

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue
Denver, Colorado 80203

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 ▲

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Case No.: 16SA51

RESPONDENTS' OPENING 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 3,482 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 Opening 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”).

STATEMENT OF ISSUES PRESENTED FOR REVIEW¹

1. Does Initiative #63 violate the single subject requirement by: (a) rearranging the legal status of local governments in relation to Article XX and section 16 of Article XIV of the Colorado; (b) creating a hierarchy of fundamental rights in natural persons; (c) imposing local control over environmental regulations with the authority to supersede or preempt any less restrictive state or federal environmental regulations; and (d) requiring state and local governments to prioritize the protection of the environment and authorizing a new action at law or in equity for persons and governmental entities.

2. Is the Title set for Initiative #63 unfair and misleading because: (a) it includes the term “fundamental right, which is a catchphrase creating prejudice in favor of the initiative;” (b) it prioritizes the right to a healthy environment in a

¹ These issues are drawn, as best Respondents are able, from Petitioners’ “Advisory Statement of Issues” in their Petition for Review.

manner that is vague and misleading with regard to other individual constitutional rights; (c) it fails to communicate that only aggrieved persons or governments may bring an action to enforce the amendment; and (d) it fails to inform voters that the amendment permits an award of punitive damages for reckless disregard of the provisions of the Initiative, and neglects to include a definition of “reckless disregard.”

STATEMENT OF THE CASE

This is an appeal from the Title Board’s setting of the Title for Initiative #63. On December 22, 2015, Proponents filed Initiative #63 with the directors of the Legislative Council and the Office of Legislative Legal Services. Members of the Legislative Council staff provided Proponents with a review and comment memoranda for Initiative #63 on December 30, 2015, and conducted the associated review and comment hearing on January 5, 2016.

Proponents revised Initiative #63 in response to staff comments, and filed Initiative #63 with the Secretary of State’s office on January 8, 2016. At the Title Board hearing on January 20, 2016, the Title Board found that Initiative #63 contained a single subject, as required pursuant to article V, section 1(5.5) of the Colorado Constitution, and Section 1-40-106.5, C.R.S. (2015). The Title Board set the Title for Initiative #63.

On January 27, 2016, Petitioners Tracee Bentley and Stan Dempsey filed a Motion for Rehearing. On February 3, 2016, the Title Board revised the Title to its current form. Petitioners Tracee Bentley and Stan Dempsey filed an appeal, pursuant to Section 1-40-107(2), C.R.S. (2015), on February 10, 2016.

STATEMENT OF FACT

Initiative #63 amends the Colorado Constitution to establish a fundamental right to a healthy environment, defining healthy environment as safe and sustainable conditions for human life, including healthy air, water, land and ecological systems; allows local governments to enact laws that are more protective of a healthy environment than state laws; requires state and local governments to assign the highest priority to protecting a healthy environment; allows natural persons and governmental entities to sue to enforce the fundamental right to a healthy environment; and provides for the award of attorneys' fees, costs and in some cases, punitive damages, upon a determination that a violation has occurred.

The Title set by the Title Board correctly and fairly expresses the true intent and meaning of Initiative #63, and will not mislead the public. The Title follows Initiative #63's structure, using similar, and often identical, language.

The Title, as amended at the rehearing on February 3, 2016, reads:

An amendment to the Colorado constitution concerning natural persons' fundamental right to a healthy environment and, in connection therewith, defining "healthy environment" as safe and sustainable conditions for human life, including healthy air, water, land, and ecological systems; requiring state and local governments to assign the highest priority to protecting a healthy environment; allowing 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; allowing natural persons and governmental entities to sue to enforce the fundamental right to a healthy environment; and awarding reasonable costs of litigation upon determination that a violation has occurred.

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion in drafting the title for Initiative #63. 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: defining "healthy environment" as safe and sustainable conditions for human life, including healthy air, water, land, and ecological systems, allowing local governments to enact laws that are more protective of a healthy environment than state laws; requiring state and local governments to assign the highest priority to protecting a healthy environment; allowing natural persons and governmental entities to sue to enforce the fundamental right to a healthy environment; and providing for the award of attorneys' fees, costs, and in some cases, punitive damages, upon a determination

that a violation has occurred, are all implementing and enforcement details that flow from the measures single subject.

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 other laws or its application if enacted are not appropriate for review at this stage.

The Title satisfies Colorado law because it fairly and accurately sets forth the major features of Initiative #63 and is not misleading. The term "fundamental right" does not constitute a catch phrase. The Title does not need to spell out how the right to a healthy environment will interplay with other individual constitutional rights. Omission of the term "aggrieved" does not render the title misleading because 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. Similarly, inclusion of a reference to punitive damages is not necessary and inclusion of a definition of reckless disregard is inappropriate. While a title must be fair, clear, accurate and complete, it is not

required to set out every detail of an initiative, and it is improper to define terms in the Title that are not defined in the measure.

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

ARGUMENT

I. The Initiative Complies with the Single Subject Requirement.

A. Standard of Review

Article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5(1)(a), C.R.S. (2015), provide that a proposed initiative must be limited to “a single subject which shall be clearly expressed in its title.” “A proposed initiative violates this rule if its text relates to more than one subject, and has at least two distinct and separate purposes not dependent upon or connected with each other.” *In re Initiative for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012). 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). The Court will “only overturn the Title Board’s finding that an initiative contains a single subject in a clear case.” *Id.*

One purpose of the single subject requirement is to apprise voters of the subject of a measure, so that surreptitious measures that could result in voter surprise or fraud are not placed on the ballot. *In re Initiative 2001-2002 #43*, 46 P.3d 438, 441 (Colo. 2002); *see also* § 1-40-106.5(1)(e)(II), C.R.S. (2015).

Implementing provisions that are directly tied to an initiative's central focus are not separate subjects. *In re Initiative for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000).

“In determining whether a proposed measure contains more than one subject, [the Court] may not interpret its language or predict its application if it is adopted.” *In re Initiative for 1999-2000 #255*, 4 P.3d 485, 495 (Colo. 2000).

Rather, the Court applies the general rules of statutory construction and accords the language of the measure its plain meaning. *See In re Initiative for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006).

The single subject requirement protects against proponents that might seek to secure an initiative's passage by joining together unrelated or even conflicting purposes and pushing voters into an all-or-nothing decision. *See In re Initiative "Public Rights in Waters II" ("Waters II")*, 898 P.2d 1076, 1079 (Colo. 1995).

However, “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).

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

Initiative #63 contains a single subject: a fundamental right to a healthy environment for natural persons in Colorado. The remainder of the measure contains implementation terms to protect or enforce that right - all congruous and related. The measure defines healthy environment as safe and sustainable conditions for human life, including healthy air, water, land, and ecological systems. Initiative #63 allows local governments to enact laws that are protective of a healthy environment; permits local laws to govern over state laws if the local laws are more protective of a healthy environment; and requires state and local governments to assign the highest priority to protecting a healthy environment. Finally, Initiative #63 allows natural persons and governmental entities to sue to enforce the fundamental right to a healthy environment; and allows for the award of attorneys’ fees, costs and punitive damages upon determination that a violation has occurred. The text of Initiative #63 is short, and its provisions are directly tied to the measure’s central focus.

Initiative #63 does not present either of the "dangers" attending omnibus measures. *See In re Initiative 2001-2002 #43*, 46 P.3d at 442-43. First, the

proponents did not combine an array of unconnected subjects into the measure for the purpose of garnering support from groups with different, or even conflicting interests. *In re Initiative for 2013-2014 #89*, 328 P.3d at 177. Rather, each subsection of Initiative #63 is properly connected to the creation and enforcement of a fundamental right to a healthy environment for natural persons in Colorado. As a result, the proposal will pass or fail on its merits and does not run the risk of garnering support from factions with different or conflicting goals. *See Id.* at 178.

Initiative #63 also fails to trigger the second "danger" of omnibus measures because voters will not be surprised by, or fraudulently led to vote for, any "surreptitious provision[s] 'coiled up in the folds' of a complex initiative." *In re Initiative 2001-2002 #43*, 46 P.3d at 442-43. No such surprise would occur should voters approve Initiative #63 because the plain language of the measure unambiguously proposes a new "right to a healthy environment," describes the impact of that right on other legal rights, and lays out procedures for implementing and enforcing the constitutional amendment. Furthermore, Initiative #63 is not overly lengthy or complex, nor is the plain language confusing or otherwise misleading. *See In re Initiative for 2011-2012 #3*, 274 P.3d at 567.

Petitioners contend that the measure 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.” *Petition*, p. 3. This Court has previously made clear that “[t]he alteration of the existing power and authority of home rule and statutory cities to enact certain regulations pertaining to the central purpose of the initiative does not violate the single subject requirement.” *In re Initiative for 2013-2014 #90*, 328 P.2d 155, 161 (Colo. 2014). Section 7 of Initiative #63 identifies the government entities - “every Colorado city, town, county, and city and county” - that have the power to enact laws more protective of a healthier environment per the initiative. The designation of the government entities that hold the power authorized under the initiative is necessarily and properly connected to the central purpose of the measure. 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 Id.*

Similarly, Petitioners contend that the measure contains a second subject because it “creates a hierarchy of fundamental rights in natural persons.” *Petition*, p. 4. The measure requires state and local governments and their agencies to assign the highest priority to the protection of a healthy environment. Absent the creation of a fundamental right to a healthy environment for natural persons in

Colorado, assigning that right the highest priority has no meaning. *See Waters II*, 898 P.2d at 1080 (holding that the initiative violated the single subject requirement where there was “no unifying or common objective between the paragraphs.”) By contrast, “if the initiative tends to effect or to carry out one general object or purpose, it is a single subject under the law.” *In re Initiative for 2013-2014 #89*, 328 P.3d at 177 (*quoting Waters II*, 898 P.2d at 1079.)

Next, Petitioners contend that Initiative #63 contains a separate subject because it allows local laws to preempt state statutes, and because any such preemption turns on which law is more protective of a healthy environment. *Petition*, p. 4. This Court also looked at the issue of whether a change in preemption law creates a separate subject in the context of a similar measure in 2014. *See In re Initiative for 2013-2014 #89*, 328 P.3d at 178. On that issue, the Court held that “[n]ot only is the effect of an initiative outside of the scope of our review, but the mere fact that an initiative may create a change does not mean that it violates the single subject requirement.” *Id.*

Finally, Petitioners contend that Initiative #63 contains a separate subject because it “establishes a separate right in both persons and governmental entities to bring an action at law or in equity for injunctive and declaratory relief.” *Petition*, p. 4. By its own terms, the right of action mechanism in Initiative #63 applies only

to enforcement of the fundamental right to a healthy environment. Nothing in Initiative #63 indicates any broader reach of the right of action provision. Rather, the right of action provision is necessarily and properly connected to – if not completely dependent upon – the establishment of a fundamental right to a healthy environment. *See In re Initiative for 2013-2014 #89*, 328 P.3d at 178-79; *See also In re Initiative for 2013-2014 #85*, 328 P.3d 136, 143 (Colo. 2014).

As such, Initiative #63 complies with the single subject rule.

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

A. Standard of Review

The Title Board is required to set a title that "consist[s] of a brief statement accurately reflecting the central features of the proposed measure." *In re Initiative on "Trespass-Streams with Flowing Water"*, 910 P.2d 21, 24 (Colo. 1996). 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)). The purpose of reviewing an initiative title for clarity parallels that of the single-

subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose. *See id.*

B. The Title and Submission Clauses Are Not Misleading

The Title for Initiative #63 is clear and does not mislead the voters. The text of Initiative #63 establishes a fundamental right to a healthy environment for all natural persons in Colorado, defining healthy environment as safe and sustainable conditions for human life, including healthy air, water, land, and ecological systems. Next, the measure requires state and local governments and their agencies 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. Finally, Initiative #63 permits natural persons and governmental entities to sue to enforce the fundamental right to a healthy environment; and provides for the award of attorneys' fees, costs and in some cases, punitive damages, upon a determination that a violation has occurred. The Title for Initiative #63 captures the measure's text in a clear and straightforward manner.

The Petitioners argue that the title set by the Title Board for Initiative #63 is inaccurate and mischaracterizes the text of the initiative. First, they claim that the

term “fundamental right” is a catch phrase that creates prejudice in favor of the initiative. *Petition*, p. 5. 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). Initiative #63 uses the term “fundamental right” because that term has specific meaning under the law and it will determine, for example, what standard a court will apply when reviewing violations of the right to a healthy environment. Inclusion of the term “fundamental right” in the text of Initiative #63 is deliberate and its inclusion in the title contributes to voter understanding of the purpose of the initiative. *See In re Initiative for 2013-2014 #89*, 328 P.3d at 180.

Second, Petitioners contend that Initiative #63 “prioritizes the right to a healthy environment in a manner that is vague and misleading with regard to other individual constitutional rights.” *Petition*, p. 5. “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. Here, Initiative #63’s effect or lack of effect on other constitutional rights is a matter for judicial determination in a proper case should the voters approve the initiative, but does not render the title unclear or misleading. *Id.*

Third, Petitioners claim that the title is vague because it fails to communicate that a person or entity suing to enforce the measure must be “aggrieved.” *Petition*, p. 5. The Court is not to “consider whether the Title Board set the best possible title; rather, [its] duty is to ensure that the title “fairly reflect[s] the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board.” *In re Initiative for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). Here, the Title captures and fairly reflects the primary features of Initiative #63.

Finally, Petitioners allege that the title of Initiative #63 is vague and misleading because it fails to reflect that the measure provides for punitive damages for reckless disregard of the proposed measure, nor does the initiative or the title contain a definition of reckless disregard. *Petition*, p. 5. 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). “While titles must be fair, clear, accurate and complete, the Title Board is not required to set out every detail of an initiative.” *Id.* (citations omitted). The title’s references to the establishment of the right to a healthy environment, the definition of a healthy environment, the right to enact laws to protect a healthy

environment, requiring state and local governments to assign the highest priority to protecting a healthy environment, the right of action for natural persons and governmental entities to sue to enforce the fundamental right to a healthy environment, and the award of the costs of litigation are sufficient to describe the scope of the initiative and its central points.

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 2nd day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 2016 a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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