IN THE SUPREME COURT

STATE OF ARIZONA

ARIZONA SCHOOL BOARDS ASSOCIATION, INC., *et al.*, Plaintiffs/Appellees, v. STATE OF ARIZONA, Defendant/Appellant.	No. CV-21-0234-T/AP Court of Appeals No. 1 CA-CV 21-0555 Maricopa County Superior Court No. CV2021-012741

BRIEF OF *AMICI CURIAE* SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES RUSSELL BOWERS, ARIZONA SENATE PRESIDENT KAREN FANN, AND GOVERNOR DOUGLAS A. DUCEY [1]

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[1] Pursuant to Arizona Rule of Civil Appellate Procedure 16(b)(1)(A), this brief is filed with the written consent of the parties.

Russell Bowers, Speaker of the Arizona House of Representatives; Karen Fann, President of the Arizona Senate; and Douglas A. Ducey, Governor of the State of Arizona, respectfully submit this brief as *amici curiae* in support of Appellant State of Arizona.

INTRODUCTION

When acting within its demarcated sphere, the Legislature's "exercise of its legislative function is measured by the power of absolute sovereignty," *State v. Harold*, 74 Ariz. 210, 218 (1952), and limitations on the legislative power should be interpreted to avoid unnecessarily "restrict[ing] the plenary power of the legislature." *Earhart v. Frohmiller*, 65 Ariz. 221, 225 (1947). This Court has therefore construed the "Single Subject Rule" and "Title Rule" provisions of Article IV, Part 2, Section 13 deferentially, so as not to "hamper or defeat or embarrass legislation." *Dennis v. Jordan*, 71 Ariz. 430, 440 (1951). By inviting greater judicial incursion into the lawmaking process, the Superior Court's ruling portends legislative gridlock, institutional inertia, and inordinate judicial policing of two coordinate branches.

The *amici* concur with the State and will not reiterate its arguments. Rather, this brief will establish that the Legislature maintains rigorous procedures—forged over decades and informed by judicial pronouncements—to comply with the Constitution.

INTEREST OF THE *AMICI*

Russell Bowers is the Speaker of the Arizona House of Representatives, and Karen Fann is the President of the Arizona Senate. The *amici* proffer this brief as representatives

of the Arizona Legislature and as defenders of its sovereign powers, which it lawfully exercised in enacting the fiscal year 2021-2022 budget reconciliation bills that are the subject of these proceedings. Arizona law affords the Speaker and Senate President the right to intervene, file briefs and otherwise "be heard" in any action contesting the constitutional validity of a state statute. *See* A.R.S. § 12-1841.

Amicus Douglas A. Ducey is the Governor of the State of Arizona and, pursuant to Article V, Section 7, is charged with approving laws passed by the Legislature, serving as the chief executive of the state and ensuring that the laws are faithfully executed. *See* ARIZ. CONST. art. V, § 4. Governor Ducey offers this brief as the head of the executive branch and defender of its sovereign authority under the Article III of the Arizona Constitution.

ARGUMENT

I. Historical Background

A. Overview of the Budget Reconciliation Process

The Constitution directs that "[t]he general appropriation bill shall embrace nothing but appropriations." ARIZ. CONST. art. IV, pt. 2, § 20. Acknowledging this edict, the Legislature has always maintained a bifurcated budget process. The first facet is a general appropriations (or "feed") bill that only enumerates specific disbursements to various agencies, departments, and institutions of the state. *See, e.g.*, 2021 Ariz. Laws, ch. 408 (S.B. 1823). This "general appropriation bill is not 'legislation' in the strict sense. Its object is to provide funds to meet previously authorized expenses of the government's different

departments, offices, agencies, and institutions." *Carr v. Frohmiller*, 47 Ariz. 430, 441 (1936).

Often, however, an appropriation is intertwined with, or conditioned upon, an antecedent public policy determination. By constitutional necessity, these amendments to substantive law must be separately adopted. *See Sellers v. Frohmiller*, 42 Ariz. 239, 248 (1933) (noting that "the inclusion of such legislation in the general appropriation bill is forbidden"). Fully cognizant of the Single Subject Rule, however, the Legislature has always parceled substantive amendments associated with the budget into separate reconciliation bills corresponding to specific subject areas.

Before 2004, the vehicles for these enactments were "omnibus reconciliation bills" pertaining to public finance, education, and health and welfare. In 2003, however, this Court commented in *dicta* that the three ORBs adopted that year "appear to address multiple subjects," in contravention of Article IV, Part 2, Section 13. *See Bennett v. Napolitano*, 206 Ariz. 520, 528, ¶ 39 n.9 (2003). The Legislature therefore revamped its budget process in 2004, supplanting the three ORBs with a series of budget reconciliation bills, which segment substantive amendments associated with the feed bill into between eight and ten discrete subject matters. Adhering to this model, the Legislature approved eight BRBs in conjunction with the fiscal 2022 feed bill:

1. Criminal Justice, *see* Ariz. Session Laws ch. 403 (HB2893);
2. K-12 Education, *see* Ariz. Session Laws ch. 404 (HB2898);
3. Budget Procedures, *see* Ariz. Session Laws ch. 405 (SB1819);

4. Environment, *see* Ariz. Session Laws ch. 407 (SB1822);
5. Health, *see* Ariz. Session Laws ch. 409 (SB1824);
6. Higher Education, *see* Ariz. Session Laws ch. 410 (SB1825);
7. Revenue, *see* Ariz. Session Laws ch. 411 (SB1827); and
8. Transportation, *see* Ariz. Session Laws ch. 413 (SB1829).

This delineation of eight distinct subject areas complies with the Single Subject Rule, while still accommodating the practical demands of governing a large, diverse and continually growing state.

B. Overview of Title Protocols

In the early years of statehood, the Legislature customarily constructed a long-form, narrative title for every item of introduced legislation. As legislative business proliferated, however, the perils entailed in this approach increasingly came to fruition. Indeed, as this Court has explained, "[t]he scope of the title is within the discretion of the legislature; it may be made broad and comprehensive, and in this case the legislation under such title may be equally broad." *Taylor v. Frohmiller*, 52 Ariz. 211, 216 (1938); *see also State v. Sutton*, 115 Ariz. 417, 419–20 (1977) ("When the title particularizes some of the changes to be made by amendment, the legislation is limited to the matters specified and anything beyond them is void, however germane it may be to the subject of the original act."). A paradoxical byproduct of this principle, however, is that as bill titles became more detailed, they became increasingly vulnerable to Title Rule lawsuits.

This dilemma was illustrated by a 1989 bill that would have substituted the new Martin Luther King, Jr. Day for Columbus Day on the roster of official state holidays; the

bill's title represented that it was "providing that the third Monday in January is a legal holiday known as Martin Luther King, Jr. Day." The Attorney General deemed the title deficient, reasoning that it obscured the elimination of Columbus Day as a holiday. He added, however, that if the Legislature had opted for a more generic title, such as "An act relating to State Holidays," the bill likely would have complied with the Title Rule. *See* 1989 Ariz. Op. Att'y Gen. 194, No. I89-101 (Nov. 30, 1989).

The Attorney General's opinion catalyzed a reassessment of the Legislature's protocols for titling bills. After cataloguing the relevant case law and examining the practices of other states sharing a similar constitutional lineage, the staff of the Legislative Council presented its findings in a June 1990 memo. That September, the Legislative Council voted to adopt the so-called "California Format,"[2] which enumerates by title and section number every individual statute added or amended by the bill, coupled with a generalized denomination of the bill's subject matter.

II. The Legislature's Processes Conform to the Original Understanding of the Constitution, the Practices of Other States and the Practicalities of Modern Legislating

This case embodies a hazard that the framers immediately discerned was intrinsic in the Single Subject and Title Rules. Evaluating a draft of what is now Section 13 of Article

[2] Copies of the June 1990 memo and minutes of the relevant Legislative Council meetings are attached hereto as Appendix 1.

IV, Part 2, one delegate commented:

> If that provision goes into the constitution, it will be the most dangerous two lines in the constitution. There will be more laws declared unconstitutional because of these two lines than any other two lines in the constitution. Take a long and complicated act, and if there is any subject in that act that is not expressed in the title your law is unconstitutional. I cannot see any good purpose to be gained by it; it leaves a handle or a string upon every law by which the court can declare it unconstitutional. You cannot draw a long act like a primary act, for instance, and put a title on it so the supreme court cannot take hold of that string and explode your law.

THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910 590 (John S. Goff, ed.) 1991.[3] In response, another delegate proffered a substitute containing language "taken from the Idaho constitution,"[4] which the Convention approved. *See id.* at 591.

The point is not that Section 13 is a nullity. To the contrary, its commands always have been engrained in the lawmaking process. Rather, the problem resides in the ambiguity and malleability that inheres in the concept of a legislative "subject." This operative term carries no settled legal or historical definition, and it is infinitely divisible; what one person reasonably understands to be a unitary "subject" can be perceived by another as actually an amalgamation of multiple distinct "subjects." The subsidiary question of how to denominate the applicable "subject" in the bill's title is afflicted with the same difficulty.

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[3] The original incarnation of Section 13 stated: "No bill shall embrace more than one subject, and that shall be expressed in the title." *Id.* at 1048.

[4] *See* IDAHO CONST. art. III, § 16.

In short, characterizing a bill's "subject" for purposes of Article IV, Part 2, Section 13 can easily become a subjective exercise in arbitrary line-drawing. Aware that such tasks are beyond the judiciary's constitutionally assigned functions, Arizona courts—following contemporaneous guidance from their counterparts in other states—adopted a posture of substantial deference to legislative judgments concerning how to comply with the Single Subject Rule and Title Rule. As this Court stated (invoking a vivid metaphor), a plaintiff must "convince us that the subject of the act is not reasonabl[y] embraced in the title thereof, by as great a weight of evidence and reasoning as would be required to be presented by the state to convict a defendant of murder. Every intendment and every presumption is in favor of the law, and if on any reasonable theory we can hold it constitutional, statutory construction requires us to do so." *State v. Davey*, 27 Ariz. 254, 258 (1925); *see also Ex parte Liddell*, 29 P. 251, 253 (Cal. 1892) ("[T]he constitution itself does not define the degree of particularity with which a title shall specify the subject of a bill. The matter must therefore be left largely to legislative discretion."); *Pioneer Irr. Dist. v. Bradbury*, 68 P. 295, 300 (Idaho 1902) (commenting that the Single Subject Rule should be broadly construed and "was not intended 'to prevent the incorporation into a single act the entire statutory law upon one general subject'").

In this vein, the *amici* submit that the Court can properly balance its duty to interpret the Constitution with the prudential imperative of deference to legislative choices by

evaluating the Legislature's budgetary ***processes*** for compliance with the Single Subject Rule and Title Rule, rather than dissect isolated provisions of individual bills.

A. The BRB Framework Honors the Single Subject Rule

As noted above, the Legislature devised the current BRB process in immediate response to the concerns articulated in *Bennett*. By replacing three capacious omnibus reconciliation bills with a collection of 8-10 separate BRBs differentiated by more carefully crystallized subject matter areas, the Legislature has implemented a structural framework that honors the Single Subject Rule.

"The interpretation of constitutional provisions is to be made in view of the history of the times, the evil to be remedied, and the purpose to be accomplished.'" *Greenlee County v. Laine*, 20 Ariz. 296, 303 (1919). This admittedly nebulous precept can never excuse disregard of the Constitution's express directives, but it provides a useful guidepost when, as here, the constitutional text furnishes no discernible judicial metric for adjudicating what, exactly, constitutes a legislative "subject." While the provision unquestionably demands that the Legislature take steps to parcel budget reconciliation into multiple bills, it cannot "be read . . . to impede or embarrass the legislature.'" *Hoffman v. Reagan*, 245 Ariz. 313, 316, ¶ 14 (2018). It is sufficient if each bill "fall[s] under some general idea." *Id.* (internal citation omitted).

The Appellees train their fire on S.B. 1819, the budget procedures BRB. But this cavil inevitably confronts the practical demands of governance. For better or worse, state

government in the twenty-first century is a complex regulatory apparatus, and the budget process inevitably intertwines with countless facets of social and economic life. The appropriations "feed" bill spans more than 100 pages and covers dozens of state agencies and institutions. *See* 2021 Ariz. Laws ch. 408. To segment each of the (often arcane and narrow) substantive statutory amendments accompanying these appropriations into separate compartmentalized bills would convert Arizona's relatively short legislative session into a full-time undertaking, with stacks of bills languishing in legislative gridlock. Indeed, while Appellees fault S.B. 1819 for encompassing a "hodgepodge" of subjects, Ans. Br. at 1, they are notably at a loss to proffer an alternative codification scheme. Do each of the bill's fifty-two provisions correspond to its own distinct "subject"? Or only some of them? And, more importantly, how are courts to ensure that they are not merely displacing the Legislature's own discretionary judgments as to what constitutes an articulable "subject" with their own?

Given the sheer breadth and scope of Arizona's budget, certain substantive amendments that are tied to line item appropriations will elude easy classification within one of the canonical BRB subject matter areas (*e.g.*, "Health," "K-12 Education," etc.). A vehicle (such as the budget procedures bill) for these residuary provisions is essential and unavoidable. While SB 1819 may not be a paragon of legislative workmanship, it is a discrete component of a budget process that submits to the constraints of the Single Subject Rule.

B. The Titling System Notifies the Public of How Each Bill Would Affect Existing Law

1. BRB Provisions Necessarily "Effectuate the Budget"

The crux of the Superior Court's ratification of Appellees' Title Rule claims is that the titles of HB2898, SB1825, SB1824, and SB1819 do not provide "adequate notice" of the challenged provisions, which the Superior Court declared were unrelated to "the budget," Ruling at 10.

Two defects afflict this argument. First, every provision of a BRB is ***by definition*** related to carrying out the budget. This point is crucial, and derives from the *sui generis* nature of the budget process. As noted above, the Constitution requires a strict bifurcation between actual appropriations (*i.e.*, the "feed bill") and substantive policy changes that are tied to those disbursements. In other words, if a majority of both houses determines that it wishes to make a state agency or institution's funding contingent upon that instrumentality doing "X" or refraining from "Y," these substantive preconditions must be enacted separately—namely, in a BRB. There is no identifiable extrinsic constitutional standard by which a court could evaluate such a decision as somehow not "effectuating" the overall budget. The fact that the Legislature collectively decided that funding appropriations should be tied to particular policy amendments, as reified in the BRBs, is itself conclusive of the nexus between the feed bill appropriations and the accompanying BRBs. *Cf. Fogliano v. Brain ex rel. County of Maricopa*, 229 Ariz. 12, 21, ¶ 29 (App. 2011) (noting

that appropriations decisions are "entrusted to the Legislature's judgment" by the Constitution and are not justiciable, even when alleged to be contrary to law).

Second, the titles of these bills in fact do furnish notice of the subject matter of the challenged provisions. For example, the Superior Court pointed at certain provisions of HB2898 that prohibit schools from imposing mask mandates and indoctrinating students with so-called critical race theory, adding that the bill's "title does not provide notice" of them. Ruling at 10. This critique, however, notably elided the title's actual wording, which explicitly referenced "Kindergarten Through Grade Twelve" as the specific subject of the BRB. And all the challenged provisions do, as advertised, regulate the conduct of primary and secondary education, which in turn is funded by the feed bill. Likewise, the Superior Court's complaint that "SB 1825's title provides no notice that the bill would prohibit universities and community colleges from requiring vaccinations and alternative COVID-19 mitigation measures," Ruling at 10, neglects that the title signals in no uncertain terms that the BRB's provisions affect "higher education."

In short, the title of each BRB fully discharged its constitutional purpose: it (1) accurately represented that the bill is a "budget reconciliation" measure—*i.e.*, substantive policy amendments upon which the Legislature has chosen to condition funding appropriations, (2) identified the specific subject matter area implicated, and (3) itemized, by title and section number, each and every statute that the BRB would amend.

2. The "California Format" of Bill Titling Complies with the Title Requirement

The implications of the Superior Court rulings far transcend the confines of this case. At bottom, the Appellees' theory is fundamentally an attack on the so-called California Format style of bill titling that the Legislature adopted after careful analysis more than three decades ago. The Court should rebuff that gambit.

The Title Rule is simple in concept and pragmatic in orientation. "[T]he title of a bill [must] give notice of what is contained in the body of the act. The test generally applied is that any provision having a natural connection with the title of the act is properly embraced in the act." *State ex rel. Corbin v. Pickrell*, 136 Ariz. 589, 593 (1983). The California Format furnishes the necessary "connection" between the title and the body of the bill by enumerating in the title—by reference to specific title and section citations in the Arizona Revised Statutes—each and every provision that is added or amended by the bill. This disclosure is supplemented by a very general, high-level distillation of the bill's overall purpose or subject matter area, and, where applicable, a notation that the bill includes appropriations. *See generally Rowland v. McBride*, 35 Ariz. 511, 516–17 (1929) (noting that "[t]he subject as it appears in the title is more or less abstract"); *cf. Chiyoko Ikuta v. Shunji K. Ikuta*, 218 P.2d 854, 857 (Cal. 1950) (holding that the phrase "relating to personal relations" was adequate, explaining that "[t]he constitution does not demand

that the title of an act be a catalogue or abstract of its provisions, but merely that it contain a reasonably intelligent reference to the subject of the legislation").

Two key developments since the Constitution's ratification have reinforced the California Format's congruity with the Title Rule. First, while the early statehood Legislature loosely organized its enactments into general policy classifications, there was no single, systematized numerical index. The original aggregation of statutes, the 1913 Revised Statutes of Arizona, actually consisted of two wholly separate and independent divisions—a civil code and a penal code. Statutes typically were cited solely by reference to paragraph numbers in the applicable civil or penal code. *See, e.g.*, *Callaghan v. Boyce*, 17 Ariz. 433 (1915). Then, the entire statutory scheme was reorganized and recodified in 1928 and again in 1939, further confounding any use of numerical citations as reliable indicators of subject matter topics. The upshot is that, during the early decades of statehood, it would have been impossible without a detailed, narrative title to discern how a given bill would affect various provisions of extant law.

This changed in the 1950s, however, when the Legislature overhauled the statutory codification regime, inaugurating the Arizona Revised Statutes. Importantly, the Arizona Revised Statutes is organized into 49 titles, each of which is assigned to a specific policy area. Although the Arizona Revised Statutes is continually amended, its title index does not change. For example, Title 15 ("Education") is the permanent repository for all education-related statutes. An interested member of the public reviewing the formal title

of HB2898 accordingly would be notified that its references to various sections of Title 15 denoted changes to education-related laws. In other words, the Arizona Revised Statutes title numbers are effectively shorthand for the corresponding subject matter. *See also* Arizona Legislative Council, THE ARIZONA LEGISLATIVE BILL DRAFTING MANUAL, 2019-2020, § 6.2 ("The designations given the titles were selected to indicate the broad principal subject matter allocated to each title so that an examination of the list of titles will show the approximate location of a particular law.").

Second, the Legislature has developed, and made available for easy public access online, "fact sheets" that accompany each bill and that are revised and updated as the bill metamorphosizes. For example, the fact sheet appended to the enacted version of SB1819 summarizes nearly every provision of the bill in easily digestible bullet points. *See* Appendix 2.

Consideration of these evolutionary developments in the legislative process is critical to a proper application of the Title Rule. The title mandate was never intended to vindicate some static, abstract proposition; rather, it serves solely a practical and functional end—*i.e.*, ensuring that the public has some basic notice of a bill's contents. For this reason, courts here and in other states have always imputed to the average person some constructive knowledge of preexisting laws and the basic attributes of the legislative process. *See Hancock v. State*, 31 Ariz. 389, 401 (1927) (holding that the title of amendatory acts are sufficient "when they refer to the section which they amend by chapter

and section number only"); *State v. Jones*, 75 P. 819, 820 (Idaho 1904) (same). The California Format is the modern incarnation of the same principle. The implementation of a numerical title index corresponding to specific subject areas, compounded with the easy availability of comprehensive fact sheets for each bill, should inform the Court's evaluation of the Legislature's bill titling protocols.

Further, any substantively different alternative would be simply unworkable. Crafting exhaustive narrative titles not only consumes valuable (and finite) legislative time and resources,[5] but, as discussed above, descriptive titles inevitably ensnare the Legislature in a Catch-22: the inclusion of ever more detail proportionately increases the risk that the bill will be challenged for leaving something else out. The California Format obviates this perpetual dilemma with a neutral, easily implementable protocol for drafting succinct titles that signal (via references to the Arizona Revised Statutes index) the particular substantive areas of law that the bill will affect. This approach amply satisfies the "liberal construction," *State ex rel. Conway v. Versluis*, 58 Ariz. 368, 377 (1941), that courts always have accorded the Title Rule.

[5] Prior to the adoption of the California Format in 1990, the Legislature employed full-time "title clerks," whose primary responsibility was the arduous task of drafting exhaustive titles that could sometimes consume several pages.

III. Any Findings that the Legislature's Current BRB Processes Violate Article IV, Part 2, Section 13, Should be Given Only Prospective Effect

In sum, the Legislature's well-established budget reconciliation procedures and bill titling protocols comport with the single subject and title mandates in Article IV, Part 2, Section 13. Should the Court conclude otherwise, however, the *amici* request that the Court apply such rulings only prospectively, and not enjoin or otherwise abrogate any of the BRBs enacted for the 2021-2022 fiscal year.

Considerations of "reliance, purpose, and inequity" guide the "policy question" of whether to imbue a ruling with only prospective effect. *Hartford Acc. & Indem Co.v. Aetna Cas. & Sur. Co.*, 164 Ariz. 286, 293 (1990); *see also Law v. Superior Court*, 157 Ariz. 147, 160 (1988). Even assuming that Appellees have alleged the minimal cognizable "injury" necessary for standing, they have done so just barely. Appellees generally concede that the various challenged provisions are, in substance, constitutionally sound, and would be valid and enforceable if enacted separately.[6] Rather, they dispute only the joinder of these (valid) provisions with other (valid) provisions of the same budget procedures BRB, and the descriptions contained in several BRBs' titles. If this exacts an "injury" on these Appellees, it is of the most tenuous variant imaginable.

[6] Appellees do controvert several provisions of HB2898 on equal protection grounds; while the *amici* believe those arguments are specious, they are beyond the scope of this brief.

At bottom, the strictures of Article IV, Part 2, Section 13 serve to protect legislators from the pressure to "approve a disfavored proposition to secure passage of a favored proposition," *Hoffman*, 245 Ariz. at 313, ¶ 14, and to ensure that "neither the members of the Legislature nor the people can be misled to vote for something not known to them or intended to be voted for," *Taylor*, 52 Ariz. at 216. While legitimate, these concerns are largely abstractions that can be vindicated by an exclusively prospective ruling; they bear, at most, an attenuated nexus to any articulable "harm" incurred by these Appellees, none of whom have established that they were subjectively misled or unaware of the contents of the challenged BRBs.

On the other side of the ledger, upending substantial swaths of the state budget months after the Legislature adjourned *sine die* would engender substantial legal and regulatory uncertainty across state and local governments, potentially destabilize funding streams to certain agencies and instrumentalities, and possibly require hastily convening a special session to effectively redo the entire budget process. And the disruption would not be confined to a single year's budget; years and potentially decades of reconciliation bills would be subject to invalidation under a ruling of retroactive application. By way of illustration, the Legislature has included a "budget procedures" BRB in nearly every reconciliation process since 2005.

Recognizing these significant logistical challenges and inequities, at least one other state's supreme court has effectuated its single subject rule pronouncements only

prospectively, to the extent they relate to budgetary matters. *See Campbell v. White*, 856 P.2d 255, 262-63 (Okla. 1993) ("We have no desire . . . to issue an opinion which would necessitate the calling of a special session . . . [W]e give a prospective effect to our holding to avoid needless disruption to the operation of state agencies.").

These considerations counsel for similar restraint in this case. If the Court believes that, for example, the existing eight BRBs are unconstitutionally diffuse, the *amici* respectfully submit that the Court should suggest how many separate reconciliation measures would be appropriate and the proper parameters of each "subject." Similarly, if the Court finds that the longstanding California Format of bill titling offends the Constitution, then the Legislature needs to know what titling paradigm the Court expects will replace it. As it has in the past, the Legislature stands ready to implement diligently the judiciary's constructions of Article IV, Part 2, Section 13. But it is entitled to fair notice of, and an opportunity to institute, such new doctrinal developments. The Court should not permit litigants to retrospectively capsize years and even decades of statutes produced by a legislative process that incorporated a reasonable and good faith conception of the Single Subject Rule and the Title Rule.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Superior Court.

RESPECTFULLY SUBMITTED this 15th day of October, 2021.

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