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| SUPREME COURT OF COLORADO<br>2 East 14th Avenue<br>Denver, CO 80203 | DATE FILED: May 29, 2014 4:06 PM |
| Original Proceeding<br>Pursuant to Colo. Rev. Stat. § 1-40-107(2)<br>Appeal from the Title Board | |
| In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013–2014 #103<br><br>**Petitioners:** MIZRAIM S. CORDERO and SCOTT PRESTIDGE, as Registered Electors of the State of Colorado,<br>and<br>**Respondents:** PHILLIP DOE, BARBARA MILLS-BRIA, and SANDRA TOLAND, Proponents,<br>and<br>**Title Board:** SUZANNE STAIERT, DANIEL DOMENICO, and JASON GELENDER. | ▲ COURT USE ONLY ▲ |
| **Attorneys for Petitioners:**<br>Richard C. Kaufman, No. 8343<br>Julie A. Rosen, No. 40406<br>Sarah K. Pallotti, No. 45077<br>Ryley Carlock & Applewhite<br>1700 Lincoln Street, Suite 3500<br>Denver, Colorado 80203<br>Phone: (303) 863-7500<br>Email: rkaufman@rcalaw.com; jrosen@rcalaw.com; spallotti@rcalaw.com | **Case No. 14SA137** |
| **ANSWER BRIEF OF MIZRAIM S. CORDERO AND SCOTT PRESTIDGE** | |

## 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.
X It does not exceed 18 pages.

The brief complies with C.A.R. 28(k):

X 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 issues was raised on rule on.

□ For the party responding to the issue:
It contains under a separate heading, a statement of whether each 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/Richard C. Kaufman*

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## I. SUMMARY OF ARGUMENTS

The Proponents of Initiative 2013–2014 #103 ("Initiative 103") and the Ballot Title Setting Board (the "Board") assert essentially the same three arguments. First, the Proponents and the Board argue that the Board properly accepted the substitution of Ms. Toland for Ms. Mills-Bria as the designated representative of Initiative 103 because § 1-40-106, C.R.S. does not explicitly prohibit substitutions. The Proponents and the Board further assert that the information gathering purpose of § 1-40-106, C.R.S. was in no way affected by the last minute substitution of Ms. Toland who was not familiar with the actions taken with respect to Initiative 103 prior to the hearing held April 25, 2014 (the "Rehearing"). The Proponents also argue that the substitution should be permitted as they were simply following the instructions of the Board.

Next, the Proponents and the Board assert that the Board properly proceeded to set title as each provision of Initiative 103 is related to the general subject of "public ownership of environmental or natural resources" or recognition of the public trust doctrine. The Board specifically argues that the details of Initiative 103 are necessary to carry out its purpose.

Lastly, the Proponents and the Board assert that the title, ballot title, and submission clause (collectively, the "Title") are fair, clear, and accurate.

According to the Proponents and the Board, the Title does not mislead voters despite the fact that it includes numerous vague terms and materially omits two key provisions of Initiative 103.

Each of the Proponents' and the Board's arguments must summarily fail. Had the General Assembly intended to provide for substitutions of designated representatives, they would have done so when they amended § 1-40-106, C.R.S., which addresses at length the powers bestowed upon the Board and the requirements of designated representatives. It is the duty of the legislature, not the Board, to accomplish this change. Despite the Proponents' and the Board's baseless assertion that the provisions of Initiative 103 are implementing mechanisms, they fail to demonstrate how each provision is necessary to effectuate the purpose of Initiative 103. Lastly, the arguments of the Proponents and the Board are unable to reconcile the confusing and misleading Title of Initiative 103.

Petitioners specifically incorporate by reference arguments from Petitioners' Opening Brief. Arguments from Petitioners' Opening Brief not addressed herein are not conceded.

## II. ARGUMENT

### A. The Board Lacked Jurisdiction to Set Title Where the Substitution of Designated Representatives is Not Permitted Under the Applicable Statutes.

#### 1. The silence of § 1-40-106, C.R.S. as to substitute designated representatives does not equate to an authorization of the Board's actions

The Proponents and the Board incorrectly conclude that because § 1-40-106, C.R.S. does not prohibit the substitution of designated representatives, the Board's acceptance of Ms. Toland as a substitute for Ms. Mills-Bria was proper. *See* Designated Representatives' Opening Brief, p. 7; Opening Brief of the Title Board, pp. 10-14. If the Court is to follow the logic of the Proponents and the Board, then the Board is entitled to take any action it so choses, as long as it is not explicitly prohibited by statute. For example, the Board could elect to include a private citizen as a member of the Board or to hold numerous rehearings on a single measure simply because "the statute is silent in this regard." Opening Brief of the Title Board, p. 11. By the Proponents' and the Board's reasoning, any time § 1-40-106, C.R.S. does not contain an outright prohibition or is even silent on an issue, the Board has free reign to conduct the initiative process however it sees fit. The comprehensive and detailed grant of power in § 1-40-106, C.R.S., however, reveals this was certainly not the intent of the General Assembly.

The Board is a creature of statute, and its powers and duties are limited to those proscribed therein. As the Court in *In re Title, Ballot Title, and Submission*

*Clause, and Summary Adopted February 10, 1992,* 831 P.2d 1301, 1306 (Colo. 1992) explained, "[t]he Board is a special statutory body created by the General Assembly for the purpose of implementing the constitutional right of initiative…the statutory scheme creating the Board contains detailed and comprehensive provisions delineating the Board's duties and the process and procedural standards by which the Board is to carry out its unique statutory charge."

Section 1-40-106, C.R.S. does not grant the Board general power to take whatever actions necessary to carry out its responsibilities, but rather specifically and individually creates each of the Board's powers and duties. The Generally Assembly elected to enumerate, in great detail, provisions addressing the required members of the Board, the specific day of the week on which public meetings are to be held, the time of day at which drafts must be submitted to the Secretary of State, the months in which the Board may vote on measures, the standards the Board must consider, mandatory language the board must use in any amendment to the constitution, and of course, the requirements and duties of the designated representatives. §§ 1-40-106(1) , (4).

The Generally Assembly's intent is clearly reflected in this comprehensive statute. Had it been the objective of the General Assembly to provide for substitutions of designated representatives, they certainly could have done so when

they made significant revisions to § 1-40-106, C.R.S., in particular the addition of subsection (4), which directly addresses the duties of designated representatives. The fact that the Generally Assembly did not elect to do so is highly illustrative. Furthermore, it is not the place of the Board to implement substitutions of designated representatives; such changes are strictly within the purview of the General Assembly and should be accomplished only by legislative enactment. *See Byrne v. Title Bd.*, 907 P.2d 570, 575-76 (Colo. 1995) ("In the face of such clear statutory language, we believe any change in the Title Board's meeting or hearing dates which are specified by statute, should be accomplished by legislative enactment and not judicial intervention."). Similarly, where § 1-40-106, C.R.S. plainly establishes the limitations of the Board's authority and the requirements of the designated representatives, a change allowing substitutions should only be effected by the legislature.

2. <u>The purpose of the designated representative requirement is impeded by allowing substitute representatives.</u>

The Proponents and the Board assert that Petitioners have failed to demonstrate any prejudice from the non-appearance of Ms. Mills-Bria or how the Board's information gathering process was impaired. *See* Designated Representatives' Opening Brief, p. 7; Opening Brief of the Title Board, p. 16. According to the Proponents and the Board, so long as there are two designated

representatives present at a meeting of the Board, the purpose of the designated representative requirement is sufficiently satisfied.

This argument fails to appreciate that it is the designated representatives' participation in the initiative process from start to finish which is critical to the information gathering purposes of the Board. Section 1-40-104, C.R.S. requires the proponents to designate two representatives "at the time of any filing of a draft as provided in [Article 40]." Thus, it is the designated representatives who are present at the Review and Comment hearing to answer questions posed by the Offices of Legislative Council and Legislative Legal Service in accordance with § 1-40-105, C.R.S. It is also the designated representatives who are present at the initial hearing and any subsequent rehearing where challenges to the prior actions of the Board will be heard. §§1-40-106, 107. Such meetings of the Board are highly interactive with much discussion between the Board, the proponents, and the objectors. The designated representatives have a very involved role throughout the initiative process; they are not simply two bodies in the room for procedural purposes as the Proponents and the Board contend.

In order to accurately provide information to the Board, both designated representatives must be present from start to finish of the initiative process. As the Court in *Hayes v. Ottke*, 293 P.3d 551, 557 (Colo. 2013) explained, the Board must be able to inquire of the designated representatives on any number of issues

including, "whether the measure contains a single-subject, whether proponents made substantive changes after the review and comment hearing beyond those in direct response to questions or comments by the legislative council, and whether the title as initially adopted is clear and best reflects the true import of the measure." This requirement allows the Board to "fully understand the intent and purpose of the proposed initiatives considered at such meetings by requiring the designated representatives to be available to explain the measures and answer the Board's questions." *Id.* at 556.

Ms. Toland's absence throughout the entire initiative process except for the Rehearing presents a significant hindrance to the Board's information gathering process. Ms. Toland was not present at the Review and Comment hearing and therefore does not know whether the Proponents made substantive changes to Initiative 103 or whether such changes were made in direct response to questions or comments posed by the legislative counsel. Nor was Ms. Toland present at the initial hearing to have knowledge of whether the Title as first adopted reflects the true intent of the Proponents. While the Petitioners recognize that Mr. Doe was present at the Rehearing to field the Board's questions, one can easily imagine a situation where both designated representatives are substituted just prior to a meeting of the Board, and the Board is unable to ascertain the information it needs to accurately set title.

3. The Secretary of State's procedure allowing for substitution does not relieve the Proponents of their statutory obligation to attend the Rehearing.

The Proponents claim they complied with the statutory requirements because a representative of the Secretary of State's office informed Ms. Mills-Bria she could withdraw as designated representative and appoint Ms. Toland in her absence. Designated Representatives' Opening Answer Brief, p. 7. The Court in *Hayes* dealt with a similar issue wherein the Secretary of State's office emailed the designated representatives notifying them they were not required to attend the meeting on the motion for rehearing. *Hayes*, 293 P.3d at 558. There, the Court held that such action on the part of the Secretary of State's office did not relieve the designated representatives of their statutory obligation to attend the meeting. *Id.* The Court specifically noted that in signing the notarized affidavit required by § 1-40-106(4)(b), C.R.S., both designated representatives "certified that they were aware…they were required to attend all meetings at which their proposed initiatives would be considered." *Id.*

The case at hand is directly analogous. Mr. Doe and Ms. Mills-Bria both signed a Notarized Affidavit of Designated Representative (attached to Petitioners' Opening Brief as Exhibits A and B, respectively), certifying that they were familiar with the provisions of Article 40 of Title 1, C.R.S., including the requirement to attend all meetings at which Initiative 103 would be considered. Despite her affirmation, Ms. Mills-Bria failed to attend the Rehearing. Regardless of the

statements of the Secretary of State's office, Ms. Mills-Bria was not discharged of her statutory obligation to appear at the Rehearing.

Because § 1-40-106, C.R.S. does not allow for substitutions of designated representatives and Ms. Mills-Bria failed to appear at the Rehearing in violation of § 1-40-106(4)(a), C.R.S., the Board lacked jurisdiction to set Title on Initiative 103. Therefore, this Court should reverse the actions of the Board.

### B. Initiative 103 Contains Multiple Subjects None of Which are Implementing Provisions Necessary to Effectuate Initiative 103's Purpose.

Both the Proponents and the Board argue that Initiative 103 contains a single subject and that each provision of the measure is necessary to implement Initiative 103. The Proponents characterize the single subject as the recognition of the public trust doctrine while the Board states that the single subject is public ownership of environmental or natural resources. Designated Representatives' Opening Answer Brief, p. 8; Opening Brief of the Title Board, p. 22. The provisions of Initiative 103, however, bear no necessary connection to effectuating these purposes and are thus separate and distinct subjects.

This Court has previously held that an initiative will not be found to violate the single-subject requirement on grounds it contains details relating to implementation, but only if the specified procedures have a necessary and proper relationship to the substance of the initiative. *See In re Title, Ballot Title, and*

*Submission Clause for 2009–2010 No. 45*, 234 P.3d 642 (Colo. 2010); *In re Title, Ballot Title, and Submission Clause for 1999–2000 No. 258(A)*, 4 P.3d 1094 (Colo. 2000); *In re Title, Ballot Title, and Submission Clause for 1997–1998 No. 74*, 962 P.2d 927 (Colo. 1998).

*In re No. 45* involved a constitutional amendment concerning the "[r]ight to heath care choice." *In re No. 45*, 234 P.3d at 644. The petitioners there argued that the initiative impermissibly contained three separate subjects in violation of article V, section 1(5.5) of the Colorado constitution . *Id.* at 646. The operative text of the initiative was as follows:

> No statute, regulation, resolution or policy adopted or enforced by the State of Colorado, its departments and agencies, independently or at the instance of the United States shall:
>
> (a) Require any person directly or indirectly to participate in any public or private health insurance plan, health coverage plan, health benefit plan, or similar plan; or
>
> (b) Deny, restrict, or penalize the right or ability of any person to make or receive direct payments for lawful health care services.

*Id.* at 645.

The Court found the single-subject requirement was not violated because both provisions were critical to carrying out the initiative's purpose of protecting individuals' right to choose their own health care. As the Court stated,

> Without the first provision, the General Assembly or state administrative agencies could mandate that individuals participate in health care plans. Without the second provision, the state could

> attempt to circumvent the first provision by requiring individuals to indirectly pay for health care services, thereby limiting individuals' ability to manage their own health care arrangements. Therefore, both provisions seek to achieve the central purpose of the initiative.

*Id.* at 647.

The initiative could not stand without the inclusion of both these provisions, and thus the Court found they were directly related to effectuating the central purpose of the initiative.

The Court in *In re No. 258(A)* again considered a single-subject challenge to an initiative which would require all public school students to be taught in English. *In re No. 258(A),* 4 P.3d at 1097. In accordance with that purpose, the measure contained provisions which would alter the power of school boards. *Id.* at 1098. In fact, the *only* means of implementing the initiative was to alter the power of the school boards. *Id.* The Court held these provisions did not violate the single-subject requirement because they were "a logical incident of adopting structured English immersion." *Id.* Where the central purpose of an initiative cannot be achieved without a certain provision, the inclusion of that provision will not be found to violate the single-subject requirement.

Lastly, the Court in *In re No. 74* addressed a challenge based on a single-subject violation to an initiative concerning school impact fees. *In re No. 74,* 962 P.2d at 928. Additional provisions of the initiative specified how the fee revenue would be used and how issues related to payment of or exemption from the fee

would be resolved. *Id.* The Court held that the initiative did not violate the single-subject requirement because each of these provisions was essential to accomplishing the initiative's purpose. *Id.* at 929. The Court concluded that such provisions were simply "a mechanism to administer the details" of the measure. *Id.*

Unlike the three cases above, where the additional provisions were absolutely necessary to effectuating the purpose of the measure, each provision of Initiative 103 is not required in order to carry out its purpose. In particular, subsection (4) of Initiative 103, which criminalizes the act of manipulating data, reports, or scientific information, in no way directly or logically follows from creating public ownership of natural and environmental resources. Criminalization of these particular acts is not a simple implementation measure necessary to achieve the purpose of Initiative 103, but is in fact a completely unrelated and distinct subject. In each of the cases above the provisions contained details about *how* the initiative was to be carried out with each provision being absolutely critical to the purpose and enactment of the measure. It strains all logic to conclude that criminalizing "data manipulation" is necessary in order to effectuate public ownership of natural and environmental resources.

The Board's reliance here on *In re Title, Ballot Title, and Submission Clause for 2011–2012 No. 3*, 274 P.3d 562 (Colo. 2012) is misplaced. In that case

each provision was narrowly tied to the enactment of the public trust doctrine as it relates to the public's interest in the water of natural streams. *Id.* at 568. Unlike Initiative 103, which endeavors to create a new criminal act that is in no way logically to related to a public trust, the measure in *In re No. 3* anticipated that enforcement provisions would be necessary and mandated them to the executive, legislative, and judicial branches. *Id.* at 569.

Lastly, the Proponents argue that subsection (4) "places a responsibility on the state to enforce existing laws in order to carry out its responsibilities to protect our environment and resources." Designated Representatives' Opening Answer Brief, p. 10. The Proponents are mistaken however, that the criminalization of manipulating data, reports, or scientific information in an attempt to utilize public trust resources for private profit is an existing law. This subsection actually creates an entirely new crime which does not have a necessary or proper relationship to Initiative 103's purpose of creating public ownership of natural resources.

The failure of the Proponents and the Board to demonstrate how this provision is necessary in order to enact public ownership of environmental or natural resources demonstrates that Initiative 103 contains multiple subjects in violation of § 1-40-106.5, C.R.S. The Court should therefore reverse the actions of the Board.

### C. The Failure to Mention Two Key Provisions Constitutes a Material Omission Resulting in a Confusing, Inaccurate, and Misleading Title.

Contrary to the arguments of the Proponents and the Board, the omission of two key provisions renders the Title misleading, confusing, and not reflective of Initiative 103's intent.

The Board specifically relies on the argument that it is not required to include every aspect of a proposal in the title and submission clause. Opening Brief of the Title Board, p. 28. While Petitioners recognize that each and every item of a measure need not and cannot be contained in the title, a title that contains "a material and significant omission" must be rejected. *In re Title, Ballot Title, and Submission Clause for 1999–2000 No. 29*, 972 P.2d 257, 268 (Colo. 1999).

The creation of a common property right is a central feature of Initiative 103, and yet the Title completely omits any reference to this provision. While the Proponents and the Board argue that the term "public ownership of natural and environmental resources" sufficiently conveys this concept to voters, this phrase is materially misleading as it omits a necessary step in the creation of public ownership, *i.e.*, the abrogation and conversion of personal property rights. Furthermore, the Title does not mention subsection (6), which prohibits the legislature from enacting any future law which may contradict the broad and vague provisions of Initiative 103. The omission of these two key provisions renders the

Title both confusing and deceiving to voters. As a result, the Court should reverse the actions of the Board and remand this matter with instructions.

## III. CONCLUSION

For the reasons set forth above, Petitioners respectfully request that the Court find the Board lacked jurisdiction to set title on Initiative 103 where only a single designated representative appeared at the Rehearing and where Initiative 103 violates the single-subject requirement. Alternatively, Petitioners request that the Court, upon a finding that the Title is unclear and misleading, remand this matter to the Board with instructions to amend the Title**.**

Respectfully submitted this 29th day of May, 2014 by:

RYLEY CARLOCK & APPLEWHITE

*/s/ Richard C. Kaufman*
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## CERTIFICATE OF SERVICE

I certify that on May 29, 2014, a true and correct copy of the above and foregoing **ANSWER BRIEF OF MIZRAIM S. CORDERO AND SCOTT PRESTIDGE** was filed and served via ICCES addressed to the following :

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