DATE FILED: May 29, 2014 5:23 PM

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 #103

Petitioners:

MIZRAIM S. CORDERO, SCOTT PRESTIDGE, and DOUGLAS KEMPER, as Registered Electors of the State of Colorado

v.

Title Board:

SUZANNE STAIERT, JASON GELENDER, and DANIEL DOMENICO

and

Respondents:

PHILLIP DOE, BARBARA MILLS-BRIA, and SANDRA TOLAND, Proponents.

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Case Number: 2014SA000137

ANSWER BRIEF OF PETITIONER KEMPER

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.

☒ It does not exceed 30 pages.

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

☒ For the party responding to the issue:

It contains, under a separate heading, placed before discussion of the issue, a statement of whether Petitioner agrees with the opponent's statements concerning the standard of review, 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.

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

S/ Stephen H. Leonhardt

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The Title Board's jurisdiction to set titles for an initiative is defined and limited by statute. The Board may not set titles at a meeting not attended by both designated representatives. It lacks statutory authority to excuse the statutory attendance requirement, or to allow a newly substituted designated representative at the rehearing. Ms. Mills-Bria's activity in this appeal confirms that she has not withdrawn as a designated representative; she simply sought to excuse her absence from the rehearing.

Initiative #103 contains multiple subjects with no necessary or proper connection, hidden under the broad theme of creating public rights in the environment. Such an overarching theme cannot be used to combine such disparate subjects as imposing public trust responsibilities, invalidating past permits, and creating a new crime.

The Title is deficient in its use of the phrase "public ownership of natural and environmental resources" in attempting to encompass the measure's different purposes. Moreover, the Title fails to disclose two clear, central features of Initiative #103: its creation of an inalienable right and its express applicability to previously granted permits.

ARGUMENT

A. The Statute Does Not Authorize Substitution of Designated Representatives, and the Title Board Lacks Statutory Authority to Create such a Right.

1. The Title Board's standard of review regarding the Title Board's jurisdiction is incorrect.

Petitioner Kemper disagrees with the Title Board's standard of review as to the issue of its statutory authority. The Title Board's statutory authority to act is reviewed *de novo*. *Hayes v. Ottke*, 293 P.3d 551, 554 (Colo. 2013). The Court first looks to the language of the statute in question. *Id.* Where that language is clear and unambiguous, the Court gives effect to the "plain and ordinary meaning of the statute, without resorting to other rules of statutory construction." *Id.*

2. The *Hayes* decision controls.

This Court's decision in *Hayes* is the leading decision, and indeed, the only reported case on the responsibilities of designated representatives under the recently enacted subsection (4) of C.R.S. § 1-40-106 at issue here. The Court in *Hayes* evaluated circumstances similar to those before the Court in this case, where a designated representative failed to attend the Board's rehearing. It held that the prohibition against setting title when a designated representative is absent is "unambiguous and inflexible." *Hayes,* 293 P.3d at 556. Neither representations by

the Secretary of State's office nor the Title Board's waiver relieved the proponents of the statutory attendance requirement. *Id.* at 558.

The Title Board asks this Court to disregard *Hayes*, and instead cites *Armstrong v. Davidson*, 10 P.3d 1278 (Colo. 2000), and *Fabec v. Beck*, 922 P.2d 330 (Colo. 1996) to support its assertion that liberal construction should be used to interpret all statutory provisions concerning the initiative process. But those cases were decided prior to the enactment of C.R.S. § 1-40-106(4), and addressed initiative proponents' circulation of petitions—not whether the Title Board had statutory authority to act in the first instance. Both *Armstrong* and *Fabec* recognized Coloradans have constitutional and statutory rights regarding petition circulation and determination of sufficiency. *See* Colo. Const. art. V, § 1 *and* C.R.S. § 1-40-116. There is no such constitutional or statutory right to substitute a designated representative.

This Court in *Armstrong* recognized its primary duty to "effectuate the word choice, intent, and purpose of the General Assembly," while preserving the right of initiative. 10 P.3d at 1282. The *Armstrong* Court held that the absence of a provision for a stay or postponement of the Title Board's action during appellate review indicated that the proponents may gather petition signatures during the appellate process. *Id.* at 1283. This is a wholly different inquiry than the issue

now before the Court. *Armstrong* discussed the rights of proponents to gather signatures—to which they have constitutional and statutory rights—and the statute's silence regarding whether those rights may be exercised during the appellate process. Here, the inquiry is whether the statute that limits the Title Board's authority to set titles, when a designated representative is absent, also gives the Title Board the implied authority to accept a substitute designated representative. No such authority is granted by the statute's express terms.

3. The Title Board lacks statutory authority to create a new right to substitute designated representatives.

The Title Board is a creature of statute, C.R.S. § 1-40-106(1), and its authority is clearly delineated in article 40, title 1. The Title Board has "considerable discretion" in carrying out its duty to set a clear and sufficient title, and the Court will generally defer to the Title Board's reasonable determinations in carrying out this statutory duty. *Hayes,* 293 P.3d at 554. However, when evaluating the "Title Board's statutory authority to act in the first instance," the Court does not defer to the Board's discretion, but reviews the basis for its authority *de novo*. *Id.*

Here, the Title Board claims that C.R.S. § 1-40-106 is the basis for its authority, but that statute does not address substitutions of designated

representatives. The statute expressly limits the Board's authority by providing that the Title Board may not set title absent compliance with specified procedures. C.R.S. § 1-40-106(4). The Title Board argues that since a procedure is not specifically prohibited, it must be allowed. This argument ignores the common law principle of statutory interpretation, *expressio unius est exclusio alterius*, which this Court has utilized to determine that the General Assembly's exclusion of certain provisions from statutory text was intentional. *See Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001). This maxim provides that "when the persons and things to which [a statute] refers are designated, there is an inference that all omissions should be understood as exclusions." *In re Local Service Corporation*, 503 B.R. 136, 141 (Bankr. D. Colo. 2013) (internal citations omitted) (bracket in original). As this applies to state agencies, it is well established that the duties and powers of the agency and its officers are determined and limited by the statutes creating them *Colo. Div. Employment & Training v. Industrial Comm'n of Colo.*, 665 P.2d 631, 633 (Colo.App. 1983). An agency may not exceed the power conferred upon it by statute. *Id.; see also In re Title, Ballot and Submission Clause, and Summary for Proposed Initiative Entitled "W.A.T.E.R.,"* 831 P.2d 1301, 1306 (Colo. 1992) (stating that the Title Board is a statutory body created for

the purpose of implementing the constitutional right of initiative and is governed by the statutory provisions of C.R.S. § 1-40-101, *et seq.*) .

Extenuating circumstances can make a designated representative unavailable to attend a Title Board hearing, but that does not allow the Title Board to set title when it is otherwise unauthorized to do so—even when that would keep an initiative off the ballot for the year it was submitted. *Hayes,* 293 P.3d at 558. If a designated representative is not available to attend a meeting of the Title Board at which his or her attendance is mandatory, the hearing and title setting on the initiative must be delayed to a later date, regardless of the current election cycle's time constraints. *See id.*; C.R.S. § 1-40-106(4)(d). Furthermore, proponents' reliance on representations by the Secretary of State's office does not justify the Title Board's actions in going forward to set titles when statutory requirements have not been met. *Hayes,* 293 P.3d at 558.

The Title Board does not have discretion to create alternative procedures for compliance with C.R.S. 1-40-106(4)'s "unambiguous and inflexible" requirements. *Hayes,* 293 P.3d at 556. And it may not allow for substitutions of designated representatives. Sandra Toland was not present, and did not submit an affidavit, at the first Title Board meeting on Initiative #103. The Title Board had no authority to accept Ms. Toland as a designated representative after the first Title Board

hearing. According to the plain language of the statute, Ms. Toland cannot be a designated representative for Initiative #103, and in Ms. Mills-Bria's absence, the Title Board did not have jurisdiction to set titles for Initiative #103.

4. Although Ms. Mills-Bria did not attend the rehearing, she has continued to act as a designated representative following her purported withdrawal.

Barbara Mills-Bria, after her purported withdrawal as a designated representative, submitted Designated Representatives' Opening Answer Brief on behalf of the Respondents on May 16, 2014. The Court struck this brief on May 22 because she is not an attorney. An identical second re-submitted brief opens "Barbara Mills-Bria for Respondents Phillip Doe, Sandra Toland and Barbara Mills-Bria hereby submits their Opening Brief." The caption also lists Ms. Mills-Bria as the only party submitting the brief.

The continued involvement of Ms. Mills-Bria shows that her purported withdrawal and the attempted substitution of Ms. Toland in her place was a sham intended so that the rehearing on Initiative #103 could proceed at a time not convenient for Ms. Mills-Bria. The time constraints of an election year do not justify the Title Board's setting of title when it is not authorized to do so. While extenuating circumstances may render it difficult for a designated representative to attend a Title Board meeting, the Title Board is powerless to accept substitutions,

even to accommodate an individual who may have a valid reason to be elsewhere. But even if the Board might have implied authority to proceed with a substitute in some other circumstances, such as the death of a designated representative, no valid withdrawal or substitution occurred here. Ms. Mills-Bria's subsequent conduct confirms that she never intended to withdraw as a designated representative, but only to be excused from her "unambiguous and inflexible" statutory obligation to attend the rehearing.

B. Initiative #103 Has Multiple Subjects with Separate and Distinct Purposes.

1. Standard of Review.

In response to the Title Board's and Proponents' statements of the applicable standard of review for this court's review of whether the Initiative contains a single subject, Petitioner Kemper adopts the statement of the standard of review on this issue from his Opening Brief (at p. 13).

2. Initiative #103 violates the single subject rule because it contains multiple, disconnected subjects.

A proposed initiative must be limited to a single subject, and violates this single subject rule when it "has two or more distinct and separate purposes which are not dependent upon or connected with each other." *In re Title, Ballot Title and Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010); Colo.

Const. art. V, § 1(5.5). Initiative #103 is not merely "broad in scope," as characterized by the Title Board and Proponents. "[A] proponent's attempt to characterize an initiative under some overarching theme will not save an initiative that contains separate and unconnected purposes from violating the single-subject rule." *In re Title, Ballot Title and Submission Clause for 2009-2010 #45*, 234 P.3d 642, 646 (Colo. 2010).

The Court may determine that multiple purposes are accomplished by an initiative with a general theme, such that the initiative violates the single subject requirement. *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 279 (Colo. 2006). Even where the Court can find a general theme in an initiative, all provisions must also have a common objective. *See In re Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076, 1080 (Colo. 1995).

The Title Board characterizes the subject of Initiative #103 as "establishing public ownership of environmental and natural resources," while the Respondents describe the theme as the "protect[ion of] Colorado's environment and resources under the public trust doctrine." These general characterizations, however, do not obviate the fact that Initiative #103 would accomplish multiple purposes in violation of the single subject requirement. Initiative #103 not only would create

an inalienable right to clean air, clean water, and preservation of the environment and natural resources, but also would (i) adopt a public trust doctrine by declaring Colorado's environment as common property and imposing fiduciary obligations on state government; (ii) criminalize the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit; and (iii) apply these provisions retroactively to previously permitted activities and transactions "regardless of the date of any applicable local, state, or federal permits." Accordingly, Respondents and the Title Board cannot overcome Initiative #103's violation of the single subject rule by characterizing the measure as merely establishing public ownership of environmental and natural resources, or merely establishing a public trust. Under the single subject rule, these four purposes lack a common objective and cannot be unified under a broad general theme simply by calling them "public ownership of the environment."

The Title Board argues that, while Initiative #103 may be "broad in scope," it complies with the single subject rule in accordance with *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246 (Colo. 2000) because its provisions are connected. In that case, this Court determined that an initiative requiring voter-approved growth maps addressed "numerous issues in a detailed manner" when the initiative also included provisions curtailing home

rule powers over development. *See id.* at 254. All of the "numerous issues" in that initiative, however, related to the single theme of increasing local communities' management of development. *See id.*

The multiple purposes of Initiative #103, however, cannot be connected under a single broad theme. The initiative contains at least four separate and distinct subjects, each involving a separate and distinct change to Colorado law. None of these changes is dependent on the others because they are separate and unconnected. The creation of an inalienable right to clean air, clean water, and preservation of the environment is separate and distinct from the adoption of a public trust doctrine based on common property in Colorado's environment. Both of these subjects are separate and distinct from the criminalization of the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit; which subject also differs from enacting new conditions and requirements on previously permitted activities and transactions without regard to the date of the permits.

Contrary to the Title Board's argument, Initiative #103 creates the "danger" of voter surprise through "surreptitious provision[s] 'coiled up in the folds'" of the initiative. *See In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 442 (Colo. 2002) (quoting *In re Breene*, 24

P. 3, 4 (Colo. 1890)). Voters would be surprised by the surreptitious provisions "coiled up in the folds" of Initiative #103's stated theme of "establishing public ownership of the environment and natural resources." *See In re Title, 2001-2002 #43,* 46 P.3d at 442-43. Such a theme does not convey to voters that they would be enacting a new constitutional mandate on state government that would completely alter the nature of Colorado's water rights, among countless other property rights.

The Title Board also argues that Initiative #103 fits within this Court's decisions allowing for the creation of a public trust standard "not paired with a separate and discrete subject," citing *In re Proposed Initiative on Water Rights*, 877 P.2d 321 (Colo. 1994), *In re Proposed Initiative #1996-6*, 917 P.2d 1277 (Colo. 1996), and *In re Title, Ballot Title, and Submission Clause for 2011-2012 #3*, 274 P.3d 562 (Colo. 2012). While *In re Initiative on Water Rights* involved an initiative advancing a public trust doctrine, the case was decided before the Colorado voters' adoption of the single-subject requirement for initiatives in November 1994, so this Court did not have occasion in that case to make a single-subject analysis. In both *In re Initiative #1996-6* and *In re Title, 2011-2012 #3*, this Court's majority determined that the initiatives advanced a single subject of "public trust doctrine," which entailed a few closely related provisions to adopt a specific doctrine with regard to Colorado's water resources. *See In re Initiative*

#1996-6, 917 P.2d at 1281; *see also In re Title, 2011-2012 #3,* 274 P.3d at 567-68. Initiative #103 is different from those measures in that it does not overtly advance a "public trust doctrine," but seeks to impose one that is coiled up in the folds of a "right to clean air, clean water, and the preservation of the environment and natural resources." It does so by imposing trustee obligations on state government, not only with regard to water, but over the newly declared common property right in "the environment and natural resources." Initiative #103's public trust doctrine is both more hidden and far broader than those in previous water initiatives, extending over all of Colorado's natural resources and environment. This approach has but one precedent: the 2007 initiative (also from Mr. Doe) that this Court rejected because it set a new public trust standard for the State's decisions on the environment and natural resources "coiled up in the folds" of a measure to reorganize state agencies with authority over such resources. *In re Title, Ballot Title and Submission Clause for 2007-2008 #17,* 172 P.3d 871, 876 (Colo. 2007). Thus, the Title Board's reliance upon this Court's previous cases finding a public trust doctrine as a single subject is misplaced.

The Title Board argues that the creation of a public right in the environment is not the kind of "overreaching [*sic*] theme" prohibited by *In re Title, 2001-2002 #43* because the initiative entails a single purpose ("establishing public ownership

of environmental and natural resources"), with an enforcement mechanism of the state government acting as trustee. *See* Opening Brief of the Title Board, pp. 20-21, citing *In re Title, 2001-2002 #43*, 46 P.3d at 442. However, Initiative #103 presents exactly the kind of "overarching theme" that *In re Title, 2001-2002 #43* warned against. In that case, this Court determined that "a battery of procedures which govern the exercise of the right to petition" were considered part of a single subject, as were provisions authorizing aggrieved citizens to sue for a violation of the proposed initiative's provisions. *See id.* at 444 (internal quotations omitted). Provisions seeking to modify the content of initiatives and referenda, however, were distinct, *substantive* provisions, unrelated to the *process* of placing initiatives and referenda on the ballot. *Id.* at 444-45. Such provisions were not implementation or enforcement details and were deemed separate and unconnected subjects. *Id.* at 445.

As with Initiative #43 in that case, Initiative #103 attempts to combine separate and unconnected subjects that are both procedural and substantive in nature under one broad and overarching theme. The creation of a substantive inalienable right in clean air, clean water, the environment, and natural resources is separate and distinct from the adoption of a substantive public trust doctrine. *See Robinson Township v. Commonwealth*, 83 A.3d 901, 951-55 (Pa. 2013) (finding

that the Pennsylvania Environmental Rights Amendment, with language that closely tracks sections of Initiative #103, creates two separate rights of the people: (1) a declared right of the citizens to clean air, pure water, and to the preservation of natural, scenic, historic and esthetic values of the environment; and (2) the common ownership of public natural resources). Both of these subjects are separate and distinct from the criminalization of the usage of data, reports, or scientific data in an attempt to use public trust resources for private profit; and all three of these substantive subjects are separate and unconnected to the procedural changes of retroactive application of new conditions and requirements to previously permitted activities and transactions. The bundling together of each of these separate and unconnected purposes cannot be saved by the overarching and overly broad theme of "establishing public ownership of environment and natural resources."

3. The Court must look at the Initiative's language and its necessary effects in its single-subject analysis.

The Title Board asks this Court not to look at the merits or consider the application of Initiative #103 in order to find multiple subjects. Contrary to the Title Board's argument, the Court has not only the ability, but the obligation to review the substance and necessary effects of Initiative #103 sufficiently to

determine whether it violates the single-subject rule. *In re Title, 2005-2006 #55*, 138 P.3d at 279. While the Court generally does not address the merits of a proposed initiative or construe its future legal effects, it cannot conduct the single-subject analysis in a vacuum. *Id.* at 278 n. 2. (citing *In re Proposed Initiative on Parental Rights*, 913 P.2d 1127, 1134 (Colo. 1996) (Mullarkey, J., concurring)). The "court must sufficiently examine an initiative to determine whether a measure violates the single subject rule." *Id.* at 278. When necessary, the Court will characterize a proposal sufficiently to enable review of the Board's actions. *Id.*

Even so, any question regarding the evaluation of a proposed initiative's effects in this analysis can be resolved without speculation, simply by looking at the "plain language of the measure" itself. *See In re Title, Ballot Title, and Submission Clause for 2011-2012 #45*, 274 P.3d 576, 581 (Colo. 2012). In examining whether Initiative #103 complies with the single subject rule, the Court must consider the plain meaning of the Initiative's language and its necessary effects on existing law and property rights. *In re Title, 2005-2006 #55*, 138 P.3d at 279. In construing an initiative's language, each clause of the initiative 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). Subsection (1) of the initiative declares that Coloradans "have an inalienable right to clean air, clean

water . . . and the preservation of the environment and natural resources." Subsection (2) would adopt a public trust doctrine, and appoint the state government as trustee for those resources based on subsection (1)'s creation of rights to environmental resources in all Coloradans. Subsection (3) outlines a new standard of care for protection of the public trust resources created in subsection (1), and would give Colorado's citizens standing to enforce breaches of that standard of care. Subsection (4) criminalizes any manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit. Finally, subsection (5) would make the other provisions retroactive in their application, likely in contradiction to currently existing federal and state permits. The separate and unconnected subjects of Initiative #103 are clearly stated within the plain language of the initiative without any need for this Court to consider the application of the initiative's language to find them. Giving each clause of Initiative #103 a specific purpose, this Court must find that the plain language of the initiative posits at least four separate and discrete purposes.

C. Initiative #103's Titles are Misleading and Omit a Material Provision.

1. Standard of Review.

Petitioner Kemper does not disagree with the Title Board's statement of the applicable standard of review for this court's review of Title language.

2. The Titles fail to describe the Initiative's scope.

Both the Respondents and the Title Board argue that the Titles set for Initiative #103 are clear and not misleading. The Title Board cites *In re Title, 2009-2010 #45*, 234 P.3d at 647, to support its argument that the Board fulfilled its obligations in setting Titles for Initiative #103 if the initiative's single subject is clearly expressed in its titles. This argument, however, assumes that the initiative has a single subject. As argued above, Initiative #103 has multiple subjects, each of which is separate and unconnected, and three of which are unrelated to the stated subject, "public ownership of the environment and natural resources."

3. The Titles omit a material provision, the creation of an inalienable right.

Responding to Petitioner Kemper's argument that the Titles omit a material provision of Initiative #103 by failing to mention the creation of an "inalienable right" to the environment and natural resources, the Title Board argues that it may not "construe an initiative's future legal effects" under *In re Title, Ballot Title and Submission Clause for 2007-2008, #57*, 185 P.3d 142, 145 (Colo. 2008). Opening Brief of the Title Board, p. 32. Contrary to the Title Board's argument, however, one need not go so far as to interpret the initiative or construe its effects to see from the initiative's plain language that an inalienable right is being created in

subsection (1), and that a clear and concise reflection of the initiative's central features would include this new right. *See In re Title, Ballot Title, and Submission Clause for 2007-2008 #61*, 184 P.3d 747, 752 (Colo. 2008). An "inalienable right" has necessary implications, as discussed in Petitioner Kemper's Opening Brief; this phrase is sufficiently material to require disclosure in the Titles. As discussed above, the creation of an inalienable right to public trust resources is a separate and distinct subject of the initiative that has no connection with the initiative's other subjects. At a minimum, it is a material provision of the initiative that may not be omitted from the Titles.

CONCLUSION

The Title Board lacked jurisdiction to set Titles for Initiative #103 when it accepted a substitute designated representative. Additionally, Initiative #103 violates the single subject requirement in that it contains multiple separate subjects. Accordingly, the Board erred by setting Titles and its actions should therefore be reversed. In the alternative, the Titles should be remanded to the Board for modification so that they express the true intent and meaning of the Initiative by including all of its material terms.

Respectfully submitted this 29th day of May, 2014.

BURNS, FIGA & WILL, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 29th day of May, 2014, a true and correct copy of the above and foregoing ANSWER BRIEF OF PETITIONER KEMPER was served on the following via ICCES or by Federal Express, addressed as follows:

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