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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 **Petitioner:** DOUGLAS KEMPER, MIZRAIM S. CORDERO and SCOTT PRESTIDGE, as Registered Electors of the State of Colorado v. **Title Board**: SUZANNE STAIERT, JASON GELENDER, and DANIEL DOMENICO and **Respondents:** CAITLIN LEAHY and GREGORY DIAMOND, Proponents.	▲ **COURT USE ONLY** ▲
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PETITIONER KEMPER'S 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 _____ words.

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☒ For the party raising to the issue:

It contains, under a separate heading, a concise statement of the applicable standard of appellate review with citation to authority.

☒ 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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1. Whether the Ballot Title Setting Board (the "Board") incorrectly determined that Initiative 2013-2014 #89 ("Initiative #89") is limited to a single subject, in light of the multiple objectives of this measure, to:

    1. Create a fundamental right to conservation of Colorado's environment;

    2. Adopt a form of public trust doctrine by declaring common property in Colorado's environment; and

    3. Establish local control to enforce environmental regulations more restrictive than state law.

2. Whether the Board's title, ballot title, and submission clause (collectively, the "Titles") for Initiative #89 are unfair in that the phrase "concerning a public right to Colorado's environment" does not clearly express either a single subject or the full scope of Initiative #89, and in that they entirely omit a materially important feature of the fundamental right created by the Initiative.

STATEMENT OF THE CASE

A. Statement of Facts.

Caitlin Leahy and Gregory Diamond ("Proponents") proposed Initiative #89, a copy of which is attached as **Appendix A**. Initiative #89 would amend Article II of the Colorado constitution (the Bill of Rights) by adding a new section 32 with three subsections numbered (1) – (3). Subsection (1) declares that Colorado's environment is the "common property" of all Coloradans. It would also establish a fundamental right to the conservation of Colorado's environment, including its "clean air, pure water, and natural and scenic values." Subsection (2) adopts a form of public trust doctrine by imposing a trusteeship on state and local governments, requiring the state and local governments to conserve Colorado's environment "for the benefit of all the people." Subsection (2) also states that the provisions of this new measure apply to the state and to every Colorado "city, town, county, and city and county, notwithstanding any provision of article XX, or Section 16 of article XIV, of the Colorado constitution." Subsection (3) mandates for the preemption of state regulations by local governments that pass laws, regulations, ordinances, and charter provisions that are "more restrictive and protective of the environment" than state laws or regulations. Subsection (3)

dictates that if any local law or regulation adopted pursuant to article II conflicts with a state law or regulation, the "more restrictive and protective law or regulation governs."

B. Nature of the Case, Cause or Proceeding and Disposition Below.

The Board conducted a public hearing on April 3, 2014, at which time it determined that Initiative #89 consisted of a single subject and set the Titles. Petitioner Douglas Kemper, a registered elector of the state of Colorado, filed a Motion for Rehearing pursuant to C.R.S. § 1-40-107(1) on April 10, 2014. Mizraim S. Cordero and Scott Prestidge separately filed a second Motion for Rehearing. At a rehearing held on April 16, 2014, the Board denied the Motions for Rehearing except to the extent that the Board made changes to the Titles.

The Board designated and fixed the following title at the rehearing:

> 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.

The ballot title and submission clause as designated and fixed by the Board is substantially the same as the title, except that it begins with the phrase, "Shall there be," and ends with a question mark. Mr. Kemper seeks review of the final action of the Board pursuant to C.R.S. § 1-40-107(2).

SUMMARY OF THE ARGUMENT

Initiative #89 clearly violates the single subject requirement. It begins with a declaration that "Colorado's environment is the common property of all Coloradans," and proceeds to mandate a public trust, with the state and local governments as trustees, for conservation of this environment. Creation of a similar public trust, with its far-reaching legal ramifications, has been the primary focus of a series of proposed, but unsuccessful initiatives over the past twenty years. As its placement in the Constitution's Bill of Rights might suggest, the Initiative also creates a fundamental right in conservation of Colorado's environment. Initiative #89 proceeds to combine these two broad, but distinct subjects with a third, entirely separate subject: overturning the state's law of preemption in favor of local control, itself the primary subject of several current proposed initiatives. These three subjects reflect three separate purposes, lacking any necessary or proper connection, and must be pursued as separate initiatives.

The Title Board lacked authority to set titles for an initiative containing these multiple subjects.

In addition, the titles for Initiative #89 are unclear and misleading. In attempting to identify a single subject, the Board summarizes the initiative as "concerning a public right to Colorado's environment." However, this phrase fails to encompass Initiative #89's separate provisions establishing local control over state authority. Moreover, the titles omit any mention of the Initiative's creation of a "fundamental" right to conservation of Colorado's environment, which is not only a material feature but a central purpose of the initiative. Because Initiative #89 is not limited to a single subject, and because the titles fail to disclose its full scope and essential features, this Court should reverse the Board's action in setting the titles.

LEGAL ARGUMENT

I. Initiative #89 violates the single subject rule because it attempts to accomplish multiple discrete purposes.

This Court should reverse the Board's decision to set Titles for Initiative #89 because it contains at least the following distinct subjects and purposes:

1. To create a fundamental right in conservation of Colorado's environment;

2. To adopt a form of public trust doctrine by declaring common property in Colorado's environment; and

3. To provide for local control through environmental regulations that preempt less restrictive state laws.

A. Standard of Review.

The Colorado Constitution prohibits the Board from setting a title for a proposed initiative that contains more than one subject. *In re Title Ballot Title and Submission Clause for 2007-2008 #61*, 184 P.3d 747, 749 (Colo. 2008). A proposed initiative violates the single subject requirements of article V, section 1(5.5) of the Constitution and C.R.S. § 1-40-106.5 when it "relate[s] to more than one subject and . . . [has] at least two distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246, 253 (Colo. 2000) (quoting *In re Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1078-79 (Colo. 1995)) (brackets in original).

Generally, the Board's actions are treated as presumptively valid. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #235(a)*, 3 P.3d 1219, 1222 (Colo. 2000). However, the "court must sufficiently examine an initiative to determine whether a measure violates the single subject rule." *In re*

Title and Ballot Title and Submission Clause for 2005-2006 #55, 138 P.3d 273, 278 (Colo. 2006). When necessary, the Court may characterize a proposal sufficiently to enable review of the Board's actions. *Id*. The Court must "examine sufficiently an initiative's central theme, as expressed, to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme." *Id*. at 279.

B. Initiative #89 Contains Multiple Subjects, Violating the Single Subject Requirement.

1. An Initiative must be limited to only one subject.

Several dangers are associated with a broad general theme containing multiple subjects. One is the "voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex issue." *In re Title, Ballot Title, and Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo. 2009) (quoting *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007)). Another is the practice of "'log-rolling' or 'Christmas tree' tactics," which involve "joining together of multiple subjects into a single initiative in the hope of attracting support from various factions which may have different or even conflicting interests." *In re Public Rights in Waters II*, 898 P.2d 1076, 1079 (Colo. 1995) (discussing *Catron v.*

Cnty. Comm'rs, 33 P.513, 514 (Colo. 1893), and the legislative history for the single subject requirement found in the Legislative Council's Analysis of 1994 Ballot Proposals).

To evaluate whether or not an initiative is limited to a single subject, the Court should first look to the text of the proposed initiative. *In re Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006). The Court should employ the usual rules of statutory construction, including reading all words and phrases in context and construing them according to the rules of grammar and common usage. *In re Title, Ballot Title and Submission Clause for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006). In construing an initiative's language, each clause 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). The Court should favor a construction that will give effect to each word, rather than one that will render some words useless. *City of Aurora v. Acosta*, 892 P.2d 264, 267 (Colo. 1995).

2. Initiative #89 creates a fundamental right to conservation of Colorado's environment.

Subsection (1) of Initiative #89 declares that conservation of Colorado's environment, which is defined to include "clean air, pure water, and natural and

scenic values," is "fundamental." Subsection (1) of the initiative further declares that Colorado's environment should be protected and preserved "for all Coloradans, including generations yet to come." By adding to the Bill of Rights (Colo. Const., art. II) a declaration that Coloradans have a fundamental right to the conservation of Colorado's environment, Initiative #89 places conservation among the most zealously protected rights that are recognized under the state constitution. Conservation would become one of the few enumerated rights of such importance to our society that the standard of review that protects them would be the most demanding for a state to overcome.

The Constitution of the United States recognizes certain rights that are "implicit in the concept of ordered liberty," or which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *See Coalition for Equal Rights, Inc. v. Owens*, 458 F.Supp.2d 1251, 1262 (D. Colo. 2006) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 951 (1992)). The list of rights that have been recognized as "fundamental" under the Equal Protection Clause of the Fourteenth Amendment is fairly limited. *See 211 Eighth, LLC v. Town of Carbondale*, 922 F.Supp.2d 1174, 1180 (D. Colo. 2013) (listing certain recognized fundamental rights as interstate travel, voting, the rights guaranteed under the First Amendment and procedural due

process, and various iterations of privacy that implicate matters of a personal nature). Although the Colorado constitution does not contain an identical provision to the Fourteenth Amendment, the substantive application of Colorado's article II, § 25 due process clause "is the same insofar as equal protection analysis is concerned." *Lujan v. Colorado State Bd. Of Educ.*, 649 P.2d 1005, 1014 (Colo. 1982). Laws that abridge fundamental rights are subject to strict scrutiny, and "must be precisely tailored to further a compelling governmental interest." *Coalition for Equal Rights*, 458 F.Supp.2d at 1262 (citation omitted).

Nothing about a fundamental right to conservation, however, has any necessary or proper relationship to the imposition of a trustee relationship over state and local governments, nor to the authorization of local governments to impose laws or regulations that are more restrictive and protective of the environment than environmental laws or regulations imposed by the state.

3. Initiative #89 adopts a form of public trust doctrine based on a common property interest in Colorado's environment.

Subsection (2) of Initiative #89 would adopt a form of public trust doctrine, based on subsection (1)'s creation of a common property interest of all Coloradans to Colorado's environment. The measure requires that state and local governments "shall conserve Colorado's environment . . . for the benefit of all the people," as

trustees of Colorado's environment, defined to include "clean air, pure water, and natural and scenic values." Initiative #89 would impose this newly created trustee role not just on Colorado's State government, but on "every Colorado city, town, county, and city and county, notwithstanding any provision of article XX, or section 16 of article XIV, of the Colorado constitution." The newly imposed trustee obligations on the state and local governments (subsection (2)), together with the newly created common property interest in the state's environment (subsection (1)), would completely alter the nature of Colorado water rights, among other property rights.

Colorado water law is grounded in the right of prior appropriation, constitutionally guaranteed by sections 5 and 6 of article XVI. Unlike several other states, Colorado's constitution establishes and protects the right of any person or entity to appropriate the waters of the state and put them to beneficial use. Colo. Const. art. XVI, § 5 ("The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided."); Colo. Const. art. XVI, § 6 ("The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."). Only the unappropriated water is the public's property; others

acquire property rights in this resource by appropriation and beneficial use. Under the doctrine of prior appropriation, the person who first diverts water and puts it to beneficial use has a property right superior to any other person who subsequently appropriates water from the same water resource. *See Navajo Dev. Co., Inc. v. Sanderson*, 655 P.2d 1374, 1377 (Colo. 1982). An appropriative water right is a "most valuable property right" to use a certain amount of water, subject only to the amount of water physically available for appropriation and the amount taken to satisfy senior priorities. *Id.* at 1378 (citation omitted).

Initiative #89's public trust in the environment follows the path some other states have taken in expanding their common-law public trust doctrines to protect environmental features of water resources. For example, the California Supreme Court has held that the state has public trust obligations to preserve tidelands "in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). California's Supreme Court also recognized this public trust doctrine was on a "collision course" with prior appropriation water rights, ultimately requiring state agencies to take public trust interests into account in determining or reconsidering previously granted water

rights. *National Audobon Society v. Superior Court*, 658 P.2d 709, 712, 727-28 (Cal. 1983). Hawaii's Supreme Court reached the same result in applying a constitutional provision similar[1] to the public trust features in Sections (1) and (2) of Initiative #89 to limit existing water rights in order to preserve the environment. *In re Water Use Permit Applications*, 9 P.3d 409, 452-54 (Haw. 2000) (citing *National Audobon*, 658 P.2d at 728 n. 27 (Cal. 1983)).

Colorado, by contrast, has never recognized any form of public trust doctrine in water, having rejected such a concept as inconsistent with Colorado's constitution and prior appropriation doctrine. *People v. Emmert*, 597 P.2d 1025, 1027-28 (Colo. 1979); *see also In re Title, Ballot Title, and Submission Clause for 2011-2012 #3,* 274 P.3d 562, 573 (Colo. 2012) (Hobbs, J., dissenting); *Aspen Wilderness Workshop, Inc. v. Colo. Water Conservation Bd.*, 901 P.2d 1251, 1263 (Colo. 1995) (Mullarkey, J., dissenting) (noting, "This court has never recognized the public trust with respect to water."). Accordingly, Initiative 89's proposed

[1] Hawaii's Constitution, art. XI, § 1, provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii's natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

public trust for environmental protection, and its accompanying declaration of "common property," would radically transform Colorado's scheme of priority-based water rights if interpreted (as in California and Hawaii) to subordinate existing appropriative water rights, regardless of priority, to the public's new common property right. Under Colorado's prior appropriation doctrine, the value of a water right is the priority to use a certain amount of water from a specified source such as a river or lake. *Navajo Dev. Co.*, 655 P.2d at 1377. Subjecting these established priority rights to the "common property of all Coloradans" would be a radical change to Colorado's prior appropriation system, substantially diminishing the value of the property rights grounded in the established priorities. This public trust, with its inherent disruption to Colorado's water law, has no necessary or proper connection with the recognition of a fundamental right of all Coloradans to conservation of Colorado's environment, nor to the authorization of local control over environmental laws and regulations.

4. Initiative #89 completely alters the priority of environmental regulations enacted by state and local governments.

Subsection (3) of Initiative #89 would allow local governments, in order to "facilitate conservation of Colorado's environment," to override state law by enacting "laws, regulations, ordinances, and charter provisions that are more

restrictive and protective of the environment" than laws or regulations adopted by state government, and would require "the more restrictive or protective law or regulation" to govern if there should be a conflict between local and state enactments. This would dictate that any "more restrictive" locally-enacted environmental law or regulation be prioritized or held superior to a conflicting state law, fundamentally changing the relationship between the state and local governments on the issue of environmental regulation.

In Colorado, most issues are in the primary jurisdiction of the state legislature. The Colorado preemption doctrine "establish[es] a priority between potentially conflicting law enacted by various levels of government." *Bd. of Cnty. Comm'rs v. Bowen/Edwards Assocs., Inc*., 830 P.2d 1045, 1055 (Colo. 1992). To determine whether a local law is preempted by a state law, Colorado courts use an analysis borrowed from federal preemption cases. *Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718, 723 (Colo. 2009). The components of this analysis, however, differ depending on whether the local law was passed by (1) a statutory municipality or county, or (2) a home-rule city or town. The source and scope of authority for these two types of local governments is different, requiring separate preemption analyses and foreclosing the legal possibility of a sweeping

requirement that more restrictive environmental laws passed at the local level preempt less restrictive state laws.

A statutory municipality or county is "not an independent governmental entity" but is a "political subdivision of the state." *Bowen/Edwards Assocs.*, 830 P.2d at 1055 (quoting *Bd. of Cnty. Comm'rs v. Love*, 470 P.2d 861, 862 (Colo. 1970)) (internal quotations omitted). Statutory municipalities "possess[ ] only the regulatory authority 'expressly conferred upon [them] by the constitution and statutes, and such incidental implied powers as are reasonably necessary to carry out such express powers.'" *Id*. There are three ways that a state statute may preempt a local law: "(1) the express language of the statute may indicate state preemption of all local authority over the subject matter; (2) preemption may be inferred if the state statute impliedly evinces a legislative intent to completely occupy a given field by reason of a dominant state interest; and (3) a local law may be partially preempted where its operational effect would conflict with the application of the state statute." *Dep't of Transp. v. City of Idaho Springs*, 192 P.3d 490, 495 (Colo. App. 2008) (citing *Bowen/Edwards Assocs.*, 830 P.3d at 1056–57) (internal quotations omitted). The Colorado General Assembly has granted local governments the explicit authority "to plan for and regulate the use of land within their respective jurisdictions." C.R.S. § 29-20-102(1); *see also* § 29-

20-104 (listing the specific subject areas that local governments may regulate as "land use"). Zoning also is a matter of local control. *See* C.R.S. § 31-23-202, § 24-67-102, § 24-65.1-101; § 31-23-301; and § 31-23-227.

Unlike statutory municipalities, a home-rule city or town adopts its own charter, "which shall be its organic law and extend to all its local and municipal matters." Colo. Const. art. XX, § 6. A home-rule municipality may enact any law within its boundaries that the state legislature could adopt unless the law is preempted. The preemption analysis for home-rule municipalities uses three categories of regulated matters: (1) matters of local concern, (2) matters of state concern, and (3) matters of mixed state and local concern. *City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003) (citing *City of Commerce v. State of Colorado*, 40 P.3d 1273, 1279 (Colo. 2002)). For matters of local concern, "both home-rule cities and the state may legislate," but "when a home-rule ordinance or charter provision and a state statute conflict with respect to a local matter, the home-rule provision supersedes the conflicting state statute." *Id*. In matters of state concern, the Colorado General Assembly may legislate and "home-rule municipalities are without power to act unless authorized by the constitution or by state statute." *Id*. Lastly, for "mixed" matters of state and local concern, "local enactments and state statutes may coexist if they do not conflict." *Id*.

This Court has held that certain matters involving state environmental regulations are matters of statewide concern, thereby preempting local regulation absent specific statutory authorization. *See, e.g., Voss v. Lundvall Bros., Inc.*, 830 P.2d 1061 (Colo. 1992) (finding that the state's interest in efficient and fair development and production of oil and gas resources militates against a home-rule city's total ban on drilling within the city limits), *see also Colo. Min. Ass'n v. Board of Cnty. Comm'rs*, 199 P.3d 718 (Colo. 2009) (finding that a county's ordinance banning the use of certain chemicals in mining operations is impliedly preempted by Mined Land Reclamation Act). The Colorado Areas and Activities of State Interest Act ("AASIA"), which arose from the 1970 Colorado Land Use Act and H.B. 74-1041, grants local governments the power to "designate areas and activities of state interest" and the authority to regulate such areas and activities. C.R.S. § 24-65.1-101(2)(b); *see also* § 24-65.1-201 (areas of state interest) and § 24-65.1-203 (activities of state interest). The Colorado Supreme Court has held that limited local government regulations pertaining to activities of state interest pursuant to the AASIA are not an unconstitutional delegation of legislative power to local governments. *See e.g., City & Cnty. of Denver By & Through Bd. of Water Comm'rs v. Bd. of Cnty. Comm'rs*, 782 P.2d 753, 759–60 (Colo. 1989) (holding that local governments may designate site selection and construction of major new

domestic water and sewage treatment systems, and the efficient utilization of such systems, to be a matter of state interest). By requiring local government enactments that are "more restrictive and protective of the environment" than statewide enactments to prevail in any conflict, Initiative #89 completely subverts the established preemption regime for environmental regulations throughout Colorado.

5. The multiple purposes of Initiative #89 violate the single subject rule.

Initiative #89 violates the single subject rule because it would alter three different areas of Colorado law in three different ways. It would create a new fundamental right for all Coloradans to conservation of Colorado's environment, giving that right the highest protection afforded under the law. It would also impose a form of public trust doctrine based on a common property interest in Colorado's environment, including clean air, pure water, and natural and scenic values, and would impose public trust obligation not only on the state, but on local governments, too. While these two purposes are separate and unconnected, the third is even farther removed: Initiative #89 would completely overturn the established regime of preemption between state and local government enactments involving environmental regulations.

The purposes of the three parts to Initiative #89 are distinct. None of the three subjects – creating a fundamental right in conservation, imposing a form of public trust doctrine over state and local governments, and reversing state preemption of environmental laws and regulations enacted by local governments – requires that the other be enacted to achieve its underlying purpose. The only common characteristic claimed by the Proponents is that all involve protection of Colorado's environment. Just as this Court has determined that a common theme of "water" is too broad to constitute a single subject, *see In re Public Rights in Waters II*, 898 P.2d at 1080, it also stands that "environmental rights" is too broad of a theme to constitute a single subject.

Proposed initiatives in years past have had the sole or primary purpose of adopting a "public trust doctrine" in the Colorado constitutional provisions governing water, art. XVI, § 5. *See In re 2011-2012 #3*, 274 P.3d 562 (Colo. 2012); *MacRavey v. Hufford*, 917 P.2d 1277 (Colo. 1996); *Public Rights in Water II*, 898 P.2d 1076 (Colo. 1995); and *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994). Another initiative with the "public trust" theme is now before this Court in Case No. 2014SA137 (Initiative 2013-14 No. 103); and the Court previously found that a "public trust standard" was "coiled in the folds" of another proposed

initiative, violating the single subject requirement. *In re 2007-2008 #17*, 172 P.2d at 876.

In contrast, several other currently proposed initiatives (all in 2013-2014) have as their sole or primary subject another of Initiative's #89's subjects: local control over aspects of environmental regulations. For example, proposed Initiative 2013-2014 #75 (now before this Court in Case No. 2014SA100) would prevent state and federal preemption of local laws protecting the health, safety, and welfare of individuals, their communities and nature, reallocating primary power over environmental regulation to local authority. Also, Initiative 2013-2014 #82, Initiative 2013-2014 #90, and Initiative 2013-2014 #91 (now before this Court in Case Nos. 2014SA118, 2014SA121, and 2014SA120, respectively) each have the singular or primary purpose of empowering local governments to impose local restrictions or prohibitions on oil and gas development—conferring powers currently reserved to the state. The fact that Initiatives 2013-2014 #75, #82, #90, and #91 claim their sole subject to be local control over environmental regulation demonstrates that Initiative #89's subject of local control over environmental regulations is quite distinct and appeals to separate constituencies from the "public trust" raised in Initiative #89 and several past initiatives.

Combining the three separate and distinct subjects of Initiative #89 into one initiative may place "voters in the position of voting for some matter they do not support to enact that which they do support." *In re Title, Ballot Title and Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1079 (Colo. 2010) (citation omitted). Initiative #89 inappropriately joins three purposes into one measure to garner support from distinct interest groups, defeating the purpose of the single subject rule. This is a classic form of "log rolling," a principal "'evil' sought to be prevented" by the single subject requirement. *Public Rights in Water II*, 898 P.2d at 1079. Accordingly, this Court should reverse the Board's action in setting the Titles.

II. The Titles set for Initiative #89 do not fully express the Initiative's true meaning and intent.

The Titles should be "a brief statement that fairly and accurately represents the true intent and meaning of the proposed text of the initiative." C.R.S. § 1-40-102(10). In setting titles, the Board "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." C.R.S. § 1-40-106(3)(b). The Titles fail to meet these standards, because they describe Initiative #89's subject as concerning only "a public right to

Colorado's environment," and improperly omit material provisions of the Initiative.

A. Standard of Review.

In reviewing titles, the Court must "engage all legitimate presumptions in favor of the propriety of the Title Board's actions. . . ." *In re Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 58 (Colo. 2008). While the Court may not rewrite the titles or submission clause for the Board, it must determine whether the prohibition against unclear titles has been violated. *Id*. The Court will "reverse the Board's action in preparing [the titles] if they contain a material and significant omission, misstatement, or misrepresentation." *Id*. (quotations omitted). Ballot titles "'shall correctly and fairly express the true intent and meaning' of the initiative," unambiguously stating the principle of the amendment. *Id*. (quoting C.R.S. § 1-40-106(3)(b)). Further, the Colorado constitution also requires that the title clearly express the initiative's single subject. *In re Title, Ballot Title and Submission Clause for 2009-2010 # 45*, 234 P.3d 642, 647-48 (Colo. 2010).

> The matter covered by [the initiative] is to be clearly, not dubiously or obscurely, indicated by the title. Its relation to the subject must not rest upon a merely possible or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. Such connection should be

> within the comprehension of the ordinary intellect, as well as the trained legal mind.

Id. (citation omitted) (bracket in original)

B. The Titles inaccurately describe the subject as "a public right to Colorado's environment."

This Court should reverse the Board's decision because setting the Titles for Initiative #89 because the phrase "concerning a public right to Colorado's environment" is too vague and is inadequate to encompass the substantial change its passage would bring to the legal relationship between state and local governments in Colorado. The Titles describe the subject of Initiative #89 as "[a]n amendment to the Colorado constitution concerning a public right to Colorado's environment," failing to consider Initiative #89's provisions that would empower local governments, reversing the priority of environmental regulations enacted by state and local governments. The Titles fail to provide voters with adequate notice that, by giving local governments the authority to preempt state environmental regulations, Coloradans would be subject to a potential patchwork of environmental rules that would directly impact resources that this Court already determined to be of such significance as to be regulated by the state.

In drafting the Titles, the Board has attempted to craft a title that describes only a single subject. In the process, however, the Board has described Initiative

#89 in terms that are misleading. Doing so demonstrates that the Board cannot fashion a title for Initiative #89 that both concerns only a single subject and accurately describes the scope of the measure.

C. The Titles improperly omit a material provision of the Initiative.

This Court should reverse the Board's decision setting the Titles for Initiative #89 because the Titles omit any mention of the feature of the Initiative creating a "fundamental right" to conservation of Colorado's environment. By failing to include this important purpose of the Initiative, the Titles do not adequately inform the voters of a very significant right they are creating in a vague and nondescript concept, which the Initiative itself does not fully define. Where the Board's titles omit reference to, or mischaracterize, a central element of the measure, the titles are legally deficient and must be remanded to the Board for correction. *In re Proposed Election Reform Amendment*, 852 P.2d. 28, 34-35 (Colo. 1993). Voters would be unclear regarding the impact of their "yes" or "no" vote on Initiative #89 if they are not provided with notice that the measure would elevate conservation of Colorado's environment to the status of a fundamental right.

Because the Titles are too broad, are unclear, and conceal essential features of Initiative #89, this Court should reverse the Board's decision.

CONCLUSION

This Court should reverse the Board's action in setting the Titles because Initiative #89 is not limited to a single subject and because the Titles are unclear and misleading.

Respectfully submitted this 13th day of May, 2014.

BURNS, FIGA & WILL, P.C.

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

By: S/ Stephen H. Leonhardt
Stephen H. Leonhardt (#15122)
Alix L. Joseph (#33345)
Wenzel J. Cummings (#41250)

Attorneys for Petitioner
Douglas Kemper

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of May, 2014, a true and correct copy of the foregoing **PETITIONER KEMPER'S OPENING BRIEF** was served by ICCES to the following:

LeeAnn Morrill, Esq.
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Assistant Attorneys General
Colorado Attorney General's Offices
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S/ Parasia Oleksiuk

DATE FILED: May 13, 2014 4:58 PM

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, SCOTT GESSLER, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the filed text, motions for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2013-2014 #89 'Local Government Regulation of Environment'" .....

..... **IN TESTIMONY WHEREOF** I have unto set my hand .....
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 17th day of April, 2014.

SECRETARY OF STATE

RECEIVED
MAR 2 1 2014
Colorado Secretary of State
S.WARD 1:15P.M.

2013-2014 #89 - FINAL

Be it Enacted by the People of the State of Colorado:

SECTION 1. In the constitution of the state of Colorado, amend article II to add the following:

Section 32. Environmental Rights (1) THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT COLORADO'S ENVIRONMENT IS THE COMMON PROPERTY OF ALL COLORADANS; CONSERVATION OF COLORADO'S ENVIRONMENT, INCLUDING ITS CLEAN AIR, PURE WATER, AND NATURAL AND SCENIC VALUES IS FUNDAMENTAL; AND COLORADO'S ENVIRONMENT SHOULD BE PROTECTED AND PRESERVED FOR ALL COLORADANS, INCLUDING GENERATIONS YET TO COME.

(2) THE PEOPLE OF THE STATE OF COLORADO, INCLUDING FUTURE GENERATIONS, HAVE A RIGHT TO COLORADO'S ENVIRONMENT, INCLUDING ITS CLEAN AIR, PURE WATER, AND NATURAL AND SCENIC VALUES. AS TRUSTEES OF THIS RESOURCE, THE STATE AND LOCAL GOVERNMENTS SHALL CONSERVE COLORADO'S ENVIRONMENT, INCLUDING ITS CLEAN AIR, PURE WATER, AND NATURAL AND SCENIC VALUES FOR THE BENEFIT OF ALL THE PEOPLE. THIS SECTION APPLIES TO THE STATE OF COLORADO AND TO EVERY COLORADO CITY, TOWN, COUNTY, AND CITY AND COUNTY, NOTWITHSTANDING ANY PROVISION OF ARTICLE XX, OR SECTION 16 OF ARTICLE XIV, OF THE COLORADO CONSTITUTION.

(3) ALL PROVISIONS OF THIS SECTION OF ARTICLE II OF THE COLORADO CONSTITUTION ARE SELF-EXECUTING AND SEVERABLE. TO FACILITATE THE 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. IF ANY LOCAL LAW OR REGULATION ENACTED OR ADOPTED PURSUANT TO THIS ARTICLE CONFLICTS WITH A STATE LAW OR REGULATION, THE MORE RESTRICTIVE AND PROTECTIVE LAW OR REGULATION GOVERNS.

Ballot Title Setting Board

Proposed Initiative 2013-2014 #89[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning the creation of a public trust over 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; requiring state and local governments, as trustees, to conserve the environment; and declaring that if state or local laws conflict the more restrictive law or regulation governs.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning the creation of a public trust over 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; requiring state and local governments, as trustees, to conserve the environment; and declaring that if state or local laws conflict the more restrictive law or regulation governs?

Hearing April 3, 2014:
Single subject approved; staff drafts amended; titles set.
Hearing adjourned 10:17 a.m.

1 Unofficially captioned **"Local Government Regulation of Environment"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

RECEIVED
APR 10 2014
Colorado Secretary of State
S.WARD 1:45 P.M.

BEFORE THE TITLE BOARD, STATE OF COLORADO

MOTION FOR REHEARING

IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2013-14 #89

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 "Titles") set by the Title Board on April 3, 2014, for Initiative 2013-14 #89 (the "Initiative"), which would amend the Colorado constitution. Reconsideration is requested for the following reasons:

1. The Initiative and Titles do not conform to 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 Board's chosen subject phrase is too broad and vague and would cause public confusion regarding the effect of a "yes/no" vote on the Initiative in violation of C.R.S. § 1-40-106.

3. The Titles fail to describe important aspects of the Initiative and are therefore misleading in violation of C.R.S. § 1-40-106.

THE INITIATIVE AND TITLES 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, by having at least these three separate, distinct, and unrelated subjects:

1. The creation of a common property right to the environment, defined as consisting of "clean air, pure water, and natural and scenic values;"

2. The adoption of a form of public trust doctrine, which would create rights of the public inherently conflicting with current water appropriation rights vested under constitutional provisions; and

3. The imposition of local control over environmental regulations with the authority to supersede any less restrictive state environmental regulations.

A. Creation of a Common Property Right to the Environment

Section (1) of the Initiative declares that the environment, defined to include clean air, pure water, and natural and scenic values, "is the common property of all Coloradans." Additionally, Section (1) proclaims that conservation of the environment is a "fundamental" right belonging to all Coloradans, including generations "yet to come."

Taken alone, the Initiative's definition of the environment extends its reach beyond a single subject by changing the legal relationship between Colorado's citizens and each of the separate and distinct factors within the definition. Natural and scenic views, for instance, may already be preserved under Colorado law through the creation of conservation easements. *See* COLO. REV. STAT. § 38-30.5-104. Such easements are actual property interests in the land that may only be created by the record owner of the surface. *See id.* The Initiative's creation of a fundamental right in natural and scenic views would subrogate the landowner's property interest in these easements by transferring ownership of the preservation of scenic views to the public at-large without any compensation to the landowner.

B. Adoption of a form of Public Trust Doctrine

Section (2) restates the right of all Coloradans to the environment, and then proceeds to impose upon state and local governments a trusteeship over the environment for the benefit of the people. While the Initiative stops just short of using the phrase "public trust doctrine," the effect of the Initiative's language would impose just such a doctrine over the state's water rights as well as other natural resources. The Titles recognize, in fact, that the Initiative concerns "creation of a *public trust* over the environment" (emphasis added).

In its traditional common law form, public trust doctrine declares that the state holds its navigable waters and lands underneath them in trust for the people. *See Ill. Cent. RR. Co. v. Illinois*, 146 U.S. 387, 452 (1892). Colorado has never adopted a public trust doctrine or applied such a doctrine to water rights within the state due to the express protection of private property rights contained in Article XVI of the Colorado constitution. *People v. Emmert*, 597 P.2d 1025, 1029-30 (Colo. 1979) (holding Colo. Const. Art. XVI, Section 5 does not impose a public trust but protects private property rights in appropriation of Colorado waters and ownership of adjoining lands). This is likely because of the adverse impacts that doctrine would have on existing water rights under the prior appropriation doctrine. *See* Gregory J. Hobbs, Jr. and Bennett W. Raley, *Water Rights Protection in Water Quality Law*, 60 U. Colo. L. Rev. 841, 855-56 (1989). The "Colorado Doctrine" of water rights developed out of the "imperative necessity" of water scarcity in the western region. *In re Title, Ballot Title, Submission Clause for 2011-12 No. 3*, 274 P.3d 562, 574 (Colo. 2012) (Hobbs, J., dissenting). The break from the common law was so complete in Colorado as to make "all surface water and groundwater in the state, along with the water-bearing capacity of streams and aquifers, a public resource dedicated to the establishment and exercise of water use rights created in accordance with applicable law." *See, id.*, at 573-4.

By adopting a form of public trust doctrine, the Initiative would enact a constitutional provision in conflict with the prior appropriation doctrine, subrogating the rights of those who hold appropriative water rights from the state to the rights of the public to be managed restrictively by the state and local governments.[1] The Initiative would effectively dismantle water rights and water laws that have been held intact as a property rights regime based on Colorado's constitutional, statutory, and case law for more than 150 years.

C. Imposition of Local Control over Environmental Regulations with Authority to Supersede Any Less Restrictive State Environmental Regulations

Section (3) provides that local governments have the power to enact laws, regulations, ordinances, and charter provisions that are more restrictive and protective of the environment than those that are enacted or adopted by the state government. Further, Section (3) 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 restrictive or protective. This "local control" theme is the primary subject of several other current proposed initiatives, apart from any consideration of a public trust.[2]

In Colorado, many local government bodies are merely subdivisions of the state and may not exercise any authority not delegated to them by the General Assembly. Even those local governments that adopt home rule charters are limited in authority to those issues solely of local concern. Also, many local governmental boundaries in Colorado overlap. The Initiative does not differentiate between or among the various local government entities that exist within the state; nor does it provide guidance with regard to the relationship those local governments would have with each other or with the state, except to require that any environmental law or regulation adopted by a local government would supersede against a less restrictive law or regulation adopted by the state. Such a rule would overturn the subordinate relationship currently held by local governments vis-à-vis the state, and potentially create chaos in the determination of which locally-adopted law or regulation would prevail if a conflict were to exist between two or more overlapping local governments.

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[1] Previously proposed initiatives would have expressly adopted a "public trust doctrine" in the Colorado constitution provisions governing water, Art. XVI, Section 5. *See Kemper v. Hamilton*, 274 P.3d 562 (Colo. 2012); *MacRavey v Hufford*, 917 P.2d 1277 (Colo. 1996); *MacRavey v. Hamilton (Public Rights in Water II)*, 898 P.2d 1076 (Colo. 1995); and *MacRavey v. Swingle*, 877 P.2d 321 (Colo. 1994).

[2] *See, e.g.*, Initiatives 2013-14 Nos. 75, 82, 90, and 91.

THE THREE SUBJECTS ENCOMPASSED BY THE INITIATIVE ARE SEPARATE AND DISTINCT, AND TITLES SHOULD NOT BE SET

A. The Initiative Contains Multiple Subjects That Are Unrelated but Combined for Improper Purposes

Even where two or more facets of an initiative are related, they must not be so different as to confuse the voters, or to pass one facet surreptitiously disguised by another. Multiple subjects within an initiative set up the kind of "logrolling" that the voters intended to prevent when adopting the 1994 single-subject constitutional requirement. *In re Title, Ballot Title, Submission Clause for 2009-10 No. 91*, 235 P.3d 1071, 1079 (Colo.2010). A proposed initiative violates the single subject rule if its text "relate[s] to more than one subject" and has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *MacRavey v. Hamilton (Public Rights in Water II)*, 898 P.2d 1076, 1078-79 (Colo. 1995) (citing the single subject test of *People ex rel. Elder v. Sours*, 31 Colo. 369, 403 (1903), to analyze ballot initiatives). The Colorado Supreme Court held in 2007 that "[a]n initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. We must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme." *In re Title, Ballot Title and Submission Clause, for 2007-2008, #17*, 172 P.3d 871, 875 (Colo. 2007) (internal citations omitted).

Initiative 89 presents this danger of voter surprise and fraud posed by logrolling three hidden purposes presented under a broad theme of creating a public trust over the environment. At least two of those purposes have been pursued as separate subjects in separate recent ballot initiatives, and this Initiative seeks to "log-roll" by carrying support from those favoring the separate agendas of public trust and local control. Creating a common property right to the environment that eviscerates private property interests is not dependent upon or connected with the adoption of a form of public trust doctrine that subverts over 150 years of Colorado water law, and neither of these purposes is dependent upon or connected with the imposition of local control over environmental regulations that have the authority to supersede any less restrictive state environmental regulations. For these reasons, the Initiative fails to meet the single-subject requirement.

B. The Measure is So Vague That it is Impossible To Set A Title That Accurately Reflects the True Purpose of the Measure

The Title Board must examine an initiative's central theme "to determine whether it contains hidden purposes or incongruous measures under a broad theme." *Gonzalez-Estay v. Lamm (2005-06 #55)*, 138 P.3d 273, 279 (Colo. 2006). And as the Colorado Supreme Court has held that "water" was too broad a theme to satisfy the single-subject requirement, *Public Rights in Water II*, 898 P.2d 1076, 1080 (Colo. 1995), it follows that "public trust over Colorado's environment" is similarly too broad to encompass the three topics outlined above as contemplated by the single-subject requirement. The Title Board's chosen subject phrase in the

Titles, "concerning creation of a public trust over Colorado's environment," is too broad and vague to state a single subject. It fails to encompass the measure's provisions that would substantially alter the relationship between local governments and the state, and those that would convert Colorado's environmental resources, including natural and scenic views and appropriative water rights, into "common property."

C. The Titles Fail to Describe Important Aspects of the Measure And Are Therefore Misleading

An initiative's ballot title and submission clause must "correctly and fairly express the true intent and meaning" of the measure. COLO. REV. STAT. § 1-40-106(3)(a). "[A] material omission can create misleading titles." *Garcia v. Chavez*, 4 P.3d 1094, 1098 (Colo. 2000). Here, the Initiative's title was set as follows:

> An amendment to the Colorado constitution concerning the creation of a public trust over 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; requiring state and local governments, as trustees, to conserve the environment; and declaring that if state or local laws conflict the more restrictive law or regulation governs.

The ballot title and submission clause were set as follows:

> Shall there be an amendment to the Colorado constitution concerning the creation of a public trust over 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; requiring state and local governments, as trustees, to conserve the environment; and declaring that if state or local laws conflict the more restrictive law or regulation governs?

As drafted, the Titles are misleading because they fail to describe at least two important aspects of the Initiative:

(a) The Initiative's title and ballot title and submission clause improperly omit the Initiative's provision creating a fundamental right to conservation of the environment. (Init. #89, § (1)). This is a material omission of a key provision because a fundamental right is held to the highest level of scrutiny whenever a legislative body would attempt to alter or limit it in any way.

(b) The Initiative's title and ballot title and submission clause improperly omit the Initiative's requirement to preserve the environment for future generations. (Init. #89, § (1)). This is a material omission of a key provision that establishes a vested property right in the preservation of the environment for all future generations—a novel interest in property otherwise unknown to the law.

For these reasons, the Titles do not conform to the statutory requirements of § 1-40-106(3)(c).

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 April 3, 2014, for Initiative 2013-14 #89.

Respectfully submitted this 10th day of April, 2014.

BURNS, FIGA & WILL, P.C.

By: _____
Stephen H. Leonhardt, #15122
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Attorneys for Petitioner
Douglas Kemper

CERTIFICATE OF MAILING

The undersigned hereby certifies that a true and correct copy of the foregoing **MOTION FOR REHEARING** was served via electronic mail on this 10th day of April, 2014, as follows:

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Wenzel J. Cummings

RECEIVED
APR 10 2014
Colorado Secretary of State
S.WARD 3:40P.M.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2013–2014 #89

MOTION FOR REHEARING

Registered electors, Mizraim S. Cordero and Scott Prestidge, through their legal counsel, Ryley Carlock & Applewhite, request a rehearing of the Title Board for Initiative 2013-2014 No. 89. As set forth below, Mr. Cordero and Mr. Prestidge respectfully object to the Title Board's setting of title and the ballot title and submission clause on the following grounds:

TITLE AND SUBMISSION CLAUSE

On April 3, 2014, the Title Board designated the title as follows:

> An amendment to the Colorado constitution concerning the creation of a public trust over 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 value; requiring state and local governments, as trustees, to conserve the environment; and declaring that if state or local laws conflict the more restrictive law or regulation governs.

The Title Board set the ballot title and submission clause as follows:

> Shall there be an amendment to the Colorado constitution concerning the creation of a public trust over 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; requiring state and local governments, as trustees, to conserve the environment; and declaring that if state and local laws conflict the more restrictive law or regulation governs?

GROUNDS FOR RECONSIDERATION

I. THE INITIATIVE IMPERMISSIBLY CONTAINS MULTIPLE SUBJECTS IN VIOLATION OF THE COLORADO CONSTITUTION AND STATUTES.

The Colorado Constitution and statutes require that each initiative that proposes an amendment to the Constitution shall contain only one subject and that subject shall be clearly expressed in the title. *See* Colo. Const. art. V., § 1(5.5); C.R.S. § 1-40-106.5; *In re Title, Ballot Title, Submission Clause*, 898 P.2d 1076 (Colo. 1995). The Board set title for initiative No. 89 despite the fact that it contains multiple, distinct and separate purposes that are not dependent upon or connected with each other. Specifically, under the guise of "environmental rights" the initiative actually includes the following several, unrelated subjects:

(1) Establishes a public trust in the environment as the common property of the people of Colorado (#89, §1);

(2) Establishes the environment as common property of all the citizens of Colorado (#89, §1);

(3) Establishes a new preemption order of authority whereby local governments may preempt statutes and regulation enacted or promulgated by the state government (#89, §3);

(4) Implies a preemption of federal clean air and clean water statutes by local governments.

(5) Establishes a new legal doctrine of construction, separate and apart from preemption that requires, most likely, the courts to determine whether a local ordinance or state statute is more restrictive (#89, §3).

These subjects are not connected or interdependent and therefore the Title Board lacks jurisdiction to set a title.

II. THE INITIATIVE'S PROVISIONS ARE SO VAGUE THE BOARD CANNOT SET A TITLE THAT ENCOMPASSES AND REFLECTS THE PURPOSE OF THE PROPOSAL.

Colorado Revised Statutes §1-40-106(3)(c) requires the ballot title to accurately reflect the subject matter of an initiative to avoid confusion. The Title set for initiative 89 violates this statutory provision in the following ways:

(1) The measure purports to establish the "environment as the common property of all Coloradans." However, the measure does not clearly define the terms "common property" and will lead to confusion because the public trust doctrine has traditionally been applied to lands submerged beneath tidal and navigable waterways.

(2) The measure purports to assign the state and local governments as trustees of the "environment" but the title does not describe the rights each citizen of the state may have to enforce this proposal.

(3) In paragraphs (1) and (2) of the proposal, the terms "natural and scenic values" are utilized and in paragraph (1) described as "fundamental," as well as, "clean air" and "pure water." The title does not include the word "fundamental" which will lead to misinformation and confusion as to which constitutional right takes precedence over others and whether "fundamental" ascribes more or less legal importance to these proposed rights as to other constitutional rights. The term "fundamental" is undefined and amorphous.

(4) In paragraph (2) of the proposal, the term "conserve" is so broad it will lead to confusion among voters as to what the state and local governments are to conserve.

The language of the measure is so vague that no title can correctly and fairly express the true purpose of the measure. Therefore, the Title is confusing and does not meet the requirements of §1-40-106(3)(c).

Respectfully submitted this 10th day of April, 2014 by:

RYLEY CARLOCK & APPLEWHITE

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Ballot Title Setting Board

Proposed Initiative 2013-2014 #89[1]

The title as designated and fixed by the Board is as follows:

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.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be 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?

Hearing April 3, 2014:
Single subject approved; staff drafts amended; titles set.
Hearing adjourned 10:17 a.m.

Rehearing April 16, 2014:
Motion for rehearing granted to the extent that the Board made changes to the titles; denied in all other respects.
Hearing adjourned 1:36 p.m.

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1 Unofficially captioned **"Local Government Regulation of Environment"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.