

<b>SUPREME COURT, STATE OF COLORADO</b> <b>2 East 14<sup>th</sup> Avenue</b> <b>Denver, Colorado 80203</b>	DATE FILED: May 13, 2014 4:24 PM
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  <b>Petitioners:</b> DOUGLAS KEMPER, MIZRAIM S. CORDERO and SCOTT PRESTIDGE  v.  <b>Respondents:</b> CAITLIN LEAHY and GREGORY DIAMOND  and  Title Board: SUZANNE STAIERT; DANIEL DOMENICO; and JASON GELENDER  ▲ COURT USE ONLY ▲	
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<b>RESPONDENTS' OPENING BRIEF</b>	

## 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 2,468 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. \_\_, p. \_\_), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: s/Martha M. Tierney

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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 Opening 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”).

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW<sup>1</sup>**

1. Does Initiative #89 violate the single subject requirement by: (a) creating a common property right to the environment; (b) adopting a form of public trust doctrine, which would conflict with appropriative water rights vested under current constitutional provisions by creating private ownership interests and obligations that may be superior to existing water rights; and (c) imposing local control over environmental regulations with the authority to supersede or preempt any less restrictive state or federal environmental regulations?

2. Is the Title set for Initiative #89 unfair and misleading because: (a) it provides no definition of the terms: (i) environment, (ii) common property, or (iii) public trust doctrine; (b) it fails to define the term “fundamental” or what rights in the environment are “fundamental” or how these “fundamental” rights relate to

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<sup>1</sup> These issues are drawn, as best Respondents are able, from both Petitioners’ “Advisory Statement of Issues” in their Petitions for Review.

other constitutional rights; (c) it fails to define what state and local governments are to conserve; (d) it fails to inform voters that it eviscerates the distinction between statutory and home-rule municipalities; and (e) it omits the requirement to preserve the environment for future generations?

## **STATEMENT OF THE CASE**

### **I. Nature of the Case, Course of Proceedings, and Disposition Before the Title Board.**

This is an appeal from the Title Board's setting of the Title for Initiative #89. On March 3, 2014, Proponents filed Initiative #89 with the directors of the Legislative Council and the Office of Legislative Legal Services. Members of the Legislative Council staff provided Proponents with a review and comment memoranda for Initiative #89 on March 14, 2014, and conducted the associated review and comment hearing on March 17, 2014.

Proponents revised Initiative #89 in response to staff comments, and filed Initiative #89 with the Secretary of State's office on March 21, 2014. At the Title Board hearing on April 3, 2014, the Title Board found that Initiative #89 contained a single subject, as required pursuant to article V, section 1(5.5) of the Colorado Constitution, and Section 1-40-106.5, C.R.S. (2013). The Title Board set the Title for Initiative #89.

On April 10, 2014, Petitioners Mizraim S. Cordero and Scott Prestige filed a Motion for Rehearing. Also on April 10, 2014, Petitioner Douglas Kemper filed a Motion for Rehearing. On April 16, 2014, the Title Board revised the Title to its current form. Petitioner Douglas Kemper filed an appeal, pursuant to Section 1-40-107(2), C.R.S. (2013), on April 23, 2014. Petitioners Mizraim S. Cordero and Scott Prestige filed an appeal, pursuant to Section 1-40-107(2), C.R.S. (2013), on April 24, 2014. Both appeals were consolidated into this action for purposes of briefing.

## **II. Statement of Facts.**

Initiative #89 amends the Colorado Constitution to establish a right to Colorado's environment, including its clean air, pure water, and natural and scenic values; declaring that Colorado's environment is the common property of all Coloradans; requiring state and local governments, as trustees, to conserve the environment; and providing that if a state and a local law conflict, the more restrictive and protective law governs.

The Title set by the Title Board correctly and fairly expresses the true intent and meaning of Initiative #89, and will not mislead the public. The Title tracks Initiative #89's structure, using similar, and often identical, language.

The Title, as amended at the rehearing on April 16, 2014, reads:

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.

### **SUMMARY OF ARGUMENT**

Initiative #89 contains a single subject by establishing a right to Colorado's environment, including its clean air, pure water, and natural and scenic values.

Initiative #89 does not combine an array of disconnected subjects into the measure for the purpose of garnering support from various factions, and voters will not be surprised by, or fraudulently led to vote for, any surreptitious provisions coiled up in the folds of a complex initiative. Petitioners' concerns about the effects that Initiative #89 could have on other laws are not appropriate for review at this stage.

The Title satisfies Colorado law because it fairly and accurately sets forth the major features of Initiative #89 and is not misleading. It is improper to define terms in the Title that are not defined in the measure. Omission of the terms "fundamental right" and "future generations," does not render the Title confusing and misleading to voters. The Title should not include an explanation that the measure would eliminate the distinction between statutory and home-rule

municipalities, because it is incorrect, and it would require the Title Board to improperly engage in an interpretive analysis of the legal implications of the measure.

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

## **ARGUMENT**

### **I. The Initiative Complies with the Single Subject Requirement.**

#### **A. Standard of Review.**

Article V, section 1(5.5) of the Colorado Constitution, and section 1-40-106.5(1)(a), C.R.S. (2013), provide that a proposed initiative must be limited to “a single subject which shall be clearly expressed in its title.” “A proposed initiative violates this rule if its text relates to more than one subject, and has at least two distinct and separate purposes not dependent upon or connected with each other.” *In re Initiative for 2011-2012 # 3*, 274 P.3d 562, 565 (Colo. 2012).

One purpose of the single subject requirement is to apprise voters of the subject of a measure, so that surreptitious measures that could result in voter surprise or fraud are not placed on the ballot. *In re Initiative for 2001-2002 # 43*, 46 P.3d 438, 441 (Colo. 2002); *see also* §1-40-106.5(1)(e)(II), C.R.S. (2013). Implementing provisions that are directly tied to an initiative's central focus are not

separate subjects. *In re Initiative for 1999-2000 # 258(A)*, 4 P.3d 1094, 1097 (Colo. 2000).

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

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

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

However, “the single subject requirement should be construed liberally to avoid unduly restricting the initiative process.” *In re Initiative for 2007-2008 # 61*, 184 P.3d 747, 750 (Colo. 2008).

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

Initiative #89 contains a single subject: 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.

Initiative #89 does not present either of the "dangers" attending omnibus measures. *See In re Initiative 2001-2002 # 43*, 46 P.3d 438, 442-43 (Colo. 2002). First, the proponents did not combine an array of disconnected subjects into the measure for the purpose of garnering support from various factions. *See Id.* Initiative #89 differs from initiatives 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 Waters II*, 898 P.2d at 1080. This Court has repeatedly upheld the action of the Title Board in setting titles when the subject of creation of a public trust standard was not paired with a separate and discrete subject in a proposed initiative. *See In re Initiative on Water Rights*, 877 P.2d 321, 324-25 (Colo. 1994); *see also In re Initiative for 1995-1996 # 1996-6*, 917 P.2d 1277, 1278 (Colo. 1996); *In re #3*, 274 P.3d at 566-67.

Initiative #89 also fails to trigger the second "danger" of omnibus measures because voters will not be surprised by, or fraudulently led to vote for, any “surreptitious provision[s] ‘coiled up in the folds’ of a complex initiative.” *In re #43*, 46 P.3d at 442-43. No such surprise would occur should voters approve Initiative #89 because the plain language of the measure unambiguously proposes a new "right to Colorado’s environment," describes the impact of that right on other legal rights, and lays out procedures for implementing the constitutional amendment. Furthermore, Initiative #89 is not overly lengthy or complex, nor is the plain language confusing or otherwise misleading. *See In re Initiative for 2011-2012 #3*, 274 P.3d 562, 567 (Colo. 2012).

Finally, to the extent that Petitioners raise concerns about “conflicts with appropriative water rights,” *Kemper Petition for Review*, p. 3, and preemption of state or federal statutes by local governments, *id.*, *Cordero and Prestidge Petition for Review*, p. 4, it is not the role of the Court at this stage to opine on the merits of Initiative #89 nor 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.”)

As such, Initiative #89 complies with the single subject rule.

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

### **A. Standard of Review.**

The Title Board is required to set a title that “consist[s] of a brief statement accurately reflecting the central features of the proposed measure.” *In re Initiative on “Trespass-Streams with Flowing Water”*, 910 P.2d 21, 24 (Colo. 1996). Titles and submission clauses should “enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal.” *In re Initiative for 2009-2010 # 24*, 218 P.3d 350, 356 (Colo. 2009) (quoting *In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). The purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose. *See id.*

### **B. The Title and Submission Clauses Are Not Misleading.**

The Title for Initiative #89 is clear and does not mislead the voters. The text of Initiative #89 first sets forth a purposes and findings paragraph declaring that Colorado's environment is the common property of all Coloradans, that conservation of Colorado's environment, including its clean air, pure water, and natural and scenic values is fundamental; and that Colorado's environment should

be protected and preserved for all Coloradans, including generations to come.

Next, Initiative #89 establishes a right to Colorado's environment, including its clean air, pure water, and natural and scenic values, and provides that state and local governments, as trustees of the environment, are to conserve it for the benefit of all Coloradans.

Finally, Initiative #89 allows local governments to implement this environmental right by enacting laws that are more restrictive and protective of the environment than state laws, and asserting that if state or local laws conflict, the more restrictive or protective law or regulation governs. The Title for Initiative #89 captures the measure's text in a clear and straightforward manner.

The petitioners argue that the title set by the Title Board for Initiative # 89 is inaccurate and mischaracterizes the text of the initiative. First, they claim that the failure to define the terms "environment," "fundamental," "conserve," and "public trust doctrine," renders the Title misleading. *See Cordero and Prestidge Pet. for Review, p. 4.* The term "environment" is defined in Initiative #89 and in the Title as including "clean air, pure water, and natural and scenic values." The other terms are not defined in the measure and, thus, "such a definition must await future judicial construction and cannot appropriately be included in the title or submission clause." *In re Initiative on Water Rights, 877 P.2d at 327.*

Second, Petitioners contend that the omission of the terms “fundamental right” and “future generations,” renders the Title confusing and misleading to voters. *See Kemper Pet. for Review*, p. 5. The Court is not to “consider whether the Title Board set the best possible title; rather, [its] duty is to ensure that the title “fairly reflect[s] the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board.” *In re Initiative for 2007-2008 # 62*, 184 P.3d 52, 58 (Colo. 2008).

Finally, Petitioners suggest that the Title is flawed because it “fails to inform voters” that the measure “eviscerates the distinction between statutory and home-rule municipalities.” *See Cordero and Prestidge Pet. for Review*, p. 5. This statement is not only incorrect, but including such an explanation in the Title would require the Title Board to engage in an interpretive analysis of the legal implications of the measures, including their possible effect upon other constitutional provisions in all manner of contexts— which this Court has repeatedly held not to be the Title Board’s task. *In re #24*, 218 P.3d at 355-56; *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 1127, 1132 (Colo. 1996).

Here, the Title of Initiative # 89 succinctly captures the key features of the measure, is not likely to mislead voters as to the initiative's purpose or effect, nor does the title conceal some hidden intent.

### **CONCLUSION**

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

Respectfully submitted this 13th day of May, 2014.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 13<sup>th</sup> day of May, 2014 a true and correct copy of the foregoing **RESPONDENTS' OPENING BRIEF** was filed and served via the Integrated Colorado Courts E-Filing System to the following:

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