are "flowery text" that are meant to appeal to voters' emotions, and thus constitutes an impermissible catch phrase. Pet'r Cordero Opening Brief at 22-23. This issue was not addressed in Petitioner Cordero's motion for rehearing, raised orally at the rehearing, or contained in the Petition for Review to this Court.[2] 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

[2] Counsel for Petitioner Cordero at the rehearing argued that the word "environment" is a "buzzword" that voters "can get on board with this idea." Pet'r Cordero Opening Brief at Exhibit I at 26:19-23. This does not adequately preserve the issue for appeal, as the language that Petitioner Cordero now argues is a catch phrase was not presented for the Title Board's consideration.

Court requires a party to offer more evidence than "bare assertion that political disagreement currently exists." *In re #45*, 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. *In re #45*, 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 103." Pet'r Cordero Opening Brief at 23. As such, the language does not constitute a catch phrase. *See In re #45*, 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 #103.

Respectfully submitted this 29th day of May, 2014.

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CERTIFICATE OF SERVICE

This is to certify that, on this 29th day of May, 2014, I duly served this **ANSWER BRIEF OF THE TITLE BOARD** on all parties via ICCES or overnight delivery, addressed as follows:

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