

<p>SUPREME COURT OF COLORADO 2 East 14th Avenue Denver Colorado 80203</p> <p>ORIGINAL PROCEEDING UNDER C.R.S. § 1-40-107(2) Appeal from the Title Board</p>	
<p>IN RE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE SET FOR INITIATIVE 2015-2016 #4</p> <p>Petitioner: Douglas Kemper</p> <p>v.</p> <p>Respondents: Phillip Doe and Barbara Mills-Bria</p> <p>and</p> <p>Title Board: Suzanne Staiert, David Blake, and Jason Gelender</p>	<p>COURT USE ONLY</p>
<p>Attorney for Respondents:</p> <p>Name: James Daniel Leftwich (#38510) Address: MindDrive Legal Services, LLC 1877 Broadway, Suite 100 Boulder, CO 80302 Phone: (720) 212-0831 Email: dan@minddrivelegal.com</p>	<p>Supreme Court Case No.: 2015SA15</p>
<p>RESPONDENTS' ANSWER BRIEF</p>	

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).

X It does not exceed 18 pages.

X It contains 3871 words.

The undersigned also certifies that the brief complies with C.A.R. 28(k).

X 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.

X 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.

s/James Daniel Leftwich

James Daniel Leftwich

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT1

ARGUMENT 2

 I. The Initiative Complies With The Single Subject Requirement ... 2

 A. Standard of Review 2

 B. Initiative #4 Contains a Single Subject 3

 1. Initiative #4 does not attempt to accomplish
 multiple discrete purposes 4

 2. Whether the Initiative creates a new common
 property interest "at odds with Colorado's
 established legal regime" does not mean it violates
 the single subject requirement7

 3. There is no "danger of voter surprise and fraud"
 or "logrolling" from the language of the initiative .. 11

 II. The Title of the Initiative is Not Confusing or Misleading and
 Fairly Reflects the Measure's Intent 14

 A. Standard of Review 14

 B. The Title for the Initiative Fairly Informs the Voters of the
 Subject and Purpose of the Measure15

CONCLUSION18

TABLE OF AUTHORITIES

Cases	Page
<i>In re Proposed Initiative “Public Rights in Waters II,”</i> 898 P.2d 1076 (Colo. 1995)	4
<i>In re Matter of Title, Ballot Title, and Submission Clause for 1997-1998 #30,</i> 959 P.2d 822 (Colo. 1998)	13
<i>In re Title, Ballot Title, Submission Clause, and Summary for 1997-1998 #74,</i> 962 P.2d 927 (Colo. 1998)	2, 3
<i>In re Title, Ballot Title and Submission Clause, and Summary for</i> <i>1999-2000 #256,</i> 12 P.3d 246 (Colo. 2000)	4, 14, 15
<i>In re Title, Ballot Title and Submission Clause for 2001-2002 #21 and #22,</i> 44 P.3d 213 (Colo. 2002)	16
<i>In re Title, Ballot Title, Submission Clause, and Summary for 2005-2006 #73,</i> 135 P.3d 736 (Colo. 2006)	9
<i>In re Title, Ballot Title and Submission Clause, and Summary for 2007-2008</i> <i>#17,</i> 172 P.3d 871 (Colo. 2007)	4, 5
<i>In re Title, Ballot Title, Submission Clause for 2007-2008 #62,</i> 184 P.3d 52 (Colo. 2008)	3, 17
<i>In re Title, Ballot Title, and Submission Clause for 2009-2010, #24,</i> 218 P.3d 350 (Colo. 2009)	13
<i>In re Title, Ballot Title & Submission Clause for 2009-2010 #45,</i> 234 P.3d 642 (Colo. 2010)	15, 18
<i>In re Title, Ballot Title & Submission Clause for 2011-2012 #3,</i> 274 P.3d 562 (Colo. 2012)	3, 8, 11, 12
<i>In re Title, Ballot Title, and Submission Clause for 2011-2012 #45,</i> 274 P.3d 576 (Colo. 2012)	8

In re Title, Ballot Title and Submission Clause for 2013-2014 #85,
328 P.3d 136 (Colo. 2014) 14, 16, 17, 18

In re Title, Ballot Title, and Submission Clause for 2013-2014 #89,
328 P.3d 172 (Colo. 2014) 5, 6, 10

Loonan v. Woodley, 882 P.2d 1380 (Colo. 1994) 2

Statutes

C.R.S § 1-40-106.5 1

Colorado Constitution

Colo. Const. art. V, § 1(5.5) 1

Phillip T. Doe and Barbara Mills-Bria ("Respondents"), through their undersigned counsel, respectfully submit this Answer Brief in support of the title, ballot title and submission clause (collectively, the "Title") that the Title Board set for Proposed Initiative 2015-2016 #4 ("Initiative #4") and in response to the Petitioner's Opening Brief.

SUMMARY OF ARGUMENT

Pursuant to Article V, § 1(5.5) of the Colorado Constitution and C.R.S. §1-40-106.5, the Board had jurisdiction to set the Title, as the proposed Initiative is limited to a single subject. Initiative #4 carries out one general objective or purpose: the establishment of a Public Trust Doctrine to protect and preserve the environment and Public Trust Resources for the benefit of the people of the state. Every provision is necessarily connected to the fundamental purpose of the initiative.

Petitioner's arguments against the Title Board's actions go to the merits of Proposed Initiative #4, or speculate about the future interpretation, scope and effects of the Initiative, if enacted. In light of this Court's limited role in the review of the Title Board's decisions, Petitioner's arguments should be rejected, and the decision of the Title Board on the single subject requirement should be affirmed.

ARGUMENT

I. The Initiative Complies With The Single Subject Requirement

A. Standard of Review

Respondents incorporate the standard of review in their Opening Brief, and agree that Petitioner preserved this issue for appeal. In response to Petitioner's statement of the standard of review, Respondents concur, but add the following principle regarding the importance of the constitutional right of initiative in the Court's review:

The right of initiative and referendum, like the right to vote, is a fundamental right under the Colorado Constitution. Likewise both the right to vote and right of initiative have in common the guarantee of participation in the political process. In light of the nature and seriousness of these rights, we have held that constitutional and statutory provisions governing the initiative process should be "liberally construed" so that "the constitutional right reserved to the people 'may be facilitated and not hampered by either technical statutory provisions or technical construction thereof, further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.'"

Loonan v. Woodley, 882 P.2d 1380, 1383-84 (Colo. 1994) (citations omitted); *see also In re Title, Ballot Title, and Submission Clause for 1997-1998 #74*, 962 P.2d 927, 929 (Colo. 1998) ("1997-98 #74) (the single-subject requirement must be "liberally construed so as not to impose undue restrictions on the initiative process.") .

B. Proposed Initiative #4 Contains a Single Subject

Petitioner attempts to artificially separate the provisions of the initiative into more than one subject, isolating certain phrases while disregarding others that are necessarily connected. "Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's Constitution." *1997-98 #74*, 962 P.2d at 929.

A proposed initiative contains a single subject if the matters included are "necessarily and properly connected" rather than "disconnected or incongruous." *In re Title, Ballot Title and Submission Clause for 2011-2012 #3*, 274 P.3d 562, 565 (Colo. 2012) ("*2011-12 #3*"). If the initiative tends to achieve or to carry out one general object or purpose, it constitutes a single subject. *In re Title, Ballot Title and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 60 (Colo.2008) ("*2007-08 #62*"). Thus, an initiative violates the single subject requirement only when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes. *Id.*

1. Initiative #4 does not attempt to accomplish multiple discrete purposes

Petitioner claims Initiative #4 is "so broad that is impossible to define a single subject." Petitioner's Opening Brief ("Pet. Br.") at 9. However, the breadth of an initiative, taken alone, does not determine whether it violates the single subject requirement, if the provisions of the initiative are connected. *In re Title, Ballot Title and Submission Clause for 1999-2000 #256*, 12 P.3d 246, 254 (Colo. 2000) ("1999-00 #256").

Petitioner cites to cases where a common theme of "water" or "environmental conservation" was too broad to contain a single subject. Pet. Br. at 9-10 (citing, *In re Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1080 (Colo. 1995) ("*In re Waters II*"); and *In re Title, Ballot Title and Submission Clause for 2007-2008 #17*, 172 P.3d 871, 875-76 (Colo. 2007) ("*2007-08 #17*"). In *In re Waters II*, the Court found the proposal constituted more than a single subject because there was no "necessary connection" between the public trust that would be created in water rights and district election requirements. *See, In re Waters II*, 898 P.2d at 1080 ("No necessary connection exists between the two district election requirements paragraphs and the two public trust water rights paragraphs."). Similarly, *2007-08 #17*

involved an initiative that encompassed more than one subject because "the public trust standard subject is paired with the subject of reorganizing existing natural resource and environmental protection divisions, programs, boards, and commissions, and these are separate and discrete subjects that are not dependent upon or necessarily connected with each other." *2007-08 #17*, 172 P.3d at 875-76 .

In contrast, other initiatives that proposed to enact a public trust doctrine have been found to contain a single subject. For example, *In re Title, Ballot Title, and Submission Clause for 2013-2014 #89*, 328 P.3d 172 (Colo. 2014) ("*2013-14 #89*") found that "the creation of a public right to Colorado's environment" constituted a single subject, and that subject was "not an overly broad, overarching category," as each of Initiative #89's subsections was properly connected to that subject. The Court described how the subsections were connected to the subject:

"Proposed subsection (1) declares that Colorado's environment is the common property of Coloradans; therefore, in unambiguous terms, this subsection states that the purpose of Initiative #89 is the same as the subject, namely, the creation of a public right to Colorado's environment. Proposed subsections (2) and (3) then provide the mechanism for carrying out the objective of subsection (1). Thus, contrary to Petitioners' arguments, these two subsections are necessarily and properly connected to the subject of creating a

public right to Colorado's environment, and therefore, their inclusion does not violate the single subject requirement."

Id. at 177; *see also* 2011-12 #3, 274 P.3d at 567 (affirming single subject in "Colorado Public Trust Doctrine" and distinguishing *In re Waters II* and 2007-08 #17, *supra*).

Petitioner tries to distinguish the Court's holding in 2013-14 #89, *supra*, by claiming that Initiative #4 encompasses much broader subject matter than Initiative #89, because it "creates a new common property interest in natural resources and water that are currently privately held and requires criminal prosecution referral for certain activities." Pet. Br. at 10. However, the only relevant inquiry is whether the provisions in Initiative #4 are "properly and necessarily connected" to a single subject. As discussed, *supra*, they are.

Moreover, whether Initiative #4 is interpreted to include common ownership of "natural resources that are currently privately held" does not have any bearing on whether a single subject is involved. 2013-14 #89, 328 P.3d at 178 ("Not only is the effect of an initiative outside of the scope of our review, but the mere fact that an initiative may create a change does not mean that it violates the single subject requirement" (citations omitted)).

The inclusion of enforcement provisions (whether criminal or civil) does not violate the single subject requirement either. *2013-14 #89*, 328 P.3d at 178 (provisions describing the legal framework necessary to protect a public right in the environment are necessarily connected to the subject).

Initiative #4 clearly identifies its central purpose in the first sentence of the proposed amendment as establishing "[t]he state's duties under the public trust doctrine to secure the rights of the people to protect natural resources." Appendix A to Pet. Br. ("App. A") at 2. Its following provisions are all related and necessarily connected to those public trust duties, including a definition of the Public Trust Resources that are subject to the public trust, rights of beneficiaries of the public trust, standards to be applied as trustee, and enforcement provisions necessary to implement that doctrine. *Id.* at 2-3.

2. Whether the Initiative creates a new common property interest "at odds with Colorado's established legal regime" does not mean it violates the single subject requirement

Petitioner argues that "[c]reation of a common property interest in natural resources such as water and minerals is at odds with Colorado's established legal regime" and is, therefore, a "separate subject from creating an inalienable right to environmental protection." Pet. Br. at 11-12; 15-19. First, this blanket assertion is wrong on the facts. As described, *supra*,

Initiative #4's placement of Public Trust Resources under the common property rights of all the people is connected to the state's obligation as a trustee to preserve and maintain those resources for the beneficiaries of the public trust. App. A at 2-3. That relevant connection satisfies the single subject requirement. *E.g., 2011-12 #3, 274 P.3d at 565.*

Petitioner's arguments about the alleged conflicts that would be created with existing legal regimes focus on the merits and potential interpretation and effects of the Initiative, which is beyond the scope of this Court's inquiry into the single subject requirement. Petitioner's arguments about the potential effects of Initiative #4 on pre-existing water rights, and mineral rights (Pet. Br. at 13) are very similar to the arguments raised by the same Petitioner in *In re Title, Ballot Title, and Submission Clause for 2011-2012 #45, 274 P.3d 576 (Colo. 2012) ("2011-12 #45)*. In that case, the argument was made that the measure would "so drastically alter the landscape of Colorado water law that it could not possibly contain a single subject." *Id.* at 581, fn. 2. The Court rejected that argument on the ground that the scope of its review on the single subject requirement is limited, and it may not issue opinions about how a measure might be applied and what the effects might be. *Id.* (the Court refrains from analyzing the merits or potential effects of the measure,

but confines its single subject review to the plain language of the measure); *see also In re Title, Ballot Title, Submission Clause, and Summary for 2005-2006 #73*, 135 P.3d 736, 740 (Colo. 2006) ("The mere fact that a constitutional amendment may affect the powers exercised by the government under pre-existing constitutional provisions does not, taken alone, demonstrate that a proposal embraces more than one subject. All proposed constitutional amendments or laws would have the effect of changing the *status quo* in some respects if adopted by the voters.").

Petitioner points out that "[n]umerous regulatory agencies in Colorado protect the environment while acknowledging and respecting private ownership, development and use of natural resources" and lists several examples. Pet. Br. at 15-16. Regardless of Petitioner's assessment of those agencies' performance in protecting the environment, Initiative #4 is directed at imposing public trust obligations to strengthen that protection. While continuing to allow those existing regimes to function as they have in the past may be acceptable to some voters, and unacceptable to others, that is a merits question that the Court is not to decide in this proceeding.

Similarly, whether the public trust doctrine proposed in Initiative #4 is "broader than the common law public trust doctrine" (Pet. Br. at 17-19), or

"imposes sweeping new obligations for the State to protect the environment" (Pet. Br. at 19-22) is not dispositive of whether it constitutes a single subject. Neither is the fact that Initiative #4 "requires referral for prosecution of data manipulation" (Pet. Br. at 23-24) a reason to reject the Initiative on single subject grounds. Protection of the environment, the obligations imposed on the state as a Trustee under the public trust doctrine, and methods of implementation and enforcement are clearly connected to the measure's single subject. *See 2013-14 #89*, 328 P.3d at 176 (measure seeking to "create a public right in the state's natural resources" met the single subject requirement because "each of the sections relates to the same subject, the plain language of [the initiative] creates a public right and then lays out the procedures for implementing and enforcing that right").

Petitioner's argument that Initiative #4 "improperly combines unrelated substantive and procedural changes" (Pet. Br. at 24-25) simply begs the question of whether the substantive creation of a public trust obligation for government to protect public trust resources and the procedural provisions to carry out that obligation have a "necessary or proper connection with each other." As discussed, *supra*, they clearly are related and have that necessary and proper connection.

3. There is no "danger of voter surprise and fraud" or "logrolling" from the language of the initiative

Petitioner's arguments that Initiative #4 presents a "danger of voter surprise and fraud by logrolling three distinct purposes hidden under a broad theme of preserving the environment and natural resources" (Pet. Br. at 26-27) has no basis. *2011-12 #3, supra*, also involved an initiative that sought to enact a "Colorado public trust doctrine," in that case for the protection of the "public's rights in waters of natural streams." The Court held the proposal presented a single subject because it did not present either of the dangers sought be prevented by the single subject requirement.

"First, the proponents did not combine an array of disconnected subjects into the measure for the purpose of garnering support from various factions. . . . Rather, Initiative 3's proposed subsections all relate to the "Colorado public trust doctrine" and that doctrine's impact on the "public's rights in waters of natural streams."

In re 2011-12 #3, 274 P.3d at 567 (citations and examples omitted). As discussed, *supra*, Initiative #4 cannot be characterized as combining "an array of disconnected subjects into the measure for the purpose of garnering support from various factions."

The Court in *2011-12 #3*, also addressed the potential for fraud and surprise and found there was none:

"Initiative 3 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. . . . [t]he plain language of the measure unambiguously proposes a new 'Colorado public trust doctrine,' describes the impact of that doctrine on other legal rights, and lays out procedures for implementing and enforcing the constitutional amendment." (citations omitted)).

Id., 274 P.3d at 567-68.

Here, the central purpose and provisions for implementation of that purpose are clearly identified in the measure. They can hardly be characterized as "surreptitious provision[s] 'coiled up in the folds' of a complex initiative." Consequently, the measure does not create a risk of surprise or fraud. Petitioner's argument on this point hinges on an assumption that is unwarranted by the plain language of the measure. The assumption is that "[a] voter would be understandably surprised to learn that, by voting to acknowledge a new inalienable right in clean air and clean water, *he or she is voting to abolish private property rights in natural resources that have existed for over 150 years.*" Pet. Br. at 26 (emphasis added). Nowhere in the measure does it say that private property rights in natural resources will be abolished by the creation of a public trust doctrine to preserve and protect the environment.

The Initiative defines Public Trust Resources as "clean air, clean water, and the *preservation of the environment and natural resources*." App. A at 2 (emphasis added). Reading Initiative #4 as a whole, the public has a right to "preservation" of those resources, that are necessary to "provide for the health, safety, and happiness of all natural persons, including future generations." App. A at 2-3. Petitioner's interpretation is not warranted by reading the plain language in the context of the entire measure. *In re Title, Ballot Title, and Submission Clause for 2009-2010, #24*, 218 P.3d 350, 353 (Colo. 2009) ("In order to determine whether an initiative carries out a single object or purpose, an initiative is reviewed as a whole rather than piecemeal, and individual statements are examined in light of their context.").

If Initiative #4 is enacted, courts will be able to interpret the legal scope and effects of the measure in the context of actual claims, using the courts' ordinary method involving "a case-by-case decision making process focusing on a record and the application of law to the operative facts." *In re Matter of Title, Ballot Title, and Submission Clause for 1997-1998 #30*, 959 P.2d 822, 829 n.2 (Colo. 1998). However, the Court does not have jurisdiction in this proceeding to decide that Initiative #4 should not be presented to the voters simply because it could alter existing environmental protection standards

potentially impacting uses of private property. *See 1999-00 #256*, 12 P.3d at 254 (Colo. 2000) (the Court noted that it has never held that “just because a proposal may have different effects or that it makes policy choices that are not inevitably interconnected that it necessarily violates the single subject requirement. It is enough that the provisions of a proposal are connected.”).

As the provisions contained in Initiative #4 are necessarily connected to a single subject, it meets the constitutional requirement and the Title Board had jurisdiction to set the Title.

II. The Title of the Initiative is Not Confusing or Misleading and Fairly Reflects the Measure's Intent

A. Standard of Review

Respondents incorporate the standard of review in their Opening Brief, and agree that Petitioner preserved this issue for appeal. Respondents concur with the standard of review in Petitioner's Opening Brief, with the following addition regarding the discretion and deference given to the Title Board's actions. The Title Board is vested with considerable discretion in setting the title and ballot title and submission clause. *In the Matter of the Title, Ballot Title and Submission Clause for 2013-2014 #85*, 328 P.3d 136, 144 (Colo. 2014) (“2013-14 #85”); see also *1999-00 #256*, 12 P.3d at 250 (Colo. 2000):

"In reviewing the actions of the Board, we grant 'great deference to the board's broad discretion in the exercise of its drafting authority.' We will not rewrite the titles and summary to achieve the best possible statement of the proposed measure's intent. We will reverse the Board's action in setting the titles only when the language chosen is clearly misleading." (citations and quotations omitted).

B. The Title for the Initiative Fairly Informs the Voters of the Subject and Purpose of the Measure.

A title is sufficient if it provides voters with a "reasonably ascertainable expression of the initiative's purpose." *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 648 (Colo. 2010) ("2009-10 #45).

The Title set for Initiative #4 meets this requirement.

Petitioner contends the opening phrase of the Title is misleading because it describes the constitutional amendment as one "concerning common ownership by all Coloradans of public trust resources" instead of stating that the Initiative will make public trust resources the "common property" of all Coloradoans. (Pet. Br. at 29). This is a distinction without a difference, and one that the Title Board is not required to make. "The Title Board's duty in setting a title is to summarize the central features of the proposed initiative; in so doing, the Title Board is not required to explain the meaning or potential effects of the proposed initiative on the current statutory

scheme.") *2013-2014 #85*, 328 P.3d at 144-45. It has broad discretion in formulating the language of a title. *Id.*

The Title Board was not required to use the exact language of the Initiative in the Title. In the case of *2013-14 #85*, the Court addressed Petitioner's argument that "hydraulic fracturing" was a central aspect of the initiative and omission of that term from the titles was misleading to voters.

The Court rejected that argument and upheld the titles:

Although section 2 of the initiatives makes clear that the setback requirement applies to new oil and gas wells "including those using hydraulic fracturing," this method is but one method of developing oil and gas wells. The titles are not misleading simply because they omit hydraulic fracturing or other methods of developing oil and gas wells that are subject to the initiative's setback requirements.

Id., 328 P.3d at 147.

Petitioner next implies that voters will be tricked into thinking that the phrase "concerning common ownership of public trust resources" simply concerns something that already exists under Colorado law. Pet. Br. at 30. This despite the fact that the Title is describing an *amendment to the constitution* concerning common ownership of public trust resources (as newly defined), and, according to Petitioner, imposing "sweeping new obligations" requiring the State to "seek natural resource damages from those

entities that cause substantial impairment of public trust resources." Pet. Br. at 19; 22. Such a speculative inference is one that the Title Board is not required to account for in the Title. *In re #85*, 328 P.3d at 145 ("a title is not unclear or misleading simply because it does "not refer to the initiative's possible interplay with existing state and federal laws."); *In re Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 60 (Colo. 2008) ("The interplay of a ballot initiative with various provisions of existing law is an issue for post-election litigation, not the basis for a ballot title challenge. The Title Board has substantial discretion in formulating the verbiage of a title and is not required to draw a "Before and after" picture of the law in the ballot title.").

Finally, Petitioner argues the Titles are invalid on the ground that they "omit mention that the Initiative's retroactive effect pertains to commercial dealings" as mentioned in the Initiative. (Pet. Br. at 31). Petitioner agrees the Titles include references to retroactive application of the Initiative, "regardless of any prior federal, state, or local approval" but argues voters would not be informed that "commercial dealings would be in jeopardy, even where any necessary federal, state, or local permits were obtained before enactment of the Initiative." (Pet. Br. at 32).

The Title Board is not required to include every aspect of an initiative in the title and submission clause or account for every possible effect. *2013-14 #85*, 328 P.3d at 148. Moreover, other provisions in the Title that Petitioner ignores include the obligation of the state to "seek natural resource damages from *anyone* who substantially impairs them"; and "requiring referral for prosecution of *any* criminal offense involving the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit." App. A to Pet. Br. at 12. The use of the terms "any" and "anyone" logically encompasses persons engaged in commercial dealings. The Title provides a "reasonably ascertainable expression of the initiative's purpose" and is sufficient under the law. *2009-2010 #45*, 234 P.3d at 648.

CONCLUSION

Respondents respectfully request that the court affirm the Title Board's denial of the Motions for Rehearing and affirm the Title Board's actions as meeting the single subject and title setting requirements found in the constitution and relevant statutes.

Respectfully submitted this 24th day of February, 2015.

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I hereby certify that on February 24th, a true and correct copy of the foregoing RESPONDENTS' ANSWER BRIEF was filed and served via the Integrated Colorado Courts E-Filing System (ICCES) to the following:

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