

SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	DATE FILED: March 22, 2016 3:00 PM
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015- 2016 #63 Petitioners: TRACEE BENTLEY and STAN DEMPSEY v. Respondents: BRUCE MASON and KAREN DIKE and Title Board: SUZANNE STAIERT; JASON GELENDER; and FREDERICK R. YARGER	▲ COURT USE ONLY ▲
<i>Attorneys for Respondents</i> Martha M. Tierney, No. 27521 Tierney Lawrence LLC 2675 Bellaire Street Denver, CO 80207 Phone: (303) 356-4870 E-mail: mtierney@tierneylawrence.com	Case No.: 16SA51
RESPONDENTS' ANSWER 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, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 2,343 words.

Further, the undersigned certifies that 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 issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such 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.

By: s/Martha M. Tierney

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Bruce G. Mason and Karen Dike (jointly “Proponents” or “Respondents”), registered electors of the State of Colorado, through their undersigned counsel, respectfully submit this Answer Brief in support of the title, ballot title and submission clause (jointly, the “Title”) that the Title Board set for Proposed Initiative 2015-2016 #63 (“Initiative #63”), and in response to the Opening Brief filed by Petitioners Tracee Bentley and Stan Dempsey.

SUMMARY OF ARGUMENT

Initiative #63 contains a single subject by establishing a right to a healthy environment for natural persons of Colorado. The remaining provisions of the proposed amendment are implementing provisions tied to the central focus of the measure.

Initiative #63 does not present either of the dangers attending omnibus measures - the proponents did not combine an array of disconnected subjects into the measure for the purpose of garnering support from various factions, and voters will not be surprised by, or fraudulently led to vote for, any surreptitious provisions coiled up in the folds of a complex initiative. Petitioners’ concerns about the effects that Initiative #63 could have on the home rule and preemption doctrines, how it will interface with other rights in the bill of rights, and the right of action

enforcement mechanism do not constitute separate subjects, and are not appropriate for review at this stage.

The Title of Initiative #63 fairly and accurately sets forth the major features of Initiative #63 and will not surprise or mislead voters. The term “healthy environment” is not a catch phrase, but rather is a phrase that contributes to voter understanding. The Title need not describe how the right to a healthy environment will interplay with other individual constitutional rights. Inclusion in the title of the phrases “highest priority” and “protective of a healthy environment,” does not render the title vague and misleading to voters. These phrases are used in the language of the measure and describe features of the proposed initiative for the voters. While Petitioners may want the title to explain the possible effects of the proposed initiative on other laws and activities, the Title Board is only obligated to fairly summarize the central points of a proposed measure, and does not need to refer to every effect that the measure may have on current law.

Finally, use of the term “including” does not render the title misleading or unclear simply because it omits other possible examples of safe and sustainable conditions for human life that might constitute a healthy environment under the initiative. The references to healthy air, water, land and ecological systems in the title are sufficient to describe the scope of the initiative. The Title Board is only

obligated to fairly summarize the central points of a proposed measure, and need not refer to every nuance and feature of the proposed measure. While a title must be fair, clear, accurate and complete, it is not required to set out every detail of an initiative.

Accordingly, there is no basis to set aside the Title of Initiative #63, and the decision of the Title Board should be affirmed.

ARGUMENT

I. Initiative #63 Contains a Single Subject.

A. Standard of Review and Preservation of the Issue on Appeal.

Petitioners only partially set forth the appropriate standard of review for a single subject analysis employed by this Court when reviewing the Title Board's action in setting a title. Petitioners agree with the Proponents that when reviewing a challenge to the Title Board's decision, this Court "employ[s] all legitimate presumptions in favor of the propriety of the Title Board's action." *In re Initiative for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014). Also, that the "single subject requirement should be construed liberally to avoid unduly restricting the initiative process." *In re Initiative for 2007-2008 #61*, 184 P.3d 747, 750 (Colo. 2008). Petitioners fail to mention that the Court will "only overturn the Title Board's

finding that an initiative contains a single subject in a clear case.” *In re Initiative for 2013-2014 #89*, 328 P.3d at 176.

Proponents agree that the issues raised by the Petitioners have been preserved for appeal.

B. Initiative 2015-2016 #63 Contains a Single Subject

Petitioners make four single subject arguments: three arguments based on how the measure preempts other existing laws, and a fourth argument alleging that the measure’s right of action mechanism creates a separate subject.

First, Petitioners contend that Initiative #63 contains a second subject because it “rearranges the legal status of local governments in relation to Article XX and section 16 of article XIV of the Colorado Constitution.” *Opening Brief*, p. 8. This Court previously affirmed on single subject grounds two ballot measures that contained similar provisions. *See In re Initiative for 2013-2014 #89*, 328 P.3d at 178; *In re Initiative for 2013-2014 #90*, 328 P.3d 155, 161 (Colo. 2014).

Petitioners contend that Initiative #63 violates the single subject requirement by establishing the right to a healthy environment on the one hand, and redefining the authority of local government on the other. Yet these two provisions are necessarily and properly connected. The designation of the government entities that hold the power authorized under the initiative is necessarily and properly

connected to the measure's central purpose to create a fundamental right to a healthy environment. To the extent that this designation has an effect on article XX and section 16 of article XIV of the Colorado Constitution, the effect is limited to state and local enactments protecting the fundamental right to a healthy environment made under the authority of Initiative #63. *See* 328 P.2d at 161.

Secondly, Petitioners contend that Initiative #63 contains a second subject because it prioritizes a new fundamental right to a healthy environment above other rights found in article II of the Colorado constitution. *Opening Brief, p. 9.* The measure requires state and local governments and their agencies to assign the highest priority to the protection of a healthy environment. Initiative #63 does not broadly change the Colorado constitution's Bill of Rights, and any effect that Initiative #63 would have on the Bill of Rights does not constitute a separate subject. *See, e.g., In re Initiative for 2013-2014 #90, 328 P.2d at 160* (the effects a measure could have on Colorado law if adopted by voters is irrelevant to the single subject analysis) (citations omitted). By its own terms, the priority assignment applies only to the fundamental right to a healthy environment if passed by the voters.

Moreover, voters will not be surprised by, or fraudulently led to vote for the priority assignment provision of Initiative #63, because it is clearly stated in the

text of the initiative and is clearly reflected in the title, which includes the phrase: “requiring state and local governments to assign the highest priority to protecting a healthy environment.” See *In re Initiative for 2013-2014 #85*, 328 P.3d 136, 143 (Colo. 2014). Thus, there are no surreptitious provisions “coiled up in the folds” of Initiative #63. See *In re Initiative 2001-2002 #43*, 46 P.3d 438, 442-43 (Colo. 2002).

Next, Petitioners contend that Initiative #63 contains a separate subject because it revamps the law of preemption by allowing local laws to preempt state laws, and because any such preemption turns on which law is more protective of a healthy environment. *Opening Brief, p. 10*. This Court has repeatedly found that a ballot measure containing a change in preemption law does not create a separate subject. See *In re Initiative for 2013-2014 #89*, 328 P.3d at 178; *In re Initiative for 2013-2014 #90*, 328 P.2d at 161. In both of those 2014 cases, the objectors for #89 and #90 made similar arguments that the preemption provision in those measures constituted a separate subject. This Court rejected those arguments for Initiatives #89 and #90 and affirmed the actions of the Title Board; it should do the same here.

Finally, Petitioners contend that Initiative #63 contains a separate subject because it “establishes a separate right of natural persons and governmental entities

to bring an action at law or in equity” for “injunctive and declaratory relief,” and to “seek punitive damages.” *Opening Brief, p. 10*. Petitioners do not explain how the right of action mechanism creates a separate subject. Nonetheless, the right of action mechanism is an implementing provision that is necessarily and properly tied to the central focus of the initiative: the establishment of a fundamental right to a healthy environment. *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000). Indeed, the right of action provision is inoperative without reference to the establishment of a fundamental right to a healthy environment. *See In re Initiative for 2013-2014 #85*, 328 P.3d at 143.

Initiative #63 contains a single subject - the establishment of a fundamental right to a healthy environment for natural persons in Colorado - and implementing provisions that are necessarily and properly connected to that single subject.

II. The Initiative’s Title Correctly and Fairly Expresses the True Intent and Meaning of the Measure.

A. “Healthy Environment” Is Not a Catch Phrase.

Contrary to the assertion contained in their Petition for Review, in which Petitioners claimed that the term “fundamental right” was a catch phrase that created a prejudice in favor of the initiative, *Petition, p. 5*, in their Opening Brief, Petitioners now contend that it is the term “healthy environment” that is a catch

phrase. *Opening Brief*, p. 12. Neither term is a catch phrase. A catch phrase consists of “words that work in favor of a proposal without contributing to voter understanding.” *In re Initiative for 2009-2010 #45*, 234 P.3d 642, 649 (Colo. 2010). The inquiry is whether the words provoke emotion “such that they distract from the merits of the proposal.” *Id.* Initiative #63 contains the term “healthy environment” and defines that term in the measure and in the title as “safe and sustainable conditions for human life, including healthy air, water, land and ecological systems.” These words do not mask the basic policy question underlying Initiative #63, but rather contribute to voter understanding. *See id.*

In this regard, when considered in light of the contemporary political debate, the term “healthy environment” forms a descriptive phrase, designed to allow voters to understand the purpose of the initiative, rather than to distract voters from consideration of the proposed initiative’s merits. *See In re Initiative for 2013-2014 #89*, 328 P.3d at 180. The Court’s “task is not to prevent voters from making a choice, but rather to guard against inflammatory catch words or phrases that promote prejudice in place of understanding what is really being proposed.” *In re Initiative for 2009-2010 #45*, 234 P.3d at 649. “Healthy Environment” is not a catch phrase.

B. The Title and Submission Clauses Are Not Misleading.

Petitioners first contend that the Title for Initiative #63 is vague and misleading because it contains the terms “highest priority” and “protective of a healthy environment.” *Opening Brief, p. 14.* Petitioners contest Initiative #63’s title because they assert that the title should explain to voters what the potential effects of the proposed initiative will be on other laws or activities. *Id.*

To the contrary, the title for Initiative #63 makes clear that the measure requires state and local governments to assign the highest priority to the protection of a healthy environment, allows local governments to enact laws that are protective of a healthy environment; stating that such a local law governs over a state law that is less protective of a healthy environment. The “Title Board is given discretion in resolving interrelated problems of length, complexity, and clarity in setting a title.” *In re Initiative for 2013-2014 #85, 328 P.3d at 144.* Further, the Title Board “is only obligated to fairly summarize the central points of a proposed measure, and need not refer to every effect that the measure may have on the current statutory scheme.” *In re Initiative for 2013-2014 #90, 328 P.2d at 164 (citations omitted).* “A title is not unclear or misleading simply because it does not refer to the initiative’s possible interplay with existing state and federal laws.” *In re Initiative for 2013-2014 #85, 328 P.3d at 145.*

Second, both the text and title of Initiative #63 define “healthy environment,” as: “safe and sustainable conditions for human life, including healthy air, water, land, and ecological systems.” (emphasis supplied). Petitioners contend that use of the word “including” makes the definition open-ended and may leave voters to surmise at what other subjects might be included in that list.

Opening Brief, pp. 14-15. Proponents, however, intentionally used the word “including” to allow for a non-exhaustive definition of “healthy environment.”

The title for Initiative #63 is not misleading simply because it omits other possible examples of safe and sustainable conditions for human life that might constitute a healthy environment under the initiative. The references to healthy air, water, land and ecological systems in the title are sufficient to describe the scope of the initiative. Titles and submission clauses should “enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re Initiative for 2009-2010 #24*, 218 P.3d 350, 356 (Colo. 2009) (quoting *In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)).

In response to a challenge in 2014 regarding alleged confusion that may be caused by use of the non-exhaustive term “includes,” this Court found no error by the Title Board. *In re Initiative for 2013-2014 #90*, 328 P.2d at 164. Instead, the

Court made clear that it “will not rewrite the titles or submission clause for the Board,” and “will reverse the Board’s action in preparing them only if they contain a material and significant omission, misstatement, or misrepresentation.” *Id.*

Here, the title of Initiative #63 succinctly captures the key features of the measure, is not likely to mislead voters as to the initiative's purpose or effect, nor does the title conceal some hidden intent.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board with regard to Proposed Initiative 2015-2016 #63.

Respectfully submitted this 22nd day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2016 a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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