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Colorado Court of Appeals Case No.: 2023CA73 Opinion by Hon. Timothy J. Schutz (Hon. Robert D. Hawthorne, concurring) Dissenting Opinion by Hon. Jerry N. Jones	
Petitioner: Matthew K. Hobbs, **v.** **Respondents:** City of Salida; Christy Doon, in her official capacity as City of Salida Administrator; and Giant Hornet LLC d/b/a HighSide! Bar and Grill.	
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Opening Brief	

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of Colorado Appellate Rules 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in Colorado Appellate Rule 28(g).

It contains **6,920** words (opening brief does not exceed 9,500 words).

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s/ Julian R. Ellis, Jr.
Julian R. Ellis, Jr.

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ISSUE PRESENTED FOR REVIEW

Whether under subsection 25-12-103(11) the City may excuse violations of statewide noise limits set in Colorado's Noise Abatement Act by permitting for-profit entities to exceed the limits when holding "cultural, entertainment, athletic, or patriotic events" on private property, or are such permits invalid under the Act.

STATEMENT OF THE CASE

For decades, Colorado has had a comprehensive statutory scheme that regulates noise pollution to protect against the serious harms caused by excessive noise. *See* Colorado Noise Abatement Act, Colo. Rev. Stat. §§ 25-12-101 to -110. The statute declares excessive noise to be a public nuisance; sets baseline statewide noise limits; defines narrow exemptions based on legislative priorities; allows local authorities to adopt more protective measures regulating excessive noise; and, critically, grants a private right to those most impacted by noise pollution—residents—to seek abatement in court.

The crux of the dispute is straightforward: did the general assembly set statewide noise standards in the Act, a violation of which may be remedied through private enforcement by those impacted; or did the general assembly set statewide standards and delegate to political subdivisions (and nonprofits) the power to excuse violations of these

standards in favor of for-profit enterprises using private property for "entertainment events," thereby abrogating residents' rights?

The answer to this question turns on a narrow exemption to the Act's statewide limits: "the use of property by this state, any political subdivision of this state, or any other entity not organized for profit …, or any of their lessees, licensees, or permittees," in promoting or holding "cultural, entertainment, athletic, or patriotic events." § 25-12-103(11). While subsection 103(11) clearly exempts "the use of property by" government and nonprofit actors when hosting a Fourth of July fireworks display at the State Fairgrounds in Pueblo, a Colorado Symphony concert series at Washington Park in Denver, or a football game at Folsom Field in Boulder, a 2-1 majority of the court of appeals refashioned this narrow exemption into a near-limitless delegation of power to local authorities to "permit" and "license" violations of statewide noise limits. The effect is that now localities like the City of Salida may excuse violations by *for-profit* entities hosting "entertainment events" on *private* property and insulate noise polluters from abatement actions by those harmed by the excessive noise.

Close review of the text, structure, and history of the Act makes plain that the general assembly did not adopt statewide standards, and confer statutory rights to enforce those standards, only to allow

localities to excuse violations of the standards by for-profit enterprises. The court of appeals majority erred in concluding otherwise.

I. Statutory Background.

Statutory-rule cities are subdivisions of the state. They exist for "the convenient administration of the state government" and enjoy only those powers expressly or impliedly granted by the general assembly. *Bd. of Cnty. Comm'rs of Douglas Cnty. v. Bainbridge, Inc.*, 929 P.2d 691, 699 (Colo. 1996). A city's statutorily defined authority includes the power to regulate "nuisance[s]" and "prevent and suppress … noises." Colo. Rev. Stat. § 31-15-401(c), (e). It does so by issuing ordinances, which are subject to limitations. *See* § 31-15-103. Ordinances must (1) "discharg[e] the powers and duties conferred" by the general assembly; (2) be "necessary and proper" for the "safety," "health," and "prosperity," and to improve "morals, order, comfort, and convenience," of the city and its residents; and (3) "not [be] inconsistent with" state law. *Id.* The last limitation is central to this case.

In 1971, the general assembly adopted the Noise Abatement Act. 1971 Colo. Sess. Laws, ch. 164, § 1 (codified in Colo. Rev. Stat. §§ 25-12-101 to -110). The Act "declare[d]" noise to be "a major source of environmental pollution," and found that "[e]xcess noise" causes "physiological and psychological" harm to citizens. Colo. Rev. Stat. § 25-

12-101. Because of this harm, the Act "establish[ed] statewide standards for noise level limits" for "time periods and areas," and it designated "[n]oise in excess of the limits" to be "a public nuisance." *Id.*

While the Act is over 50 years old, the general assembly showed commendable foresight. The scientific consensus, confirmed by decades of research, is "[e]nvironmental noise exposure" affects "the brain and cognition due to its detrimental effects on the learning process (e.g. distracting attention from lessons or work), sleep (e.g. keeping one awake and affecting cognitive capability and development subsequently), stress (increasing psychological frustration and annoyance, and physical stress responses involving cortisol and adrenaline), and learned helplessness (a noisy environment impacting the individual's sense of control and self-efficacy, reducing their confidence and motivation)." Rhiannon Thompson, et al., *Noise Pollution and Human Cognition: An Updated Systematic Review and* Meta-*Analysis of Recent Evidence*, 158 Env't Int'l 1, 2 (2022). Thus, it's no surprise that reducing exposure to excessive noise improves health and prevents cognitive deficits. *Id.* at 21.

Section 103 sets the statewide noise limits in A-weighted decibels based on four zones (residential, commercial, light industrial, and industrial) and two time periods (7:00 a.m. to 7:00 p.m. and 7:00 p.m. to

7:00 a.m.). Colo. Rev. Stat. § 25-12-103(1). Noise exceeding the statewide limits is "prima facie evidence" of a "public nuisance." *Id.*

Critically, not only does the Act set statewide standards, but it confers a private right for citizens to protect themselves from the physiological and psychological harm caused by excessive noise. §§ 25-12-101, -103, -104. "[A]ny … resident of the state may maintain an action in equity in the district court … to abate and prevent such nuisance and to perpetually enjoin the person conducting or maintaining the same." § 25-12-104. Violation of a court-imposed injunction is subject to a $100 to $2,000 fine for contempt each day a person violates the injunction. § 25-12-105.

Both the 1971 Act and subsequent amendments recognize narrow exemptions from the statewide standards. For example, the Act exempts aircraft operations and other federally regulated activities, § 25-12-103(4), speedways and motor-sports events, § 25-12-103(7), and activities related to snowmaking, § 25-12-103(10). This case concerns yet another narrow exemption: "the use of property by this state, any political subdivision of this state, or any other entity not organized for profit …, or any of their lessees, licensees, or permittees, for the purpose of promoting, producing, or holding cultural, entertainment, athletic, or patriotic events[.]" § 25-12-103(11).

In addition to setting statewide noise limits, the Act reserves for local authorities the power to impose stricter noise limits to protect their residents. Section 108 states that the Act does not "preempt or limit the authority of [political subdivisions] to adopt standards that are no less restrictive than the provisions of this article." Other provisions reinforce that local authorities maintain the power to protect their residents beyond the baselines set in the Act. *See, e.g.*, §§ 25-12-103(7) (last clause), -103(10) (last sentence), -103(11) (last sentence).

II. Factual Background.

Hobbs lives in Salida, Colorado, less than 600 feet from the HighSide! Bar and Grill. (Op. ¶ 4.) He purchased his property and built his home before HighSide opened in 2020. (*Id.* ¶ 5; CF, p 376, ¶ 20.) Between Hobbs's home and HighSide's outdoor patio is open space; the space includes a walking path, a county road, and the whitewater of the Arkansas River. (Op. ¶¶ 4–5; CF, p 376, ¶ 19.) Between May and November, the HighSide patio is a hotbed for outdoor concerts. These concerts cause Hobbs regular sleep disruption, aggravation, emotional distress, and loss of productivity. (Op. ¶ 5; CF, p 382, ¶ 63.)

Hobbs raised concerns about the loud noises with everyone in a position to fix the problem. He complained to HighSide; he filed noise complaints with the City; he emailed city officials; he petitioned city

council with support of neighbors who were also impacted by the noise; and he participated in mediation. (CF, pp 377–79, ¶¶ 21–28, 32–34, 40.)

Despite his attempts to find a nonlitigation solution, Hobbs ended up worse off than when he started. After hearing his complaints, the City amended its permitting process and *increased*—from 18 to 60—the number of yearly amplified noise permits it could issue to a single location between May 1 and November 1. (*Id.* at 379, ¶ 42.) The city administrator in fact issued permits authorizing HighSide to host over 50 outdoor concerts between May 2022 and September 2022. (*Id.* at 44–49; *id.* at 380, ¶ 47.) And these permits authorized HighSide to emit noise up to 85dB(A)—3,000% higher than the maximum level allowed under the statewide standards.[1] (*See id.* at 47; *id.* at 375, ¶¶ 16–17.)

III. Procedural Background.

Hobbs sued. Consistent with Colo. Rev. Stat. § 25-12-104, he sought temporary- and permanent-injunctive relief to prohibit the City from issuing amplified noise permits to HighSide and to prohibit the bar from exceeding statewide limits. (*See* CF, pp 383–84, ¶¶ C–F.)

[1] *See* Colo. Rev. Stat. §§ 25-12-103(1) (55 dB(A) is the highest noise level for residential zones, and 80 dB(A) is highest noise level for any zone), -102(3) (the effect of the decibel formula is that every three-decibel increase is 100% increase in sound level, and every 10-decibel increase is 1,000% increase in sound level).

The District Court's Order. HighSide and the City immediately moved to dismiss. They argued Hobbs's claims failed as a matter of law because the alleged noise violations resulted from "music events"; the City granted HighSide permits to hold those music events; and Colo. Rev. Stat. § 25-12-103(11) exempts the City and HighSide, as a permittee, from the statewide noise limits in subsection 103(1).

The district court agreed. (Order 5–8.) Finding subsection 103(11) "dispositive," the court reasoned, "[T]he general assembly also explicitly provided that [the Act] in its entirety does not apply to political subdivisions or their permittees for purposes of promoting, producing, or holding entertainment 'including, but not limited to' concerts and music festivals." (*Id.* at 5–6.) Despite quoting the subsection and purporting to interpret its plain language, the court never acknowledged or gave meaning to the words "use of the property by." Instead, it simplified—and thus vastly expanded—the exemption to excuse noise violations whenever the City's permittees hold a "cultural" or "entertainment" event, regardless of whether the City itself uses the property where the event occurs. (*Id.* at 7–8.)

Having found the exemption applicable, the district court rejected Hobbs's argument that the Act preempted the City's ordinance and process for issuing "amplified noise" permits. (*Id.*)

The Court of Appeals Majority Decision. In a 2-1 decision, the court of appeals affirmed, "address[ing] for the first time in a published opinion the interplay between" the Act's statewide noise limits and the amplified noise permits issued by local governments to exceed those limits. (Op. ¶ 1.) The majority disagreed that the Act preempted the City's power to issue such permits. Like the district court, the majority found subsection 103(11) dispositive; also like the district court, it failed to contend with the words "use of the property by."

Instead, the majority focused on dismantling arguments that Hobbs never made. In briefing, Hobbs argued the statutory text foreclosed application of the exemption because the City did not host or sponsor the music events, nor did the events occur on City property. His point: there was no "use of the property by" the City. Rather, the only connection between the City and HighSide was that the City issued dozens of permits for the bar to hold outdoor concerts and exceed statewide noise limits on the bar's property.

Sidestepping the point, the majority reframed Hobbs's argument to mean that the phrase "use of by property by" limits subsection 103(11) to "concerts on property [the City] *owns*." (Op. ¶ 31 (emphasis added).) The majority then rejected the strawman as unsupported by the statutory text, which "refers broadly to the 'use of property' without

restriction with respect to who owns the property." (*Id.* ¶¶ 32–33). Having neutralized an argument Hobbs did not make, the majority (like the district court) ended its analysis without contending with and providing meaning to the words "use of the property by."

The Dissent. The dissent focused on this gap, noting the majority's "reasoning falters most fundamentally by failing to read the statutory language as a whole." (*Id.* ¶ 69.) A comprehensive reading of subsection 103(11) identifies three categories of primary actors (the state, political subdivisions, and nonprofits); three categories of subordinate actors (lessees, licensees, and permittees of primary actors); and a predicate requirement that a primary actor "use" its real property before the exemption applies. (*Id.*) Meaning the exemption is necessarily limited to property used by a primary actor, and any other subordinate actor that uses the property used by the primary actor (whether by lease, license, or permit). (*Id.* ¶ 74.) Because the majority's construction effectively reads "the use of property by" requirement out of the statute, the dissent identified many "absurd results" that followed from the flawed construction. (*Id.* ¶¶ 70–73.)

Hobbs sought review from this Court, which the Court granted.

SUMMARY OF THE ARGUMENT

Colorado's Noise Abatement Act strikes a balance to protect residents from the physiological and psychological harm caused by noise pollution. The Act sets baseline statewide noise standards applicable to defined property zones and time periods. It confers a private right for citizens to enforce these standards and to protect themselves from excessive noise by seeking abatement and prohibitory injunctions in court. And it reserves for local authorities the power to adopt more protective measures through local codes and ordinances.

Over the general assembly's clear intent, the majority interpreted a narrow exemption from this comprehensive legislative scheme—meant to exempt community events hosted by the state, local governments, and nonprofits—as a delegation of power to local authorities (and private nonprofits) to excuse violations of the Act's statewide noise limits. The majority's interpretation is irreconcilable with the text, structure, and history of the Act.

First, the majority's interpretation is textually flawed. The majority's read of the exemption omits critical words and punctuation that limits the exemption to property *used* by a primary category of users: the state, political subdivisions of the state, or nonprofits. As the dissent and the division in *Freed v. Bonfire Entertainment LLC*, 2024COA65 explained, the exemption only applies when the state, a

political subdivision, or a nonprofit uses property to hold a qualifying event. It's only when this predicate occurs that the exempt users' "lessees, licensees, and permittees" are exempted from statewide limits.

Second, the majority's interpretation is contrary to the structure and design of the Act, and violates multiple canons of statutory interpretation. While the Act sets statewide noise limits, confers private rights to residents, and allows local authorities to adopt more protective measures, the majority held that a narrow *exemption* actually grants localities the power to avoid this statewide aim by "licensing" or "permitting" noise violations on private property by private actors when holding "entertainment" events. The majority's view transforms a statewide statutory scheme into an opt-out scheme to the detriment of those most impacted by excessive noise: residents. Not only does the majority's read destroy the Act's design, but it fails to give harmonious and sensible effect to all the Act's parts, renders the exemption unconstitutional, and leads to absurd results.

Third, the majority's interpretation is against the exemption's legislative history. The committee and floor debates—and the bill's title—conclusively show that the general assembly intended to create a narrow exemption from the Act to allow the state, political subdivisions, and nonprofits to hold public-facing events (firework displays, concerts

in the park, etc.) without fear that these events would be shut down because they violate statewide noise limits.

STANDARD OF REVIEW

Questions of statutory interpretation like the one at issue here are reviewed de novo. *See, e.g.*, *Edwards v. New Century Hospice, Inc.*, 535 P.3d 969, 972–73 (Colo. 2023).

ARGUMENT

As with any exercise in statutory interpretation, the Court's "primary task" "is to determine and effectuate legislative intent." *Burnett v. State Dep't of Nat. Res.*, 346 P.3d 1005, 1008 (Colo. 2015). Here, that requires reviewing a comprehensive statutory scheme meant to protect residents from excessive noise and interpreting a narrow exemption from the scheme. Read in context, the dissent and the division in *Freed v. Bonfire Entertainment LLC*, 2024COA65, have the best read of the text, structure, and history of the statute. Subsection 103(11) narrowly exempts state and local governments, and nonprofits, from statewide limits to allow community-enhancing events.

I. The Majority's Interpretation of Subsection 103(11) Is Against the Noise Abatement Act's Text and Structure.

A. The Act is a comprehensive statutory scheme that must be liberally construed.

Questions of statutory interpretation "always ... begin with the text." *People in Int. of A.T.C.*, 528 P.3d 168, 171 (Colo. 2023) (quoting *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022)). The aim is "to 'give effect to the intent of the legislature'" by applying the text's "plain and ordinary meaning." *Id.* (quoting *Am. Fam. Mut. Ins. v. Barriga*, 418 P.3d 1181, 1183 (Colo. 2018)).

For statutory provisions that are part of a "comprehensive legislative scheme," the Court must "construe each provision to further the overarching legislative intent." *People in Int. of W.P.*, 295 P.3d 514, 519 (Colo. 2013). "[T]he entire scheme should be understood ... to give consistent, harmonious, and sensible effect" to the statutory design. *People v. Jones*, 346 P.3d 44, 48 (Colo. 2015); *Frank M. Hall & Co. v. Newsom*, 125 P.3d 444, 448 (Colo. 2005) ("[A] provision existing as part of a comprehensive statutory scheme must be understood, when possible, to harmonize the whole.").

Further, comprehensive legislative acts "intended to be 'remedial and beneficent in purpose ... should be liberally construed' to accomplish [their] goals." *Wolford v. Pinnacol Assurance*, 107 P.3d 947, 951 (Colo. 2005) (quoting *Davison v. Indus. Claim Appeals Off.*, 84 P.3d 1023, 1029

(Colo. 2004)). While a "liberal constru[ction]" is not license to "read into a statute a provision that does not exist," a provision in a remedial-and-beneficent statutory scheme must be interpreted to give effect to "its evident intent and purpose" and to avoid interpretations "lead[ing] to unreasonable and unjust results." *Danielson v. Indus. Comm'n*, 44 P.2d 1011, 1013 (Colo. 1935).

The Act at issue here is both comprehensive and remedial and beneficent in purpose; the first section of the Act leaves no doubt. The general assembly declared "noise" to be "a major source of environmental pollution" that "threat[ens] ... the serenity and quality of life" in the state. Colo. Rev. Stat. § 25-12-101. It found that excessive noise adversely impacts the "physiological and psychological" wellbeing of citizens and contributes to "economic loss to the community." *Id.* Because noise pollution is not limited to a specific geographic area, the general assembly "establish[ed] *statewide* standards for noise level limits," adding that noise exceeding statewide limits is per se a "public nuisance." *Id.* (emphasis added).

The Act then proceeds in several critical sections. It defines the relevant terms. § 25-12-102. It sets the "[m]aximum permissible noise levels" based on four "zones" during two time periods. § 25-12-103(1). It confers on citizens a positive right to "maintain an action in equity ... to

abate and prevent such nuisance and to perpetually enjoin the person conducting or maintaining the same." § 25-12-104. It clarifies that any violation of a section-104 injunction subjects the violator to a fine for contempt, and that each day a violation occurs is a separate offense. § 25-12-105. It addresses transient noises from motor vehicles, including defining the power of local authorities to regulate these noises. §§ 25-12-106, -107, -110. And lastly, it states the preemptive effect of the Act: local authorities may adopt more protective, but not less protective, noise measures.[2] *See* § 25-12-108; *see also Cain v. People*, 327 P.3d 249, 253 (Colo. 2014) (using the negative-implication canon to conclude the inclusion of a narrow exception means the general assembly "intended that there be no other exceptions").

The general assembly spoke with clarity in adopting the Act. It sought to remedy a harmful environmental pollutant in the state by setting statewide noise limits and empowering citizens to enforce the limits, subject to narrow exemptions (*see* I.B and C, *infra*). The

[2] The Act varies from the general rule that local authorities may be *more* protective in three defined instances. The Act grants the public utilities commission jurisdiction to govern noise from "electric transmission facilities." § 25-12-103(12)(b). It limits local authorities' power over sports shooting ranges. § 25-12-109. And it limits local authorities' power to vary from the Act's noise limits for motor vehicles and off-road vehicles. §§ 25-12-107(1), -110(6).

statutory scheme must be considered as a whole and must be liberally construed to achieve the general assembly's overarching intent: to protect Colorado residents from harmful noise pollution.

B. Exemptions, like subsection 103(11), to broad legislative policies must be narrowly interpreted.

Section 103 of the Act includes four exemptions, one of which is central to this appeal.[3] This Court has recognized that exemptions to broad statewide policies must "be narrowly construed." *Sargent Sch. Dist. No. RE-33J v. W. Servs., Inc.*, 751 P.2d 56, 60 (Colo. 1988) (interpreting Colorado's Open Records Act); *Land Owners United, LLC v. Waters*, 293 P.3d 86, 94 (Colo. App. 2011) ("CORA contains a broad legislative declaration that all public records shall be open for inspection unless exempted by the statute itself or specifically by other law."). This interpretive rule is an extension of the rule that comprehensive statutory schemes with a clear remedial objective must be interpreted broadly to achieve that objective. As applied here, to achieve the remedial purpose of protecting citizens from harmful noise

[3] The other three exemptions relate to "the operation of aircraft or to other activities which are subject to federal law," § 25-12-103(4); "the use of property for purposes of conducting speed or endurance events involving motor or other vehicles," § 25-12-103(7); and "the use of property for the purpose of manufacturing, maintaining, or grooming machine-made snow," § 25-12-103(10).

pollution through the implementation of statewide limits, any exemption from the limits must be construed narrowly.

C. The majority's interpretation of the subsection 103(11) exemption is contrary to the statutory text.

The narrow exemption at issue provides,

> [The Act] is not applicable to the use of property by this state, any political subdivision of this state, or any other entity not organized for profit, including, but not limited to, nonprofit corporations, or any of their lessees, licensees, or permittees, for the purpose of promoting, producing, or holding cultural, entertainment, athletic, or patriotic events, including, but not limited to, concerts, music festivals, and fireworks displays.

Colo. Rev. Stat. § 25-12-103(11). What is plain from the statutory text is that statewide noise limits do not apply to the state, any political subdivision of the state, or any nonprofit when one of these three not-for-profit entities *use* property to hold "cultural, entertainment, athletic, or patriotic events" events. And such an exemption makes sense. These not-for-profit actors (sparingly) hold public events to enhance community engagement and are either directly accountable to residents or are constrained by a not-for-profit purpose.

The majority, however, went a massive step further and held that "the Act's noise standards are not applicable to [a political subdivision] *or its permittee*." (Op. ¶ 43.) While the statutory text first requires a qualifying "use of property by" one of three not-for-profit entities, the

majority jettisoned this textual limitation and determined that the exemption extends generally to *any* "lessee[], licensee[], or permittee[]" of the state, political subdivision, or nonprofit, even when there is no qualifying use by one of the three identified not-for-profit entities. The net effect of the majority's interpretation is that political subdivisions—and even nonprofit corporations—can license or permit anyone, including for-profit enterprises on private property, to violate statewide noise limits on private property without limitation so long as the activity qualifies as an "entertainment event."

The majority's interpretation cannot be squared with subsection 103(11)'s text. As the dissent explained, and as the text supports, subsection 103(11) identifies three primary categories (the state, political subdivisions, and nonprofits) and three subordinate categories (lessees, licensees, and permittees) of entities. (Op. ¶ 69 (Jones, J., dissenting).) One of the primary-category entities must *use* the property before a subordinate-category entity may be exempt.

Indeed, this is the interpretation advanced by the division in *Freed v. Bonfire Entertainment LLC*, 2024COA65, ¶ 34. "We believe the General Assembly's intended meaning was ... that lessees, licensees, and permittees are exempted from [the Act] only to the extent that they are involved in a state's, political subdivision's, or other nonprofit

entity's use of property." *Id.* ¶ 42. To reach its interpretation, the division zeroed in on two textual cues. *First*, the general assembly used the disjunctive "or" twice, "once before 'any other' nonprofit entities or corporations and again before the 'lessees, licensees, and permittees' clause." *Id.* ¶ 43. Including the disjunctive "or" twice indicates a primary set of categories and a subordinate set of categories; to read the statute otherwise "would render the first 'or' meaningless." *Id. Second*, the general assembly included the possessive pronoun "their" before the subordinate categories, and the opening clause "define[s] who 'their' refers to: the state, its subdivisions, or other nonprofits *that use property*." *Id.* ¶ 44 (emphasis in original). Thus, "substitut[ing] this pronoun with the noun to which it refers, the clause would read, 'or any of the state's, political subdivision's, or other nonprofit property users' lessees, licensees, or permittees.'" *Id.*

Freed's interpretation is the most grammatically coherent read. Syntactically, the phrase "their lessees, licensees, or permittees" follows the second "or" and is set off by commas, indicating that it is not a continuation of the primary-entity list, but rather a parenthetical element that is explanatory of the list. This compares to the prior parenthetical, "including, but not limited to, nonprofit corporations," in that it explains who is covered by the exemption. But, unlike the

nonprofit parenthetical, the lessee-licensee-permittee parenthetical uses the possessive pronoun "their" to maintain a connection to the primary entities' use of property. In that way, it clarifies that the subordinate—or derivative—users of property are exempt only when using the primary entities' property or property rights through conveyance by a lease, license, or permit.

Narrowly construed then, subsection 103(11)'s exemption only applies when the state, a political subdivision, or a nonprofit uses property to hold a qualifying event. As explained next, not only is the majority's interpretation contrary to the plain text of subsection 103(11), but it is also irreconcilable with the structure of the Act (I.D, *infra*), and violates multiple interpretive canons (I.E, *infra*).

D. The majority's interpretation of the subsection 103(11) exemption is irreconcilable with the Act's structure.

As stated, the Act provides a comprehensive statewide scheme governing excessive noise—a recognized environmental pollutant dangerous to humans that the general assembly deemed a public nuisance. Colo. Rev. Stat. § 25-12-101. Again, the key features of the Act are statewide standards generally applicable to all real property use in the state, § 25-12-103(1); a private right to abate violations of the statewide standards and to seek prohibitory injunctions, §§ 25-12-104, -105; and a provision preserving local authority to adopt standards that

are more protective of citizens, § 25-12-108. To this last point, there are multiple examples in the Act where the general assembly clarified the scope of local authorities' power to regulate excess noise:

- -108: states local authorities are not preempted from providing greater protection from excessive noise.
- -103(12)(b): states local authorities may not set noise limits for electric transmission facilities that are more restrictive than the public utilities commission.
- -107(1): states local authorities may adopt noise limits for motor vehicles consistent with the limits specified in the Act. In other words, they cannot set more restrictive standards.
- -110(6): states local authorities may not set noise limits for off-highway vehicles that are more restrictive than the limits specified in the Act.

Taken together, these provisions emphasize the Act's design vis-à-vis local authorities: it sets baseline statewide noise limits and reserves for local authorities the power to adopt more protective measures except in isolated circumstances. *See Freed*, 2024COA65, ¶ 46 ("To the extent that the General Assembly intended to leave room for local noise regulation, we conclude that it most clearly defined that division of power in section 25-12-108, where it established that municipalities and counties are free to adopt any standards they see fit so long as those standards are 'no less restrictive' than those set in the Noise Abatement Act."). These provisions also show that the general assembly speaks with precision when it deviates from the general rule.

Despite this structure, the majority held that hiding in plain sight in subsection 103(11) is a broad *grant* of power to local authorities. To the majority, rather than a narrow exemption for qualifying events held by not-for-profit entities to promote community engagement, subsection 103(11) gives localities broad authority to license or permit near-limitless violations of statewide standards by for-profit users on private property. For context, here the City excused violations of the Act's statewide limits an astonishing *60 times per location*, and at noise levels 3,000% higher than the maximum levels in the Act. (*See* CF, p 47; *id.* at 375 ¶¶ 16–17; *id.* at 379, ¶ 42.) That means all bars in a city like Salida could violate statewide limits more than twice per week (no matter the night) for half the year. (*See* Op. ¶ 42; CF, pp 44–49; *id.* at 380, ¶ 47.)

If the general assembly intended to grant local authorities broad power to avoid *statewide* noise limits and positive rights, thereby altering the state regulatory framework in the most fundamental way, it would have said so in clear terms. To say it would be odd for the general assembly to tuck this sort of delegation of power to political subdivisions to excuse violations of statewide noise limits into a narrow exemption is an understatement. The general assembly "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in

mouseholes." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). As this Court recently said, "We ... cannot conclude that the General Assembly intended [a statutory provision] to allow for such a ready means of evading the legislature's own statutory enactment without a clearer expression of such an intent" in the statute itself. *Educ. reEnvisioned BOCES v. Colo. Springs Sch. Dist. 11*, 548 P.3d 669, 677–78 (Colo. 2024).

Yet that's what the majority's interpretation of subsection 103(11) does. It turns a comprehensive statewide scheme regulating environmental harm into an opt-out scheme based on local preference.

E. The majority's interpretation of the subsection 103(11) exemption violates multiple interpretive cannons.

The majority's view that political subdivisions may broadly excuse violations of statewide standards by lease, license, or permit suffers from other textual shortcomings as well.

1. The majority's interpretation fails to "giv[e] consistent, harmonious, and sensible effect to all of [section 103 and subsection 103(11)'s] parts." *See Young v. Brighton Sch. Dist. 27J*, 325 P.3d 571, 576 (Colo. 2014). Adjacent to subsection 103(11) are two similarly worded exemptions. Subsections 103(7) and 103(10) track the language of subsection 103(11) by stating, "This article is not applicable to the use of property ...," and then continue with the words "for purposes of"

to explain the exempted use. While subsection 103(11) is similarly drafted, it departs from subsections 103(7) and (10)'s structure in one way: it also defines the class of property users to which the exemption applies—use "by this state, any political subdivision of this state, or any other entity not organized for profit ..., or any of their lessees, licensees, or permittees." This is a material textual *limitation*. Rather than exempting all qualifying uses of property in subsection 103(11), whether public or private, the general assembly defined the class of not-for-profit property users that are exempt. It would be incongruous to conclude that this textual limitation operates to not only *limit* the scope of the exemption but also *expand* local authorities' power to license and permit noncompliance with statewide standards.[4]

Indeed, if the first sentence of subsection 103(11) grants to local authorities the power to license and permit noncompliance, as the majority suggests (Op. ¶ 43), the second sentence clarifying that exemption does not "preempt or limit the authority [or power] of any political subdivisions" makes no sense. That is, if the first sentence is

[4] Recall that the Act was adopted in 1971. The initial version of the Act set statewide noise standards and clarified that local authorities only had the power to adopt more protective standards. *See* 1971 Colo. Sess. Laws, ch. 164, § 1 (codified in Colo. Rev. Stat. § 25-12-108). Thus, the status quo when subsection 103(11) was adopted in 1987, *see* 1987 Colo. Sess. Laws, ch. 212, § 1, was that local authorities had no power to license or permit noise exceeding statewide limits.

power enhancing—it is a delegation of power to regulate (up or down) in an area that the general assembly has said statewide standards are necessary—why clarify in the second sentence that this supposed *expansion* of power does not otherwise "preempt or limit" a political subdivision's authority? If what the general assembly intended was to grant political subdivisions new power, it chose an odd way of doing so.

2. The majority's interpretation casts serious doubt on the constitutionality of subsection 103(11). *See People v. Iannicelli*, 449 P.3d 387, 392 (Colo. 2019); *see also Plemmons v. People*, 517 P.3d 1210, 1217 (Colo. 2022) ("In interpreting ambiguous statutes, we are further directed, if possible, to avoid interpretations that would render the statute unconstitutional."). If the majority is correct that subsection 103(11) gives political subdivisions the power to permit property users to exceed statewide noise limits, so too may nonprofits. (Op. ¶ 70 (Jones, J., dissenting) (observing that under the majority's interpretation "any nonprofit entity[] ... could issue a permit to anyone anywhere in the state to violate the statewide noise standards for the statutorily identified events ... without any limitation as to noise level, duration, or frequency").) The dissent found this "absurd[]" (*id.*); it is also unconstitutional as a violation of the nondelegation doctrine, *see Amica Life Ins. v. Wertz*, 462 P.3d 51, 58 (Colo. 2020).

Under our constitution, the general assembly has the power to make law. Colo. Const. art. V, § 1. While the general assembly may delegate power to administrative agencies to execute law within defined "standards and safeguards," it cannot authorize agencies to "circumvent[] the clear language [of a statute]," *Amica Life*, 462 P.3d at 54, 56, and it certainly cannot delegate such power to private entities, *see In re House*, 46 P. 117, 119 (Colo. 1896) (citing Colo. Const. art. V, § 35 and stating the constitution "prohibit[s] the delegation to private corporations ... the exercise of powers strictly governmental"); *see also* Colo. Const. art. XXI, § 4 (requiring persons authorized to exercise governmental power be appointed, drawn, or designated "by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers").

The majority's read of subsection 103(11) would sanction an unconstitutional delegation of power to private nonprofits to excuse compliance with statewide standards. As the dissent warned, under the majority's interpretation any nonprofit entity could license or permit anyone—anywhere in the state—to violate statewide noise standards for "statutorily identified events ... without any limitation as to noise level, duration, or frequency." (Op. ¶ 70.) That cannot be right—because the general assembly cannot delegate to private entities that power.

Requiring a nonprofit to "use" the property when holding a qualifying event does not present the same constitutional infirmity. In this scenario, the exempt nonprofit, through lease, license, or permit, is only extending *its* exempted use to those participating in the presentation of a qualifying event. The "use" limitation thus restricts private nonprofits' licensing and permitting discretion by requiring the nonprofit to convey its property, or its right to use property.

3. The majority's interpretation leads to absurd results. *See Town of Erie v. Eason*, 18 P.3d 1271, 1276 (Colo. 2001). Both the dissent and the division in *Freed* catalogued the "effectively endless" number of entities that would be exempt from statewide noise standards "[w]ithout proper limitation." *Freed*, 2024COA65, ¶ 53. (Op. ¶¶ 70, 73, 74 & n.8.) The majority's read would mean any state "licensee"—e.g., by driver's license, liquor license, or law or medical license—can violate statewide noise limits so long as they are "promoting, producing, or holding" an "entertainment event." (*See id.* ¶ 73.) "[E]very tenant, company, or professional organization that leases space in a government building and hosts a qualifying event [would be] exempt from [the Act] simply by leasing property from the government." *Freed*, 2024COA65, ¶ 53. "[E]very permit holder" in the City would "receive shelter from nuisance litigation" for entertainment events "simply by

possessing a permit." *See id.* At bottom, the majority's interpretation "would cause the exemption to swallow the rule" and would subject residents to differing noise limits based on where they live. *Id.*

* * *

The majority's decision, if left standing, will eviscerate a statewide environmental statute that grants citizens the right to protect themselves from noise pollution. By reading into the Act a power that is against its text or structure, the decision erroneously delegates to localities the authority to excuse violations of state law.

II. The Majority's Interpretation of Subsection 103(11) Is Against Its Legislative History.

The legislative history of House Bill 87-1340 (the bill that added subsection 103(11) to the Act) "conclusively" resolves the statutory interpretation issue in Hobbs's favor. (Op. ¶ 75 (Jones, J., dissenting).) Review of the committee and floor debates on HB 1340 shows that the bill was special legislation—with, necessarily, broader application—to benefit Fiddler's Green. *See* Second Reading on H.B. 1340 before Whole House, 56th Gen. Assemb., 1st Reg. Sess., at 2:50–55 (Apr. 13, 1987) (Rep. Schauer explaining the bill was intended to fix an issue brought to his attention by Fiddler's Green but "it is very difficult to draw a particular piece of legislation for a particular facility"). At the time of the amendment (and presently), Fiddler's Green was owned by a

nonprofit entity promoting the public display of outdoor forms of art. *See* Fiddler's Green Amphitheater, Museum of Outdoor Arts (MOAOnline.org), https://bit.ly/4hOgOpS (last visited Dec. 2, 2024); Hearing on H.B. 1340 before H. Fin. Comm., 56th Gen. Assemb., 1st Reg. Sess., at 2:20–22 (Apr. 1, 1987) (Rep. Schauer explaining Fiddler's Green was owned by a nonprofit organization).

While HB 1340 was motivated principally by the concerns of Fiddler's Green, the committee and floor debates include examples of other venues and events that would be exempted:

- The City of Colorado Springs hosting the Air Force Academy marching band at the City's Memorial Park.
- The City and County of Denver hosting the Colorado Symphony at Washington Park.
- The state holding (including through a private promoter) a concert at the University of Colorado's Folsom Field.
- The state holding a Willie Nelson concert at the State Fairgrounds in Pueblo.
- The state producing a fireworks display at the State Fairgrounds in Pueblo.

Along with Fiddler's Green, these exemplars are consistent: they evidence an intent that the exemption be limited to the state's, a city or county's, or a nonprofit's use of their property to host "cultural, entertainment, athletic, or patriotic events." Nowhere in the legislative

debate is there mention of a for-profit enterprise promoting an event on private property, even if licensed or permitted by local authorities.

The legislative debate is also consistent with HB 1340's title, which here is perhaps the clearest indicator of the 56th General Assembly's intent. The title, "An Act Concerning the Exemption of Property Used By Not for Profit Entities for Public Events from Statutory Maximum Permissible Noise Levels," 1987 Colo. Sess. Laws, ch. 212 (caps removed), "indicates that the exception was intended to apply only to property used by not-for-profit entities," as pointed out in the dissent (Op. ¶ 75 (Jones, J., dissenting)). *See also Freed*, 2024COA65, ¶ 47. The title thus leaves no doubt that subsection 103(11) was intended to apply to "property *used by not for profit entities* [like the state, political subdivisions of the state, and nonprofits] for public events" (caps removed), just like the examples referenced by the legislators debating the bill. While "the title of a statute is not dispositive of legislative intent, it is a useful aid in construing a statute," particularly when it speaks to the precise issue in dispute. *See Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004); *see also City of Ouray v. Olin*, 761 P.2d 784, 789 (Colo. 1988) (holding the title of the legislation at issue, "an act concerning compensation of county employees," indicated it was intended to apply only to county employees).

In sum, the legislative history of HB 1340 contradicts the majority's broad interpretation of the subsection 103(11) exemption. Rather, the history conclusively shows the general assembly intended to create a property-based exemption to allow public events by a limited class of qualified property users—the state, political subdivisions, and nonprofits—without fear the events would violate statewide noise limits and be subject to abatement in court.

CONCLUSION

Hobbs asks the Court to REVERSE the majority's decision. The majority's interpretation of the statute is against the text, structure, and history of the Act and subsection 103(11). Once the majority's interpretive error is corrected, it is clear the City may not permit for-profit entities to violate statewide noise limits on private property.

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CERTIFICATE OF SERVICE

I certify that on December 3, 2024, a true and correct copy of this Opening Brief was filed with the Court and served via the Colorado Courts E-Filing System upon all counsel of record.

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