DATE FILED: June 2, 2014 4:13 PM

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 2013-2014 #89 **Petitioners:** DOUGLAS KEMPER, MIZRAIM S. CORDERO and SCOTT PRESTIDGE v. **Respondents:** CAITLIN LEAHY and GREGORY DIAMOND and Title Board: SUZANNE STAIERT; DANIEL DOMENICO; and JASON GELENDER	▲COURT USE ONLY▲
Attorneys for Respondents Martha M. Tierney, No. 27521 Edward T. Ramey, No. 6748 Heizer Paul LLP 2401 15th Street, Suite 300 Denver, CO 80202 Phone: (303) 595-4747 Fax: (303) 595-4750 E-mail: mtierney@hpfirm.com E-mail: eramey@hpfirm.com	Case No.: 14SA126

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 3,136 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.AR. 32.

By: s/Martha M. Tierney

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Caitlin Anne Leahy and Gregory M. Diamond (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 2013-2014 #89 ("Initiative #89"), and in response to the briefs submitted by Petitioner Douglas Kemper and Petitioners Mizraim Cordero and Scott Prestidge (collectively "Petitioners").

SUMMARY OF ARGUMENT

1. Initiative #89 does not violate the single subject requirement of Colo. Const. art. V, §1(5.5), by (a) stating that conservation of Colorado's environment is fundamental; (b) declaring that Colorado's environment is the common property of all Coloradans; or (c) stating local governments have the power to enact laws that are more restrictive and protective of the environment than state laws.

2. The Title for Initiative #89 expresses the measure's true intent and meaning and will not mislead the voters by (a) failing to explain how the measure alters existing laws applicable to property rights and preemption; (b) omitting the term "fundamental" from the Title; and (c) including the words "clean air, pure water, and natural and scenic values," which do not constitute a catch phrase.

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

The Proponents concur with the standard of review recited by Petitioners.

B. Initiative 2013-2014 #89 Contains a Single Subject

The single subject of Initiative #89, as accurately expressed in its Title, is the creation of a public right to Colorado's environment. The measure defines environment to include clean air, pure water, and natural and scenic values. Initiative #89 declares that Colorado's environment is the common property of all Coloradans, requires state and local governments, as trustees, to conserve the environment, and states that if state or local laws conflict, the more restrictive and protective law or regulation governs. The text of Initiative #89 is short, and its provisions are directly tied to the measure's central focus.

1. The Right to Colorado's Environment Does Not Create a Separate Subject.

Petitioner Kemper contends that by declaring that conservation of Colorado's environment is fundamental, Initiative #89 contains multiple subjects. Most of Petitioner Kemper's arguments on this point concern the manner in which

Initiative #89 might affect other constitutional provisions, an analysis that is improper at this juncture. As frequently reiterated by this Court, "[t]he Board is not required to 'state the effect that an initiative may have on other constitutional provisions.'" *In re Proposed Initiative on Parental Rights*, 913 P.2d 1127, 1132 (Colo. 1996), quoting *In re Proposed Initiative on Limited Gaming in the City of Antonito*, 873 P.2d 733, 740 (Colo. 1994). As explained in City of Antonito, any such potential effect "is a question of constitutional interpretation and is not subject to review in this proceeding." 873 P.2d at 740.

Despite Petitioner Kemper's contention, Initiative #89's declaration that "conservation of Colorado's environment, including its clean air, pure water, and natural and scenic values is fundamental," is connected to the statement that "as trustees, state and local governments shall conserve the environment," and to the provision that if state or local laws conflict, "the more restrictive and protective law or regulation governs." These qualifications are implementing stipulations solely pertinent and connected to the single subject of Initiative #89 that is the creation of a public right to Colorado's environment. "Implementation details that are 'directly tied' to the initiative's 'central focus' do not constitute a separate subject." *See In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000).

Alternatively, Petitioners Cordero and Prestidge maintain that Initiative #89 creates a new previously unrecognized property right to Colorado's clean air, pure water, and natural and scenic values, which is a separate subject from a public right to Colorado's environment. To the contrary, Initiative #89 defines Colorado's environment to include its clean air, pure water, and natural and scenic values, so the Initiative creates one new right to Colorado's environment, and then defines what the environment includes. There is no separate subject here.

2. To the Extent that Initiative #89 Creates a Form of Public Trust, It Does Not Generate a Separate Subject.

Petitioners' claim that Initiative #89 contains a separate subject by establishing a public trust is not supported by the language of the measure. Initiative #89 does not combine an array of disconnected subjects into one measure, but rather the plain language of the measure unambiguously proposes a new "right to Colorado's environment," describes the impact on other legal rights, and lays out procedures for implementing the constitutional amendment. This Court has repeatedly found a single subject in other measures seeking to create a public trust standard so long as the measures did not combine separate and discrete subjects in a proposed initiative. *See In re Initiative on Water Rights,* 877 P.2d 321, 324-25 (Colo. 1994); *see also In re Initiative 1995-1996 # 1996-6,* 917 P.2d

1277, 1278 (Colo. 1996); *In re Initiative for 2011-2012 #3*, 274 P.3d 562, 566-67 (Colo. 2012).

Petitioner Kemper further contends that the proposed initiative "would completely alter the nature of Colorado water rights, among other property rights." Kemper Op. Br. at p. 11. Petitioners concerns do not address the single subject requirement but rather raise issues about how Initiative #89 would impact existing law. It is not the role of the Court at this stage to opine on the merits of Initiative #89 or suggest how the Initiative might be applied if enacted. *See In re #3,* 274 P.3d at 568 n.2. ("The effects this measure could have on Colorado water law if adopted by voters are irrelevant to our review of whether Initiative 3 and its Titles contain a single subject.")

3. Allowing Local Governments to Enact Laws That Are More Restrictive and Protective of the Environment Than State Law Is Not a Separate Subject.

Petitioners contend that Initiative #89 creates a second subject by adopting a new preemption standard beyond the single subject of the measure because it may conflict with existing constitutional law and common law doctrine. The single subject of Initiative #89, as accurately expressed in its Title, is the creation of a public right to Colorado's environment. Initiative #89 describes how the measure is to be executed and implemented by including the provision that local

governments have the power to enact laws that are more restrictive and protective of the environment than state laws, and clarifying that if state or local laws conflict, the more restrictive and protective law or regulation governs. These implementation details are directly tied to Initiative #89's central focus and do not constitute a separate subject. *See In re #200A*, 992 P.2d at 30.

Petitioners' point is really, and quite explicitly, that Initiative #89 is a very bad idea that may lead to serious and undesirable consequences. Petitioner Kemper posits, after a lengthy discussion of the interplay of preemption involving statutory and home rule towns, that "Initiative #89 completely subverts the established preemption regime for environmental regulations throughout Colorado." Pet. Kemper Op. Br. at p. 19. In the context of both the single subject and clear title requirements, however, neither the Title Board nor this Court may "address the merits of a proposed initiative, nor . . . interpret its language or predict its application if adopted by the electorate." *In re Initiative for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). That is the task of political campaigns, and the Petitioners will have ample opportunity to inform the public of their concerns.

To the extent that Petitioners Cordero and Prestidge suggest that a further separate subject is the expansion of local government power to enact laws that are more protective of the environment than state laws, this argument is the same as

the preemption argument. Pet. Cordero and Prestidge Op. Br. at p. 9. The language of subsection (3) of Initiative #89 makes clear that this grant of authority to local governments is part of the implementation of the measure: "*[t]o facilitate conservation of Colorado's environment*, local governments have the power to enact laws, regulations, ordinances, and charter provisions that are more restrictive and protective of the environment than laws or regulations enacted or adopted by the state government." [Emphasis supplied.] Implementation details do not constitute a separate subject. *See In re #200A*, 992 P.2d at 30.

4. The Breadth of Initiative #89 Does Not Violate the Single Subject Requirement.

Petitioners Cordero and Prestidge maintain that Initiative #89 is too broad to be a single subject because the environment is not a common feature. Pet. Cordero and Prestidge Op. Br. at p. 10. Yet breadth alone does not render an initiative in violation of the single subject requirement. *See In re Initiative 2001-2002 # 43*, 46 P.3d 438, 442-43 (Colo. 2002). Rather, it is the combination of separate and unconnected purposes that runs afoul of the single subject requirement. *See In re #200A*, 992 P.2d at 30. Initiative #89 is distinguishable from initiatives cited by Petitioners that proposed the establishment of a public trust doctrine combined with either the creation of a new state environmental department, *see In re Initiative, for 2007-2008, # 17*, 172 P.3d 871, 876 (Colo. 2007), or the imposition

of new election requirements on water districts. *See In re Initiative "Public Rights in Waters II" ("Waters II")*, 898 P.2d 1076, 1080 (Colo. 1995). The public trust is not too broad to be a single subject, so long as it is not paired with a separate and discrete subject in a proposed initiative. *See In re Initiative on Water Rights*, 877 P.2d at 324-25; *see also In re # 1996-6*, 917 P.2d at 1278; *In re #3*, 274 P.3d at 566-67.

5. Initiative #89 Does Not Logroll Multiple Subjects Into One Measure, Nor Will It Defraud or Surprise Voters.

Petitioners suggest that Initiative #89 poses the prospect of both "surprise" and "logrolling," two of the evils to which the single subject requirement is directed. §1-40-106.5(1)(e)(I), (II), C.R.S. (2013). In particular, Petitioners Cordero and Prestidge contend that the appeal of the general subject of "environment" presents a risk of voter fraud and surprise. Pet. Cordero and Prestidge Op. Br. at p. 12. Petitioner Kemper points out that because Initiative #89 allows local governments to enact laws that are more restrictive and protective of the environment than state laws, it might appeal to independent advocates of local control who are a separate constituency from advocates of the public trust. Pet. Kemper Op. Br. at p. 21.

First, with regard to "voter fraud" and "surprise," there are no "surreptitious provision[s] 'coiled up in the folds'" of Initiative #89 that will fraudulently lead

voters to vote for the measure or surprise voters. *See In re #43*, 46 P.3d at 442-43. The text of Initiative #89 clearly states that the measure concerns a public right to the environment, which includes Colorado's clean air, pure water, and natural and scenic values, declaring that the environment is the property of all Coloradans, that state and local governments, as trustees, are required to conserve the environment, and stating that to facilitate the conservation of Colorado's environment, local governments have the power to enact laws that are more restrictive and protective of the environment than state laws, and that if state or local laws conflict, the more restrictive law or regulation governs. The features of Initiative #89 are well articulated, its text is not overly lengthy or complex, nor is the plain language confusing or otherwise misleading. *See In re #3*, 274 P.3d at 567.

Second, with regard to "logrolling," a close examination of the language of the Title reveals how difficult it would be to co-opt independent advocates of local control and a public trust to conserve Colorado's environment. Public trust advocates will favor those laws that are most restrictive and protective of Colorado's environment irrespective of the level of government at which they are enacted. Local control advocates will not vote for a measure that trumps local control whenever a state law is more restrictive and protective of the environment.

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

A. Standard of Review

The Proponents concur with the standard of review recited by Petitioners.

B. The Title for Initiative #89 Is Not Misleading.

1. The Title Board Is Not Required to Explain in the Title That the Measure Alters Existing Property Rights or Preemption Doctrine.

Petitioners suggest that the Title is flawed because it fails to inform voters that the measure changes existing law governing preemption. Pet. Kemper Op. Br. at p. 24; Pet. Cordero and Prestidge Op. Br. at pp. 14-14. Petitioner Kemper also contends that the Title misleads because it fails to include a description of the impact of the measure on property rights, specifically water rights, under existing law. Pet. Kemper Op. Br. at p. 14.

The Title for Initiative #89 is clear and states:

> An amendment to the Colorado constitution concerning a public right to Colorado's environment, and, in connection therewith, declaring that *Colorado's environment is the common property of all Coloradans*; specifying that the environment includes clean air, pure water, and natural and scenic values and that state and local governments are trustees of this resource; requiring state and local governments to conserve the environment; and *declaring that if state or local laws conflict the more restrictive law or regulation governs*.

[Emphasis supplied.] Not satisfied with the plain statement "Colorado's environment is the common property of all Coloradans," Petitioner Kemper seeks

for the title to include an explanation of how the measure would impact priority-based water rights in Colorado. Similarly, not satisfied with the clear explanation in the Title of how conflicting laws will be construed, Petitioners would have the Title Board explain in the title a description of the preemption doctrine in Colorado and how it has evolved over time.

But that is not the role of the Title Board nor is it appropriate to include such information in an initiative's title, for it would require the Title Board to engage in an interpretive analysis of the legal implications of the measures, including their possible effect upon other laws in all manner of contexts– which this Court has repeatedly held not to be the Title Board's task. *In re Initiatives for 2009-2010 #24, #23, #22*, 218 P.3d 350, 355-56 (Colo. 2009); *In re Initiative for 1999-2000 #227 and #228*, 3 P.3d 1, 4 (Colo. 2000); *In re Proposed Initiative on Parental Rights*, 913 P.2d at 1132.

The Title for Initiative #89 informs voters that the measure declares "Colorado's environment is the common property of all Coloradans" and that it contains a provision stating that in the event of a conflict between state and local law, the "more restrictive law or regulation governs." The Title as a whole fairly reflects the primary attributes of the Initiative, and gives voters sufficient information to make a decision about whether to support or oppose Initiative #89.

2. Omission of the Term "Fundamental" from the Title Does Not Render the Title Misleading.

Petitioner Kemper argues that the title set by the Title Board for Initiative #89 is misleading because it omits the term "fundamental." Pet. Kemper Op. Br. at p. 25. Petitioner Kemper suggests that without the term "fundamental" in the Title, voters will be unclear about what a "yes" or "no" vote on Initiative #89 means. This argument is without merit. The Title of Initiative #89 succinctly captures and fairly reflects the key features of the measure. The term "fundamental" is not a central element of Initiative #89, and its absence from the Title is not likely to mislead voters as to the initiative's purpose or effect. 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 # 62*, 184 P.3d at 58.

3. Clean Air, Pure Water, and Natural and Scenic Values Is Not a Catch Phrase.

Although they did not raise it in their motion for rehearing or in their petition for review, Petitioners Cordero and Prestidge now contend that the words "including the clean air, pure water, and natural and scenic values," constitute an impermissible catch phrase in the Title for Initiative #89.

First, the words are assuredly not a catch phrase. "Catch phrases are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." *In re #62*, 184 P.3d at 60, *quoting In re Initiative for 1999-2000 #258(a)*, 4 P.3d 1094, 1100 (Colo. 2000). The words "clean air, pure water, and natural and scenic values" – drawn directly from the text of the measure – define what the term "environment" means in the measure. Omitting these words from the Title would be misleading because "environment" could have different meanings, and using different words would be less precise at best, and contribute less to voter understanding of the actual contents of the measure.

To the extent that Petitioners Cordero and Prestidge contend that it is the word "including" that prefaces the words "clean air, pure water, and natural and scenic values," that creates the fatal defect, Petitioners are referring to the text of the measure itself and not to the Title. The word "including" does not appear in the Title for Initiative #89 and, thus, the argument that it renders the Title misleading is void.

Petitioners Cordero and Prestidge claim that "voters may be swayed by the appeal of conserving the 'clean air, pure water, and natural and scenic values.'" Pet. Cordero and Prestidge Op. Br. at p. 17. That alone, however, does not render the words a catch phrase. "Catch phrases are 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). Here, the complete phrase "clean air, pure water, and natural and scenic values" certainly contributes, and may be essential, to widespread voter understanding of this measure. Rather than distracting voters from the proposal's merits, it directly informs them of the primary focus and impact of the measure. The essential informative value of a ballot title should not be sacrificed because it refers clearly to a controversial topic.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board with regard to Proposed Initiative 2013-2014 #89.

Respectfully submitted this 2nd day of June, 2014.

HEIZER PAUL LLP

By: s/Martha M. Tierney
Martha M. Tierney, No. 27521
Edward T. Ramey, No. 6748
2401 15th Street, Suite 300
Denver, Colorado 80202
Phone Number: (303) 595-4747
FAX Number: (303) 595-4750
E-mail: mtierney@hpfirm.com
E-mail: eramey@hpfirm.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of June, 2014 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:

Stephen H. Leonhardt
Alix L. Joseph
Wenzel J. Cummings
Burns, Figa & Will, P.C.
6400 South Fiddlers Green Circle, Suite 1000
Greenwood Village, CO 80111
Email: sleonhardt@bfwlaw.com; ajoseph@bfwlaw.com; wcummings@bfwlaw.com
Attorneys for Petitioner Douglas Kemper

Richard C. Kaufman
Julie A. Rosen
Sarah K. Pallotti
Ryley Carlock & Applewhite
1700 Lincoln Street, Suite 3500
Denver, Colorado 80203
Email: rkaufman@rcalaw.com; jrosen@rcalaw.com; spallotti@rcalaw.com
Attorneys for Petitioners Mizraim S. Cordero and Scott Prestidge

Sueanna P. Johnson, Esq.
Assistant Attorney General
1300 Broadway, 6th Floor
Denver, Colorado 80203
Email: Sueanna.Johnson@state.co.us
Attorneys for Title Board

s/Amy Knight

In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.