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Colorado Secretary of State

BEFORE THE TITLE BOARD, STATE OF COLORADO

MOTION FOR REHEARING

IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE
2015-16 #63

Petitioner, Douglas Kemper, a registered elector of the State of Colorado, by and through his counsel, Burns, Figa & Will, P.C., hereby requests a rehearing and reconsideration of the title and ballot title and submission clause (collectively the "Title") set by the Title Board ("Board") on January 20, 2016, for Initiative 2015-16 #63 (the "Initiative"), which would amend the Colorado Constitution. Reconsideration is requested for the following reasons:

1. The Initiative and Title violate the single-subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and C.R.S. § 1-40-106.5;
2. The Title does not correctly and fairly express the true intent and meaning of the Initiative because it omits two central features of the initiative, in violation of C.R.S. § 1-40-106(3)(b).

1. THE INITIATIVE AND TITLE VIOLATE THE SINGLE SUBJECT REQUIREMENT.

The Initiative violates the single subject requirements of Article V, Section 1(5.5) of the Colorado Constitution, and C.R.S. § 1-40-106.5, because it contains two separate, distinct, and unrelated subjects: (a) creation of a new fundamental right to a healthy environment for all natural persons in Colorado; and (b) overturning preemption doctrines by imposing local control over environmental regulations with the authority to supersede any less restrictive state environmental regulations.

Section (5) of the Initiative provides that local governments have the power to enact laws, regulations, ordinances, and charter provisions that are more protective of a healthy environment than those that are enacted or adopted by the state government. Further, Section (5) provides that any local law or regulation adopted pursuant to this power shall govern over any conflicting state law or regulation whenever the local law or regulation is more protective. This "local preemption" theme is itself the primary subject of several other current and recent proposed initiatives that do not include any creation of environmental rights. *See, e.g.*, Initiatives 2015-16 #40, 64 and 75 (noting that Initiatives 64 and 75 were introduced by the same designated representatives as Initiative 63); 2013-14 Initiatives #75, 82 and 90-92. The stand-alone treatment of local preemption in these other proposed initiatives demonstrates that Section (5) is a separate, distinct and unrelated subject, coiled in the folds of a measure creating a fundamental right to a healthy environment, but lacking any necessary or proper connection to that subject.

2. **THE TITLE DOES NOT CORRECTLY AND FAIRLY EXPRESS THE TRUE INTENT AND MEANING OF THE INITIATIVE BECAUSE IT OMITTS TWO KEY FEATURES OF THE INITIATIVE.**

The Title omits any mention of two central features of Initiative 63: (a) the definition of a healthy environment, and (b) the provision for awarding punitive damages. Because these key features are omitted, the Title does not correctly and fairly express the true intent and meaning of the Initiative, in violation of C.R.S. § 1-40-106(3)(b).

A. The Title Must Correctly and Fairly Express the True Intent and Meaning of the Initiative.

An initiative's ballot title and submission clause must "correctly and fairly express the true intent and meaning" of the initiative. C.R.S. § 1-40-106(3)(b). To be correct and fair, the title must include the central features of the initiative. See *Matter of Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d 155, 162 (Colo. 2014); *Garcia v. Chavez*, 4 P.3d 1094, 1098 (Colo. 2000). It is critical that titles contain the central features of an initiative so that voters, "whether familiar or unfamiliar with the subject matter of a particular proposal, [can] determine intelligently whether to support or oppose" it. *Matter of Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d at 162.

The Board is charged with ensuring that the title is fair, clear, and accurate, and does not mislead the voters. See *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 258(A)*, 4 P.3d 1094, 1099 (Colo. 2000). Accordingly, in setting the titles, the Board must specifically "consider the public confusion that might be caused by misleading titles." *Id.* at 1098 (internal quotation marks omitted). The Board may not set titles that contain a "material and significant omission, misstatement, or misrepresentation." *Matter of Title, Ballot Title & Submission Clause, & Summary for 1997-98 No. 62*, 961 P.2d 1077, 1082 (Colo. 1998). Omitting a "key feature" of the initiative from a title is a "fatal defect" if that omission may cause confusion and mislead voters about what the initiative actually proposes. *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 258(A)*, 4 P.3d at 1099.

B. The Distinct Definition of "Healthy Environment" is a Central Feature of the Initiative.

Initiative 63 includes a distinct definition of the phrase "healthy environment." Section (2) defines a "healthy environment" as "safe and sustainable conditions for human life, including healthy air, water, land, and ecological systems."

However, the Title for the Initiative omits this definition of "healthy environment." Instead, this defined phrase is repeated five times in the Board's Title without any indication of what the phrase means.

For an informed vote on the measure, voters will need to understand this definition because it is new, could be controversial, and will be a significant legal standard. *See Matter of Proposed Initiative On Parental Notification of Abortions For Minors*, 794 P.2d 238, 241 (Colo. 1990). This definition of “healthy environment” does not appear to follow any common dictionary definition of “healthy” or “environment.” Nor is this definition, which includes the distinct concepts of both “safe” and “sustainable,” a common and prevalent meaning for the phrase “healthy environment.” Thus, voters will not be able to know the true intent and meaning of “healthy environment” as used in the Initiative without being made aware of this definition. *See id.*

This definition is a central feature of this Initiative, and is material to understanding most of the other provisions. Other sections in the Initiative, including the new fundamental right to this healthy environment, government protection priorities, and what violations can be the basis of a lawsuit, will turn on this definition. For example, Section (4) will require governments to assign the highest priority to protecting a healthy environment. In context, this would specifically mean protecting and prioritizing a “safe and sustainable” environment ahead of other concerns that could be related to the environment or health in other ways.

C. Punitive Damages is a Material Feature of the Initiative.

Section (6) of the Initiative authorizes lawsuits to enforce the fundamental right to a healthy environment, providing that prevailing parties may recover reasonable attorney fees and costs. Prevailing parties may also be awarded punitive damages, on a finding of reckless disregard.

While the Board’s Title recognizes the Section (6) enforcement provision as a central feature, the Title omits mention of punitive damages. The Title mentions only reasonable costs of litigation.

Allowing punitive damages in addition to reasonable costs is a central and material feature of the Initiative. A potential award of punitive damages is separate from the reasonable costs of litigation, and is in addition to any award for such costs. The Colorado Supreme Court recognized that punitive damages are a “distinct form of damages.” *Seaward Const. Co. v. Bradley*, 817 P.2d 971, 973 (Colo. 1991). Unlike other types of damage awards, punitive damages “punish the wrongdoer and deter similar acts.” *Id.* at 975. They are not intended to be a reimbursement for reasonable attorney fees and costs, or compensation to cover the cost of a loss. *See id.* Additionally, punitive damages are available in Colorado only pursuant to a statute, or in this case, a constitutional amendment. *See id.* at 973. Thus, voters will not be able to know the true intent and meaning of Section (6) without knowing that punitive damages may be awarded.

D. The Title Omits these Central and Material Features of the Initiative.

The Title does not mention either the Section (2) definition of healthy environment or the Section (6) punitive damages provision. The Initiative's Title was set as follows:

An amendment to the Colorado constitution concerning natural persons' fundamental right to a healthy environment and, in connection therewith, 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.

Voters will not be able to vote intelligently based on this Title because it omits these two central features of the Initiative. From the Title, as now set, voters will have no way to anticipate what the definition of "healthy environment" includes, or does not include, or how this definition affects other provisions in the Initiative. Voters will also be unaware that defendants may face, or that prevailing parties may be entitled to, punitive damages, in addition to reasonable attorney fees and costs. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 258(A)*, 4 P.3d at 1099. Omitting these two central and material features will cause confusion and mislead voters, and is thus a fatal defect that must be corrected in an amended title.

By adding the short definition of a healthy environment, and the fact that punitive damages may be awarded, the Title will enable voters to determine intelligently whether to support or oppose the Initiative. *See Matter of Title, Ballot Title & Submission Clause for 2013-2014 #90*, 328 P.3d at 162. Adding these features will not make the title and submission clause overly lengthy or complicated. *See In re Title, Ballot Title & Submission Clause, & Summary for 1999-00 #£256*, 12 P.3d 246, 256 (Colo. 2000).

For these reasons, the title and ballot title and submission clause do not conform to the statutory requirements of § 1-40-106(3)(b), or to the requirements set by case law construing the statute.

WHEREFORE, Petitioner Douglas Kemper respectfully requests a rehearing and reconsideration of the title and ballot title and submission clause set by the Title Board on January 20, 2016, for Initiative 2015-16 #63.

Respectfully submitted this 26th day of January 2016.

BURNS, FIGA & WILL, P.C.

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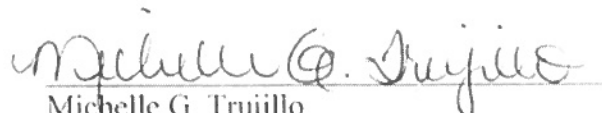
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CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **MOTION FOR REHEARING** was served via U.S. mail on this 26th day of January 2016, as follows:

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