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| SUPREME COURT OF COLORADO<br>101 West Colfax Avenue, Suite 800<br>Denver, Colorado 80203 | FILED IN THE<br>SUPREME COURT<br><br>MAY 30 2012<br><br>OF THE STATE OF COLORADO<br>Christopher T. Ryan, Clerk |
| Original Proceeding<br>Pursuant to §1-40-107(2), C.R.S. (2011)<br>Appeal from the Ballot Title Board | |
| In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2011-2012, #84<br><br>**Petitioner:**<br><br>Don Childears,<br><br>**v.**<br><br>**Respondents:**<br><br>Corrine Fowler and Stephen A. Brunette,<br><br>**and**<br><br>**Title Board:**<br><br>Suzanne Staiert, Sharon Eubanks, and David Blake | **▲ COURT USE ONLY ▲** |
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| **ANSWER BRIEF OF RESPONDENTS/PROPONENTS** | |

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g). It contains 3,559 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

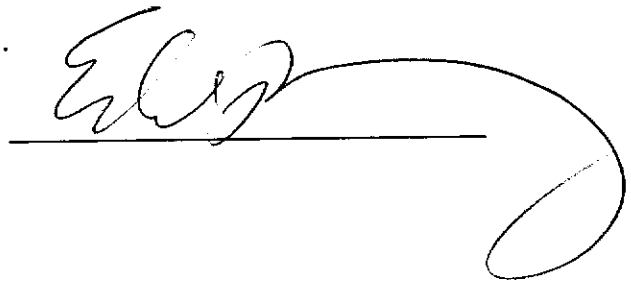
For the party raising the issue:

☐ It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.__, p.__), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

☑ 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.AR. 32.



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Respondents Corrine Fowler and Stephen A. Brunette, Proponents, respectfully submit the following Answer Brief pursuant to Order of Court dated May 2, 2012:

## I. SUMMARY OF THE ARGUMENT

A. The Title Board was able to comprehend the meaning and intent of the measure sufficiently to set a title.

B. The Proponents made no amendments to the original text of the measure other than in direct response to comments in the review and comment memorandum.

C. The proposed initiative contains a single subject.

D. The title does not contain an impermissible catch-phrase.

E. The title correctly and fairly expresses the true intent and meaning of the measure.

## II. ARGUMENT

### A. The Title Board was able to comprehend the meaning and intent of the measure sufficiently to set a title.

#### 1. Standard of Review:

While the Proponents concur with the comments presented in Section A(1) of Petitioner's Opening Brief, they adopt the Standard of Review presented in Section IV(A) of their own Opening Brief.

#### 2. Argument:

This Court has, as noted by Petitioner, stated that if the Title Board "cannot comprehend the initiatives well enough to state their single subject in the titles" it cannot set a title. In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #44, 977 P.2d 856, 858 (Colo. 1999), quoting In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25, 974 P.2d 458, 469 (Colo. 1999). The Petitioner does not focus here upon the single subject of the measure, but, rather, argues that the measure is so "vague" that a fair and accurate title cannot be set.

Proponents acknowledge that the text of the measure is a bit awkward. Addressing two alternative interpretations that could be accorded the bare words of the measure, the Title Board unanimously determined, however, that it was able to choose between those interpretations and set a title. Rehearing Tr. p. 27, ll. 10-23

(appended to Proponents' Opening Brief). As discussed by one of the Board members, Ms. Eubanks, "Just because a measure is subject to differing interpretations, I don't think that makes it vague or that it makes it that the Title Board cannot set a title. I would think that the vast majority of measures that come before the Title Board are subject to probably more than one interpretation. And I don't believe that alone prevents us from setting a title in terms of looking at the language of the measure itself. . . . To me, I go with the language and right now I'm comfortable that the language, first of all, is not so vague that we can't proceed to set a title." Rehearing Tr. p. 25, l. 24 – p. 26, l.8; p. 27, ll. 2-4.

As noted in Proponents' Opening Brief, the language at issue is the requirement that a foreclosing party "in the foreclosure proceeding files competent evidence of its right to enforce a valid security interest, recorded before the foreclosure is commenced with the Recorder of Deeds . . . ." One interpretation is that the "competent evidence" of enforcement rights must be filed in the foreclosure proceeding, and that only the "valid security interest" need be recorded with the Recorder of Deeds (county clerk and recorder) before the foreclosure proceeding is commenced. The other interpretation would be that competent evidence of enforcement rights – rather than or in addition to the valid security interest – must be recorded with the county clerk and recorder before the

foreclosure proceeding is commenced. The first interpretation is the correct one – consistent with the intent of the proponents, reasonable construction and context, and common sense. That interpretation was adopted by the Title Board and is expressed clearly in the title.

Petitioner is correct that there was a degree of miscommunication on this issue at the review and comment hearing that carried through to the initial staff draft of a ballot title. Petitioner is also correct, however, that the Proponents moved promptly to correct this miscommunication at the initial meeting of the Title Board, beginning with circulation of a proposed revision to the staff draft of the title (Exhibit 5 to the Petitioner's Opening Brief), and continuing throughout their testimony at the initial meeting and the rehearing.[1]

The Title Board addressed this interpretive issue in three ways – by inquiring as to the Proponents' intent, reading the language of the measure in

[1] Petitioner is incorrect, however, in attempting to interpret the revision to the text of the measure discussed on page 12 of his Opening Brief as inconsistent with the Proponents' stated intent. The shift in location of the word "files" was purely in response to Technical Comment No. 8 in the April 3, 2012, review and comment memorandum (attached to the Petitioner's Opening Brief as Exhibit 1).

context and according to rules of grammar and common usage, and avoiding unreasonable or unjust results.[2]

In response to inquiries regarding their intent, the Proponents emphasized at both the initial meeting and rehearing that their intent was that the competent evidence of the foreclosing party's right to enforce the security interest must be filed in the foreclosure proceeding, and that only the "valid security interest" need be recorded with the county clerk and recorder.[3] This Court has held that "[i]t is appropriate for the Board, when setting a title, to consider the testimony of the proponents concerning the intent and meaning of a proposal." In re Proposed Initiative Concerning Water Rights, 877 P.2d 321, 327 (Colo. 1994). "The proponent of the measure best understands the reasons for initiating the change or addition to the constitution or statutes." In re Proposed Initiative Concerning Unsafe Workplace Environment, 830 P.2d 1031, 1034 (Colo. 1992).

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[2] These points are discussed as well in Proponents' Answer Brief in Case No. 2012SA134, in response to another objector who elected to advocate for the alternative interpretation.

[3] *See, e.g.*, the discussion at the rehearing quoted by the Petitioner on page 11 of his Opening Brief and the continuing discussion thereafter at p. 54, l. 19 – p. 55, l. 10, as well as the discussion at p. 15, l. 24 – p. 16, l. 19, of the transcript attached as Exhibit 4 to the Petitioner's Opening Brief, as well as the suggested title revision attached as Exhibit 5 to the Petitioner's Opening Brief.

The Title Board next followed this Court's guidance that "words and phrases shall be read in context and construed according to the rules of grammar and common usage." In re Title, Ballot Title and Submission Clause for 2005-2006 #75, 138 P.3d 267, 271 (Colo. 2006). Applying the "rule of the last antecedent," Board member Ms. Eubanks noted that a phrase set off by commas usually refers back to the first item immediately preceding that phrase – thus "recorded before the foreclosure is commenced with the Recorder of Deeds" would refer back to "valid security interest" (not "competent evidence") – consistent with the Proponents' stated intent.[4] The Petitioner offers an alternative grammatical analysis, citing as authority the United States Supreme Court's opinion construing a provision in the Bankruptcy Code, Nobelman v. American Savings Bank, 508 U.S. 324 (1993). Interestingly, the point of the opinion in Nobelman is that while a particular reading of a clause may be "quite sensible as a matter of grammar" it "is not compelled." Id. at 330. Rather, the Court stated that another, non-rule-bound, interpretation "is the more reasonable one, since we cannot discern how [the

[4] See p. 25, ll. 21-23, of the rehearing transcript attached to the Petitioner's Opening Brief as Ex. 4.

provision] could be administered under petitioners' interpretation." Id. at 331.[5] Here, both the Board's grammatical analysis and the practical context within which the proposed initiative would be administered (see immediately below) favor the interpretation advocated by the Proponents and adopted by the Board.

Finally, the Title Board considered the context and the goal of avoiding a construction that would lead to an "unjust, absurd or unreasonable result." Bickel v. City of Boulder, 885 P.2d 215, 229 (Colo. 1994). As with statutory construction generally, the presumption is that the drafters "intended a consistent, harmonious, and sensible effect." In re Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #62, 961 P.2d 1077, 1079 (Colo. 1998). While it would make sense to require a foreclosing party to file "competent evidence of its right to enforce" a valid recorded security interest in a foreclosure proceeding, there would be no discernable point to requiring it also to "record" all of that evidence with the county clerk and recorder "before the foreclosure is commenced." It would make little sense to freeze the assemblage of competent evidence of enforcement rights prior to the initiation of a foreclosure proceeding. Nor would there be a rationale for barring valid assignments of a secured debt to a new holder during the

[5] The sole separate opinion, a concurrence, notes that the "Court's literal reading of the text of the statute is faithful to the intent of Congress." Id. at 332 (Stevens, J., concurring).

pendency of a foreclosure proceeding simply because evidence of that assignment, albeit available in the foreclosure proceeding, did not exist (and therefore had not been recorded) before that proceeding was commenced.

Applying the rules of construction mandated by this Court, the Title Board was easily able to "comprehend the initiatives well enough" to set a title.

## B. The Proponents made no amendments to the original text of the measure other than in direct response to comments in the review and comment memorandum.

### 1. Standard of Review:

While the Proponents concur with the citations presented in Section B(1) of Petitioner's Opening Brief, they adopt the Standard of Review presented in Section IV(A) of their own Opening Brief.

### 2. Argument:

Section 1-40-105(2), C.R.S. (2011), states that "[i]f any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition shall be resubmitted to the directors for comment . . . prior to submittal to the secretary of state." In this case, *no* amendments (substantial or otherwise) were made to the measure other than in direct response to comments in the review and comment memorandum itself. The

Petitioner concedes as much (Pet. Op. Br. at p. 21). The Petitioner contends, however, that two changes indisputably made in direct response to technical suggestions in the review and comment memorandum "had substantive impacts on the meaning of the measure," thus depriving the Title Board of jurisdiction – an argument the Petitioner acknowledges is "an issue of first impression" (Pet. Op. Br. at p. 22).

The first change is the shift of the word "files" from immediately before to immediately following the phrase "in the foreclosure proceeding." This shift was made in direct response to Technical Comment No. 8 in the April 3, 2012, review and comment memorandum (Ex. 1 to Pet. Op. Br.) – a point acknowledged by the Petitioner at page 21 of his Opening Brief. The Petitioner argues, however, that this technical shift engendered a "substantive" change "by eliminating the explicit requirement that the evidence [of the foreclosing party's right to enforce the security interest] be filed 'in the foreclosure proceeding' and instead apparently creating a new requirement that it be filed 'in the county in which the real property is located.'" Pet. Op. Br. at p. 22. As discussed in Section II(A) above – and in Case No. 2012SA134 – the Title Board specifically rejected arguments that the measure be interpreted consistent with this suggested "apparent[]" substantive change.

The second change was the revision of the words "shall include" to "includes" at the beginning of the second sentence of the text in direct response to Technical Comment No. 11 in the review and comment memorandum. The Petitioner argues that this technical change converted an "imperative" list of evidentiary filings into a nonexclusive list of "examples" of evidentiary filings. Yet, the Petitioner concedes that his own substantive interpretation of the revised language is consistent with the Proponents' stated intent and the Title Board staff's understanding that the list be viewed as nonexclusive examples (Pet. Op. Br. at p. 20). The Legislative Council and Office of Legislative Legal Services staffs also clearly viewed both the original and revised language in the same manner, or they would not have issued the technical comment. The Title Board had no difficulty with this point either.

Both of the revisions cited by the Petitioner were indisputably in direct response to specific technical comments in the review and comment memorandum. Neither engendered a "substantive" change, intended or unintended.

**C. The proposed initiative contains a single subject.**

**1. Standard of Review:**

The Proponents concur with the standard of review as presented in Section (C)(1) of Petitioner's Opening Brief, except to add the holding of this Court that it

"will only overturn the Title Board's finding that an initiative contains a single subject in a clear case." In re Title, Ballot Title and Submission Clause for 2011-2012 #3, 2012 Colo. LEXIS 284, at **6 (Colo. April 16, 2012).

**2. Argument:**

A proposed initiative violates the single subject requirement of Colo. Const. art. V, §1(5.5), and §1-40-106.5, C.R.S. (2011), "if its text 'relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other.'" In re Title, Ballot Title and Submission Clause for 2011-2012 #3, *supra*, at **8, quoting People ex rel. Elder v. Sours, 74 P. 167, 177 (1903). This initiative has one purpose – to enhance due process in real property foreclosure proceedings by, as stated in the title, "changing the existing evidentiary requirements for foreclosure of real property."

The measure does not "combine[] subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions" – *i.e.*, "logrolling" – nor is there any "surreptitious provision 'coiled up in the folds'" of the measure. Id. at **9-10 (citations omitted), quoting In re Title, Ballot Title and Submission Clause for 2001-2002 # 43, 46 P.3d 438, 442 (Colo. 2002). The measure is quite straightforward – it changes the existing evidentiary requirements for foreclosure of real property.

As feared – see, Proponents' Opening Brief at page 11-12 – the Petitioner posits a (slightly winnowed) list of seven additional subjects. Some are simply incorrect, all are unsupported predictions of application, and none recite or are connected to a separate purpose.

As this Court has held, "[i]n determining whether a proposed initiative comports with the single subject requirement, [w]e do not address the merits of a proposed initiative, *nor do we interpret its language or predict its application if adopted by the electorate*." In re Title, Ballot Title and Submission Clause for 2007-2008 # 62, 184 P.3d 52, 59 (Colo. 2008) (emphasis in original); *accord* In re Title, Ballot Title and Submission Clause for 2011-2012 #3, *supra*, at **16, ftn. 2.

Particularly, items 1, 2, 3, 4, and 7 (on pages 27-28 of the Petitioner's Opening Brief) are simply incorrect interpretations of the language and application of the measure, while items 5 and 6 are wholly unsupported and very debatable predictions of its practical impact. Contrary to the discussion on pages 29-33 of the Petitioner's Opening Brief, the measure does not suggest that a defect in endorsements, assignments, or transfer of an evidence of debt, in the recording of an assignment, or the loss of "relevant documents" would "preclude foreclosure." It does not require that documents containing private financial data be publicly filed. And Proponents would vigorously debate the Petitioner's predictions of dire

impact upon the MERS system and the secondary mortgage market. But, if all this were true, this would not alter the fact that the measure contains a single subject – changing the existing evidentiary requirements for foreclosure of real property.

The Title Board unanimously concurred that the proposed measure contains a single subject. Rehearing Tr. p. 44, l. 2 – p. 46, l. 18 (p. 42, l. 25 – p. 45, l. 12 of the transcript appended to Petitioner's Opening Brief). Proponents respectfully submit that this determination should be affirmed.

**D. The title does not contain an impermissible catch phrase.**

**1. Standard of Review:**

The Proponents concur with the citations in section (D)(1) of the Petitioners' Opening Brief, though incorporating the Standard of Review presented in Section IV(A) of their own Opening Brief.

**2. Argument:**

Having succeeded (without objection from the Proponents) in removing the phrases "competent evidence" and "deprivation of any real property" from earlier drafts of the title, the Petitioner now objects to the words "sufficiently establish" in the phrase "requiring evidence be filed to sufficiently establish a party's right to enforce a valid recorded security interest."

"Catch phrases are words that work in favor of a proposal without contributing to voter understanding. . . . 'By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content itself, but merely on the wording of the catch phrase.' . . . The purpose of the rule prohibiting catch phrases is to prevent prejudicing voters in favor of the proposed initiative merely by virtue of those words' appeal to emotion and to avoid distracting voters from consideration of the proposed initiative's merits." In re Title, Ballot Title and Submission Clause for 2009-2010 #45, 234 P.3d 642, 649 (Colo. 2010) (citations omitted).

It is difficult to discern the emotional appeal or distracting tug of the words "sufficiently establish." It is equally difficult to discern how these words would "inflame the contemporary debate" regarding foreclosure practices. These words were adopted in the title specifically to avoid using the words "competent evidence" – to which the Petitioner objected on the grounds that the implication would be that foreclosure was currently permitted upon "incompetent" evidence of the foreclosing party's right to enforce the security interest – yet indicate accurately to the voters that the measure would at least change current practices. Now the Petitioner suggests a negative implication that current practice is supported by evidence that is "insufficient" to establish the foreclosing party's

right to foreclose; indeed dropping the adjective "sufficiently" would arguably leave the more damaging implication that current practice is unsupported by *any* evidence of the foreclosing party's right to foreclose.

At base, the point of the title is to capture "the true intent and meaning" of the measure. §1-40-106(3)(b), C.R.S. (2011). The text of this measure requires a foreclosing party to file "competent evidence of its right to enforce a valid security interest." Neither the Proponents nor the Title Board (nor indeed the Petitioner) could think of a more neutral manner in which to capture this concept.

## E. The title correctly and fairly expresses the true intent and meaning of the measure.

### 1. Standard of Review:

The Proponents concur with the citations in section (E)(1) of the Petitioner's Opening Brief, though supplemented by the citations noted immediately below and the Standard of Review presented in Section IV(A) of their own Opening Brief.

### 2. Argument:

"While titles must be fair, clear, accurate and complete, the Title Board is not required to set out every detail of an initiative. . . . In addition, the Title Board may not speculate as to the measure's efficacy, or its practical or legal effects." In re Title, Ballot Title and Submission Clause for 2007-2008 # 62, 184 P.3d at 60. "[T]he Title Board is neither obligated nor authorized to construe the future legal

effects of an initiative as part of the ballot title. . . . The interplay of a ballot initiative with various provisions of existing law is an issue for post-election litigation, not the basis for a ballot title challenge." Id. (citations omitted). "We are not permitted in our review to determine the legal meaning or application of the initiative when reviewing its title for defects." In re Title, Ballot Title and Submission Clause for 2009-2010 #45, 234 P.3d at 648.

The Petitioner would have this Court require the Title Board to expand the title to reflect at least six purported "legal effects" of the proposed initiative, posited as examples of an apparently even longer list. Inclusion of any of these purported effects in the title would directly violate this Court's directives (per the authorities noted above), in all cases would be at least arguably inaccurate, and in most cases would be patently inaccurate.

Particularly: (1) the extent of the measure's interplay with current §38-38-101(6)(b), C.R.S. (2011) is undetermined in the context of a public trustee foreclosure and inapplicable to a judicial foreclosure; (2) the measure would have no impact upon the use of corporate surety bonds in lieu of presentation of an original evidence of debt under §38-38-101(1)(b)(1), C.R.S. (2011); (3) the legal effects upon current holders of secured interests in real property are undetermined; (4) the measure should have no material effect upon the public availability of

personal financial data; (5) the details of the measure's evidentiary standard are dependent upon judicial development; and (6) the measure does not require the recording of evidence (discussed in detail in section II(A) above).

The title is fair, clear, accurate, and complete, and avoids predictions and representations (both debatable and wrong) as to future applications, interpretations, and legal effects. The Title Board fully honored the guidance and directives of this Court.

## III. CONCLUSION

For the reasons set forth above, the Respondent Proponents renew their request that the Court affirm the actions of the Title Board.

Respectfully submitted this 30th day of May, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 30, 2012, a true and correct copy of the foregoing **ANSWER BRIEF OF RESPONDENTS/PROPONENTS** was served via Federal Express on the following:

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