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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203 ORIGINAL PROCEEDING PURSUANT TO C.R.S. § 1-40-107(2) Appeal from the Title Board	
IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2013-2014 #89 **Petitioners:** DOUGLAS KEMPER, MIZRAIM S. CORDERO and SCOTT PRESTIDGE, as Registered Electors of the State of Colorado v. **Respondents:** CAITLIN LEAHY and GREGORY DIAMOND, Proponents. and **Title Boards**: SUZANNE STAIERT, JASON GELENDER, and DANIEL DOMENICO	▲ **COURT USE ONLY** ▲
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ANSWER BRIEF OF PETITIONER KEMPER	

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 responding to the issue:

It contains, under a separate heading, placed before discussion of the issue, a statement of whether Petitioner agrees with the Opponent's statements concerning the standard of review, 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.

Original signature at the offices of Burns, Figa & Will, P.C.

S/ Stephen H. Leonhardt

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Initiative #89 contains multiple subjects with no necessary or proper connection, combined for the improper purpose of attracting support from different factions that support distinct issues. The overarching theme of a public right to Colorado's environment cannot be used to combine the disparate subjects of creating a fundamental right to conservation of the environment, adopting a form of public trust doctrine based on creating common property in Colorado's environment, and empowering local control over environmental regulations that would preempt less restrictive state laws. Each of these separate subjects is designed to appeal to a separate constituency in order to garner support for the Initiative.

The Title is deficient in its use of the phrase "concerning a public right to Colorado's environment" in attempting to encompass the measure's different purposes. Moreover, the Title fails to disclose a central feature of Initiative #89: its creation of a fundamental right to conservation of Colorado's environment.

ARGUMENT

I. Initiative #89 has Multiple Subjects with Separate and Distinct Purposes.

A. Standard of Review

Petitioner Kemper does not disagree with Respondents' statement of the applicable standard of review for this court's review of whether an initiative contains a single subject.

B. Initiative #89 violates the single subject rule because it contains multiple, disconnected subjects.

Initiative #89 is not merely "broad in scope," as characterized by the Title Board. It has multiple subjects with distinct and separate purposes. A proposed initiative must be limited to a single subject, and violates this single subject rule when it "has two or more distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010); *see also* Colo. Const. art. V, § 1(5.5); C.R.S. § 1-40-106.5. "[A] proponent's attempt to characterize an initiative under some overarching theme will not save an initiative that contains separate and unconnected purposes from violating the single-subject rule." *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010).

The Court may determine that multiple purposes are accomplished by an initiative with a general theme, such that the initiative violates the single subject requirement. *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 279 (Colo. 2006). Even where the Court can find a general theme in an initiative, all provisions must also have a common objective. See *In re Public Rights in Waters II*, 898 P.2d 1076, 1080 (Colo. 1995).

Respondents and the Title Board have characterized Initiative #89 as creating or establishing a public "right to the environment in Colorado." This general theme conceals multiple purposes, however, in violation of the single subject requirement. Initiative #89 creates a fundamental right in conservation of Colorado's environment, adopts a form of public trust doctrine by declaring common property in Colorado's environment, and provides for local control through environmental regulations that preempt less restrictive state laws. Respondents and the Title Board cannot overcome Initiative #89's violation of the single subject rule simply by characterizing the measure as creating or establishing a public right to the environment in Colorado. The initiative has at least three subjects that lack a common objective and cannot, under the single subject rule, be unified by a general theme.

The Title Board argues that Initiative #89, while "broad in scope," complies with the single subject rule in accordance with *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246 (Colo. 2000), because its provisions are connected. In *In re 1999-2000 #256*, this Court determined that an initiative requiring voter-approved local growth maps addressed "numerous issues in a detailed manner" when the initiative also included provisions curtailing local home rule powers over development. *See id.*, 12 P.3d at 254. All of the "numerous issues" in that initiative, however, related to the single theme of increasing the voters' say in local development. *See id.*

The multiple purposes of Initiative #89, however, cannot be related under a single theme. As explained below, the initiative contains at least three separate and distinct subjects involving at least three separate and distinct changes to Colorado law. None of these changes is dependent on the others because each of them is separate and unconnected. The creation of a fundamental right to conservation of Colorado's environment is separate and distinct from the adoption of a form of public trust doctrine based on common property in Colorado's environment. Both of these subjects are separate and distinct from the institution of local control over environmental regulations that would preempt less restrictive state laws, which is

itself the subject of other current proposed initiatives, including some from the same proponents as #89.

C. Initiative #89 is designed to appeal to separate factions with different interests, and would lead to voter surprise.

Respondents point out the two recognized "dangers" of combining an array of disconnected subjects in order to gain support from various factions, and voter surprise through "surreptitious provisions 'coiled up in the folds'" of a complex initiative, *see In re Initiative 2001-2002 #43*, 46 P.3d 438, 440 (Colo. 2002) (quoting *In re Breene*, 24 P. 3, 4 (Colo. 1890)), but argue that Initiative #89 will not lead to those dangers. In *In re 2001-2002 #43* this Court determined that a proposed initiative to eliminate an exemption from the Taxpayers' Bill of Rights (TABOR) contained surreptitious provisions "intended to secure the support of various factions which may have different or even conflicting interests." *Id.* at 447.

Appealing to such "various factions" with "different or even conflicting interests" is exactly what Initiative #89 attempts to do. Other proposed initiatives during the 2013-2014 election cycle, including some brought before this Court on appeal, have focused solely on one of the multiple subjects included within

Initiative #89's broad scope: local control of environmental regulations.[1] As the same Respondents in this matter stated in another appeal before this Court involving their proposed local control initiatives, the subject of Initiatives #90 - #93 is to grant "the authority for local governments to enact laws regulating oil and gas development . . . that may be *more restrictive and protective* of a community's . . . environment than state laws." Respondents/Cross-Petitioners' Opening Brief p. 7, *In re Title, Ballot Title, and Submission Clause for Proposed Initiatives 2013-2014 #90, #91, #92, #93*, 14SA120. (emphasis added.) Those initiatives, which the same designated representatives, Ms. Leahy and Mr. Diamond, proposed to appeal to a particular faction seeking to strengthen local control over environmental regulations, track the language they use in Initiative #89 to the effect that more restrictive and protective regulations would preempt less restrictive state enactments.

Indeed, all of these initiatives, including Initiative #89 and #90-93, are promoted by the organization Coloradans for Safe and Clean Energy ("C.S.C.E."), whose stated purpose is to "support ballot measures that *establish local control* of oil and gas development . . . *and a public trust doctrine* for environmental rights in

[1] For example, on Initiative 2013-2014 #75, the Title Board determined the single subject is "concerning a right to local self-government." The Court affirmed this title setting in Case No. 2014SA100 on May 22, 2014.

the Colorado constitution." Mark Jaffe, *Colorado Energy Ballot Issues Fight Raises $5 Million, Led by Industry*, THE DENVER POST, May 19, 2014, http://www.denverpost.com/news/ci_25794726/colorado-energy-ballot-issues-fight-raises-5-million# (emphasis added); *see also* Colorado Secretary of State, Committee Registration Form: Coloradans for Clean and Safe Energy (amended Apr. 18, 2014).[2] C.S.C.E. received all of its $1.45 million in donations from one entity: Coloradans for Local Control. Colorado Secretary of State, Report of Contributions and Expenditures: Coloradans for Safe and Clean Energy (May 19, 2014).[3] This confirms that local control is a primary purpose and subject of Initiative #89, just as a narrower form of local control is a subject of Initiatives #90 - #93, and indicates that the proponents have included this subject in this initiative for the purpose of obtaining the same faction's support for Initiative #89.

As discussed more thoroughly in Petitioner Kemper's Opening Brief, other recent and current initiatives have attempted to enact only the public trust subject also advanced in Initiative #89. These separate subjects appeal to separate

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[2] *available at* http://tracer.sos.colorado.gov/PublicSite/SearchPages/FilingAmendmentSelect.aspx?FilingID=182985.

[3] *available at* http://tracer.sos.colorado.gov/PublicSite/SearchPages/FilingDetail.aspx?FilingID=182991.

factions: those who support more local control over environmental regulations and those who support some form of public trusteeship of state government over some or all of the state's natural resources. Now, Initiative #89's proponents seek to accomplish in one initiative what multiple attempts to enact these separate subjects could not accomplish. By securing the support of the various factions in favor of the separate subjects in Initiative #89, voters who may oppose one subject would be forced to vote in favor of it in order to obtain another subject that they do support. This is exactly the type of "log rolling" that this Court prohibited in *In re Public Rights in Water II*, 898 P.2d at 1079.

D. Local control and a public trust doctrine are separate subjects coiled up in the folds of an overarching theme of a "right to the environment."

Contrary to Respondents' argument, voters would also be surprised by the surreptitious provisions "coiled up in the folds" of Initiative #89's benign-sounding theme of creating a "right to Colorado's environment." *See In re 2001-2002 #43*, 46 P.3d at 442-43. Such a theme does not convey to voters that they would be enacting a new constitutional mandate on state and local governments that would completely alter the nature of Colorado's water rights, among various other property rights, as shown in Petitioner Kemper's Opening Brief. Nor does this theme indicate to the voters that by instituting local control over the environment

with laws or regulations that are "more restrictive and protective" than those enacted by the state they would be overturning the well-established doctrine of state law preemption for issues that this Court has deemed to be matters of statewide concern. *See, e.g., Voss v. Lundvall Bros., Inc.* 830 P.2d 1061 (Colo. 1992). Voters would be making an all-or-nothing decision on a public trust and local control when they think they are voting only on the creation of an environmental right.

Respondents argue that Initiative #89 fits within this Court's decisions allowing for the creation of a public trust standard when "not paired with a separate and discrete subject," citing *In re Proposed Initiative on Water Rights*, 877 P.2d 321 (Colo. 1994), *In re Proposed Initiative #1996-6*, 917 P.2d 1277 (Colo. 1996), and *In re Title, Ballot Title and Submission Clause for 2011-2012 #3*, 274 P.3d 562 (Colo. 2012). While *In re Initiative on Water Rights* involved an initiative advancing a public trust doctrine, the case was decided before the Colorado voters' adoption of the single-subject requirement for initiatives in November 1994, so this Court did not have occasion in that case to make a single-subject analysis. In both *In re #1996-6* and *In re 2011-2012 #3*, this Court's majority determined that the initiatives advanced a single subject of "public trust doctrine," which entailed a few closely related provisions to adopt a specific

doctrine with regard to Colorado's water resources. *See In re #1996-6*, 917 P.2d at 1281; *see also In re 2011-2012 #3* 274 P.3d at 567-68.

Initiative #89 is different, however, in that it does not overtly advance a "public trust doctrine," but seeks to impose one that is coiled up in the folds of a "right to the environment." It does so by imposing trust obligations on state and local governments in an ill-fitting combination of competing trustee obligations and preemptive local powers. Because Initiative #89 is unique in the separate purposes it combines with a public trust doctrine over Colorado's natural resources, Respondents' reliance upon this Court's line of cases allowing for the imposition of a public trust standard is entirely misplaced. Indeed, the language of Initiative #89 more closely tracks the text of multiple subjects of the Pennsylvania Environmental Rights Amendment, and its first two subjects closely follow the separate subjects Pennsylvania's highest court found in that Amendment. *See Robinson Township v. Commonwealth*, 83 A.3d 901, 951-55 (Pa. 2013) (finding that the Pennsylvania Environmental Rights Amendment, with language that closely tracks sections of Initiative #89, creates two separate rights of the people: (1) a declared right of the citizens to clean air, pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment; and (2) the common ownership of public natural resources).

The Title Board argues that the creation of a public right in the environment is not the kind of "overreaching [*sic*] theme" prohibited by *In re 2001-2002 #43* because the initiative entails a single purpose ("creating the public's right to the environment") with an enforcement mechanism of state and local governments acting as trustees. *See In re 2001-2002 #43*, 46 P.3d at 442. Contrary to the Title Board's contention, however, Initiative #89 presents exactly the kind of "overarching theme" that *In re 2001-2002 #43* warned against. In that case, this Court determined that "a battery of procedures which govern the exercise of the right to petition" were considered part of a single subject, as were provisions authorizing aggrieved citizens to sue for a violation of the proposed initiative's provisions. *See id.* at 444 (internal quotations omitted). Provisions seeking to modify the content of initiatives and referenda, however, were distinct, *substantive* provisions, unrelated to the *process* of placing initiatives and referenda on the ballot. *Id*. at 444-45. (Emphasis added.) Such provisions were not merely implementation or enforcement details and therefore were held to be separate and unconnected subjects. *Id*. at 445.

As with the initiative in *In re 2001-2002 #43*, Initiative #89 attempts to hide separate and unconnected subjects that are either procedural or substantive in nature under one broad and overarching theme. The creation of a substantive

fundamental right in conservation is separate and distinct from the adoption of a substantive public trust doctrine through the declaration of common property in Colorado's environment; and both of these substantive subjects are separate and unconnected to the procedural changes in how Colorado's environment is protected by either state or local governments who pass the "more restrictive and protective" law or regulation. The bundling together of each of these separate and unconnected purposes cannot be saved by the overarching theme of a "right to Colorado's environment."

E. Local control is its own separate subject, not merely an enforcement mechanism.

Additionally, given that local control is the purpose and objective of several other measures brought before the Title Board this year, including some from the same proponents, it clearly constitutes a separate subject and purpose; it is not merely an enforcement mechanism for another subject as the Title Board suggests.

Both the Title Board and Respondents argue that this Court should not consider the merits of Initiative #89, nor suggest how the initiative may be applied, to find that preemption of state-enacted environmental regulations by "more restrictive and protective" local enactments is a separate subject. The Title Board even cites as authority for their proposition *Amundson v. Travis*, 962 P.2d 970

(Colo. 1998), which the Title Board characterizes as this Court's determination that a measure had a single subject despite a provision allowing local regulations of hog farms to be more restrictive than state law. The *Amundson* case, however, was a *per curiam* decision issued by this Court, and there is no mention of any single-subject analysis, let alone one that allows local preemption to be combined with other matters addressed within that initiative as a single subject. Even if the measure in *Amundson* did allow for local government preemption of state regulations, the subject matter there (hog farming) was far more limited in scope than the entire breadth of state-enacted environmental laws and regulations that would be subject to preemption by local governments under Section (3) of Initiative #89.

Likewise, Initiative #89 cannot be compared to the Title Board's single subject determination that this Court recently affirmed on another local control initiative considered this year, Initiative 2013-2014 #75. Although this Court affirmed the Title Board's determination that Initiative #75 contained a single subject, s*ee* Order of Court, *In re Initiative 2013-2014 #75*, Case No. 2014SA100 (May 22, 2014), the measure at issue there declared an "inalienable right to local self-government," and authorized local governments to enact laws that cannot be preempted by state or federal government. *See* Opening Brief of Title Board p. 3,

In re #75, Case No. 2014SA100. Initiative #89 is completely different from Initiative #75 in that it creates a fundamental right to *conservation*, which carries no necessary or proper connection to local government preemption of matters of statewide concern.

F. The plain language of Initiative #89 reveals separate subjects.

Both the Title Board and the Respondents implore this Court not to look at the merits or consider the application of Initiative #89 in order to find multiple subjects. These concerns can be resolved simply by looking at the "plain language of the measure" itself. *See In re Title, Ballot Title, and Submission Clause for 2011-2012 #45*, 274 P.3d 576, 581 (Colo. 2012). In examining whether Initiative #89 complies with the single-subject rule, the Court must consider the plain meaning of the Initiative's language and its effect on existing law and property rights. *In re 2005-2006 #55*, 138 P.3d at 279. In construing an initiative's language, each clause of the initiative is presumed to have a specific purpose. *In re Interrogatories Relating to the Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 542 (Colo. 1996).

Subsection (1) of Initiative #89 creates a fundamental right by declaring, in the Constitution's Bill of Rights, that "*conservation* of Colorado's environment . . . is *fundamental*." (Emphasis added.) Subsection (2) would adopt a set of public

trust obligations, based on subsection (1)'s creation of a "common property" interest in all Coloradans to Colorado's environment. Subsection (3) requires that whenever "any local law or regulation enacted or adopted pursuant to [the provisions of the initiative] conflicts with a state law or regulation, *the more restrictive and protective law or regulation shall govern*." (emphasis added.)

The three separate and unconnected subjects of Initiative #89 are clearly stated in the plain language of the initiative, avoiding any need for this Court to look at the initiative's merits or to consider the application of the initiative's language to find them. It is appropriate for the Court to "examine the proposal sufficiently to enable review" of the Board's single subject finding, as it did with the 2007 measure that similarly combined a "new and mandatory public trust standard" with changes to government structures. *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 874 (Colo. 2007). Giving each clause of Initiative #89 a specific meaning and purpose, this Court should find that the plain language of the initiative posits three separate and discrete purposes.

II. Initiative #89's Titles are Misleading and Omit Material Provisions

A. Standard of Review.

Petitioner Kemper does not disagree with the Title Board's statement of the applicable standard of review for this court's review of Title language.

B. The Titles fail to describe the Initiative's scope.

Both the Respondents and the Title Board argue that the Titles for Initiative #89 are clear and not misleading. The Title Board cites *In re 2009-2010 #45*, 234 P.3d at 647, to support its argument that the Board fulfilled its obligations in setting Titles for Initiative #89 if the initiative's single subject is clearly expressed in its titles. This argument, however, assumes that the initiative has a single subject. As argued above, Initiative #89 has multiple subjects, each of which is separate and unconnected, designed to appeal to separate factions in order to obtain support for the initiative's passage. The phrase attempting to describe a subject for the entire measure, "concerning a public right to Colorado's environment," does not encompass the discrete purpose of local control.

C. The Titles omit material provisions of Initiative #89.

Respondents also argue that the Titles do not omit material provisions of Initiative #89 by failing to include the terms "fundamental right" and "future generations." They then try to lower the bar of responsibility for the Title Board

by citing *In re Initiative 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008) as standing for the proposition that the Board need not set the "best possible" title, but merely ensure voters "will not be misled into support for or against" Initiative #89. This argument should fail, however, because the creation of a fundamental right to the conservation of Colorado's environment is not just a material provision of the initiative, but a separate and distinct subject of the initiative that has no connection with the initiative's other subjects of adopting a form of public trust doctrine based on a common property interest in Colorado's environment and local control of environmental regulations through "more restrictive and protective" enactments that preempt less restrictive state enactments.

Additionally, the term "future generations" is a material provision of the initiative that carries important implications for the state and local governments' responsibilities as trustees over Colorado's environment under the initiative. *See Robinson Township*, 83 A.3d at 979-80 (finding that Pennsylvania's Environmental Rights Amendment, which tracks closely to the language of Initiative #89, prohibits the Commonwealth from authorizing operations of oil and gas development throughout the Commonwealth because of the Amendment's "express command" for the state to "manage the corpus of the [public] trust for the benefit of 'all the people.'")

The omission of these two central features renders the Titles deficient. A title that contains "a material and significant omission" must be rejected. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d 257, 266 (Colo. 1999) (citation omitted).

CONCLUSION

Initiative #89 violates the single subject requirement in that it contains three separate subjects. Accordingly, the Board erred by setting Titles and its actions should therefore be reversed. In the alternative, the Titles should be remanded to the Board for modification so that they express the true intent and meaning of the Initiative by revealing all of its central features.

Respectfully submitted this 2nd day of June, 2014.

BURNS, FIGA & WILL, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2014, a true and correct copy of the foregoing **PETITIONER KEMPER'S OPENING BRIEF** was served by ICCES to the following:

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