

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: March 22, 2016 5:00 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #63 (“Right to a Healthy Environment”)</p> <p>Petitioners: TRACEE BENTLEY AND STAN DEMPSEY</p> <p>v.</p> <p>Respondents: BRUCE MASON AND KAREN DIKE and</p> <p>Title Board: SUZANNE STAIERT; JASON GELENDER; AND FREDERICK R. YARGER.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p>PETITIONERS’ ANSWER BRIEF</p>	

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.
- It does not exceed 30 pages.

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 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.

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

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I. SUMMARY OF THE ARGUMENT

In their Opening Brief, Proponents assert Initiative #63 contains only one subject – the right to a healthy environment for natural persons. Beyond that subject, they assert that all of the other provisions are merely implementation measures. However, exempting cities and counties from certain provisions of the Colorado Constitution, creating a new hierarchy and priority for the rights found in the Colorado Bill of Rights, revamping the existing preemption regime, and creating a right to enforce their measure that includes punitive damages, constitute separate and distinct subjects which are not interrelated or dependent upon each other. The Title, as set, will lead to surprise in violation of the second prong of the single subject analysis.

The catch phrase “fundamental right” will appeal to the emotions of voters while failing to inform them about the substance of Initiative #63. Such phrases obscure the meaning of Initiative #63 behind a façade that, in this case, attempts to convince voters in the first sentence of the Title that they should vote for the proposal because it protects their fundamental right.

Finally, the omission of any reference to the new priority of rights within Article II of the Colorado Constitution, or the provisions that permit individuals to bring a legal or equitable action, constitute significant omissions by the Title Board.

Due to these errors, Petitioners respectfully request the Court to reject the Title set by the Title Board for the reasons set forth below

II. ARGUMENT

A. Initiative #63 Violates the Colorado Constitution and State Statutes Because it Contains Multiple, Unrelated Subjects

Proponents assert that Initiative #63 has only one purpose – to establish “a right to a healthy environment for natural persons,” while all the other provisions are “implementing and enforcement details.” *See* Opening Brief of Proponents, pp. 5, 8.

While an initiative may comply with the single subject rule where it contains provisions that relate to the implementation of the measure, those provisions must be necessary and related to the initiative. *See In re Title, Ballot Title, and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010); *In re Title, Ballot Title, and Submission Clause for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000) (each provision of an initiative must have a “logical incident” to the others and must be necessary to achieve its primary purpose). However, this Court has rejected initiatives that contain a broad theme but separate and distinct subjects and purposes. *In re Title, Ballot Title, and Submission Clause for 2009-2010 #9*, 235 P.3d 1071, 1076 (Colo. 2010). While the Court’s task does not include analyzing the prospective application of the initiative, the examination does include an analysis of the subjects and purposes contained in the initiative. *In re*

Title, Ballot Title & Submission Clause, for 2007-2008 #17, 172 P.3d 871, 874 (Colo. 2007). This examination is necessary to determine whether the initiative violates the single subject rule. *In re Title, Ballot Title, & Submission Clause, for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012).

1. The exemption of local government from Colorado Constitutional provisions is a separate, unrelated subject in violation of the single subject rule.

Proponents deny that rearranging the legal status of local governments under Article XX and section 16 of Article XIV of the Colorado Constitution constitutes a violation of the single subject rule and claim that it is merely an implementing provision of Initiative #63. *See* Opening Brief of Proponents, pp. 9-10. Proponents cite a 2014 decision by this Court as dispositive. *See In re Initiative for 2013-2014 #90*, 328 P.3d 155, 161 (Colo. 2014). Unlike Initiative #63, Initiative #90 focused only on local control of oil and gas development. As Petitioners conceded in their Opening Brief, the right to a healthy environment is not dependent upon the legal relationship between local governments or the particular constitutional authority assigned to local governments. *See* Opening Brief of Petitioners, pp. 8-9. Moreover, Initiative #63 establishes a new right within the Bill of Rights, Article II of the Colorado Constitution, something Initiative #90 did not. The new proposed right is not dependent on local government authority, and

therefore this exemption of local government from state constitutional provisions is a separate, independent subject which violates the single subject requirement.

2. Creating a hierarchy of rights within the Colorado Bill of Rights violates the single subject rule.

One of the two primary purposes of the single subject rule is to prevent “surreptitious measures” which, if allowed to proceed to the ballot, would either surprise voters or subject them to fraud. *In re Initiative for 2013-2014 #93*, 328 P.3d at 155, 159 (Colo. 2014). This rule, codified at C.R.S. § 1-40-106.5(1)(e), protects voters by ensuring they are informed of the true purpose of a measure and can understand and judge the meaning and consequences of each initiative placed before them on the ballot.

In this case, Proponents of Initiative #63 rely on its brevity as a reason why it should be easily understood by the electorate. *See* Opening Brief of Proponents, p. 9. They equate brevity with understanding. Most voters may have very little understanding of what the words “Article II” mean from a constitutional perspective or the importance of Article II as it pertains to their individual rights. Imagine the surprise and likely chagrin when voters discover a new, previously unrecognized right now trumps all of their other individual rights included in Article II. Brevity cannot obviate that fact. Indeed, the opposite is true: brevity permits surprise and compounds misunderstanding.

Subsection (4) of Initiative #63 provides that state and local governments “shall assign the highest priority to the protection of a healthy environment.” It follows that both the state and local governments are required to protect the right to a healthy environment above and before all other rights contained in Article II. Nothing in either the measure itself or the Title set by the Title Board informs the electorate about this fundamental revision to the Bill of Rights. For example, voters will be surprised to learn that their right to due process (Art. II, sec. 25), their protection against unreasonable search and seizure (Art. II, sec. 7), and their right to free speech (Art. II, sec. 10), would all be subordinated to the right to a healthy environment (ironically, so would their right to vote (Art. II, sec. 5)). Rearranging the hierarchy of rights in the Bill of Rights, as is required by the terms of Initiative #63, certainly represents a separate subject that violates the single subject rule.

Proponents attempt to overcome this argument by asserting that without the creation of a right to a healthy environment, “assigning that right the highest priority has no meaning.” *See* Opening Brief of Proponents, pp. 10-11. However, even if one accepts that statement, it represents only half an explanation. It certainly does not eliminate the potential for surprise, which violates the single subject rule regardless of whether Proponents assert a legal meaning or not. *See In re Proposed Initiative 1996-4*, 916 P.2d 528, 532 (Colo. 1996). It also assumes no

court will ever import meaning to this priority, something Proponents cannot guarantee in the likely event the right comes into direct conflict with, for example, the inalienable right to acquire and possess property (Art. II, sec. 3).

3. The preemption provision of Initiative #63 violates the single subject rule.

Section 32(5) of Initiative #63 provides that local government charter provisions and ordinances which are protective of a healthy environment may preempt state statutes. As Petitioners argued in their Opening Brief, this provision redefines preemption in terms of the breadth and restrictiveness of a charter provision or ordinance. Existing preemption law would therefore be replaced by an undefined analysis of whether a charter provision or ordinance is more “protective” of a “healthy environment” than a state statute. *See* Opening Brief of Petitioners, p. 10.

Proponents of Initiative #63 argue that the Court decided this issue in a previous case. *See In re Initiative for 2013-2014 #89*, 328 P.3d 172, 178 (Colo. 2014); Opening Brief of Proponents, p. 11. Proponents argue this is just a policy change; however, that begs the question of whether the preemption provision of Initiative #63 represents a separate, unrelated subject from the establishment of right to a healthy environment and whether, as argued in the preceding section, it constitutes an impermissible surprise to the electorate.

Revising the preemption law of Colorado is not a prerequisite to establishing a right to a healthy environment. If anything, it represents a back door approach to transferring control over our public affairs from the state government to cities and counties on the broad range of rights contained in Article II of the Colorado Constitution. Such a drastic revision of power and authority between the state and local governments, especially in light of the direct implication of Article II, represents a separate and distinct subject in violation of the single subject rule.

4. The scope of the legal and equitable enforcement mechanisms in Initiative #63 will impermissibly surprise voters.

As argued in Petitioners' Opening Brief, Section 32(6) establishes a separate right of natural persons and governmental entities to enforce the right to a healthy environment. Enforcement actions under Initiative #63 may be at law or in equity, including equitable actions for injunctive and declaratory relief, and may also include punitive damages in certain circumstances. In this case, the scope of the permissible legal actions is far broader than a provision to implement and protect the right to a healthy environment. It is the mechanism to ensure the new hierarchy in the Colorado Bill of Rights. Again, such surprise violates the single subject rule. *See In re Proposed Initiative 1996-4*, 916 P.2d at 532.

B. The Title Impermissibly Contains Catch Phrases and is Vague and Misleading.

1. The use of the catch phrase “Fundamental Right” will appeal to voter emotion without contributing to understanding of Initiative #63.

In Petitioners’ Opening Brief, they established the phrase “healthy environment” as an impermissible catch phrase. *See* Petitioners’ Opening Brief, pp. 11-12. The same analysis applies to the use of the phrase “fundamental right,” which the Title Board placed in the first sentence of the Title it adopted.

Impermissible catch phrases are “words that form the basis for a slogan.” *See In re Title, Ballot Title & Submission Clause & Summary Pertaining to Casino Gaming Initiative*, 649 P.2d 303, 308 (Colo. 1982). Such words or phrases “should be carefully avoided by the board in writing the ballot title and submission clause.” *Say v. Baker*, 137 Colo. 155, 322 P.2d 317, 320 (Colo. 1958). By avoiding such words or phrases, the Title Board eliminates slogans that “tend to color the merit of the proposal on one side or the other.” *Id.*

The catch phrase “fundamental right” is misleading and confusing to voters. Proponents assert the term “has specific meaning under the law,” but their Opening Brief fails to cite to any authority to support that assertion. *See* Petitioners’ Opening Brief, pp. 13-14. Proponents cite to the Court’s decision in Initiative #89 as dispositive on the issue. However, in Initiative #89, the Court’s analysis focused on the *omission* by the Title Board of the term “fundamental right” rather

than its *inclusion*. See *In re Initiative for 2013-2014 #89*, 328 P.3d at 180. Thus, the Court in *Initiative #89* did not evaluate whether the *inclusion* of the term “fundamental right” constitutes a catch phrase.

The Colorado Bill of Rights does not contain the term “fundamental right.” See Colo. Const., Art. II. Article II sets forth the various rights possessed by each citizen of Colorado without any reference to one or more being a “fundamental right.”

The meaning and scope of the constitutional rights that each citizen possesses are constantly debated by the public, as well as in our judicial, legislative, and executive branches of government. In the context of Initiative #63, the term “fundamental right” does not add to a description of the right to a healthy environment. Instead, that term adds a gloss of legitimacy to Initiative #63 that is unrelated to its substance. The term can easily be used to prejudice the public in favor of the measure without adding to the voters understanding. See *In re 2009-2010 #45*, 234 P.3d at 649; *In re Title, Ballot Title & Submission Clause & Summary Pertaining to Proposed Initiative Designated “Governmental Business,”* 875 P.2d 871, 875-76 (Colo. 1994) (finding the use of the terms “consumer protection” and “open government” were misleading and unrelated to the substance of the initiative before the court). The use of “fundamental right” does not enhance a voter’s knowledge about the specific, substantive provisions in

Initiative #63. Rather, the inclusion of the term prejudices a voter to favor any measure described as a “fundamental right.”

2. The Title is vague and misleading in violation of the Colorado Constitution and applicable statutes.

In their Opening Brief, Petitioners established that the terms “highest priority,” “protective of a healthy environment,” and “healthy environment” will mislead the voters. *See* Petitioners’ Opening Brief, pp. 14-15. In Proponents’ Opening Brief, they excuse the vague and misleading new hierarchy in the Bill of Rights, the omission in the Title that an individual may bring suit if they are “aggrieved,” and that the Title, as set, omits any reference to punitive damages for reckless disregard of the measure. *See* Proponents’ Opening Brief, pp. 14-16. The basis of their excuse is that a title need not set forth all the provisions contained in an initiative but is only required to include the primary points. *Id.* at 15.

These omissions are not secondary details. Each is a central part of Initiative #63. As argued above, the new hierarchy within the Bill of Rights is a primary purpose of Initiative #63 and represents a significant shift in citizens’ individual rights. The Title and the measure itself do not clearly express that purpose. In fact, it is not expressed anywhere in the measure or the Title. When a measure includes a fundamental, unspoken prioritization between it and existing constitutional rights, omitting that revision will mislead the public and cannot stand. *See In re Title, Ballot Title, and Submission Clause for 1999-2000 #29*, 972

P.2d 257, 258 (Colo. 1999). As a result of these omissions, the public cannot “determine intelligently whether to support or oppose such a proposal.” *See In re Title, Ballot Title, and Submission Clause for 2009–2010, #24*, 218 P.3d 350 (Colo. 2009).

The same principles apply to the omission of any reference to enforcement provisions and to punitive damages for reckless disregard of the right to a healthy environment. The purpose of the title is to make voters familiar with all of the essential points of a proposal so they can judge the merits. *See In re Proposed Initiated Constitutional Amendment of Educ., 1984*, 682 P.2d 480, 482 (Colo. 1984). The existing Title of Initiative #63 does not inform voters that new and steep penalties may be imposed for violations of the right to a healthy environment. A voter may assume different enforcement or remedies should exist for a violation of the measure, and the Title does not address this issue. In legal and equitable actions, the basis for such actions and the scope of remedies available are always an important and essential part of the law. By omitting any reference to these provisions, the Title set for Initiative #63 fails to meet the constitutional and statutory requirements that the title set forth the true intent of the measure. *See Colo. Const., Art. V, sec. 1 (5.5); C.R.S. § 1-40-106(3)(b)*. Such omissions obscure the true intent of the measure and are impermissible.

III. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court find Initiative #63 violates the single subject requirement and reverse this matter with instructions to return the Initiative to Proponents. Alternatively, Petitioners request that the Court, upon a finding that the Title is unclear and misleading, remand this matter to the Board with instructions to amend the Title.

Respectfully submitted this 22nd day of March, 2016.

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CERTIFICATE OF SERVICE

I certify that on this 22nd day of March, 2016, a true and correct copy of the foregoing **PETITIONERS' ANSWER BRIEF** was filed and served thru ICCES addressed to the following:

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