SUPREME COURT OF COLORADO 2 East 14th Avenue Denver Colorado 80203 ORIGINAL PROCEEDING UNDER C.R.S. § 1-40-107(2) Appeal from the Ballot Title Board Petitioners: Mizraim Cordero, Scott Prestidge, and Douglas Kemper v. Respondents: Phillip Doe, Sandy Toland, and Barbara Mills-Bria and Title Board: Suzanne Staiert, Dan Domenico, and Jason Gelender	DATE FILED: May 22, 2014 FILED IN THE SUPREME COURT MAY 22 2014 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk COURT USE ONLY
Barbara Mills-Bria For Designated Representatives 1831 South Welch Circle Lakewood, CO 80222 303-989-7481 FAX 303- E-mail: bmillsbria@msn.com	Supreme Court Case No: 2014SA137
DESIGNATED REPRESENTATIVES' OPENING ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

X The brief complies with C.A.R. 28(g) because it does not exceed 30 pages.

X 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:

N.A. 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.

Sandra Toland

SANDRA TOLAND

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Barbara Mills-Bria for Respondents Phillip Doe, Sandra Toland and Barbara Mills-Bria hereby submits their Opening Brief.

STATEMENT CONCERNING ISSUES PRESENTED FOR REVIEW

1. Did the Title Board have jurisdiction to set title despite approving Proponents' substitution of another person as its designated representative for the rehearing in compliance with the Secretary of State's specified procedures?
2. Does proposed Initiative #103, which places a responsibility upon the state of Colorado to hold the natural resources of the state in trust for the citizens of Colorado and to protect them from harm for the health and safety of the people as beneficiaries, contain a single subject?
3. Is the title set by the board confusing, vague, or misleading?

STATEMENT OF THE CASE

A. NATURE OF THE CASE.

This original proceeding was brought by Objectors pursuant to C.R.S. §1-40-107(2) seeking review of the action of the Ballot Title Setting Board on April 25, 2014 at which time it denied the Objectors' Motion for Rehearing and affirmed its decision at the hearing on April 16, 2014 to set a title for proposed initiative #103. Objectors Cordero and Prestidge timely filed their Petition for Review in

this Court, together with certified copies of the required documents pursuant to C.R.S. § 1-40-107(2).

Proponents never received or saw a copy of the Petition for Review of Objector Douglas Kemper until May 15, 2014 when his counsel sent a copy to Proponents, as mentioned in Proponents' Motion for Enlargement of Time. The certificate of service on the Kemper Opening Brief only states that he served ICCES.

B. NATURE OF THE MEASURE. Proposed Initiative #103 would establish the public trust doctrine for natural resources in the state of Colorado by adding a new section 9 to Article XVI of the Colorado Constitution and place the responsibility upon the state of Colorado to protect the air, water, including ground water and surface water, the environment and natural resources for the health and safety of the citizens of Colorado.

C. COURSE OF PROCEEDINGS AND DISPOSITION BEFORE TITLE BOARD.

At the first hearing of the Ballot Title Setting Board ("Title Board") on April 16, 2014 the Title Board set a title for Initiative #103. The Objectors filed a Motion for Rehearing on the ground that the measure contained multiple subjects and was vague and confusing. The rehearing was held on April 25, 2014. At the

rehearing the title board permitted Proponents to substitute a new representative in place of one of its representatives, and after the rehearing denied the motion for rehearing and affirmed its decision to set title.

Objectors Cordero and Prestidge timely filed a Petition for Review in this Court.

STATEMENT OF THE FACTS

A. Substitution of Designated Representative. Both designated representatives Phillip Doe and Barbara Mills-Bria were present for the initial public hearing on April 16, 2014 when the Board set the titles.

On April 23, 2014 designated representatives received from Mr. Ward of the Secretary of State's office an email giving notice of the rehearing for April 24, 2014 and/or April 25, 2014. Ms. Mills-Bria sent an email response to Mr. Ward stating that she could not attend the April 24 and 25, 2014 rehearing because she would be enroute to Nebraska for a family funeral. Ms. Mills-Bria then received an email from Mr. Ward which stated that if she could not attend:

> You may withdraw as a designated representative and appoint a new designated representative to serve in your absence. However, there are documents required for this procedure as spelled out in the summary of designated representatives' responsibilities (attached).

Attached to Mr. Ward's email was a document entitled: "Designated Representatives: A summary of designated representatives' responsibilities under Colorado's initiative and referendum law". (These emails and the document "Designated Representatives: A summary..." are attached as Exhibit A). In the last paragraph on page 2 of the summary at the end of Exhibit A the Secretary of State provides a specific procedure to designate the withdrawal of one designated representative and to replace the representative with another, including signed affidavits by both the withdrawing representative and the substituting representative.

Ms. Mills-Bria and Ms. Toland complied fully with this procedure before the rehearing by submitting to the Secretary of State the proper notarized forms allowing Ms. Mills-Bria to withdraw and Ms. Toland to replace Ms. Mills-Bria and to attend the rehearing with Mr. Doe. Secretary of State Scott Gessler certified the copies of the affidavits of Ms. Mills-Bria and Ms. Toland which show their compliance with the specified procedure (affidavits and certification by Mr. Gessler are in Exhibit B attached, and in the attachments to Objectors' Petition for Review).

Designated representatives relied in good faith upon the representation by the Secretary of State's office that they could substitute a representative in place of

Ms. Mills-Bria if they complied fully with the designated written procedure provided by the Secretary of State. Objectors have failed to allege or show that they were prejudiced in any way by the substitution of Ms. Toland for Ms. Mills-Bria.

B. Single subject issue. Objectors Cordero and Prestidge contend that proposed Initiative #103 constitutes more than one subject. The title as designated and fixed by the Board is as follows:

> An amendment to the Colorado constitution concerning public ownership of natural and environmental resources, and, in connection therewith, creating a public trust in those resources, which include clean air, clean water, and the preservation of the environment and natural resources; requiring the state, as trustee, to conserve and maintain public trust resources by using the best science available to protect them against any substantial impairment, regardless of any prior federal, state, or local approval; seeking natural resource damages from anyone who substantially impairs them, and using damages obtained to remediate the impairment; allowing Colorado citizens to file enforcement actions in court; requiring anyone who is proposing an action or policy that might substantially impair public trust resources to prove that the action or policy is not harmful; and criminalizing the manipulation of data, reports, or scientific information in an attempt to use public trust resources for private profit.

Standard of Review. Proponents state that this Court in ruling on initiative measures in the past has held that the court should "allow the greatest possible exercise of this valuable right." *City of Glendale v. Buchanan*, 578 P. 2d 221, 224 (Colo. 1978) and should "engage in all legitimate presumptions in favor of the

propriety of the Board's actions." *In re Ballot Title (Petitions)*, 907 P.2d 586, 590 (Colo. 1995).

In addition, Proponents disagree with the contention by the Objectors Cordero and Prestidge that the proposed initiative is not limited to a single subject. A Public Trust Doctrine is widely recognized throughout history. The arguments raised by Cordero and Prestidge try to parse what is a single subject into various parts. The Title Board ruled correctly when it set title.

SUMMARY OF ARGUMENT

The Title Board had jurisdiction to set title with a substitute representative, Ms. Toland, present at the rehearing in place of Ms. Mills-Bria. The Proponents complied with the written procedure provided by the Secretary of State for withdrawing and replacing a representative, and such procedure is needed to protect the rights of proponents and the right of initiative in an emergency situation or extenuating circumstances. Proponents relied upon that procedure in making the substitution, and Objectors have not shown any prejudice or harm from the substitution.

The proposed initiative #103 complies with the single subject rule, as each provision is necessary and connected to the fundamental purpose of the initiative to provide that the state has an obligation as trustee to protect the environment and

natural resources of the state in order to safeguard the health and safety of all of the citizens of Colorado, who are its beneficiaries.

The ballot title is clear, fair, and accurately expresses the intent of the Proponents.

ARGUMENT

A. Designated Representatives Made a Proper Substitution of a Representative for the Rehearing. The designated representatives complied to the letter with the written procedure provided by the Secretary of State for having Barbara Mills-Bria withdraw as designated representative and Sandra Toland take her place as designated representative to attend the rehearing before the title board on April 25, 2014, and their actions were certified by the Secretary of State. The statutes governing the title board do not prohibit such measures. Moreover, the principle of due process would appear to permit if not require a procedure such as that provided by the Secretary of State to allow the substitution of one representative for another in an emergency or for good cause, such as the death and funeral of a family member. Proponents relied upon those procedures as being adequate to protect their interests in Initiative #103. Cordero and Prestidge have failed to show any prejudice from the non-appearance of Ms. Mills-Bria and the

presence of Ms. Toland at the rehearing or how the outcome of the hearing might have been different had this change not been made.

For the foregoing reasons, Proponents submit that if the Court indulges all legitimate presumptions in favor of the Board's action on this issue, Objectors have failed to make a clear case for invalidating such action and the denial of Objectors' motion for rehearing should be affirmed on this issue.

B. The Initiative contains a single subject. Pursuant to Article V, Section 1(5.5) of the Colorado Constitution and C.R.S § 1-40-106.5, the Board had jurisdiction to set title, as the proposed Initiative is limited to a single subject—the recognition of the Public Trust Doctrine and the duties required of government pursuant to the doctrine to protect vital natural resources for the public beneficiary.

Objectors Cordero and Prestidge contend that the initiative contains the following multiple and distinct objectives:

> 1. Establish a common property right in the "clean air, clean water, including ground and surface water, and the preservation of the environment and natural resources";
>
> 2. Create a constitutional public trust doctrine and impose a trusteeship upon the State:
>
> 3. Criminalize the manipulation of data, reports, or scientific information used in an attempt to utilize public trust resources for private profit; and

4. Retroactively apply the requirements of the Proposed Initiative to previously issued local, state or federal permits this subjecting current property interests to a taking.

In regard to the first paragraph above, we do not agree that we are creating a new "right." The rights to which Objectors refer already exist. They are integral to one of the oldest principles of government—that the government holds vital natural resources in trust for the public pursuant to the public trust doctrine. This requires sustainable management of natural resources. We are simply seeking to formally enumerate these trust responsibilities as a reminder to government that these are our natural, inalienable rights. It is the duty of government to protect our health and safety. It is government's highest obligation in our opinion. Indeed, if it doesn't protect these sacred rights, government loses the authority we've vested in it, its reason for being, if you will. If clean air, clean water, and the natural environment are not sustained through the actions of government, our most basic rights are being forfeited.

Moreover, the second item above, which refers to the declaration of a Public Trust Doctrine, encompasses item 1 above, the purpose of the doctrine being the maintenance and protection of the environment and resources of Colorado for the health and safety of the citizens of this state. These two items are essentially the same item.

In regard to item three above, which uses the term "criminalize" the Initiative states:

> Any person, corporation, or other entity found to be manipulating data, reports, or scientific information in an attempt to utilize public trust resources for private profit shall be referred for prosecution for any criminal offenses that may apply in addition to other penalties the state may impose, including loss of charter to operate in the state. (emphasis added) (Initiative #103, subsection 4)

So subsection 4 of the Initiative doesn't make any behavior that is not already criminal a crime, but instead places a responsibility on the state to enforce existing laws in order to carry out its responsibilities to protect our environment and resources under the Public Trust Doctrine. Or, the Colorado legislature, in order to better enable the state to carry out its responsibilities under the Public Trust Doctrine might pass new criminal laws and/or impose new or enhanced penalties in order to protect the environment and resources of the state for the general health and safety of the citizens. Subsection requires more effective enforcement of existing laws to protect the environment and resources of the state.

In regard to Objectors' assertion in item 4 above that the Initiative involves a "taking", Proponents state that it does not create a "taking", although it may have an effect upon an existing permit in the future. The initiative says "(5) this section is self-enacting and self-executing and shall apply to a public action or commercial

dealing that would violate it, regardless of the date of any applicable local, state, or federal permits." It allows the state to update the understanding of what is harmful as the science progresses so that what may be permitted at one point in time may no longer be permitted once the potential harm that may be caused by such actions is identified. On this point Objectors appear to object to the measure itself rather than the issue of whether it contains a single subject.

Objectors have tried to artificially separate the provisions of the initiative into more than one subject.

> 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. *In re Ballot Title 1997-1998 No. 74*, 962 P.2d 927, 929 (Colo. 1998)(en banc).

The single-subject requirement must be "liberally construed so as not to impose undue restrictions on the initiative process." *In re Ballot Title for 1997-1998 No. 74*, 962 P.2d at 929. To that end, "the single-subject requirement does not preclude the use of provisions that are not wholly integral to the basic idea of a proposed initiative." *Id.*

An initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes. *In re*

Title for 2007-2008 No. 61, 184 P.3d 747, 750 (Colo.2008). In contrast, if the initiative tends to achieve or to carry out one general object or purpose, it constitutes a single subject. *In re 2007-2008 No. 61*, 184 P.3d at 750; *In re Public Rights in Waters II*, 898 P.2d at 1078-79. Initiative #103 tends to achieve one object or purpose---to protect Colorado's environment and resources under the public trust doctrine and all of its provisions are designed to carry out that purpose.

Therefore, Initiative #103 complies with the single subject rule, and the Title Board had jurisdiction to set the title.

C. The Ballot Title is not confusing or misleading and fairly reflects the Proponents' intent. Finally, Objectors Cordero and Prestidge contend that the Board violated Article V, Section 1 of the Colorado Constitution and C.R.S § 1-40-106 by setting a title and submission clause that is confusing, misleading, and not reflective of the Proponents' intent because it:

1. Contains the phrase "preservation of the environment and natural resources," which Objectors state is vague and overly broad;

2. Fails to define the term "substantial impairment";

3. Fails to sufficiently inform the voters that previously issued permits are subject to takings through retroactive application of the requirements contained in the Proposed Initiative; and

4. Omits in its entirety Section 6 of the Proposed Initiative.

It is not necessary or even appropriate for a measure to define every term, especially when the language used is plain English, as in proposed Initiative #103. As science advances the meaning of the term "substantial impairment" may change, just as the meaning of a term such as "unreasonable speed" or "impaired" may change when applied to the driver of a car and whether the driver had consumed an excessive amount of alcohol as knowledge of the effects of speed and of alcohol and the conscience of the community advance and evolve. The same is true of knowledge regarding the effects of the use of chemicals or other substances that may substantially impair the environment, natural resources, health and safety of the citizens of Colorado.

In the case of *In re Title v. John Fielder*, 12 P.3d 246 at 255-256 (2000) the Court discussed the requirements of the title at some length. It noted that the Title Board should be given "great deference" in exercising its broad discretion in setting title, that it will reverse the board's action only when the title is "clearly misleading", that the board should "facilitate" the right of initiative rather than "hamper" it with "technical constructions", and that it is not necessary to "spell out every detail" of a proposal. The failure to mention section 6 of the initiative in the

ballot title does not make it misleading because that section merely recites existing law to the effect that the legislature may not pass laws that conflict the Constitution, and the statement that the legislature may pass laws that "enhance" the law, which is consistent with the measure's intent that the state take action to ensure that the public trust is enforced for the protection of the environment and natural resources.

For these above reasons the title set by the board clearly and fairly expresses the intent of proposed Initiative #103 and is not misleading.

CONCLUSION

Designated representatives respectfully request that pursuant to C.R.S. § 1-40-107(2) the court affirm the Title Board's denial of the Motions for Rehearing and find that the Title Board had jurisdiction to hear these measures and set titles for the Initiatives.

Dated: May 22, 2014

Respectfully submitted,

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Certificate of Service

I hereby certify that on May 22, 2014, a true and correct copy of the foregoing OPENING ANSWER BRIEF OF PROPONENTS was served via hand delivery and via email at the addresses shown below to the following:

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On May 22, 2014, at 8:58 AM, Phillip Doe wrote:
I am hereby authorizing Sandy Toland to sign for me on our resubmitted opening brief. Phillip Thomas Doe. I am in Berlin, Germany, and cannot sign in person. Thank you,

Phillip Thomas Doe

Sent from my iPad