SUPREME COURT OF COLORADO 2 East 14th Ave. Denver, CO 80203	DATE FILED: May 17, 2018 4:57 PM
Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #169 ("Compliance with Federal Immigration Law") **Petitioner: Kyle Huelsman** **v.** **Respondents: Floyd Trujillo and Thomas Tancredo** **and** **Title Board: SUZANNE STAIERT; JASON GELENDER; and GLENN ROPER**	▲ COURT USE ONLY ▲
Attorney for Petitioner: Mark G. Grueskin, #14621 RECHT KORNFELD, P.C. 1600 Stout Street, Suite 1400 Denver, CO 80202 Phone: 303-573-1900 Facsimile: 303-446-9400 Email: mark@rklawpc.com	**Case No. 2018SA119**
PETITIONER'S OPENING 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:

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

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☒ 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, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

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

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

s/ Mark G. Grueskin
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STATEMENT OF ISSUES PRESENTED

Whether Initiative #169 violates the single subject requirement by: (a) mandating that government, at all levels and in all forms, participate in an information exchange on the lawful or unlawful immigration status or citizenship of "any individual" in Colorado; and (b) prohibiting any jurisdiction from facilitating or encouraging the physical harboring of a person who is in the state without legal authorization.

Whether the ballot title set for Initiative #169 is misleading by its failure to define, identify, or at least indicate the breadth of covered "jurisdictions" (which explicitly include school districts, special districts, instrumentalities, agencies, and law enforcement agencies), but are described merely as "state and local government" in the title.

STATEMENT OF THE CASE

A. Statement of facts.

Initiative #169 is an initiative for the 2018 general election ballot that proposes to require all "jurisdictions" (a defined term in the initiative) to engage in information exchanges with "federal immigration agencies… regarding the citizenship or immigration status, lawful or unlawful, of any individual." Proposed C.R.S. §24-33.5-2103(1)(a), (b). It also requires all "jurisdictions" to prohibit the

facilitation or encouragement of physical harboring of any person not lawfully in the United States. Proposed C.R.S. §24-33.5-2103(1)(c).

Initiative #169 also provides for a finding of "sanctuary jurisdiction" if one or more specified conditions are met. Proposed C.R.S. §24-33.5-2103(2). Additionally, it provides for notices alerting all elected officials, employees, and law enforcement officers "of his or her duty to comply with all federal laws related to immigration." Proposed C.R.S. §24-33.5-2103(4). Finally, it contains a requirement that municipal or county-city jurisdictions with populations of more than 10,000 people file compliance reports with the Colorado Department of Public Safety. Proposed C.R.S. §24-33.5-2103(5).

B. Statement of the Case, Course of Proceedings, and Disposition Below.

Floyd Trujillo and Thomas Tancredo (hereafter "Proponents") proposed Initiative 2017-2018 #169 (hereafter "Initiative "#169" or "#169"). A review and comment hearing was held before representatives of the Offices of Legislative Council and Legal Services. Thereafter, the Proponents submitted a final version of the Proposed Initiative to the Secretary of State for the Title Board.

A Title Board hearing was held on April 18, 2018 to establish the Proposed Initiative's single subject and set a title. On April 25, 2018, Petitioner Kyle Huelsman filed a Motion for Rehearing, alleging that the Board lacked jurisdiction to set a title due to single subject violations, that the title set was misleading and

confusing to voters, and that the fiscal abstract failed to properly summarize state and local government fiscal impacts. The rehearing was held on April 26, 2018, at which time the Title Board denied the Motion for Rehearing as to the measure's multiple subjects but revised certain aspects of the title that had been set and certain representations made in the abstract. As revised, the Board's title states:

> *Shall there be a change to the Colorado Revised Statutes concerning state and local government cooperation in the enforcement of federal immigration laws, and, in connection therewith, prohibiting state and local government from barring or restricting communication with federal immigration agencies regarding the citizenship or immigration status, whether lawful or unlawful, of any individual or the intergovernmental sharing or maintenance of records of such citizenship or immigration status; prohibiting state and local government from encouraging or facilitating the physical harboring of an individual not lawfully present in the United States; requiring each jurisdiction to annually notify its elected officials and employees of their duty to comply with federal immigration laws; and requiring annual compliance reporting?*

SUMMARY OF ARGUMENT

Initiative #169 joins disparate mandates for unrelated immigration-related responsibilities: (1) the exchange of any requested information between Colorado "jurisdictions" and federal immigration agencies; and (2) a prohibition against harboring of persons who are not lawfully in the United States. Persons who would support the latter must weigh the trade-off of supporting the former, which provides state authority for transmitting information about persons who are not in violation of any law – including the state's voters. In other words, one must weigh

personal privacy concerns against whatever policy merits one associates with the anti-harboring provision. That is precisely the concern that led to the single subject requirement – attracting votes from voters with conflicting interests. Thus, Initiative #169 comprises multiple subjects in violation of the Constitution.

Moreover, the title that was set fails to inform voters of a central aspect of this measure: the definition of "jurisdiction" is wide-ranging but is inaccurately encapsulated in the title as "state and local governments." In fact, a "jurisdiction" includes every "school district," every "special district," every "instrumentality," and every "agency" in the public sphere. No voter-approved initiative has contained such a broad array of government entities, and thus voters would be surprised at the true content – and breadth – of this measure.

Notably, the Title Board required specificity concerning local governments included in another initiative that is currently being circulated for the November 2018 ballot (Initiative #66), the growth limit measure that has been before this Court. The limited reach of that measure, which applies only to cities and counties, was clearly stated in that measure's ballot title. Without clarity about the much broader reach of Initiative #169, voters will be confused, thinking that "local government" has a single (and limited) meaning. Because it does not, the Board erred and created a confusing and misleading title that must be revised before it is presented to voters.

LEGAL ARGUMENT

I. Standard of review

In identifying whether an initiative is consistent with the single subject requirement, Colo. Const., art. V, §1(5.5), the Title Board must assess whether an initiative's provision are "necessarily and properly connected rather than disconnected or incongruous." *In re Title, Ballot Title and Submission Clause for 2015-2016 #73*, 2016 CO 24 at ¶14, 369 P.3d 565. The measure must "effectuate one general objective or purpose." *Id.* at ¶17. An initiative fails to do so where "the joining together of multiple subjects" presents the possibility "of attracting support from various factions which may have different or even conflicting interests." *In re Title, Ballot Title, Submission Clause, and Summary Pertaining to a Proposed Initiative "Public Rights in Water II*," 898 P.2d 1076, 1079 (Colo. 1995).

This Court must "sufficiently examine an initiative" to determine whether there has been a single subject violation. *In re Title, Ballot Title, Submission Clause, and Summary for Initiative1997-1998 #30*, 959 P.2d 822, 825 (Colo. 1998) (citation omitted). This review is limited, however, and the Court will "employ all legitimate presumptions in favor of the Title Board's actions," overturning a Board decision only "in a clear case." *In re Title, Ballot Title and Submission Clause for 2013-2014 #129*, 2014 CO 53 at ¶8, 333 P.3d 101. Further, the Court will not

"adopt standards or make interpretations that unduly limit or curtail the exercise of the initiative or referendum rights of the people of Colorado." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 29*, 972 P.2d 257, 261 (Colo. 1999).

In setting a title and ballot title and submission clause, the Title Board may exercise its discretion in addressing the interrelated problems of an initiative's length, complexity, and clarity. *In re Title, Ballot Title & Submission Clause, & Summary Clause for a Petition on Sch. Fin.*, 875 P.2d 207, 212 (Colo. 1994). Nevertheless, the titles must fairly reflect the proposed initiative so that voters will not be misled into supporting or opposing the initiative because of the words employed in the title. *In re Title, Ballot Title, and Submission Clause for 2011-2012 #45*, 2012 CO 26, ¶ 22, 274 P.3d 576, 582. To achieve that end, the titles must summarize the central features of an initiative. *In re Title, Ballot Title & Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 648 (Colo. 2010).

The title and submission clause should enable voters, whether they are familiar or unfamiliar with the topics addressed by the proposal, to determine intelligently whether to support or oppose such a proposal. *Id.* (citations omitted). The titles "shall correctly and fairly express the true intent and meaning" of the initiative. C.R.S. §1-40-106(3)(b). The titles must also prevent "public confusion"

about an initiative and avoid content "for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear." *Id.*

This Court employs all legitimate presumptions in favor of the propriety of the Title Board's actions. *In re 2009-2010 No. 45*, *supra*, 234 P.3d at 645.

Issues raised in this appeal were preserved before the Title Board. *See* Motion for Rehearing at 1-2 (single subject) and 2-3 (failure to specify that many public entities that are not the "state" or "local government" are covered by this measure).

II. Initiative #169 contains more than one subject, contrary to the single subject mandate in the Colorado Constitution.

This initiative mandates that all local jurisdictions comply with two very different federal immigration laws. One is a mandate that all local jurisdictions engage in an information exchange with the federal government about the citizenship and immigration status, whether legal or illegal, of any individual in Colorado. Proposed C.R.S. §24-33.5-2103(1)(a), (b). Another deals with a requirement that all local jurisdictions prohibit the facilitation or encouragement of the physical harboring of any person not lawfully in the country. Proposed C.R.S. §24-33.5-2103(1)(c).

The prohibition against the physical harboring of persons in Colorado may appeal to a certain segment of the population. But even these voters may well have

second thoughts about supporting a provision that forces every Colorado "jurisdiction" – literally every "agency" of state or local government as well as every school district, special district, and instrumentality – to maintain and transmit information about the citizenship and the immigration status (even if lawful) of "any individual." Proposed C.R.S. §24-33.5-2103(1)(b). In other words, in deciding if the anti-harboring mandate is a legitimate concept, voters will also have to decide whether they want all of their many governmental units in this state to keep files and report on such individuals' own immigration status or citizenship.

The anti-harboring provision deals with third persons, whereas the information exchange deals with every individual (including every voter) who comes into any sort of contact with any governmental jurisdiction. One provision is narrowly drawn; the other is all-encompassing and expressly requires an information exchange about any person in a governmental database. There is no "necessary or proper connection" between mandates such as these. *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006) (restrictions in immigration initiative did not comprise a single subject) (citations omitted).

In *In re 2005-2006 #55*, this Court struck down an immigration-related initiative that had a relatively defined objective ("decreasing taxpayer expenditures on behalf of people not lawfully present in Colorado by terminating services

benefiting the welfare of individuals") and a virtually unlimited objective ("restricting unrelated administrative services" for persons not lawfully in the state). *Id.* at 275. The single subject violation posed by that measure echoes the Petitioner's concern here.

> [T]here no doubt exists a diversity of approaches and attitudes regarding the presence of the individuals targeted under this Initiative. Some voters may indeed wish to both reduce taxpayer expenditures for services benefiting individuals, such as medical and social services, and also restrict unrelated administrative services such as recording services that may inhibit property ownership by targeted individuals. Other voters may find, however, they have unwittingly voted to restrict services while only wishing to reduce taxpayer expenditures for medical and social services.

Id. at 282.

Justifiably, voters may be concerned about the state's endorsement of an information exchange about their own citizenship or immigration status in order to preserve and defend their own substantial constitutional privacy interests. *See, e.g., Martinelli v. District Court*, 612 P.2d 1083, 1092 (Colo. 1980) (citations omitted) ("To override constitutional privacy interests, a countervailing state interest must exist and be compelling at the point where those interests collide"). Alternatively, they may be uncomfortable with a statute that creates a state reporting obligation that affects others. But under this initiative, they must accept the anti-harboring language *and* the information exchange if they believe in either

of the two concepts and fervently wish to vote "yes" to support their preferred concept.

Measures such as this one epitomize the log-rolling concern that was at the heart of the single subject requirement in the first place. *See In re Title, Ballot Title, & Submission Clause for 2015-2016 #132*, 2016 CO 55 at ¶34, 374 P.3d 460. The single subject requirement was adopted to prevent initiative proponents from "attracting support from various factions that may have different or even conflicting interests." *Id*. at ¶15.

Given the unrelated nature of the anti-harboring provisions and the information exchange provisions, Initiative #169 holds out exactly such potential to force take-it-or-leave-it decision making from voters who hold "different or even conflicting interests."

III. Initiative #169's title is misleading, as its use of "local government" fails to describe many public entities that are subject to its mandates.

Initiative #169 places two distinct restrictions on state and local officials. It prohibits such governmental entities from:

> (1) restricting covered jurisdictions from facilitating an information exchange with the federal government about the immigration status and citizenship of any person; and

(2) facilitating or encouraging the physical harboring of a person not lawfully in the United States.[1]

See Proposed C.R.S. §24-33.5-2103(1)(a), (b), and (c).

The ballot title states – twice – that its key provisions prohibit certain acts by "state and local government." But the text of the measure actually imposes its prohibitions on any "jurisdiction" in Colorado, *see* Proposed C.R.S. §24-33.5-2103(1) ("A jurisdiction shall not..."), and that term is clearly and expansively defined in the measure.

> (2) "JURISDICTION" MEANS THE STATE OR A POLITICAL SUBDIVISION THEREOF ORGANIZED PURSUANT TO LAW, INCLUDING ANY COUNTY; CITY AND COUNTY; CITY; MUNICIPALITY; SCHOOL DISTRICT, SPECIAL DISTRICT, OR ANY OTHER DISTRICT; AGENCY; INSTRUMENTALITY; LAW ENFORCEMENT AGENCY; AND ANY STATE INSTITUTION OF HIGHER EDUCATION.

Proposed C.R.S. § 24-33.5-2102(2).

As discussed below, this very specific definition is at odds with voter understanding of the phrase, "local government." It is also at odds with the meaning of that phrase that the Title Board projected in its titles set for at least one other measure that may be in the petitioning process and/or on the ballot with Initiative #169. These failures will certainly confuse voters.

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[1] Instead of "person not lawfully in the United States," the text of Initiative #169 uses the phrase, "illegal immigrant." The Title Board did not use this term in the ballot title, which is not defined in the initiative.

A. This title's reference to "local government" is inconsistent with voter understanding of that term, as reflected in other voter-approved ballot measures.

By its terms, Initiative #169 applies to entities that are not commonly considered to be "state and local government," and thus, this title misstates the expanse of this measure in the context of what voters know and understand in amending their constitution.

When voters amended the Colorado Constitution to mandate certain ethical standards by public officials and government employees, they applied these provisions to "local government," which is defined to mean only a "county or municipality." Colo. Const., art. XXIX, § 2(2). That initiative excluded the types of public entities that Initiative #169 expressly applies to, such as special districts, school districts, law enforcement agencies, and instrumentalities. Therefore, voters reasonably would think that a measure that applies to "local governments" would not be as far-reaching as Initiative #169.

In the tax limitation context, voters adopted TABOR to restrict the power of various governmental entities, including "local government," to prohibit new taxes without prior voter approval. *See* Colo. Const., art. X, § 20(2)(b) (a "district" subject to TABOR is "the state or any local government, excluding enterprises"). When they amended the constitution in this way, voters intended to encompass

only those local entities that are capable of "exercising taxing authority." *Campbell v. Orchard Mesa Irrigation Dist.*, 972 P.2d 1037, 1041 (Colo. 1998).

This usage excludes key entities that are included within #169's broad definition of "jurisdiction." For instance, the TABOR construction of "local government" is not nearly as broad as Initiative #169's definition of "jurisdictions" that includes "instrumentalities" and "law enforcement agencies" and even any "agency" of local government.

Fiscal impact procedures associated with the initiative process reinforce this understanding of "local government." Beginning in 2016, the General Assembly mandated that petitions include an "abstract." C.R.S. §1-40-105.5(4). That abstract must estimate "the effect the measure will have on… "**local government revenues,** expenditures, **taxes,** and fiscal liabilities if the measure is enacted." C.R.S. §1-40-105.5(3)(a) (emphasis added). Thus, the legislature believed, and voters reviewing this ballot title would have ample cause to believe, that "local government" means those entities that have taxing capacity. *See In re Title, Ballot Title & Submission Clause for 2017-2018 #4*, 2017 CO 57 at ¶23, 395 P.3d 318 (abstract approved where it addressed "generally how local government revenue may be affected"). As noted above, that understanding would be erroneous, as Initiative #169 applies to non-taxing entities such as every "law enforcement agency," "instrumentality," and state and local "agency."

Where an initiative, as a means of its definitions, changes the scope of what voters would otherwise presume and thus blocks the electorate's understanding of the measure, that defined term must be made clear by the ballot title. *In re Proposed Initiative on "Obscenity"*, 877 P.2d 848, 850 (Colo. 1994). Titles will "create confusion and are misleading" if "they do not sufficiently inform voters" of the reach of the measure. *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 221 (Colo. 2002). In connection with Initiative #169, the Board was asked, but refused, to reflect the specific language of the measure relating to the definition of "jurisdiction." By failing to do so, it prevented voters from understanding just how broad this measure is.

B. This title's reference to "local government" is inconsistent with the Board's own use of that term, as reflected by other ballot titles before voters in this election cycle.

The Title Board is charged with ensuring that its titles do not create confusion for voters. In setting the title for Initiative #169, the Board failed to live up to this standard.

In its previous work for this election cycle (and thus on initiatives that will be before voters for signature at the same time as Initiative #169 as well as potentially on the same ballot for the November, 2018 election), the Title Board referred to "local government" with much greater precision. Given that the Board

has been clear about the meaning for other initiatives, the ambiguous and misleading reference to "local government" in #169's ballot title will confuse voters.

For example, Initiative 2017-2018 #66 expands the growth limitation powers accorded to voters of specified "local governments." That measure defines "local government" to mean "A CITY, TOWN, CITY AND COUNTY, OR LOCAL COUNTY, WHETHER STATUTORY OR HOME RULE."[2]

As to Initiative #66, the Title Board knew exactly how important it was for the petition signing and voting public to know what "local government" means. The Board ensured that the ballot title would clarify for voters that "local government" means "city, town, city and county, or county."

> A change to the Colorado Revised Statutes concerning limitations on the growth of housing, and, in connection therewith, permitting the electors of **every city, town, city and county, or county** to limit housing growth by initiative and referendum; permitting county voters by initiative and referendum to limit housing growth uniformly within the county, including all or parts of **local governments** within the county; establishing procedural requirements for initiatives for **local governments**, whether statutory or home rule, concerning limits on housing growth; and for the city and counties of Broomfield and Denver, and in the counties of Adams, Arapahoe, Boulder, Douglas, El Paso, Jefferson, Larimer, and Weld: 1) prohibiting the issuance of

[2] http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/filings/2017-2018/66Final.pdf (last viewed on May 16, 2018). In a summary affirmance, this Court approved that title. Order, *In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #66 ("Limit on Local Housing Growth"*), Case No. 2017SA305 (Feb. 23, 2018).

> new permits for privately owned housing units by **local governments** located in whole or in part within such counties and such cities and counties until January 1, 2019, 2) limiting the growth of privately owned residential housing units to one percent annually starting in 2019, and 3) permitting the one percent growth limitation to be amended or repealed by initiative and referendum commencing in 2021.[3]

Imagine the voter who is presented with a petition for Initiative #66. She reads the ballot title and comes to understand the limited nature of "local government." The first phrase following the title's single subject statement make it clear that "local government" means *only* cities and counties, an accurate representation given the specific definition contained in the initiative's text.

If the same petition circulator then provides this voter with a petition for Initiative #169, voter confusion will ensue. What is this voter to think about #169's expanse when she sees "local government" as used in that measure's ballot title? Put differently, what reason would a voter have to think that "local government," as specifically defined in one ballot title, means something very different in a second ballot title? No conjecture is required to realize that this voter will assume, incorrectly, that #169's "local government" is no different from #66's "local government" as set forth in the ballot title.

[3] http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/results/2017-2018/66Results.html (final ballot title for Initiative 2017-2018 #66) (emphasis added) (last viewed on May 16, 2018).

This scenario is not at all speculative. The Secretary of State has approved petition forms for Initiative #66 as well as Initiative #169.[4]

It is appropriate for the Court to consider the Board's inconsistent ballot titles that may confuse voters.

> The initiative process in Colorado has proliferated, and accordingly, this court and the title board now deal with an increasing number of measures. More importantly, when the proposals acquire the requisite support to be placed on the ballot, the **voters now deal with an increasing number of measures. Particularly in this climate, we conclude that the fixing of an understandable title is of great importance.**

In re 2001-2002 #21 and #22, supra, 44 P.3d at 222 (emphasis added).

In setting a title for Initiative #66, the Board properly provided voters with clarity about that measure's reach. By refusing to do the same for Initiative #169, the Board created confusion about a key aspect of the measure. Where a ballot title "generally stat[es]" a legal change will be effected by the initiative "without in any way describing" the specific nature of the change, the title "does not provide sufficient information to allow votes to determine intelligently whether to support or oppose the proposal." *In re 2015-2016 #73*, 2016 CO 24 at ¶32.

[4] http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html (*see* listing of both initiatives under "Approved for circulation") (last viewed on May 17, 2018).

The doctrine of *stare decisis* binds this Court in ballot title matters. *In re 1999-2000 # 29, supra*, 972 P.2d at 262. That doctrine provides for "uniformity [and] certainty" in the law. *Id*.

In a similar vein, the Title Board should be cognizant of its responsibility to provide for consistency on the same ballot. If this Court can "see no reason to distinguish" between a term's meaning when it is used both in a statute and a constitutional provision, *Allen v. Board of County Comm'rs*, 497 P.2d 1026, 1028 (Colo. 1972), voters will not make such a distinction when presented with petitions or when voting on such matters if both earn places on the same ballot. Given that, confusion is sure to occur, contrary to the Board's statutory mandate.

Specifically, voters who think Initiative #169 is limited to cities and counties would be surprised to discover that it applies to a school district, Proposed C.R.S. § 24-33.5-2102(2), whose staff will be required to track and report the citizenship and immigration status of "any individual" including, for example, students and parents. Voters would also be surprised that personnel working for any special district, *id.*, such as a library district, would be required to track and report the citizenship and immigration status of "any individual" including, for example, library cardholders and visitors. These are hardly "prediction[s] of doubtful future effects" of the measure, *In re #21 and #22*, 44 P.3d at 221, but reflect, instead, the clearly intended purposes of the measure.

Given its failure to inform voters of #169's express reach and meaning, this ballot title is flawed and should be returned to the Board for correction.

CONCLUSION

Initiative #169 violates the single subject requirement, and the title set is confusing and misleading to voters. As such, the measure should either be returned to the proponents, or the title should be returned to the Title Board. In no event should the measure and/or the ballot title be presented to the electorate without correction.

Respectfully submitted this 17th day of May, 2018.

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CERTIFICATE OF SERVICE

I, Erin Holweger, hereby affirm that a true and accurate copy of the **PETITIONER'S OPENING BRIEF** was sent this day, May 17, 2018, via Colorado Courts Electronic Filing to Counsel for the Title Board and via FedEx overnight to the Respondents as follows:

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