Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, CO 80202	
Original Proceeding Pursuant to § 1-40-107(2), C.R.S. Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2011-2012 #84 **Petitioners:** Don Childears **v.** **Respondents:** Corrine Fowler and Stephen A. Brunette **and** **Title Board:** Suzanne Staiert, Sharon Eubanks, and David Blake	FILED IN THE SUPREME COURT MAY 16 2012 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk ▲ **COURT USE ONLY** ▲
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OPENING BRIEF OF PETITIONER DON CHILDEARS	

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.

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

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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.

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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.

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Michael D. Hoke

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Don Childears ("Petitioner"), registered elector of the State of Colorado, through his undersigned counsel, respectfully submits the following Opening Brief in support of his Petition for Review of Final Action of the Title Setting Board Concerning Proposed Initiative 2011–2012 No. 84.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The measure is so vague and indefinite that the legislative staff's interpretation of the measure at review and comment was inconsistent with the interpretation of the Title Board, and the proponents themselves have offered two mutually contradictory interpretations. Did the Title Board err in determining that the measure was sufficiently clear that it could set a title that accurately reflects the measure's meaning and purpose?
2. The proponents of the Initiative made significant changes to the underlying measure after the review and comment hearing that were not in direct response to substantive questions or comments. Did the Title Board err in determining that it had jurisdiction to review the Initiative and set a title despite those changes?
3. The Initiative contains multiple separate subjects that bear no necessary or proper connection to each other. Did the Title Board err in approving the Initiative under Colorado's single-subject requirement?

4. The title and ballot title and submission clause contain at least one impermissible catch-phrase. Did the Title Board err in setting the title and ballot title and submission clause for the Initiative?

5. Did the Title Board err in setting a ballot title for the Initiative that fails to disclose major provisions of the measure and is otherwise vague and misleading?

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This original proceeding is brought pursuant to section 1-40-107(2), seeking review of the actions of the Ballot Title Setting Board regarding proposed Initiative #84. Petitioner is a registered elector who timely submitted a Motion for Rehearing before the Title Board pursuant to section 1-40-107(1). In addition, Petitioner timely filed his Petition for Review, together with certified copies of the required documents, within five days from the date of the hearing on the Motion for Rehearing pursuant to section 1-40-107(2).

B. NATURE OF THE MEASURE, COURSE OF PROCEEDINGS, AND DISPOSITION BEFORE THE TITLE BOARD

1. Initiative #84 would apparently require foreclosing parties to record "competent evidence" with the county before initiating foreclosure proceedings.

Initiative #84 proposes to add a new section 25a to Article II of the Colorado Constitution. While exceedingly difficult to interpret, the measure appears, based on statements of the proponents at the Title Board meeting, to require that a party seeking to foreclose on a security interest in real property file "competent evidence" of its right to foreclose before depriving any party of that real property through foreclosure. The measure would also apparently require that either the competent evidence or the security interest be recorded with the county clerk before foreclosure proceedings are commenced. However, the measure's plain text is vague or in contradiction to the Proponents' statements as to where the evidence must be filed, what must be recorded, and what may constitute "competent evidence."

2. April 6, 2012 Review and Comment Hearing

The initial Review and Comment hearing was held on April 6, 2012.[1] After that hearing, Proponents made several revisions to the measure, two of which were substantial. Proponents submitted the revised measure to the Secretary of State without further review and comment from legislative staff.

3. April 18 Hearing and April 27 Rehearing Before the Title Board

The Title Board conducted its initial public hearing and set the title for the Initiative on April 18, 2012.[2] Petitioner and one other objector timely filed a Motion for Rehearing on April 25, 2012. The Title Board held a hearing on the motions on April 27, 2012. At the rehearing, the Title Board denied the motions for Rehearing and set a new title.[3]

SUMMARY OF ARGUMENT

The Title Board's decision to set a title for Initiative #84 must be reversed because the Board lacked jurisdiction to set a title for the measure and because the title as set is improper. *First*, the measure is so vague that it is impossible to

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[1] *See* Exhibit 1 (April 3, 2012 Memorandum from Legislative Council Staff and Office of Legislative Legal Services regarding Initiative #84); Exhibit 2 (video recording of April 6, 2012 review and comment hearing before legislative staff).

[2] Exhibit 3 (Transcript of April 18, 2012 Hearing before the Title Board ("4/18/12 Tr.")) at 32:3–11.

[3] Exhibit 4 (Transcript of April 27, 2012 Hearing before the Title Board ("4/27/12 Tr.")) at 96:12–17.

discern the meaning of its major provisions. Even the Proponents have offered contradictory positions as to what the measure means, and the legislative staff and the Title Board read the measure in vastly different ways.

Second, Proponents made substantial changes to the measure after review and comment. While legislative staff did suggest technical changes to the measure that were not intended to be substantive, as amended the changes dramatically altered the substance of the measure such that its major purpose was not discussed at review and comment.

Third, the measure violates the single-subject requirement. Proponents agreed that the primary purpose of the measure is to prohibit the commencement of foreclosure proceedings until the foreclosing party records competent evidence of its right to foreclose. But proponents also explicitly intend for the measure to overrule a statutory provision that allows certain material to be offered in lieu of evidence during foreclosure proceedings, and the measure would burden numerous other unrelated substantive rights.

In addition, even if the Title Board somehow had jurisdiction to set a title for the measure, the title must be redrafted because it contains an impermissible catch-phrase, "sufficiently establish," and is otherwise misleading. The title gives no indication of what changes would be made to the evidentiary standard in

foreclosure proceedings, and fails to mention any of the substantive rights that would be burdened by the measure. The title must therefore be stricken and remanded to the Title Board.

ARGUMENT

A. THE MEASURE IS SO VAGUE THAT IT IS IMPOSSIBLE TO SET A TITLE THAT FAIRLY AND ACCURATELY REFLECTS ITS SUBSTANCE AND EFFECT.

1. Standard of Review

"In fixing a title and a summary, the Board's duty is 'to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice . . . .'"[4] "If the Board 'cannot comprehend the initiatives well enough to state their single subject in the titles . . . the initiatives cannot be forwarded to the voters and must, instead, be returned to the proponent.'"[5]

Petitioner raised this issue in his Motion for Rehearing and at the April 27 rehearing,[6] but the Title Board exercised jurisdiction and set a title.

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[4] *In re Ballot Title 1999-2000 No. 44*, 977 P.2d 856, 857 (Colo. 1999) (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)).

[5] *Id.* at 858 (internal quotation omitted, quoting *In re Proposed Initiative for 1999-2000 No. 25*, 974 P.2d 458, 469 (Colo. 1999)).

[6] Mot. for Rehearing at § I, 1–2; Ex. 4, 4/27/12 Tr., at 5:20–10:11.

2. **The measure is so poorly drafted that Proponents themselves do not understand its effect.**

Initiative #84 is so vague as written its own Proponents have been unable to provide a consistent interpretation of the measure's primary purpose. Proponents have presented contradictory positions to the legislative staff and to the Title Board as to the measure's fundamental purpose, and made revisions to the measure that obscured, rather than clarified, what purpose might be gleaned from the text of the measure itself. And while it is impossible to discern a definitive meaning from the measure, whatever the measure requires, it is not what Proponents represented to the Title Board and what the current title reflects.

(a) **Proponents initially intend for the measure to require *recording* of all of the "competent evidence."**

At the Review and Comment hearing, Proponents told legislative staff unequivocally that the measure was intended to require parties foreclosing on a security interest in real property to *record* certain "competent evidence" with the county clerk. Legislative staff suspected that the purpose of the measure was to require that all of the "competent evidence" be submitted to the county clerk before foreclosure proceedings could commence, and stated so in the review and comment memorandum to Proponents:

> The major purpose of the proposed amendment . . . appears to be to prohibit the commencement of

> foreclosure proceedings until the party claiming the right to foreclose in the foreclosure proceedings files competent evidence of its right to foreclose with the clerk and recorder of the county in which the real property is located.[7]

During the review and comment hearing, the staff read this purpose statement verbatim from the staff memorandum. Counsel for the proponents immediately and expressly agreed with this statement without reservation. Proponent Brunette, an attorney who claims experience in real estate law, interjected and said that the word "files" in that statement of purpose should actually have been "records,"[8] and apologized that he did not catch that in his prior conversation with legislative staff outside of the hearing. Legislative staff responded bluntly that the measure used the word "files," not "records." Proponent Brunette clarified that it was his intent that the competent evidence be recorded with the county: "'filing' pertains to the filing of evidence in the court, but the evidence that's filed would be ***evidence that has been recorded*** in the clerk and recorder's office."[9] Thus, there is little doubt as to how the Proponents read their own measure: it required recording of competent evidence with the county.

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[7] Ex. 1 at 1.

[8] Ex. 2 at 00:23–01:00.

[9] Ex. 2 at 01:18–01:40 (emphasis added).

(b) **After review and comment, Proponents flip their interpretation of the measure as to where the competent evidence must be filed or recorded.**

Proponents reversed their position before the Title Board. At the April 18 hearing, the Title Board presented an initial staff draft of the title for discussion purposes. It read:

> An amendment to the Colorado Constitution concerning a prohibition against the commencement of foreclosure proceedings until the party claiming the right to foreclose ***files competent evidence of its right to enforce a valid security interest with the clerk and recorder of the county*** in which the property is located, and, in connection therewith, listing examples of documents that are competent evidence.[10]

As was the case with the legislative staff and the proponents themselves at Review and Comment, the Title Board staff's initial draft title reflected its understanding that the "competent evidence" was required to be filed with the county clerk.

Counsel for Proponents then distributed a document showing his proposed changes to the draft title.[11] Those changes suggested that Proponents now intended the measure to require only that the security interest must be recorded with the county clerk, and that the competent evidence should be filed in the foreclosure

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[10] Ex. 3, 4/18/12 Tr., at 5:15–25 (emphasis added).

[11] Exhibit 5 (Counsel for Proponents Ed Ramey's redline of proposed changes to initial staff draft title, presented at April 18 hearing before Title Board); *see also* Ex. 3, 4/18/12 Tr., at 4:2–8.

proceeding (*i.e.*, presumably with the public trustee or the court). The proposed revisions did not, however, indicate where or with whom the "competent evidence" should be filed.

On numerous occasions during the hearing, Counsel for Proponents reiterated Proponents' new position that only the security interest would need to be recorded with the county clerk.[12]

During the April 27 rehearing, counsel for Petitioner questioned whether Proponents understood the measure or if they had changed positions on what it would require to be recorded with the county clerk. Somewhat surprisingly, counsel for Proponents confessed that there had been "various interpretive diversions" with regard to that portion of the measure and that "at least two of the interpretations that had been suggested can, consistent with normal reading, be drawn from" the measure: namely, (1) that the measure would require the "competent" evidence to be recorded with the county clerk, or (2) that only the security interest would need to be recorded, with the competent evidence filed

[12] *See, e.g.*, Ex. 3, 4/18/12 Tr., at 4:22–5:2; 7:4–13; 15:18–19; 15:24–16:7; 19:13–18; 22:7–11; 27:1–5;

separately in the foreclosure proceeding.[13] He then went on to argue that the Proponents had *always* intended the latter.

Later in the hearing, Deputy Secretary of State Staiert challenged that interpretation, and counsel for Proponents acknowledged that the text of the measure is poorly drafted on that point:

> MS. STAIERT: So you're trying to say that only the valid security interest has to be recorded before the foreclosure is commenced?
>
> MR. RAMEY: That's correct, Madam Chair.
>
> MS. STAIERT: But the competent evidence doesn't have to be filed until the proceeding is under way?
>
> MR. RAMEY: Right. It couldn't be. There would be no place to file it until the proceeding is under way—
>
> MS. STAIERT: I'm just not sure—
>
> MR. RAMEY: —and then before the end of the proceeding, when there's a deprivation, yes.
>
> MS. STAIERT: There's just no set apart between this "files competent evidence" and the "valid security interest" in your language.
>
> MR. RAMEY: Well, again, I mean, here's where we've got the less, I guess—***I don't disagree***, but the less than optimal language in the text . . . .[14]

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[13] Ex. 4, 4/27/12 Tr., at 13:14–18 & 15:10–19.

[14] Ex. 4, 4/27/12 Tr., at 54:1–19 (emphasis added).

(c) Proponents revised the measure after review and comment in a way that rendered it less consistent with their new position.

After review and comment, Proponents revised the measure to make it *less* consistent with the position they later advanced before the Title Board. The original text stated that the evidence would need to be "file[d] in the foreclosure proceeding." Significantly, Proponents revised the measure and moved "files" after the discussion of the foreclosure proceeding, suggesting that the evidence was not intended merely for the foreclosure proceeding (*i.e.*, with the public trustee or court), but also that it should be presented to the county clerk. The revised language is ungrammatical and does not parse sensibly, but the best reading of the final measure would be that the foreclosing party "files competent evidence . . . in the county in which the real property is located." This would be entirely consistent with the Proponents' and legislative staff's interpretation of the measure during Review and Comment, but inconsistent with the position Proponents took before the Title Board.

(d) The measure is too vague to determine its key provisions, but neither of Proponents' positions appears to be consistent with the text of the measure.

Proponents' contradictory positions are fundamentally at odds—and neither interpretation is entirely consistent with the final text of the measure itself, which appears to require the competent evidence to have been recorded before the

foreclosure is commenced, but also requires that the evidence be "filed" in some indeterminate location and in some indeterminate fashion before any person is "deprived" of real property through foreclosure.

The final text of the measure requires a foreclosing party to file:

> competent evidence of its right to enforce a valid security interest, recorded before the foreclosure is commenced with the recorder of deeds, created by section 8 of Article XIV of this constitution, in the county in which the real property is located.

As written, the phrase "competent evidence of its right to enforce a valid security interest" is a *noun phrase* that identifies a single entity—the "evidence" of the right to foreclose. The noun phrase is followed by two serial adjectival phrases set off by commas: (1) "recorded before the foreclosure is commenced with the recorder of deeds"; and (2) "created by section 8 of Article XIV of this constitution"; which are followed by a final prepositional phrase: "in the county in which the real property is located."

Under common English interpretive principles, the adjectival phrases would each modify the last *noun phrase* immediately preceding them. This can be seen from the measure itself: it is the "recorder of deeds," and not the "deeds," that is "created by section 8 of Article XIV of this constitution." Accordingly, under a

consistent reading of the measure, it would be the "evidence" that is "recorded before the foreclosure is commenced," not the "interest."

In *Nobelman v. American Savings Bank*, the U.S. Supreme Court interpreted a similarly structured phrase in the Bankruptcy code and found that the adjectival phrase modified the subject of the preceding noun *phrase*, not the noun immediately preceding the adjectival phrase (that is, the object of the prepositional component of the noun phrase).[15] Section 1322(b)(2) of the Bankruptcy code provided that a debtor's plan may:

> 'modify the *rights of holders of secured claims*, other than a claim secured only by a security interest in real property that is the debtor's principal residence . . . .'[16]

The question presented to the Court was whether the adjectival phrase "other than a claim . . ." modified "the rights of holders" (the subject of the preceding noun phrase) or just "secured claims" (the object of the prepositional component of the preceding noun phrase and the last preceding noun).[17] The Court determined that the modifier applied to the full noun phrase, and specifically to the "rights of

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[15] 508 U.S. 324, 327–28 (1993).

[16] *Id.* at 327 (emphasis altered, quoting 11 U.S.C. §§ 1322(b)(2)).

[17] *See id.* at 328.

holders," rather than just to "secured claims." The Court based its holding in part on the fact that the statutory provision was focused on "rights."[18]

In doing so, the *Nobelman* Court recognized that a contrary reading might be "quite sensible as a matter of grammar."[19] However, the Court explicitly rejected a purported application of the so-called "rule of the last antecedent" that would read the "other than" clause to modify "claims," the noun immediately preceding the modifying clause.[20] That "rule" has been soundly criticized, and as originally formulated applied in cases in which a modifier could potentially modify one or more nouns in a *list*.[21]

As in *Nobelman*, the provision here is focused on the *subject* of the noun phrase at issue—in this case, the "evidence." This would strongly suggest that the measure requires the "evidence" to be recorded. So Proponents' current interpretation, which is reflected in the title, is inconsistent with the text of the measure. The Title Board would have to engage in impermissible construction of

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[18] *Id.*

[19] *Id.* at 330.

[20] *Id.* at 330–31.

[21] *See* Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 LEGAL WRITING: J. LEGAL WRITING INST. 81, 86–89 & 91–93 (1996).

the text of the measure to conclude that it does *not* require recording of the evidence.

But the text of the measure would apparently also require the foreclosure proceedings to be "commenced with the recorder of deeds" and does not specify where or how the evidence is to be filed. Because Proponents eliminated from the original text the possibility that a party "files in the foreclosure proceeding" by moving the word "files" to the beginning of the next clause, they must have intended to change where a party is required to file their evidence. In the final measure, the only possible adverbial phrase that could modify "files" is the last phrase of the measure: "in the county in which the real property is located." No further detail is given by the measure as to where or with whom the evidence must be filed, other than that it must be in the appropriate county. A title therefore could not specify where the evidence is to be filed without the Title Board engaging in impermissible interpretation of the measure unsupported by the plain text.

Proponents have stated that they believe it is a "material component" of the measure that the security interest must be recorded before the foreclosure proceeding is commenced.[22] Such a "material component" cannot be gleaned from the text of the measure, which does not appear to require that the security interest

[22] Ex. 3, 4/18/12 Tr., at 29:5–12.

be recorded at all. In fact, the changes Proponents made after review and comment eliminated such a reading from the text.

If a material component of the measure cannot be determined from the text of the measure, then the Title Board cannot set a title that fairly and accurately reflects the purpose of the measure.[23] Given the lack of consistent interpretation of the measure by the Proponents, and the lack of a plain meaning discernable from the measure's text, the title set by the Title Board is improper. The Title Board therefore lacked jurisdiction to set a title at all, and the title must be stricken and the measure returned to Proponents.

B. THE PROPONENTS MADE SUBSTANTIAL CHANGES TO THE MEASURES AFTER REVIEW AND COMMENT HEARINGS THAT WERE NOT IN DIRECT RESPONSE TO STAFF COMMENTS.

1. Standard of Review

Ballot measures must be submitted to the directors of the legislative council and the office of legislative legal services for review and comment. Proponents may not thereafter make any substantial amendment to the measure, "other than an amendment in direct response to the comments of the directors of the legislative

[23] *See In re Ballot Title 1999-2000 No. 258(A)*, 4 P.3d 1094, 1099 (Colo. 2000) (omission of key features of the measure is material and renders the title impermissibly misleading).

council and the office of legislative legal services," without resubmitting the amended measure for additional review and comment.[24]

"The requirement that the original draft be submitted to the legislative council and office of legislative legal services . . . allows the public to understand the implications of a proposed initiative at an early stage in the process."[25] For this reason, if substantial changes are made without the benefit of review and comment, the Title Board lacks jurisdiction to set titles.

This objection was raised in the Motion for Rehearing and at the April 27 rehearing.[26]

2. Because the Proponents made substantial amendments after review and comment that were not in direct response to comments made by legislative staff, the Title Board lacked jurisdiction to set a title.

The Title Board lacked jurisdiction, and the title should not have been set, because the measure was substantially altered after review and comment but was not sent back for additional review and comment as required by section 1-40-105(2).

First, Proponents moved the word "files" to *after* "in the foreclosure proceeding": under the final version of the measure, the party is no longer directly

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[24] C.R.S. § 1-40-105(2).

[25] *In re Ballot Title 1999-2000 # 256*, 12 P.3d 246, 251 (Colo. 2000).

[26] *See* Mot. for Rehearing at § II; Ex. 4, 4/27/12 Tr., at 10:12–12:21.

required to file anything in the foreclosure proceeding. Instead, the party must, arguably, "file[] competent evidence . . . in the county in which the real property is located." The phrase "in the foreclosure proceeding" now simply clarifies which party must do the filing: "the party claiming the right to foreclose in the foreclosure proceeding . . . ."[27]

Second, Proponents amended the definition of "competent evidence." The initial measure stated that "[c]ompetent evidence shall include" three separate items: "(1) the evidence of debt; (2) endorsements, assignments, or transfers, if any, of the evidence of debt to the foreclosing party; and (3) duly recorded assignments, if any, of the recorded security interest to the foreclosing party." The initial text was clear that "competent evidence" required all three items because the measure used the term "shall," which connotes mandatory conditions.[28] Proponents removed the imperative "shall" so that the final version of the measure states that "[c]ompetent evidence *includes*" the same three items.[29]

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[27] *See* Amended Text (redline version of measure submitted by Proponents to Secretary of State).

[28] *See, e.g., Colorado State Bd. of Med. Examiners v. Saddoris*, 825 P.2d 39, 43 (Colo. 1992) ("The word 'shall' is presumed to indicate a mandatory requirement.").

[29] *See id.* (emphasis added).

During the April 18 Title Board hearing, Proponents indicated that they agreed with staff's interpretation of the measure that it merely lists "examples" of what might constitute "competent evidence" but that the list is neither exhaustive nor mandatory.[30] Counsel also stated during the April 27 rehearing that Proponents intended the list of components of "competent evidence" to be a "nonexclusive" list of "examples" only, and that "competent evidence" would not be limited to the items listed.[31]

Undoubtedly, Proponents will argue that both of these changes are responsive to *technical* comments provided by the legislative staff in their memorandum (but not discussed at all at that hearing). Likewise, one of the Title Board members indicated that she had discussed the matter with the staff attorney who had conducted the review and comment hearing, and that she had deferred to that attorney's belief that the changes were made in direct response to comments made at the hearing.[32] But this position suffers a fatal defect: changes that were supposed to be merely technical corrections had substantive impacts on the meaning of the measure. That is, while the formal changes made to the text of the

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[30] *See* Ex. 3, 4/18/12 Tr., at 12:7–13.

[31] Ex. 4, 4/27/12 Tr., at 16:22–17:2, 57:20–25 & 58:4–8.

[32] Ex. 4, 4/27/12 Tr., at 23:14–24:7.

measure arguably may have been responsive to technical comments, the resulting *substantive changes* as interpreted by Proponents and the Title Board were not discussed at review and comment. Proponents have capitalized on ambiguities introduced by the technical changes proposed by legislative staff to change their interpretation of what the measure requires. Because the substantive changes were not made in response to comments from legislative staff, the Initiative violates the requirement in section 1-40-105(2) that the measure be resubmitted for additional review and comment.

Indeed, there can be little doubt that these grammatical or technical suggestions from legislative staff were not intended to change the meaning of the measure. Staff suggested that "files" should be moved because "it is standard drafting practice to make sentences as reader friendly as possible by locating verbs directly before adjectives and nouns."[33] Similarly, staff suggested changing "shall include" to "includes" because "[s]entences should generally be stated in the present tense."[34]

Neither comment suggests any intent to change the meaning of the measure; rather, staff was trying to conform the measure to standard drafting practice.

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[33] Ex. 1 at 2 ¶ 8.

[34] Ex. 1 at 3 ¶ 11.

Unfortunately, neither suggestion was appropriate. The first obscured the measure, rather than clarifying it or rendering it more "reader friendly," by eliminating the explicit requirement that the evidence 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." Similarly, "shall include" is an imperative phrase, not the future tense of "includes," and the amendment altered the meaning of the measure. The initial draft of the measure was crystal clear: "competent evidence *shall* include" all three elements listed in the measure. If any listed component were not filed in the foreclosure proceeding, then the provision would not be satisfied and property could not be transferred through foreclosure. After the amendment, the meaning is no longer clear. It is possible that any one of the listed components would suffice to satisfy the requirement for "competent evidence." Proponents admit as much.[35]

Accordingly, this question presents an issue of first impression for this Court: can substantive changes that fundamentally alter the basic principle of a measure be permitted after Review and Comment if those changes can be attributed only to grammatical or technical suggestions in the Review and Comment memorandum that were not otherwise discussed?

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[35] *See* Ex. 3, 4/18/12 Tr., at 12:7–13.

The Petitioner here contends that the constitution and statutory provisions governing the title-setting process dictate an answer in the negative, that to allow otherwise would not only violate the plain language of section 1-40-105(2), but would run directly counter to the purpose of the review and comment process itself. That hearing is specifically designed to afford the public ample notice of a proposed initiative and to allow the proponents to receive technical advice on drafting changes to our constitution or statutes. The general prohibition on making substantive changes after this stage serves to protect the benefits that accrue from such proceeding. To justify material changes to a measure simply on a grammatical notation in the review and comment memorandum directly subverts that protection. This Court should reject the Proponents' attempt here to create such precedence.

Likewise, this Court is being asked to condone and authorize a harmful precedent that will allow Title Board members to seek out and rely upon third party statements as to whether such changes were responsive to the Review and Comment hearing, as at least one Title Board member did here. The Court should instruct the Board that it is inappropriate and improper for it to defer to the judgment of a legislative staff attorney, who was not subsequently present at the Title Board hearing to make such statements publicly.

In addition, the result of the Board's improper reliance on such *ex parte* statements is that it improperly shifts the burden to any objectors to prove that the changes *were not* responsive to any objectors present at the hearing. In essence, objectors are placed in the difficult situation of having to prove a negative. Section 1-40-105(2) expressly permits only changes in response to staff comments, and directs proponents to resubmit a measure for additional review and comment if any other substantial changes are made. This scheme clearly places the burden of justifying such changes squarely on the proponents, and on the Title Board to justify its jurisdiction to set a title despite such changes.

Accordingly, Proponents should be required to return the measure to legislative staff for additional review and comment before it is considered by the Title Board.

C. THE INITIATIVE CONTAINS MULTIPLE SEPARATE SUBJECTS HAVING NO NECESSARY OR PROPER CONNECTION.

1. Standard of Review

This Court's review of a measure for compliance with the single-subject requirement of article V, section 1(5.5) of the Colorado Constitution is *de novo*.[36] The Court "'must sufficiently examine an initiative to determine whether or not the

[36] *See, e.g., In re Ballot Title 2007–2008, #17*, 172 P.3d 871, 876 (Colo. 2007) (reversing Title Board's exercise of jurisdiction without deference to Board findings on single-subject issue).

constitutional prohibition against initiative proposals containing multiple subjects has been violated.'"[37]

Petitioner challenged the measure's compliance with the single-subject requirement in his Motion for Rehearing and before the Title Board at the April 27 rehearing.[38]

2. Proponents identified the principal purpose of the Initiative.

At the April 6 Review and Comment hearing, counsel for Proponents informed legislative staff that the "single subject" of the measure is:

> to require parties claiming a right to foreclose on real property in Colorado to file in the court *competent evidence of their right to foreclose, properly recorded* before the foreclosure is commenced.[39]

Legislative staff then read substantive question 3 from the review and comment memorandum verbatim:

> Section 38-38-102(6)(b), Colorado Revised Statutes, allows a holder of an evidence of debt to foreclose on real property under a deed of trust, even if the holder's interest is based on an assignment from the original lender and the assignment or other intermediate documents are not produced, by providing a statement from the holder's attorney that the holder's interest in the

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[37] *In re Ballot Title 1999–2000 No. 29*, 972 P.2d 257, 260 (Colo. 1999) (quoting *In re Ballot Title 1997–1998 # 30*, 959 P.2d 822, 825 (Colo. 1998)).

[38] *See* Mot. for Rehearing at § III; Ex. 4, 4/27/12 Tr., at 27:22–35:21.

[39] Ex. 2 at 02:13–02:32 (emphasis added).

> property is valid. Is it your intent for the proposed initiative to replace this section of the law?

Counsel for Proponents responded that it was their intent to "overrule that section."[40]

Proponent Brunette also testified at the April 27 Title Board hearing. When questioned about what deficiencies in the evidentiary requirements in the foreclosure process the measure was intended to address, he stated that he believed section 38-38-10[1](6)(b) requires "no evidence whatsoever" and that the measure would "definitely affect" that statutory provision.[41] One member of the Title Board acknowledged the Proponents' intent to "modify and change the existing requirements" under section 38-38-10[1](6)(b). According to the Proponents, the principal purpose of the measure appears to be to alter the evidentiary burden in foreclosure proceedings by requiring "competent evidence."

3. The Initiative addresses multiple separate subjects that are not dependent upon each other.

In addition to the Proponents' stated purpose to modify the evidentiary burden in foreclosure proceedings, the measure includes the following additional

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[40] Ex. 1 at 3, "Substantive Comments and Questions" ¶ 3 (the actual section described is section 38-38-101(6)(b)); Ex. 2 at 03:36–04:06.

[41] Ex. 4, 4/27/12 Tr., at 85:14–19.

separate and distinct purposes that are not dependent upon or connected with each other:

1. Modifying the current standard permitted under sub-sections 38-38-101(1)(b)(I)–(III), which allows foreclosing parties to post corporate surety bonds or certain other materials in lieu of evidence of debt;
2. Eliminating substantive foreclosure rights in the event that there is any defect in assignments or indorsements of the evidence of debt, and thereby invalidating C.R.S. § 38-38-101(6)(b);
3. Prospectively eliminating the right to foreclose on an unrecorded interest in real property;
4. Retroactively eliminating substantive foreclosure rights, as established by private contract, of current holders of unrecorded security interests or of interests obtained through unrecorded or missing assignments or transfers;
5. Substantially burdening or eliminating access to the secondary mortgage market for loans issued on Colorado real property;
6. Substantially burdening or eliminating use of the modern Mortgage Electronic Registration Systems ("MERS") for tracking ownership of loans and servicing rights; and

7. Requiring public filing of private financial data, restricting the holding in *Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (Colo. 1980) and restricting individuals' privacy interests in certain financial data.

In addition, Counsel for Proponents stated that he believes the requirement that the security interest be properly recorded is "a material component of the measure itself."[42]

Perhaps most importantly, in addition to the primary purpose of changing the evidentiary burden in foreclosure proceedings, the measure would eliminate a number of substantive rights. When a measure burdens substantive rights in addition to making procedural changes, it impermissibly contains multiple subjects; substantive changes in the law "should be separately addressed by the voters."[43] Accordingly "[b]ecause the[] proposed measure[] would affect existing substantive rights in addition to the primary subject concerning the procedural mechanisms" of the foreclosure process, Initiative #84 does "not comply with the single subject requirement."[44]

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[42] Ex. 3, 4/18/12 Tr., at 29:5–12.

[43] *In re Ballot Title 2003-2004 No. 32 & No. 33*, 76 P.3d 460, 463 (Colo. 2003).

[44] *Id.*

Under the plain text of the measure, any defect in the recording of assignments of the security interest, as well as any defect in the endorsement, assignment or transfer of the evidence of debt, would preclude foreclosure. Importantly, this would apply retroactively to contracts entered into years and decades before the measure is adopted, meaning that individuals and entities with existing foreclosure rights that otherwise include such defects would lose those rights as a result of this measure. If relevant documents issued decades ago are lost in fire, flood or otherwise, a party will no longer be able to foreclose if the measure is adopted. Similarly, any holder of an unrecorded security interest would now be prohibited from foreclosing on that interest unless and until it is recorded, which may not always be possible.

In addition, the measure would have such a significant adverse effect on the secondary lending market that such effects must be considered to be a "purpose" of the measure. As Petitioner, who is President and CEO of the Colorado Bankers Association, testified before the Title Board, the measure would almost certainly devastate the secondary market and would negatively affect the lending process as a whole:

> MR. CHILDEARS: Good morning. Don Childears with the Colorado Bankers Association. It is our belief that these changes so cloud and complicate the foreclosure process that we will have an end result of the secondary

> market not being willing to buy mortgages originated in Colorado, and that the MERS system will no longer effectively be able to function.
>
> . . .
>
> That system of both private purchasers and quasi-public purchasers, we think, will grind to a halt because of the complexities given by this amendment, both prospectively and retroactively.
>
> The fact is that 90 percent of mortgages originated in Colorado are sold on the secondary market. That is an astoundingly high percentage, and if you even have a significant dent in that, you've caused major repercussions in the lending process itself by grinding it to a halt in the home construction industry and the ability of citizens to purchase homes, et cetera.[45]

Large participants in the secondary market, such as Fannie Mae and Freddie Mac, would likely refuse to purchase loans secured by real property in Colorado because of the complexities created under the measure.

Likewise, the secondary market relies heavily on the MERS system, which allows lenders and investors to transfer mortgages without recording assignments in local clerk and recorders' offices, and enables easy identification and tracking of the current holder of registered mortgages. As Petitioner explained to the Title Board:

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[45] Ex. 4, 4/27/12 Tr., at 30:8–31:16.

> MERS stands for the Mortgage Electronic Registry System, and it is an electronic system used nationwide by all the secondary markets, the public entities, quasi-public entities, as well as the private ones. It's used by every significant lender, everybody involved in the lending process even down to the credit rating agencies. That is how widespread it is, and it basically sets up a nominee system where you don't have to have each endorsement or assignment tracked through the system. It's done electronically, but not on the official documents back in the county where the real estate is located.
>
> And this is a system applicable in all 50 states. It's been around for a significant amount of time. It is in high usage. I think it probably accommodates 60, 70 percent of all the mortgages in Colorado, and we think it, too, would balk at this system and say, We can't handle that because it basically undoes the system that we've put in place and requires that we go back to the actual endorsements, and that is like a step backwards in time.[46]

With some 90% of loans in Colorado being sold on the secondary market, loss of access to that market would have a devastating effect on the entire lending process. Such a significant effect is not merely incidental to the main purpose of the measure: it is a natural, significant and foreseeable result of the measure, and it constitutes a purpose in its own right. And, relevant to the Court's role here, that purpose is not remotely dependent upon, or connected with, the primary purpose of changing the evidentiary burden in foreclosures.

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[46] Ex. 4, 4/27/12 Tr., at 32:9–33:6.

Petitioner also noted that the measure would impact the whole lending process, not just the foreclosure process:

> Moving forward, the impact is so significant that it literally alters lending processes. So it basically is an amendment that impacts lending, not just foreclosures, and in our minds, those are very different topics. They are at opposite ends of the transaction, and it not only impacts the lending, but all the economic consequences that flow out of that; of consumers not being able to buy homes because of the lack of lending, the impact on real estate values, et cetera.[47]

Where a measure will have such disparate and wide-ranging substantive effects, it cannot be said to have a single dominant purpose or subject.

Finally, to the extent that the measure requires recording of documents other than the security interest, it would impermissibly require other substantive changes in rights that are not necessarily connected to the primary purpose of the measure. If promissory notes are required to be recorded, then the measure would essentially eliminate the privacy interests in the personal financial information reflected in the note, such as the interest rate and other financing terms, which would be publicly recorded. For most notes, it will likely require revelation of the borrower's Social Security number, driver license number, and date of birth, which commonly appeared on promissory notes until recently. Under current law, individual have a

[47] Ex. 4, 4/27/12 Tr., at 35:12–22.

protectable privacy interest in certain records of financial transactions, which permits individuals to resist production of such documents in response to subpoenas issued to financial institutions.[48] Under the measure, borrowers would lose their expectation of privacy in the information contained in promissory notes because the notes would be publicly recorded. Changing the evidentiary burden in foreclosure proceedings is not dependent upon this significant loss of privacy.

The measure exhibits numerous substantive purposes that are not dependent upon, or connected with each other. It therefore fails to satisfy the single-subject requirement, and the Title Board lacked jurisdiction to set a title.

D. THE TITLE CONTAINS AN IMPERMISSIBLE CATCH-PHRASE.

1. Standard of Review

"Titles may not contain a catch phrase that unfairly prejudices the proposal in its favor; this contravenes section 1-40-106(3)(a)."[49] "'Catch phrases' are words that work to a proposal's favor without contributing to voter understanding."[50] The Court determines the existence of a catch phrase in the context of contemporary political debate."[51]

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[48] *See Charnes v. DiGiacomo*, 200 Colo. 94, 612 P.2d 1117 (Colo. 1980).

[49] *In re Ballot Title 1999-2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000).

[50] *Id.* at 1100.

[51] *Id.*

By including a catch-phrase in the title for the Initiative, "the Title Board tips the substantive debate surrounding the issue to be submitted to the electorate."[52]

2. The phrase "sufficiently establish" suggests to an uninformed voter that the current evidentiary standard for foreclosure proceedings is "insufficient" without clarifying what is being added by the measure.

The title set by the Title Board implies that the current evidentiary standard is *insufficient* and thus impermissibly suggests that voters should vote in favor of the measure without explaining in any detail the perceived deficiencies the measure would address or the changes to the evidentiary standard the measure would effect.

"By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase."[53]

The title set by the Board asks voters nothing more than whether they would like to require foreclosing parties to "sufficiently establish" their right to foreclose before being permitted to do so. Who would ever vote against such a proposal? The title itself advocates in favor of the measure. "[T]he particular words chosen

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[52] *Id.* (holding phrase "as rapidly and effectively as possible" to be an impermissible catch-phrase).

[53] *In re Ballot Title 1999-2000 No. 258(A)*, 4 P.3d 1094, 1100 (Colo. 2000).

by the Title Board should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion."[54]

There can be no question that there is currently a pervasive, complex contemporary political debate regarding foreclosure. The Title Board's title will inflame the contemporary debate without adding substance. It does not contribute to voter understanding of what evidence will be required to complete a foreclosure, but merely suggests that current law permits foreclosure by parties who are unable to "sufficiently establish" their right to do so.

Because the phrase "sufficiently establish" constitutes an impermissible catch-phrase, to the extent the Court finds the Title Board had jurisdiction to set a title, the measure should be remanded to the Title Board with instructions to strike the title.

E. IF THE TITLE BOARD HAD JURISDICTION TO SET A TITLE, THE TITLE MUST NEVERTHELESS BE REVISED TO REFLECT THE SUBSTANCE OF THE MEASURE ACCURATELY.

1. Standard of Review

"The titles must be sufficiently clear and brief for the voters to understand the principal features of what is being proposed; a material omission can create

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[54] *Id.* at 1100.

misleading titles."[55] A title must be rejected if it is "misleading, inaccurate, or fails to reflect the central features of the proposed initiative."[56] Similarly, a title must be rejected if it "reinforces voter confusion about the effect of a 'yes' or 'no' vote" on the initiative.[57]

2. The title must contain all of the key features of the Initiative.

"The titles and summary are critical to the voters' accurate understanding of a proposal. Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes."[58] Omission of a key feature of the measure "is material, and renders the title and summary misleading."[59] "Titles that contain a 'material and significant omission, misstatement, or misrepresentation' cannot stand."[60]

Failure to explain an incongruous or surprising element of the measure renders a title misleading. For example, in *In re Ballot Title 1999–2000 No. 104*, the measure provided that removal petitions for judges could be placed on the

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[55] *In re Ballot Title 1999–2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000).

[56] *In re Ballot Title 1997–98 No. 10*, 943 P.2d 897, 901 (Colo. 1997).

[57] *In re Ballot Title 1999–2000 No. 29*, 972 P.2d 257, 268 (Colo. 1999).

[58] *In re Ballot Title 1999-2000 No. 258(A)*, 4 P.3d 1094, 1099 (Colo. 2000).

[59] *Id.*

[60] *Id.*

ballot when signed by a number of registered electors "not to exceed 5%" of the number of votes cast in the district in the last general election for the secretary of state.[61] The Court found that, under a plain reading of the measure's text, a single signature would be sufficient to place a removal petition on the ballot, but that if the petition garnered too many signatures, it could not be placed on the ballot.[62] The title for the measure contained the same "not to exceed 5%" phrase, but did not explain that the provision would have the surprising results found by the Court. The lack of explanation or analysis of the phrase caused impermissible ambiguity.[63]

3. The title is misleading and does not reflect the material components of the measure.

The title violates section 1-40-106(3) because it is misleading, is likely to create confusion among voters, does not correctly and fairly express the true intent and meaning of the initiative or the multiple subjects encompassed by it, and does not unambiguously state the principle of the provision sought to be added.

For example, the purpose of the measure as expressed by the proponents during the review and comment hearing is to "overrule" section 38-38-101(6)(b),

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[61] *In re Ballot Title 1999-2000 No. 104*, 987 P.2d 249, 259 (Colo. 1999).

[62] *Id.*

[63] *Id.* at 260.

which permits foreclosure in cases where the evidence of debt is without proper indorsement or assignment, but the title does not mention section 38-38-101(6)(b) or the function or purpose of that section. Nor does the title indicate that parties will no longer be permitted to foreclose by posting corporate surety bonds in lieu of presenting the evidence of debt or associated documents, as currently permitted by section 38-38-101(1)(b)(I).

Moreover, given the numerous, unconnected substantive rights that will likely be altered or burdened by the measure, it is important that the title accurately reflect those substantive effects. Yet the title set by the Title Board does not clearly state, for example, that current holders of interests secured by real property stand to lose those rights if the measure is adopted. Nor does the title reflect the important substantive effect the measure will have on the public availability of personal financial data if promissory notes or other evidence of debt must be recorded with the county clerk.

In fact, the title does not even indicate what changes are being proposed to the evidentiary standard for foreclosure proceedings. All it says is that the measure will change the evidentiary standard and will require a party to "sufficiently establish" its right to foreclose. And just as in *In re Ballot Title 1999–2000 No. 104*, the title omits a surprising requirement of the measure—that all of the

evidence must be recorded before foreclosure proceedings can be commenced. In fact, the title makes no mention of any requirement that *anything* be recorded before the foreclosure proceedings commence—a requirement that Proponents themselves called a "material component" of the measure. The title obscures, rather than elucidates, the principal provisions of the measure.

The title, which does not indicate that any evidence has to be recorded or that the recording must occur before the foreclosure process is commenced, does not accurately reflect the substance of the measure as submitted to the Title Board.

Because the title does not fairly and accurately reflect the central features of the measure, it must be rejected. To the extent the Court finds the Title Board had jurisdiction to set a title, the action should nevertheless be remanded to the Title Board with instructions to strike the misleading title.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests, pursuant to section 1-40-107(2), that the actions of the Title Board with respect to the Initiative be reversed and the matter be remanded to the Title Board with instructions to strike the titles and return the initiative to its proponents or, to the extent the Title Board had jurisdiction to set a title, to correct the errors in the title at a future meeting of the Title Board.

Respectfully submitted this 16th day of May, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2012, a true and correct copy of this **OPENING BRIEF OF PETITIONER DON CHILDEARS** was delivered via overnight delivery service to the following:

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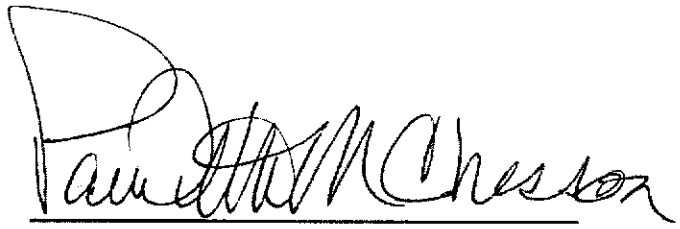

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MEMORANDUM

April 3, 2012

TO: Corrine Fowler, Stephen Brunette, and Miriam Pena

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #84, concerning foreclosure due process and fraud prevention

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purpose of the proposed amendment to the **Colorado constitution** appears to be to prohibit the commencement of foreclosure proceedings until the party claiming the right to foreclose in the foreclosure proceedings files competent evidence of its right to foreclose with the clerk and recorder of the county in which the real property is located.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment

EXHIBIT 1

meeting. Please consider revising the proposed initiative as suggested below.

1. Do you intend Miriam Pena to be listed as a proponent of the proposed initiative? She is not listed on the initiative.

2. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.

3. Each constitutional section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, your current amending clause should be changed to "In the constitution of the state of Colorado, **add** section 25a to article II as follows:".

4. It is standard drafting practice to insert a left tab, not a hard indent, at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings.

5. Each section in the Colorado constitution has a headnote. Headnotes should briefly describe the contents of the section, should follow the section number, should be in bold-faced type, and should be in lower case letters. The headnote in the proposed initiative could read:

   Section 25a. Foreclosure due process - fraud prevention.

6. It is standard drafting practice to use small capital letters [rather than ALL CAPS] to show the language being added to the Colorado constitution. For example, the first sentence would begin "NO PERSON SHALL BE..."

7. Constitutional provisions are often divided into subsections, paragraphs, subparagraphs, and sub-subparagraphs, for ease of reading. It is standard drafting practice to divide lists into different subsections and paragraphs on different lines and initial cap the first word in each subsection. The designation of a list begins with a colon and each item in the list is separated by a semi-colon. For example:

   (1) NO PERSON SHALL BE... INCLUDE:
   (a) THE... DEBT;
   (b) ENDORSEMENTS... PARTY; AND
   (c) DULY ... PARTY.
   (2) ANY STATUTES...SECTION.

8. It is standard drafting practice to make sentences as reader friendly as possible by locating verbs directly before adjectives and nouns. For example, line 2 should read "CLAIMING THE RIGHT TO FORECLOSE IN THE FORECLOSURE PROCEEDING FILES COMPETENT EVIDENCE OF".

9. "In accord" means to be in agreement, while "in accordance" means to be in compliance. It

is standard drafting practice to use "in accordance" when determining whether something is in compliance with a particular section of the Colorado constitution (line 5).

10. It is standard drafting practice when citing the Colorado constitution to format citations to read "section __ of article __ of this constitution". For example, the citation on line 5 should read "SECTION 8 OF ARTICLE XIV OF THIS CONSTITUTION."

11. Sentences should generally be stated in the present tense. The second sentence should read: "Competent evidence includes:...."

12. When providing an internal reference to the section of the Colorado constitution that is being amended, repealed, or added, it is standard drafting practice to refer to it as "this section/subsection/paragraph". For example, the reference on lines 8 and 9 should read "ANY STATUTES INCONSISTENT WITH THIS SECTION...".

13. It is standard drafting practice to capitalize only proper nouns. For example, the end of line 9 should read "SECTION." (not initial capped).

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. What is the single subject of the proposed initiative?

2. What is the purpose of the reference to section 8 of article XIV of the Colorado constitution on line 5? This section only deals with the election and salaries of county officials, not the functions or duties of their office. Therefore, it is not necessary to say "in accordance with" in the preceding part of the sentence as no standard procedures regarding filing documents with a county clerk or recorder are described in that particular section of the Colorado constitution.

3. Section 38-38-102 (6) (b), Colorado Revised Statutes, allows a holder of an evidence of debt to foreclose on real property under a deed of trust, even if the holder's interest is based on an assignment from the original lender and the assignment or other intermediate documents are not produced, by providing a statement from the holder's attorney that the holder's interest in the property is valid. Is it your intent for the proposed initiative to replace this section of the law?

4. In order to repeal sections of the Colorado Revised Statutes that are in conflict with a proposed constitutional amendment (lines 8 and 9), it is standard drafting practice to make conforming amendments for all possible conflicts. This entails amending or repealing each section of the Colorado Revised Statutes that may be in conflict with your addition to the Colorado constitution. Are you aware of any other sections of the Colorado Revised Statutes that may be in conflict with your addition?

5. What will be the effective date of the proposed initiative (line 9)?

6. As a change to the Colorado constitution, the proposed initiative may be amended only by a subsequent amendment to the constitution. Is this your intention?

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BEFORE THE INITIATIVE TITLE SETTING REVIEW BOARD

STATE OF COLORADO

DEPARTMENT OF STATE

April 18, 2012

INITIATIVE 84: FORECLOSURE PROCESS

The initiative came on for hearing at 1700 Broadway, 3rd Floor Aspen Conference Room, Denver, Colorado 80290, on April 18, 2012, at 9:55 a.m. before Tiffany D. Goulding, Registered Professional Reporter and Notary Public within Colorado.

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Title Setting Review Panel:

Suzanne Staiert, Deputy Secretary of State

Sharon Eubanks, Deputy Director, Colorado General Assembly's Office of Legislative Legal Services

David Blake, Deputy Attorney General for Legal Policy

Proponent Representatives:
Corrine Fowler
Stephen A. Brunette
Edward T. Ramey, Esq.

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P R O C E E D I N G S

MS. STAIERT: It is now 9:55. We're going to go back to 72. 84. We're going to go back to 84, which is the foreclosure process. And if the proponents could introduce yourselves.

MR. RAMEY: Good morning. My name is Edward Ramey, counsel for the proponents, both of who are here with their IDs. And I appreciate the Court's forbearance on that. Ms. Fowler and Mr. Brunette.

MS. STAIERT: All right. Staff have any initial questions for the proponent? Is there any public comment on whether this complies with the single-subject requirement? All right. Then the board will move on to single subject motion.

MS. EUBANKS: I would move that the title board finds that No. 84 consists of a single subject and proceed to set a title.

MS. STAIERT: Second.

MR. BLAKE: Second.

MS. STAIERT: All those in favor.

MS. EUBANKS: Aye.

MR. BLAKE: Aye.

MS. STAIERT: Aye. We'll proceed to title setting. Is there any comment by the proponent

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on the staff draft?

MR. RAMEY: Yes. Madam Chair, we do have a few revisions that we would like to propose to clarify the staff draft. What I was thinking might be the most efficient is I have a redline copy of what we'd propose, if I could hand that out to the board. And I know we have some opponents in the room, if they'd like copies as well. One more. Mr. Rogers would like one.

What we've attempted to do with these revisions is -- the staff draft, by the way, is very good and very close, but it could be read to suggest that it's a prohibition against -- that the measure constitutes a prohibition against the commencement of proceedings until the party claiming the right to foreclose presents its evidence of its right to enforce a valid security interest, and actually, anybody can commence any proceeding any time they want. The way the measure reads is that they cannot be deprived of their real property through a foreclosure proceeding until they present the evidence. And we also wanted to make it clear -- I think the measure is clear on this, but the title got a little bit confusing as to what had to be recorded with the clerk and recorder. It is the evidence of the

EXHIBIT 3

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right to foreclose or is it the security interest itself. And it's the latter. So I guess since I've placed this in front of you, rather than read it to the board, if the board has any comments or questions, our recommendation or suggestion to the board would be to make the few minor revisions to the title indicated.

MS. STAIERT: I think we'll go ahead and take public comment first, then talk about the draft.

MR. BLAKE: Are you going to read the draft?

MS. STAIERT: Sure.

MR. BLAKE: Are you going to read proposed changes?

MS. STAIERT: [illegible] read the draft, then the proposed current stat[illegible]. As it currently stands the draft is "An amendment to the Colorado constitution concerning a prohibition against the commencement of foreclosure proceedings until the party claiming the right to foreclose files competent evidence of its right to enforce a valid security interest with the clerk and recorder of the county in which the property is located, and in connection therewith, listing examples of documents that are competent evidence."

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As submitted by the proponents it would read, An amendment to the Colorado constitution concerning a prohibition against the deprivation of real property through foreclosure proceedings, unless the party claiming the right to foreclose files competent evidence of its right to enforce a valid security interest, which security interest has been recorded before the foreclosure is commenced with the clerk and recorder of the county in which the property is located. And on this item we have four people. Is Ed Ramey present?

MR. RAMEY: That's me.

MS. STAIERT: That's you. Corrine Fowler?

MR. RAMEY: Ms. Fowler is one of the proponents.

MS. STAIERT: She's marked yes. Stephen Brunette?

MR. RAMEY: Another proponent.

MS. STAIERT: Another proponent. And Robert Bose?

MS. FOWLER: He's not in the room.

MS. STAIERT: Is there anyone else in the audience who wishes to speak on this issue? I guess we don't have testimony. All right. I guess I have a

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general question just based on what you had stated about anyone can commence an action at any time, and then in the second line you have the security interest. So you only have the security interest being recorded before the foreclosure is commenced.

MR. RAMEY: Yes. In other words, the intent of the measure and I think the language of the measure is not to require that the evidence, whatever the evidence of the right to foreclose upon the interest is, itself be recorded. It's the security interest, the deed of trust, the mortgage that needs to be recorded prior to the commencement of the action.

MR. BLAKE: I have a question which is, is the intent to protect the property owner or is the intent to compel the person with the security interest to do something? Because the way I read the -- well, what's your intent?

MR. RAMEY: Well, it's really both. It's the intent to protect the property owner by requiring that the person who is pursuing the foreclosure proceeding demonstrate evidence that they are the party entitled and with the right to foreclosure.

MR. BLAKE: The reason I ask is I read it as kind of almost shifting. The way the actual draft

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is it starts out with no person shall be deprived of real property, which immediately says, okay, here we are, we're protecting -- the intent is to protect from foreclosure the person who's going to be foreclosed upon. But then the title kind of switches that and says it puts the -- reads to me as putting the onus on the person attempting to foreclose to take an action and file documents. I read it to be -- I don't want to call it burden shifting, but it kind of flip-flopped things for me. I guess I'd like your reaction to that. I understand your intent is to do both, so I want to convey both.

MR. RAMEY: Well, yes. I think there's a primary purpose, which is to protect the property owner, obviously. It's a foreclosure due process measure, which is the title to the measure. On the other hand, the way of accomplishing that is to require that the party seeking the right to foreclose demonstrate that they have a legal right to do so through the submission of this evidence. I take your point. It's not really --

MR. BLAKE: What you just said is to me much more clear.

MR. RAMEY: What I just said is more or less clear?

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MR. BLAKE: More clear.
MR. RAMEY: More. Okay. I think what the title, particularly with our provisions, does -- and we certainly would entertain some tweaks to address your point, because I think we have a primary and subsidiary purpose or a main purpose and a way of accomplishing that; but I won't quibble with anything you just said. It's not a burden shift, I guess, is what I was about to say.
MR. BLAKE: I know.
MR. RAMEY: It's B is a way of accomplishing A.
MR. BLAKE: That's my term. I understand it was not terribly artful, but I couldn't come up with anything else to convey it.
MS. EUBANKS: I have a couple questions. Mr. Ramey, as you've proposed in your modified draft, pretty much the statement of the single subject is the entire text of your measure. I mean, it pretty much reads that way. Is the fact that -- to say about the security interest being recorded before the foreclosure is commenced, is that really important enough to have it in the title, I mean, for voters or --
MR. RAMEY: Frankly, I don't know as a

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practical reality how you can foreclose on a security interest that hasn't been recorded. So, Ms. Eubanks, if that's the concern, it's probably a little redundant of reality to say that; but I think it clarifies the language of the measure itself because the measure does require that the security interest be recorded prior to the commencement of the action.
MS. EUBANKS: I understand that. Part of the difficulty with this type of measure is that for most citizens in terms of understanding security interests and all of that, I mean, those terms aren't very meaningful. And a couple of other questions I had. Regardless of whether we go with the staff draft or your proposed provisions, one of the difficulties I have is the fact that the measure talks about the recorder of deeds.
MR. RAMEY: Right.
MS. EUBANKS: And you specifically changed the terminology from clerk and recorder to recorder of deeds between review and comment -- after review and comment and now.
MR. RAMEY: During review and comment.
MS. EUBANKS: Right. So the fact that now the title would have clerk and recorder, while that is the recorder of deeds, that's not the

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terminology of the measure, that bothers me somewhat in terms of having a reference to clerk and recorder when that's not in your measure. And you specifically changed that terminology.
MR. RAMEY: Right.
MS. EUBANKS: The other thing is, do you have any thoughts about the need to say "in connection therewith, listing examples of documents that are competent evidence"? To me I don't know that that's an important feature of the measure of listing the examples and having that referenced in the title whether or not we could just -- if we're going to go with something just describing the meat of the measure, whether we go along with something like prohibiting the deprivation of real property through foreclosure proceedings, blah, blah, blah and whether we drop the whole bit about the security interests having been recorded and get rid of that language "and in connection therewith," would you have any feeling or preferences there? I'm trying to think of something short that still gets the -- you know, we don't have to have all the details, but whether or not you would be opposed to dropping either the idea of the security interest having been recorded, which gets me out of my terminology issue with clerk and recorder

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versus recorder of deeds, and also the examples of competent evidence.
MR. RAMEY: Sort of three questions there.
MS. EUBANKS: I know.
MR. RAMEY: I'll take them out of order. First the easiest thing. I think your suggestion of dropping the "and in connection therewith, listing examples of documents that are competent evidence," I think we'd be ambivalent about that. If the board preferred to drop that language, I think that would be fine with us. It was in the staff draft. It was okay with us. I think one thing that I would suggest would be overdoing it would be to list the kinds of examples specifically that we have on the measure. So we were happy the staff draft did not do that.
The other two questions kind of meshed because they deal with the recorder of deeds and clerk and recorder issue. The change that was made was specifically responsive to the substantive comment No. 2 in the review and comment. And what was pointed out to us after the review and comment hearing was that the way the initial draft was worded it stated -- I can give you the exact language of that that.
MS. EUBANKS: I've got a copy of it.

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MR. RAMEY: It was that the valid security interest had to be recorded before the foreclosure is commenced with the clerk and recorder of the county in which the real property is located in accord with Article XIV, Section 8 of the constitution. It was pointed out properly by counsel and your office, Ms. Eubanks, that Article XIV, Section 8 has to do primarily with elections and salaries of various county officials, so why did that matter. And we responded with a comment that that's correct. What we were attempting to do was refer to the constitutional officer with whom these types of documents need to be recorded. Now, under the constitution, that's denominated recorder of deeds. So we adopted that in our change in response to question No. 2.

Now, I noticed in the staff draft when it came out that the more common usage of clerk and recorder instead of recorder of deeds was used. I think the proponents, we prefer that because the public understands more likely who the clerk and recorder is. It's something maybe not much -- more than Citizens United, at any rate, the public will understand who the clerk and recorder is. Recorder of deeds sinks to the Citizens United level. It's the

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same office. If the title board felt that it would prefer the constitutional term "recorder of deeds," I don't think we'd have an objection. I don't think that's quite as clear or as informative in the title.

Finally, the phrase that gets us into this quagmire is the reference to the fact that security interest has to be recorded before the foreclosure is commenced with the clerk and recorder. I think it's important to say, since the measure says, where it has to be recorded. We do have the reference to that constitutional office as a place it has to be recorded. And since the measure itself does state, perhaps unnecessarily, but that it nevertheless states it has to be recorded before the foreclosure action is commenced, I think that's an element that would be good to have in the title. Otherwise, I could see there will be some objection based upon the fact that it's not in the title and isn't a material part of the measure.

So I've gone around the bar and I hope I've answered your question, but dropping that last phrase would be fine. We would prefer to keep the reference to the prior recording of the security interest and where it should be recorded in. And frankly, I think for title purposes reference to the

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clerk and recorder is more informative or meaningful, I guess I would say, to the voters than the archaic recorder of deeds constitutional term; but obviously we defer to the board on this.

MS. EUBANKS: So going along with your preference of keeping the phrase in indicating that the security interest has to be recorded, would you be agreeable to a change to it, working off of your draft, that if we strike the language "which security interest has been" so it just reads "unless the party claiming the right to foreclose files competent evidence of its right to enforce a valid security interest recorded before the foreclosure is commenced"? Would that --

MR. RAMEY: I'll tell you what I was trying to do with the phraseology I put in, is -- and the staff draft posed this problem to some degree -- we wanted to be very clear that the competent evidence does not need to be recorded. If we've got a recorded security interest, one of the difficulties we've had historically is that these things and the underlying or the overriding promissory note get assigned into the astroid somewhere and nobody knows who actually is the party with the right to foreclosure. Those assignments of the promissory note and so forth do not

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need to be recorded. We want to make it very clear that obviously we need to have a recorded encumbrance on the property, but the evidence that I'm the guy who's now holding the promissory note and the right to foreclose because I've got an assignment from 13 other syndicated institutions tracing back to the bank, all that does not need to be recorded.

MS. EUBANKS: Would it help if we said, "Right to enforce a valid security interest that is recorded" so that it's clear that that language goes to the security interest and not to the filing of competent evidence?

MR. RAMEY: So a valid security interest that is recorded before the foreclosure is commenced or you have a problem with that?

MS. EUBANKS: No. I mean, you didn't like me dropping it completely, so as an alternative it would read, "Right to enforce the valid security interest that is recorded before the foreclosure is commenced."

MR. RAMEY: So changing has been to is, I think that would be fine.

MS. EUBANKS: We'd drop the duplicative reference to the security interest, just so that -- we'd drop the comma so it would be one continuous

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statement of saying, "Right to enforce a valid security interest that is recorded before the foreclosure is commenced with the clerk and recorder," blah, blah, blah.

MR. RAMEY: I think that works. I might want to see it on the screen to see if it reads right.

MS. STAIERT: You need to strike the "in connection therewith" while you're there.

MR. BLAKE: I might propose almost a complete redraft.

MS. EUBANKS: I'm open to anything.

MS. STAIERT: I'm sort of there, too. I think it should read in the reverse. I would like to see --

MR. BLAKE: That's where I'm going.

MS. STAIERT: I would like to see the commencement first, not the deprivation first.

MR. BLAKE: Which version were you looking at, proposed revised?

MS. STAIERT: Yeah.

MS. EUBANKS: I was working off of his revised.

MR. BLAKE: Okay.

MS. STAIERT: I was thinking even an amendment to the Colorado constitution concerning

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foreclosure in connection therewith, because they're two different things that happen.

MR. RAMEY: What you just said, Madam Chair, that would be fine. I'm concerned about whatever else I'm hearing, but I probably should see it before I comment.

MS. STAIERT: I don't mind "in connection therewith." I just think that in connection therewith a bunch of documents are not going to tell you what they are.

MS. EUBANKS: I agree. That's not helpful at all.

MS. STAIERT: Why don't you give us yours.

MR. BLAKE: Are you ready?

MS. EUBANKS: Go ahead.

MS. STAIERT: I was redrafting over here. You start.

MR. BLAKE: What I would at least want to see up on the screen maybe and certainly get feedback from the proponent is an amendment to the Colorado constitution concerning foreclosure -- that's yours. Let me read requiring competent evidence -- I'm sorry -- establishing the party's right to foreclose be recorded with the whatever your term was.

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MS. STAIERT: I think county is fine.

MR. BLAKE: County or recorder of deeds or whichever prior to commencement of foreclosure proceedings.

MR. RAMEY: Mr. Blake, I don't mean to interrupt.

MR. BLAKE: Let's get it up on the board. I'm sorry. I would have done it as a completely separate paragraph. I'd like to leave the original up there and kind of compare it to what I had proposed. Want me to try it again?

MR. RAMEY: Madam Chair, may I address what's there? That's one of the things we're trying to avoid, because the suggestion there from Mr. Blake, I believe, is that what needs to be recorded is the competent evidence. And we don't want to require recording the competent evidence. That just needs to be presented in the foreclosure procedure. That's exactly the knot that I got myself into.

MR. BLAKE: Is it not the competent evidence that establishes the valid security interest?

MS. STAIERT: Yeah, but that's for deprivation of the property.

MR. RAMEY: Right. Again, what needs to be recorded --

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MR. BLAKE: I'm fine to work through that. I'm trying to get to my original point of what you're looking to do here is the party looking to foreclose has to make the first step, which is establish their right.

MR. RAMEY: Right.

MR. BLAKE: And then in order to commence foreclosure, and that's how I think it should be conveyed to the voter. I'm with you with working on the other language if this is something that --

MR. RAMEY: I'm okay with that.

MR. BLAKE: -- gets us there, because I think it's cleaner, shorter, more to the point. I agree with my colleagues about striking the listing of examples of documents. I don't think that helps at all. But anyway, that's where I was going with it. I'm happy to work through the language that is your point.

MS. STAIERT: I think it would be an amendment to the Colorado constitution requiring a security interest be filed prior to the commencement of a foreclosure, and competent evidence must be established prior to the deprivation of the property. Isn't that essentially it?

MR. RAMEY: Yes. I don't know if that's

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the way you want to present it, but that's --
MS. STAIERT: So would you -- if I start reading would you -- okay. So what I had was an amendment to the Colorado constitution --
MR. BLAKE: Wait. I'm sorry. Are you doing a third or are you amending mine?
MS. STAIERT: I'm kind of doing a third that includes yours. So if you go back up over his and then you say, "An amendment to the Colorado constitution concerning foreclosure, and in connection therewith, prohibiting the commencement of a foreclosure proceeding" -- and I didn't write this down very well -- "until the security interest has been recorded with the county." And that needs to be moved around. Then the second point would be and requiring a competent or just requiring competent evidence prior to the deprivation of any real property. That's what I had.
MR. BLAKE: I would still be interested in putting at the front the triggering event. You have to establish your security interest before commencement.
MS. STAIERT: Right.
MR. BLAKE: Right.
MR. RAMEY: Yeah. May I interject? I

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guess I want to go back to a point that I sort of inartfully stated at the beginning. Technically I don't think we're prohibiting the commencement of anything. I think what we're prohibiting is the deprivation of property through a foreclosure proceeding unless, and this is where I'm going to go where I think you're going, two things exist. One is that the security instrument itself has to be recorded with the clerk and recorder prior to the commencement of the action. And second the competent evidence has to be presented in the action. So we may be talking about tweaking the words here to get where the board, I think, is trying to go in terms of recording.
MR. BLAKE: I'm trying to go to your point of one, then two.
MR. RAMEY: I think we can do that.
MR. BLAKE: How it reads, first one comes before two.
MR. RAMEY: I think what I would -- we might be able to accomplish that, Mr. Blake. And let me know if this doesn't go where you want it to go. An amendment to the Colorado constitution concerning foreclosure, and in connection therewith, prohibiting the deprivation of property.
MS. STAIERT: See, that takes the second

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before the first. You do say in here, even in your draft, that you won't commence until there is a valid security interest.
MR. RAMEY: What we're saying is that the security interest has to be recorded before.
MS. STAIERT: Right, has to be recorded. Doesn't have to be valid. You're right. It has to be recorded.
MR. BLAKE: I would say going back to my original point, rather than prohibiting the commencement, it's requiring the party seeking to foreclose to do something, right?
MS. STAIERT: Okay. So go back and strike "prohibiting" and say requiring and whatever.
MR. BLAKE: The party can we say with the valid security interest? They can't establish it unless they have it, right?
MR. RAMEY: There's a presumption in there.
MR. BLAKE: Yeah, there is a presumption, exactly.
MS. STAIERT: Have such interest filed prior to the commencement?
MR. RAMEY: I love where the board is trying to go, but I'm liking the staff draft more and

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more. There may be a way we can do this.
MS. EUBANKS: May I ask a question? I'm a little troubled because I agree, I don't think the measure is really prohibiting the commencement. So I'm trying to understand that. In terms of dealing with valid security interest, I guess I would have thought that all of them would be recorded before a foreclosure proceeding was commenced, but obviously maybe not. So is that -- in terms of reality out there, and this is just from my personal knowledge, are there instances where a foreclosure proceeding is commenced prior to a security interest being recorded with the clerk and recorder?
MR. RAMEY: Probably. And it probably doesn't last more than about a day, if one is commenced. I think generally is that the security interest has to be recorded, in other words, be effective before a foreclosure action on that interest can be effected. Now, there is a caveat to that, I guess I would say. If you had an intervening parties and the recordation didn't matter, that could get into a fairly subtle discussion. So I guess, Ms. Eubanks, I would say there might be a rare possibility that, yes, a foreclosure action might be able to be commenced prior to or without recordation. But for

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[redacted] the most part that is redundant language in the measure, but it's in the measure.

MS. EUBANKS: But it's not really changing sort of what [redacted] now? I mean, is it imposing a new requirement?

MR. RAMEY: [redacted] not in any practical terms.

MS. STAIERT: We can take it out in its entirety then?

MR. RAMEY: I guess my recommendation to the board is, I mean, tracking the measure there are --

MS. EUBANKS: I don't know that we have to track the measure word for word in the title. That's where I'm going.

MR. RAMEY: Well, I agree.

MS. EUBANKS: I mean, if it's not changing sort of how things operate now -- I mean, because if it's a limitation that this provision only applies -- okay. So what if it isn't -- a security interest isn't recorded before the foreclosure is commenced? What happens then? Does this provision apply or not?

MR. RAMEY: Under this measure, the security interest would have to be recorded with the

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clerk and recorder prior to the commencement of the proceeding. I can envision the possibility of a very rare circumstance today where that may not be the case.

MS. STAIERT: We don't generally draft in rare circumstance. So that's why we're interested in what the change is.

MS. EUBANKS: See, one, I don't think we're effecting the commencement. And two, again, I just don't know that it's important to really describe that the security interest has to be recorded.

MS. STAIERT: Right.

MS. EUBANKS: Which I think would then simplify the whole issue as to trying to describe what this measure is doing for purposes of the title. That's just me.

MS. STAIERT: So then you get rid of everything up until "requiring competent evidence."

MR. RAMEY: Can we see, Ms. Eubanks, perhaps what it would look like, what you're proposing?

MS. STAIERT: Go all the way down, Steven, all the way to "and." Strike it see what it looks like.

MR. RAMEY: Going with where you're

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trying to go with this right now, [redacted] again, the competent evidence isn't what's recorded. So we need to tweak that language a little bit. It's the security interest that is recorded. The competent evidence needs to be presented in the proceeding.

MS. EUBANKS: If we take out the language "be recorded with the county."

MS. STAIERT: That competent evidence being provided or established.

MS. EUBANKS: Or filed.

MR. RAMEY: Filed. Presented or filed.

MR. BLAKE: Madam Chair, put back in your "regarding foreclosure" language that you had.

MS. STAIERT: Well, only if the --

MR. BLAKE: It's not short enough? It's pretty clear we're talking about foreclosure.

MS. STAIERT: We don't need "in connection therewith" anymore.

MR. BLAKE: Okay.

MS. EUBANKS: And I'm inclined to say to establish rather than -- I just hate the requiring and establishing. Requiring competent evidence be filed to establish a party's right to foreclose prior to the deprivation of any real property.

MS. STAIERT: Be filed with the county.

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MS. EUBANKS: The only thing that has to be filed with the county is the security interest. The only thing that has to be -- I mean, the competent evidence is going to have to be provided in the foreclosure proceedings. It's not filed with the clerk and recorder.

MS. STAIERT: So that would be to the court.

MS. EUBANKS: Right.

MR. BLAKE: But maybe I'm back to the commencement part. The point is that this be done before commencement as opposed to before deprivation.

MS. EUBANKS: No.

MS. STAIERT: The only part before commencement is the security interest.

MS. EUBANKS: Is recording the security interest. And that supposedly is not really a change from status quo.

MR. RAMEY: The evidence would not be filed before commencement of the proceeding. It would be filed in the proceeding. The recordation would be prior to the proceeding. I mean, I guess --

MS. STAIERT: In other words, you can't -- yeah.

MR. RAMEY: I guess let me -- while we're

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all cogitating about this matter, thank you, I see where the board is trying to go with this, and the idea of shortening it and not being enslaved by the language in the measure itself is certainly one which I recognize and agree with. I think the proponents would prefer frankly to [illegible] the reference to the prior recordation, some[illegible] along the lines of what was presented as a response [illegible] staff draft, in that that's -- while it may be [illegible]ndent of reality to some extent or redundant of [illegible] practices almost uniformly, it's nevertheless a material component of the measure itself. I think our preference would be to say it even though we may be saying the obvious.

MS. STAIERT: [illegible] me tell you my concern, and that is to put in the [illegible] makes it sound as though that's not the way it happens right now. So if somebody is reading the measure and they say, Well, maybe they don't even have to have a prior interest recorded and they can just commence a foreclosure? No, I don't want that. So [illegible] way for it -- not understanding that that's already the case. See what I'm saying? It just bothers me when we put provisions in there that are sort of [illegible] I don't want that.

MR. RAMEY: Mr. Brunette, one of the proponents, would like to make a comment, I hope on

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the issue.

MR. BRUNETTE: If I may, I think the board is mixing the filing and recording language. What's pertinent is not that it's a recorded security interest, a recorded security interest. What's pertinent is the right to enforce a valid security interest. That's where the issues come up. That's why it's like the evidence filed in a foreclosure proceeding, not recorded in a foreclosure proceeding. The competent evidence we're referring to is evidence of the right to enforce a valid security interest has been recorded. That's really all I have to say, the distinction between filing and foreclosure and recording is something that is being missed here.

MS. STAIERT: So it could be a right to enforce a valid security interest through requiring competent evidence to be filed.

MS. EUBANKS: I like going that direction.

MR. BLAKE: And just "and require."

MS. EUBANKS: I still don't know that I want to go the whole route about explaining that it's recorded before the foreclosure is commenced, but whether or not we could say a valid recorded security interest without getting into when it was recorded and

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with whom and all that detail that I just don't think is necessary. At least that would get the concept in there, but without all the detail.

MR. RAMEY: Ms. Eubanks, I was actually about to go partly down the road that you just went down. I think that might be possible. I think it is important to reference the fact that we need to have a recorded security interest and then deal separately with the presentation of the valid evidence. And what you just suggested may do that.

MS. EUBANKS: If I could take a stab at where you're at, line 7 and 8, so if we say on line 8, a party's right to enforce a valid security interest -- a valid recorded security interest, strike foreclose, and then on line 9 now after property through foreclosure.

MR. RAMEY: That may work.

MS. STAIERT: I'll read it. "An amendment to the Colorado constitution" -- where did it go?

MS. EUBANKS: It just vanished.

MS. STAIERT: "An amendment to the Colorado constitution requiring competent evidence be filed to establish a party's right to enforce a valid recorded security interest prior to the deprivation of

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any real property through foreclosure." Make a motion.

MS. EUBANKS: I would move that language.

MR. BLAKE: Second.

MS. STAIERT: All right. Let's have a vote. Aye.

MS. EUBANKS: Aye.

MR. BLAKE: Aye.

MS. STAIERT: So that draft will be adopted and any changes in the designated title will also be reflected in the submission. The time is now 10:35. Do you want to take a five-minute break?

MR. BLAKE: That would be great.

WHEREUPON, the within proceedings were concluded at the approximate hour of 10:34 a.m. on the 18th day of April, 2012.

* * * * *

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

I, TIFFANY D. GOULDING, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that the within proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the proceedings had.

I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 20th day of April, 2012.

My commission expires October 19, 2014.

_____ Reading and Signing was requested.

_____ Reading and Signing was waived.

_x___ Reading and Signing is not required.

BEFORE THE INITIATIVE TITLE SETTING REVIEW BOARD
STATE OF COLORADO
DEPARTMENT OF STATE
April 27, 2012

INITIATIVE 84: FORECLOSURE PROCESS

The initiative came on for hearing at 1700 Broadway, 2nd Floor Blue Spruce Conference Room, Denver, Colorado 80290, on April 27, 2012, at 9:33 a.m. before Tina M. Stuhr, Registered Professional Reporter and Notary Public within Colorado.

Title Setting Review Panel:
Suzanne Staiert, Deputy Secretary of State
Sharon I. Eubanks, Deputy Director, Colorado General Assembly's Office of Legislative Legal Services
David Blake, Deputy Attorney General for Legal Policy
Maurie Knaizer, Assistant Attorney General

For the Proponents:
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For the Objector Don Childears, Colorado Banking Association and Colorado Mortgage Lending Association:
JASON R. DUNN, ESQ.
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Denver, Colorado 80202

For the Objector Barbara Walker:
THOMAS M. ROGERS, III, ESQ.
Rothgerber Johnson & Lyons, LLP
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Also Present:
Steven Ward
Andrea Gyger
Stephen A. Brunette
Corrine Fowler
Don Childears

P R O C E E D I N G S

MS. STAIERT: Good morning. This is the meeting of the Title Setting Board pursuant to Article 40 Title I CRF. The time is 9:36. The date is April 27th. We're meeting in the Secretary of State's Blue Spruce Room. The Title Setting Board today consists of myself, Suzanne Staiert, Deputy Secretary of State on behalf of Scott Gessler; David Blake, Deputy Attorney General designee of Attorney General, John Suthers; and Sharon Eubanks, Deputy Director of the Office of Legislative Legal Services on behalf of Dan Cartin.

To my right is Steven Ward of our Elections Division. Maurie Knaizer is a Deputy Attorney General to my left, who represents the Title Board, and Andrea Gyger, our legal specialist, is floating around the room.

Today we are meeting to consider rehearings on four measures, and for anyone who wishes to testify, there is a sign-up sheet on the back table. This hearing is being broadcast over the Internet on the Secretary of State's Website. And public restrooms are located upstairs on the third floor.

Today, the first motion for rehearing is

No. 84, the Foreclosure Process. If the petitioner could come forward and identify yourself. Two petitioners?

MR. DUNN: You mean the proponents or the objectors?

MS. STAIERT: The objectors first. And do we have two?

MR. BLAKE: I think we do.

MR. DUNN: Good morning. Jason Dunn, Brownstein Hyatt Farber Schreck, on behalf of objector Don Childears, as well as the Colorado Banking Association, and the Colorado Mortgage Lending Association.

MS. STAIERT: Okay. And for purposes of the record, I'm going to try to find the actual title that we set last time.

MR. ROGERS: And while you're doing that, if I could just enter an appearance, Thomas Rogers on behalf of objector, Barbara Walker. Thanks.

MS. STAIERT: So the title that was set last time was "An amendment to the Colorado Constitution requiring competent evidence be filed to establish a party's right to enforce a valid recorded security interest prior to the deprivation of any real property through foreclosure."

EXHIBIT 4

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So maybe we could -- since I have Mr. Rogers first in the packet, did you want to -- oh, never mind. Why don't you go, Mr. Dunn.

MR. DUNN: I didn't know if you wanted the proponents first, but I'm happy to start.

MS. STAIERT: Yeah, I'd rather --

MR. DUNN: Okay.

MS. STAIERT: --since you're the petitioners, if you could start, and then we'll have the proponents come up.

MR. DUNN: And let me make a statement first. Mr. Blake and I have had communications over the last week or two on unrelated matters for other clients related to the legislative process and the attorney general's office, but I wanted to put that on the record that both I, as well as representatives of the Colorado Banking Association, have spoken with him about matters unrelated to the Title Board.

MS. STAIERT: All right. Thank you.

MR. DUNN: Well, I guess I'll start by saying that in probably the time I've been working on Title Board cases, I think I've spent more time reading and rereading and rereading and rereading the language of this measure as it was originally proposed, as it's been amended, as well as the final

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version, as well as going back and listening to the proponents' comments at the review and comment hearing, as well as the first Title Board hearing, trying to discern not only what the intent -- or what the language of the measure says, but also what the proponents actually intend for it to mean, and I've never been accused of being the smartest guy in the room, but I've had a hard time understanding what it is this measure does and what the proponents intend it to do, and I would submit that despite Mr. Ramey's noble effort to rehabilitate the measure at the first Title Board hearing, that the proponents aren't sure what the measure does.

Let me quickly walk through some of the facts. We've -- we attached to our motion a copy of the Denver Post article, and while I would never hold anybody accountable for what's written in a newspaper article, I do think it's telling that the article is focused on the fact that loan documents would have to be recorded under this measure. The article starts out by saying, "Undaunted the legislators killed a bill requiring that lenders prove their right to foreclose on a home. Backers of the bill proposal had filed it as a ballot initiative with a harder approach. Foreclosures can't happen unless" a loan --

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"unless loan papers are properly recorded with the county first."

And then Mr. Brunette, one of the proponents, later states in the article, quote, The intent is to ensure that there are no gaps in the line of title. That's his statement of what the intent of the measure does.

Let's go to the review and comment hearing. As you, I believe, have, the review and comment memo, as it does for all measures, sets forth a purpose, and that was, of course, as part of the review and comment process read to the proponents and we've quoted that in our -- in our motion, but I'll read it quickly again. "The major purpose of the proposed amendment to the Colorado Constitution appears to be to prohibit the commencement of the foreclosure proceedings until the party claiming the right to foreclose in the foreclosure proceedings files competent evidence of its right to foreclose with the clerk and recorder of the county in which the real property is located."

Now, at that point in the review and comment hearing did the proponents or their attorney who were sitting with the legislative staff object? The answer is no. Mr. Ramey nodded in agreement with

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that purpose and confirmed that that was their intent. Mr. Brunette, in fact, interjected at that point and he said, quote, Files should be records in the statement of the purpose. And he said -- he went on to state, quote, I'm sorry I didn't spot that.

And then Ms. Forrestal from Legislative Legal Services says, Well, your measure says files in the foreclosure proceeding, unquote. And Mr. Brunette responds, "Filing pertains to the filing of evidence in the court, but the evidence that's filed would be evidence that has been recorded in the clerk and recorder's office."

Unquestionably, then, the proponents, at least, and the review and comments staff believed that the purpose of the measure was to require that loan documents, the competent evidence -- and we'll get to whatever that may mean in a moment, but whatever that is be recorded with the clerk and recorder's office, as well as filed in the foreclosure proceeding.

So what happened next? The proponents submitted the measure actually within the hour after that hearing to the Secretary of State's Office. And, of course, the Secretary of State's Office -- or, excuse me, yes, the Secretary of State's Office submits a draft title to -- to you all as part of your

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preparation for this meeting. And, again, that document indicated that the purpose of the measure was to require recording with the clerk and recorder's office.

But then at the Title Board meeting, a strange thing happened. The proponents showed up and changed what they believed the purpose of the measure is or what their intent of the measure is and argued repeatedly that the purpose of the measure was to ensure that the security interest was recorded with the clerk -- county clerk and recorder's office prior to the foreclosure proceeding or, I think, quote -- to paraphrase them more accurately, to require it be recorded before there was any deprivation of property, and that only the competent evidence had to be filed in that proceeding.

That is a vastly different purpose and intent and effect than how it had been described up to that point. So I would argue that one of two things happened. Either A, the proponents did not understand their measure and hoped to change the title and the outcome at the Title Board proceeding, or, B, something was substantively changed in the measure between the review and comment hearing and the Title Board hearing that actually changed the measure

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itself. And if that's the case, then the -- those changes -- those substantive changes were in no way responsive to review and comment, other than, I suppose, they decided they didn't like what was the purpose originally as described by staff and decided to change what the measure does.

But either way, the Title Board doesn't have jurisdiction either. The measure is so vague that nobody understands what it does or the measure has substantially changed it was not in direct response to the review and comment process.

Let me also add that one of the changes that were made, as you will see -- or as you have seen to the measure is that the phrase regarding the competent evidence was changed from saying "shall include" to "includes," and that was noted in the technical comment section of the review and comment memo under the auspices of ensuring that measures are written in a present tense rather than, I guess, a future tense.

Well, not only would I take grammatical exception with that actually, but more importantly, that had a significant substantive impact on the measure. The measure, of course -- putting aside the debate about where the competent evidence must be

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filed or recorded, originally I think there can be no question that the measure required all three listed pieces, I guess, of competent evidence were required to either be filed or recorded. It says, "Shall include one, two, and three." There's case law ad nauseam that that would be a -- mandatory language requiring all three be filed.

Now, in response to the technical comment about a grammatical issue, that was changed to "includes one, two, and three." The "and" was not changed to make it a list of examples, and yet at the Title Board hearing, the proponents suggested, and I think the Title Board not necessarily agreed, but interpreted it that way as well, that those were just examples. We would contend that those are not examples, that those are pieces of competent evidence that must be filed and that that is a substantive change.

Now, of course, as the Title Board knows as well, changes can be made after the review and comment hearing if they're in direct response, but in -- at least for me an issue of -- sort of first impression is what happens if there's a technical correction not actually discussed at the review and comment hearing. It's just part of the review and

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comment memo and was never actually brought up at the hearing about a grammatical error that has a substantive -- a largely substantive effect on the measure. And the whole point, of course, of the requirement that changes only be made in response to discussion at the review and comment hearing is so that the public has notice about what the measure does and has an opportunity to comment on it and get advance notice on it before the review and comment hearing.

So the question is: What happens when a minor technical suggestion from staff actually has a major substantive impact on the measure? I would submit that that runs afoul of the intent of that provision in law, and that because it is really not directly responsive to review and comment, that the measure has to go back on that grounds alone.

I do have also some single subject arguments, as you've seen in the motion, but maybe it would be best to kind of pause there before going on to that stage.

MS. STAIERT: I agree. Mr. Rogers, did you have anything on this particular issue or --

MR. ROGERS: I don't, Madam Chair.

MS. STAIERT: You don't, okay. So if the

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proponents could come forward. And can you just identify yourself, and then -- for the record because it's been an issue, could you identify that your proponents are present.

MR. RAMEY: Certainly. Thank you, Madam Chair. My name is Edward Ramey, and I'm counsel for the proponents. Both of them are present, Mr. Brunette and Ms. Fowler, with photo IDs today. So we hopefully can proceed.

And I'm glad, by the way, Madam Chair, that we're breaking this up a little bit because there are so many objections and taking this one first makes a lot of sense.

I will acknowledge there have been various interpretive diversions with regard to the language of the measure on the particular point that Mr. Dunn has raised, and regrettably I contributed to them myself. At the review and comment hearing we focused on one issue. I think the words that came out of my mouth could easily be interpreted as suggesting and the effect of this measure being different from what the proponents intend. There's also a comment, as Mr. Dunn points out, in the media which interestingly is not a quote from one of the proponents, but a statement of the reporter which goes

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off on an interpretation, and actually there are probably three or four different interpretations, that, if you look at all of these things, have come out in this language.

I guess what I would first say is one of the values is -- something we're doing here is attempting to create some legislative history, so that if this measure proceeds to the ballot and is adopted, courts some day have to interpret it. They can apply, as the Supreme Court a week and a half ago advised us, that they do the normal rules of construction to determine what the language means. Because ambiguities in language or potential divergent interpretations are not at all uncommon things in legislation or ballot initiatives in particular.

We tried to clear this up with the discussion with the board a week ago as to -- as to what the language is intended to mean, and the language of the measure -- and it really hasn't changed appreciably at all. The word "files" moved in response to a technical comment, but otherwise, with regard to this particular point, the language of the measure hasn't changed.

What it says -- and I'm now referring to the text of the measure itself, not the title, not a

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newspaper report, not a comment made in the discussion or a staff draft or anything else of an interpretive value, but the language of the measure itself says that "The party claiming the right to foreclose in a foreclosure proceeding must file" comp -- "must file," that's the first operative word, "competent evidence of its right to enforce a valid security interest," comma, "recorded before the foreclosure is commenced with the recorder of deeds."

I will acknowledge that that language -- at least two of the interpretations that had been suggested can, consistent with normal reading, be drawn from -- from that; either that the security interest must be recorded, which is, indeed, the intent of the proponents and has always been the intent of the proponents and what they intend this language to mean, or I will acknowledge it is possible to read this language to say that the competent evidence must all be recorded.

Now, some of the other things that have been said and the other interpretations that have been offered, I don't think you can draw from this language, but those two interpretations you could.

The logical interpretation, I would submit, and the one intended by the proponents is and

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always has been that it is the security interest that must be recorded before the foreclosure proceeding is commenced. And the logic of that is -- I mean, obviously during the pendency of a foreclosure proceeding, there's nothing to prevent a further assignment of the underlying debt, which, therefore, couldn't be recorded before the foreclosure proceeding commenced.

So, you know, it creates the possibility of an impossibility, which doesn't make a lot of sense, and I would submit that what a court would do with this is -- as it does with language that it's interpreting at all times is say, Well, clearly the reasonable -- reasonable and rational way to read this is that it is the security interest itself that must be recorded, not everything else that possibly could serve as competent evidence because we don't even know the full gamut of things that could ultimately serve as competent evidence.

And referring to one of Mr. Dunn's last statements -- we had this discussion last time as well -- the intent from the beginning is that the examples of competent evidence that are listed is competent evidence includes those things, but it's not limited to those items. If other -- if other

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competent evidence can be offered, that's fine as well. So that is the intent of the proponents.

Now, the question, I guess, is, well, what the board should do about it. The guidance the Supreme Court has given us over the years -- I guess, number one, if the board is so confused and we all just can't decide what this measure does or means, Mr. Dunn is correct that the board cannot set a title. I don't think I've ever seen it happen. I'm sure it has happened with measures in the past, but I don't think we're at a state of discombobulation, if you will, here where a title cannot be set.

Secondly, the question is: Is it the board's responsibility to provide the ultimate interpretation of this measure and resolve potential two interpretations that could be given to the language? And I think the court has pretty clearly advised -- the Supreme Court -- that it is not -- and there are a variety of cases that I could cite, that it is not the job of the Title Board in the title setting process to resolve ambiguities in language or predict interpretations that will be given to language that may be susceptible to more than one interpretation in the future.

That is a post-adoption process that the

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courts engage in, and it is not our job here. And if we start down that road, we will be adjudicating pre-adoption, free of any particular dispute or context, it would appear to me, potential ambiguities in language, the language of initiatives, some of which are quite lengthy, unlike this one, ad nauseam, and I'd hate to imagine where the Title Board hearings will be going in the future, but we will be days on each particular measure, and, again, without the benefit of particular parties in here with a particular dispute saying this language affects me in a strange way and I don't understand how it can be applied to me. And I think that would be a really bad place for the board to go, and I think the Supreme Court has been very clear about it.

I do think this discussion, again, is helpful, though, because I think we are creating some legislative history by going back and forth on this issue, and I think -- I hope that that will be helpful in the future.

I would particularly refer on the question of ambiguities -- the two particular cases, and they're back some years ago, the fair fishing rights case in 1994 and the water rights case in 1994, both addressed potential conflicting interpretations

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and ambiguities in the language, and the Supreme Court was very clear we don't deal with that here. Now, if this board feels so completely unable to have any understanding of what this measure does, then I would agree with Mr. Dunn. Obviously we can't set a title.

I also think it's important -- Mr. Dunn hasn't really argued this, but to the extent that the title itself -- and we're not really at that point, but if the board believes that it can't set a title, we can look at the title and if it incorporates an ambiguity or an interpretation of an ambiguity that the board is uncomfortable with, we can always look at that in the context of the language in the title itself, but I would submit that going with the plain measure of the language and the discussion we had, that we can certainly proceed and have a title set, and the board does have the jurisdiction to do so.

And I think that's all I have on that particular point. I now see that they're going to sandwich me here. One objector in front and one to respond to me, so I may ask for a sur-reply.

MR. ROGERS: Madam Chair, if I --

MS. STAIERT: Change your mind?

MR. ROGERS: Well, I did. I was prepared to talk about this -- this issue, the meaning of the

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language as it pertains to title. Mr. Dunn has raised it in the context of whether the measure is so vague that a title can't be set, and as we've now loaded all of this language and these arguments up in our minds, I think that I would like to proceed with argument, although I'm not going to argue it's too vague to set a title. I have a different argument that pertains to the title that has been set, so --

MS. STAIERT: Oh, okay. But you're argument is not jurisdictional yet?

MR. ROGERS: It is not jurisdictional, but I would like to do this now, because, again, I think we've delved so far into this, I don't want to have to, you know, kind of reload all of this stuff in a half an hour when we get to the language -- or we get to the language of the title.

So Mr. Dunn's argument is, essentially, this -- this initiative is so vague that a title can't be set. Mr. Ramey's argument is, well, it may be ambiguous, and if it's ambiguous, then that's something for the courts to sort out later. That's a -- that is a brilliant response on his part. That saves him from a loss here today and preserves the issue to be debated down the road.

Let me tell you why he's wrong. This

language is not ambiguous. It is crystal clear, and it does not mean what he told you it meant in the Title Board last week. Look at the language itself.

We've got to file competent evidence under this initiative. What competent evidence? "Competent evidence of the party moving forward with foreclosures right to enforce a valid security interest." That clause of its "right to enforce a valid security interest" does nothing in that sentence other than answer the question which competent evidence.

Then we've got a comma and the word "recorded," and the key question here today is what must be recorded? There is no question. There is no ambiguity in this language. What must be recorded is the competent evidence. That's what Mr. Brunette said in review and comment. That's what the proponents at that point believed that it meant. That is what it means. And if you agree with me that this language is not subject to any other reasonable interpretation, then the title you've set is -- is utterly inadequate, and it must be completely rewritten to reflect the intent of the plain language the initiative suggests.

I also want to point out that the rules of construction that Mr. Ramey alluded to, absurd

results, intent -- legislative intent only come into play if there is an ambiguity. The first task of the Title Board or the court is to look at the plain language, apply the plain meaning of the words, the plain rules of grammatical construction, and determine what it means, and only if you or a court finds an ambiguity do you get into those rules of construction. You don't have to get there here.

They've written an initiative that requires the recording of competent evidence and ask you to set a title that discusses the recording of evidence of a valid security interest.

And finally I want to point out I think this Title Board was confused. I think by your first reading, you agreed with the interpretation I'm giving you today. And, Ms. Eubanks, I know you put an amendment to the staff draft up on the board that discussed the recording of the competent evidence, which caused Mr. Ramey to come up and say for the fifth or sixth time, No, no, no. We're not requiring the recording of the competent evidence. It's the evidence of the security interest that has to be recorded or it is the security interest that has to be recorded. This thing requires recording of the competent evidence. That's all I've got.

MS. STAIERT: All right. So the first issue before us is the jurisdictional -- it looks like there's a couple of issues whether it's so vague and then whether it's changed. Is there any discussion about change between the first draft and the second draft not in response to comments from legislative legal? Is there any discussion by the board?

MS. EUBANKS: I'd like to start, and basically what I do in terms of preparing for Title Board whenever we're dealing with measures is once we have the three versions, the review and comment version, the striked type showing changes, and then the final version that's filed with the Title Board, **one of the things that I do, because the staff of our office is involved in review and comment, is I go back to those attorneys and ask them to look at these documents and tell me whether they think all the changes made, if there were any changes made, are in direct response so that we can deal with the jurisdictional issues.**

And I had, even prior to the issue being raised by motion for rehearing, done that with Ms. Forrestal, the attorney in our office who dealt with the review and comment meeting on this particular measure, and it was in her opinion that all the

changes made were in direct response.

And so taking -- you know, she was at the review and comment meeting. I think she's best able to evaluate that fact, and based on that position and her opinion, I think that the changes made, and especially looking at the striked type, I think those changes were made in direct response to questions.

In terms of -- you know, in particular, like the argument about competent evidence, whether that's a laundry list of permissive versus mandatory items, and coming from a drafting background, there's lots of discussion going on right now in terms of whether the word "shall" is overused in drafting, you know, whether it's always used in an appropriate context, and I think this change reflects perhaps those types of discussions that I know go on in our office.

And so I'm -- I think in terms of that jurisdictional issue, I don't believe that there were any substantive changes made to the draft between review and comment and filing with the Title Board that were not in direct response.

MS. STAIERT: Do you have any comment on the vagueness?

MS. EUBANKS: Sure. I guess to me for a

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measure to be so vague that we cannot set a title, I mean, it has to be very vague, and I think there's only been those couple of instances where I've ever seen the Title Board find that a measure is vague and won't proceed to set a title. 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. That's where I start in terms of thinking about a title and single subject, and, sure, I can see, you know, the issue of whether that phrase "recorded before the foreclosure is commenced with the recorder of deeds," which is set off by commas, refers to a valid security interest or refers back to the competent evidence. I can see those arguments.

I think, you know, if you look at grammar, usually it refers back to the first item immediately preceding the set-off phrase. Yes, it's a staff draft and whether the staff draft was done based on the conversation that occurred during the review

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and comment meeting and that their understanding at that point in time of the -- with the proponents' explanation, but just because the proponents explained it one way in review and comment and then, as Mr. Ramey here explained that perhaps they were mistaken, they explained it wrong, 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; and, second, when we get to the issue of meaning of what should be described, what's subject to being recorded, we can talk about that. But I think we have jurisdiction to set the title on the measure.

MS. STAIERT: Any comments?

MR. BLAKE: I agree. I think we have jurisdiction. I don't have the -- I just don't agree with the vagueness argument.

MS. STAIERT: Okay. Do you want to make a motion? Someone want to make a motion?

MS. EUBANKS: Well, I guess since we're dealing with motions for rehearing, then I would move that we deny the motion for rehearing on the grounds that the Title Board lacks jurisdiction because the measure is so vague that we cannot proceed to set a title.

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MS. STAIERT: Second.

All those in favor?

(All members of the board said aye.)

MS. STAIERT: So No. 2 --

MR. DUNN: Madam Chair, Jason Dunn.

MS. STAIERT: Yeah. I'm going to use yours as a template as we go through, because I'm going to assume Mr. Rogers' overlaps with yours, but maybe not necessarily.

MR. DUNN: I don't believe that the board took a position on changes made after review and comment. I think -- if I'm not mistaken, I heard -- what I just heard was you voted on the vagueness issue, but not the changes.

MS. STAIERT: Okay. I'll make a motion that we deny the rehearing as to changes made after review and comment, deny the request for rehearing for lack of jurisdiction.

MS. EUBANKS: Second.

MS. STAIERT: All those in favor?

(All members of the board said aye.)

MR. DUNN: Let's turn, then, to the single subject arguments, as we said, in Section 3, and we obviously have quite a few here. I won't go through them all, much to Mr. Ramey's happiness, I

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assume, but I will talk about a couple of them because I think they're particularly substantive.

And, again, it's -- you know, not to be repetitive, but it's a little bit hard to talk about what some of the subjects are when it's, at least, unclear in my mind what the intent of the measure is and what it says, but I will try to do so.

The first one really is, you know, perhaps a combination of the first couple, and that is to amend the statutory foreclosure process, which at this -- in current law talks about the evidence that has to be filed in the foreclosure proceeding. We've now changed -- or this measure would now change that to a competent evidence standard, whatever that means and however that's defined by the measure.

That, of course, is a substantive change that, if not overrules, alters the process in 38-38-101(1)(b)(I). Likewise, it eliminates the holder process in Colorado, which is under Subsection 101(6)(b), and I think that's perhaps more the stated intent of the proponents of the measure is to eliminate the process by which an attorney representing the holder of the security interest can attest that that party is the true party in interest.

The -- one of the issues I thought were

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interesting in this was the application of the measure prospectively and retroactively. The measure, I think -- one of the things I think it clearly does is impacts current security interest and loans that are out there, and that really is a retroactive application. Those are, of course, private contracts -- or contracts between private parties, in most cases, that has an expectation or includes an expectation that if the party holding the security interest does not receive payment under the loan, that they can foreclose on the property, and this retroactively, going back to loans that are arguably decades old, amends those contracts. That's a very substantive change and is different than saying loans or security interest recorded or entered into going forward need to follow this revised process.

No. 5 and 6 on this list, I'm going to have Don Childears, the objector, come up and talk about those because he's more knowledgeable about those than I am, but I think those are very substantial impacts, and it really goes to the question -- I think we had this discussion yesterday. The discussion about when does an impact -- you know, before the board recites it back to me, of course, impacts of a measure are not necessarily a separate

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subject, even if ancillary to the measure, but at what point do the impacts of a measure, if they're so substantial and perhaps even more substantial than the stated purpose of the measure, when does it become a separate subject of the measure. And I think we've crossed that threshold here, so I'll let Mr. Childears talk about those aspects.

MR. CHILDEARS: **Good morning. Don Childears with the Colorado Bankers Association. It is our belief that these changes so cloud and complicate the foreclosure process that we will have an end result of the secondary market not being willing to buy mortgages originated in Colorado, and that the MERS system will no longer effectively be able to function.**

Regretfully we won't know the absolute outcome of that until something like this is enacted, but we feel quite confident in our conclusion based upon our knowledge of that system.

The secondary market is basically composed of quasi public entities like Freddie Mac and Fannie Mae and others, and private parties that buy mortgages from the originating lender. That allows that original lender, after they've made the loan for, say, a quarter-of-a-million-dollar house, to sell it,

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they get a quarter of a million dollars or thereabouts back from the secondary market purchaser, and they can turn around and lend that again. And that's what really allows for the volume in the secondary market. **That system of both private purchasers and quasi public purchasers, we think, will grind to a halt because of the complexities given by this amendment, both prospectively and retroactively.**

The fact is that 90 percent of mortgages originated in Colorado are sold on the secondary market. That is an astoundingly high percentage, and if you even have a significant dent in that, you've caused major repercussions in the lending process itself by grinding it to a halt in the home construction industry and the ability of citizens to purchase homes, et cetera.

You can imagine all of the consequences that come out of that, and we believe that the secondary market will not buy these instruments because they have plenty of opportunities elsewhere, and they, in fact, have given us evidence very recently of this, and this is, in fact, the case.

The State of Colorado adopted a statute about two years ago that dealt with energy loans and their liens on real property. The Federal Housing

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Finance Authority, the federal regulator of the quasi public secondary market, Freddie Mac, Fannie Mae, et cetera, put in writing an absolute prohibition against them purchasing those kinds of mortgages saying that is not going to be an acceptable level of quality for these entities to purchase mortgages from the state of Colorado, so we will not allow Freddie and Fannie to buy any mortgages that have that complication in them.

The MERS system -- MERS stands for the Mortgage Electronic Registry System, and it is an electronic system used nationwide by all the secondary markets, the public entities, quasi public entities, as well as the private ones. It's used by every significant lender, everybody involved in the lending process even down to the credit rating agencies. That is how widespread it is, and it basically sets up a nominee system where you don't have to have each endorsement or assignment tracked through the system. It's done electronically, but not on the official documents back in the county where the real estate is located.

And this is a system applicable in all 50 states. It's been around for a significant amount of time. It is in high usage. I think it probably accommodates 60, 70 percent of all the mortgages in

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Colorado, and we think it, too, would balk at this system and say, We can't handle that because it basically undoes the system that we've put in place and requires that we go back to the actual endorsements, and that is like a step backwards in time.

My only point is to say that this has major impact on lending and all other aspects around lending that we think are very significant, and it does so both prospectively and retroactively. And I think that concludes the remarks. I would be glad to answer any questions.

MS. STAIERT: Any questions?

MR. BLAKE: So just so I'm understanding your argument as it dovetails to Mr. Dunn's, is the argument that the two subjects that are here is one is retrospective and one is prospective? Those are the two problems that are created?

What you articulated to me -- or at least what I heard was a very articulate argument against it on the merits as opposed to why there's more than one subject.

MR. DUNN: Sure. That was my point. The retroactivity piece is, I guess, twofold; one, is the issue that -- that existing loans and security

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interest are subject to this impact. The point I was making earlier with regard to retroactivity was that you're just simply taking a new amendment and impacting every loan and security interest that's out there right now, and the point was not so much that -- the impact on the foreclosure process that it has, but the fact that it's impacting privately entered into contracts that are in existence right now. And I'm not sure the public would understand that from this measure, that, Gee, this impacts now my -- the mortgage I already have. You know, they might think of it as going forward.

But to alter, in a substantial way, probably the most meaningful way, contracts that have been in existence for decades has to be more than just some of the fallout of a measure. That has to be, essentially, the -- one of the purposes of the measure.

MR. CHILDEARS: If I could --

MR. DUNN: And the same thing applies to the secondary -- sorry, the secondary lending -- secondary market for loans in that because that's such an integral part of our economy and the way that people are able to get loans, the way that lending institutions are able to function, if you dramatically

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alter that to the point where, in Colorado, loans will not be available to a large extent because there is no longer a secondary market where lenders can then sell those loans and then allow themselves to have liquidity to enter into other agreements, at what point does that become so substantial an impact on the economy and the ability of people to get home loans that it's a separate subject, a separate purpose of the measure.

MR. BLAKE: Mr. Childears.

MR. CHILDEARS: What I was going to volunteer was what he just said. **Moving forward, the impact is so significant that it literally alters lending processes. So it basically is an amendment that impacts lending, not just foreclosures, and in our minds, those are very different topics. They are at opposite ends of the transaction, and it not only impacts the lending, but all the economic consequences that flow out of that; of consumers not being able to buy homes because of the lack of lending, the impact on real estate values, et cetera.**

MR. BLAKE: Can I --

MS. STAIERT: Go ahead.

MR. BLAKE: So can I go back to Mr. Dunn's first point? If I understand it correctly,

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Mr. Dunn, you really focused on No. 1 and No. 4, and then Mr. Childears really kind of focused on No. 6 in the list of 10; is that fair?

MR. DUNN: Yes. My initial comments were with regard to 1 and 2, and then No. 4, and then his comment on the secondary market was No. 5, and the MERS system is No. 6.

MR. BLAKE: Okay. So on 1 and 2, why can't it do that? Why can't that -- why isn't that exactly what this does? I mean, it seems to me that that's exactly what the purpose is.

MR. DUNN: Well, I think that's right.

MR. BLAKE: It's sort of a separate --

MR. DUNN: Right.

MR. BLAKE: -- subject. Are these things articulated to be a different subject than what the proponents --

MR. DUNN: Well, I think those two -- I think you're right. Those two are the primary purpose, at least from the proponents' perspective, not to put words in their mouth. I think that's, to a large extent, the primary purpose of the measure.

MR. BLAKE: Okay. All right. So they're contrasted with the rest of the list?

MR. DUNN: Right. And related, I think,

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to the point we were making about the secondary market, but I think different from the primary purpose of the measure is the impact that this will have on the Uniform Commercial Code which governs the transfer of promissory notes as freely assignable instruments. That will just go away, and the question for you is: Does that constitute a separate subject?

If we're talking about amending the foreclosure process or maybe we're talking about the recording process or we're certainly not talking about the negotiability of a financial instrument under the UCC, which is 4-3-104, you know. Is that a separate subject from the measure rather than just an impact? And like the secondary market, I would argue that it is.

Let me jump down to No. 9, and I thought this was another very important and interesting purpose of the measure or perhaps impact of the measure. Under the case cited, Chames v. DiGiacomo, if you had to a chance to review that, the Supreme Court looked at the issue of whether taxpayers have a privacy interest, a privacy right in bank information, and the Supreme Court in a nutshell held that that was a reasonable expectation of taxpayers, that financial information and banking information would be kept

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private.

And so what this measure does is, essentially, overrule that opinion and changes the reasonable expectation that consumers can have with regard to privacy -- private information that's in lending documents, and that's because the security instrument does not have the same type of personal information that loan documents have.

If the measure is read, as Mr. Rogers said, that this information -- lending information has to be recorded, then that information will be publicly available, which obviously none of the parties had the expectation of when they entered into these contracts. And at a minimum, that ought to be in the title, but I would argue that's a separate purpose of the measure as well, and to, you know, I guess preempt what -- what might be argued in response to that, there is no process by which that information could be redacted. We're talking about original loan documents, and even then the holder of the loan would be submitting an altered document, or you would be asking the county clerk and recorder to redact original loan documents. Either way, not a -- not a reasonable and possible outcome.

So I'll stop there, I think, before we

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get into title issues and let the board discuss, unless there's any questions.

MS. STAIERT: Any questions?

MS. EUBANKS: No.

MS. STAIERT: Mr. Rogers, did you have a comment on that?

MR. ROGERS: No, I don't, Madam Chair.

MS. STAIERT: Okay. Mr. Ramey, did you want to come back up and address those comments?

MR. RAMEY: Thank you, Madam Chair. Excuse me. Obviously the proponents do not believe that there are multiple subjects in here, and primarily what these ten measures -- or ten points that Mr. Dunn has recited do is deal with predictions of impact and effect, which is exactly what the Supreme Court has suggested over and over and over again is not what this board should be doing. And the presentation this morning, I think, illustrates, with regard to several of these measures, exactly why that's the case.

A couple of the -- one of the proponents and one of the other individuals working on the measure with us happen to be attorneys, and they were just salivating at the opportunity of cross-examining Mr. Childears over his predicted effects with regard

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to the secondary mortgage market and the MERS system and so forth, and --

MS. STAIERT: Maybe you all will get an opportunity to do that later.

MR. RAMEY: Well, I -- Madam Chair, I'd like to agree that later in a different post-adoption context is exactly when that should occur, because we have a very different view of the predicted effects of this obviously. We're quite surprised at some of the things he said, but I would love the opportunity to spend the afternoon in front of this board cross-examining him. I don't think that's why we're here.

A couple of these points we would take exception to as a legal matter in addition to the factual predictions. One is the impact on the Uniform Commercial Code, and the second thing is the requirement, for example, in No. 9 of the public filing of financial data. It doesn't do that. As a matter of law, we would submit it doesn't do that. That would be a matter, again, for post-adoption briefing, and also quite a good argument in favor of the interpretation of the measure that we've been submitting is the proper way to read the measure as far as what documents need to be recorded.

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On the prospective/retroactive issue, my understanding of legislation -- and I hesitate to opine on this in Ms. Eubanks' presence, who is far more familiar with that than probably all the rest of us put together, but legislation is deemed at the beginning to be prospective in nature unless it otherwise states.

If, as suggested today, there are potential retroactive effects notwithstanding the prospective intent of this and any legislation, retroactive impacts that might cause problems, again, that's the kind of thing that a court will deal with in the context -- post adoption, again. But in the context of a particular dispute with a party who claims that this has created a problem for them, has made it impossible for them to foreclose, for example, upon a security interest securing a debt that was entered into prior to the adoption of this measure and so forth, and that amounts to -- to unfair, if not unconstitutional problems for them.

The courts are well equipped to deal with that, and, again, I don't think that's what we do in this process. We don't have a particular dispute. I would take quite a bit of exception to some of the things that Mr. Dunn and Mr. Childears had to say,

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though, what do I know? I mean, we don't have a particular dispute, a particular context. We don't have anybody before us. You know, we're not conducting an adversary hearing.

So each one of these things, I would submit, is a predicted effect, a predicted impact. Some of them we think are just dead wrong on their face. Some we would take exception with on the facts, but we're in no position to argue that today, and even if they were true, it wouldn't affect what the task of this board is today.

There are also arguments -- I guess I would just boil it down to the fact -- or not the fact, but the proposition that this initiative is a very, very, very, very bad idea from the perspective of the mortgage bankers. That is the political argument that would be before the voters if this were presented to them, and they would certainly have the opportunity and certainly have the wherewithal to present that argument to the voters.

So I would submit that none of these suggested items, whatever any of us -- any of us in the room may think about them, constitute a second or -- secondary or multiple subject for the measure.

MS. STAIERT: On the issue of the two

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subjects, I mean, I've wrestled with that quite a bit over the last few weeks on what makes something disconnected, and I voted double subject a couple of times. One on a limit on tax that contained an additional limit on spend, and another one that had the same kind of TABOR implication, and I think that is sort of a brighter line for me is where there's a measure that specifically states we're going to -- if this measure specifically stated we're going to limit the way loans are made, and on the other hand, we're going to limit the way foreclosures are made, then there may be an argument on a double subject because they wouldn't necessarily be connected, but I think at this point that is all speculative on whether it's, in fact, going to have an effect like that. And I don't think that I could vote that this was double subject based upon that kind of speculation.

Do you have any comments?

MS. EUBANKS: I think it's helpful to go back to the Supreme Court's decision, and the first one where they set forth the standard for the single subject requirement, which was In Re: Proposed Initiative of Public Rights In Waters II, 898 P.2d 1076. It talks about "A proposed measure violating a single subject requirement if its text

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relates to more than one subject and if it has at least two distinct and separate purposes which are not dependent upon or connected with each other."

I think that the discussion today is, is it, you know, more than one purpose because it may have these impacts? I don't view the fact that if this measure is approved by the voters, it may change the law and require different statutes to be changed. I don't think you evaluate it on that basis.

And -- and I do think that there is a difference as was noted by several speakers in terms of a purpose versus an impact. I think we go to the text of the measure itself, and -- and I think on its face, to me, it constitutes a single subject. There isn't more than one subject, and for that reason, I think we have jurisdiction to set a title and still view.

MR. BLAKE: I think I agree with both of you, I mean, liberally construing all of this. I think the other subjects that have been articulated are really effects of the language, and therefore, I'm not really sure that they are -- in the language they conflict with one another or they really establish two different subjects.

Some of these are clearly legal arguments

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or potential impacts, but I think that's for the merits of the debate when it's put forward, and therefore, I don't think -- I don't think there are two subjects in the language that's been put forward by the proponents.

MS. STAIERT: Then I will move that the motion for rehearing be denied on the issue of whether the proposed measure impermissibly contains multiple subjects that are not necessarily connected.

MS. EUBANKS: Second.

MS. STAIERT: All those in favor?

(All members of the board said aye.)

MS. STAIERT: I think that turns us to the title.

MR. ROGERS: Again, Thomas Rogers for objector, Barbara Walker. Two quick points on title. First, this initiative would, in effect, repeal the tradition of Colorado law that allows the use of a corporate surety bond, also known as a lost instrument bond, in lieu of original evidence of debt. That opportunity is currently found at 38-38-101(1)(b)(I).

The manner in which the initiative does that is by amending our constitution and adding a provision that requires competent evidence in order to proceed with a foreclosure. Competent evidence is

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defined as evidence of debt in the measure, and evidence of debt is defined at 38-38-100.38, and it does not include corporate surety bonds. The reason it doesn't is because a corporate surety bond is not evidence of debt. It is something that can be offered in lieu of evidence of debt. So pretty expressly the measure eliminates the opportunity for the use of a loss instrument bond from the statute.

Now, the proponents were asked in review and comment to identify the conflicting provisions of law. I think the reason that question was asked by alleged counsel is so that conforming amendments can be included in the measure here. That opportunity was offered but not accepted by the proponents, so we're now left with the question of whether this is a material enough provisional impact of the measure to warrant inclusion in the title. I would suggest that it is.

First, this is not a -- kind of an attenuated impact that the measure might have. This is very clear -- a very clear impact that we can kind of identify within the text of the existing statute, and I would submit that the voters need to understand that the measure eliminates this existing right under Colorado law.

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Second, I would just return to the argument that this initiative includes an unambiguous requirement that competent evidence be recorded, not filed -- or recorded and filed, I suppose, and would argue that the title is inconsistent with that unambiguous intent of the measure. Thanks.

MS. STAIERT: All right. Now, Mr. Dunn --

MR. ROGERS: Oh, and I've got a red line on that as well.

MS. STAIERT: Oh, that would be great.

MR. ROGERS: Yeah.

MR. DUNN: For the record, Jason Dunn again. Well, as we articulate in our motion and in the conversation that Mr. Blake and I just had, it seems to me the primary purpose of the measure, at least from the proponents' perspective as they've stated, I believe, at review and comment was to overrule the holder process in Colorado, 38-38-101(6)(b), and as Mr. Rogers just said, Subsection 101(1)(b)(I) as well.

If that's the purpose of the measure, to overrule that process, then that ought to be described in the title. It isn't just about filing certain documents as part of a process, but rather it's to

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eliminate an alternative process and that should be reflected in the measure.

I'm not sure whether -- well, part of my struggle is that I'm not sure what the Title Board thinks the measure does in terms of where something has to be filed. The Title Board obviously disagreed with my vagueness argument, and Mr. Rogers -- well, I don't know if they disagreed with Mr. Rogers' argument about what it says, so it's hard to describe what I think the title should reflect without knowing what the board thinks the measure does.

MS. STAIERT: Do you want to -- we can have Mr. Rogers come up first and have that discussion and then have you back.

MR. DUNN: Does that mean that you agree with what he articulated the measure does?

MS. STAIERT: I'm not entirely sure right now, so, you know, I might be in your position --

MR. DUNN: Right.

MS. STAIERT: -- and I'm just wondering if having the proponent come back up and talk about this issue might be --

MR. DUNN: You mean Mr. Ramey?

MS. STAIERT: Mr. Ramey, yeah. I'm not sure what Mr. Rogers would --

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MR. BLAKE: I would suggest that. I would like -- I mean, I think that's right.
MS. STAIERT: Okay.
MR. BLAKE: I think I'd like to hear Mr. Ramey --
MS. STAIERT: Yeah?
MR. BLAKE: -- again and have either Mr. Rogers or Mr. Dunn --
MR. DUNN: Okay. Then I'll hold off on the catch-phrase argument as well.
MS. STAIERT: Okay.
MR. RAMEY: We can both stay up here, if you'd like. We can all three line up at the podium.
Madam Chair, Ed Ramey representing the proponents. I just had a moment to look at the proposed alternative language of the title. Two things strike me specifically with regard to -- let me go to Mr. Rogers' argument first.
That is absolutely an incorrect interpretation of the measure, and I think what Mr. Rogers is doing is confusing the phrase "evidence of debt," which is the language that he was referring to and also the language that gives rise to the -- to the surety bond and the language that he proposes is an amendment to the language of our measure, which I

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don't think -- who knows what a court is going to do with this one of these days, but it really doesn't talk about what you do, for example, if the evidence of debt -- the original evidence of debt, the promissory note or whatever, may be lost and whether you can post a bond or what a qualified holder can do or not do with regard to that.
What the measure provides is that competent evidence of the right to enforce the security interest must be presented. That's a somewhat different animal, and that's, I think, what the title accurately reflects, and **to add the phrase that the language that's just been circulated suggests that this repeals Colorado law that allows foreclosing parties to obtain a bond in lieu of evidence of debt, it just doesn't do that.**
Now, I'm not so presumptuous to say that a court some day might not disagree with my statement of the predicted effect. I don't think it will, but the language of the measure, all that it requires is that the foreclosing party file, in the foreclosure proceeding, competent evidence of its right to enforce a valid security interest. So that last phrase doesn't really belong.
The earlier part of the measure or the

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proposed revision that's just been circulated adopts the interpretation that we were discussing earlier today, specifically that competent evidence of a party's right to enforce a valid security interest, using the correct language, be recorded with the recorder of deeds. We discussed that at some length. That is not our intent by the language. That is a possible interpretation of the language.
At present, the title doesn't do that, but to take -- to adopt that interpretation in the title, I think, would be inappropriate and misleading.
Now, if the board wants to assure that the title is devoid of any possible siding one way or the other on the interpretation, that would certainly be understandable, and I don't have any tinkering to suggest, but I think the title actually is very good.
As a matter of fact, reading the title prior to this hearing, I liked it better than I did last week when the board created it. I think it's a very good and short title, but I'm not sure we would object to tinkering for that purpose, but certainly don't adopt a suggested alternative interpretation which the proponents say is absolutely not the way this should be interpreted pre-adoption title.
MS. STAIERT: That issue with the

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deprivation, I mean, that's where we've had -- that's where we had our discussion last week. Does it have to be filed before the action is commenced or does it have to be filed before the property is actually foreclosed on? That, I think, is the issue we wrestled around with last time.
MR. RAMEY: Right.
MS. STAIERT: And last time, I think it was your interpretation that it was only prior to the actual deprivation of property, not at the time of commencement.
MR. RAMEY: The -- exactly. The filing of the competent evidence would take place in the foreclosure proceeding, whether it be a public trustee or judicial foreclosure. So it wouldn't be filed before the proceeding in which it would be filed had commenced, so I guess that's --
MS. STAIERT: But would it be filed upon commencement?
MR. RAMEY: There's nothing in the measure that says that has to happen. It has to be filed in that proceeding.
Now, prior to the commencement of that proceeding --
MS. STAIERT: Right.

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MR. RAMEY: -- the proponents' intention is that the valid security interest be recorded.
MS. STAIERT: Right.
MR. RAMEY: Just the valid security interest, but the evidence would just be presented in the proceeding, filed in the proceeding, I think, and I probably ought to look at -- Mr. Rogers is looming.
MR. ROGERS: I am looming.
MS. STAIERT: I know. I just have some questions. I mean, we have this section in here that says, "A valid security interest recorded before the foreclosure is commenced."
MR. RAMEY: "A valid security interest" -- I'm going to have to read it myself to see what the language is. ". . . requiring competent evidence be filed to establish a party's right to enforce a valid security interest prior to the deprivation of any real property." The deprivation would not occur until the end of the foreclosure proceeding, so I think the title is correct.
MS. STAIERT: Right. But your section says "recorded before the foreclosure is commenced."
MR. RAMEY: That's the recording of the valid security interest. That's the interpretive issue we were bouncing back and forth with earlier.

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MS. STAIERT: So you're trying to say that only the valid security interest has to be recorded before the foreclosure is commenced?
MR. RAMEY: That's correct, Madam Chair.
MS. STAIERT: But the competent evidence doesn't have to be filed until the proceeding is under way?
MR. RAMEY: Right. It couldn't be. There would be no place to file it until the proceeding is under way.
MS. STAIERT: I'm just not sure --
MR. RAMEY: -- and then before the end of the proceeding, when there's a deprivation, yes.
MS. STAIERT: There's just no set apart between this "files competent evidence" and the "valid security interest" in your language.
MR. RAMEY: Well, again, I mean, here's where we've got the less -- I guess -- I don't disagree, but the less than optimal language in the text, but I think the reading is -- is pretty easily garnered from the language. That "The party claiming the right to" -- I'm looking now at the measure, not the title. "The party claiming the right to foreclose in the foreclosure proceeding files competent evidence of its right to enforce a valid security interest," comma,

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"recorded before the foreclosure is commenced."
So it is the valid security interest that needs to be recorded before the proceeding is commenced, but the competent evidence would be filed in the proceeding --
MS. STAIERT: Right.
MR. RAMEY: -- at any time up to the end of the proceeding, which is when the deprivation would happen, which is the way the title reads.
MS. STAIERT: Yeah. Okay.
MR. RAMEY: So I wish we could have foreseen all of this and could eliminate some of the less than optimal drafting, but I think that is the clear intent of the interpretation.
I will get out of Mr. Rogers' way before he pulls me out of his way.
MS. STAIERT: Yeah. He's about to -- yeah.
MR. ROGERS: Yeah, please. I'm lurking. I'm about to lurk again.
And I -- this is not clear and easy stuff, so -- but I want to walk through this lost instrument bond issue one more time. So as I read the initiative, there is this filing of competent evidence of its right to enforce a valid security interest, and

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then I look next down to the end of the initiative, "Competent evidence includes the evidence of debt."
So it looks to me as though what must be filed -- and I would argue recorded, but we can come back to that in a minute. What must be filed is the evidence of debt, and that's what ties back to 38-38-101(1)(b), which defines -- or which -- which requires that original evidence of debt must be filed to commence a foreclosure action.
So I'm not sure if I'm missing something there or if Mr. Ramey is. One of us clearly is. So it appears to me that what needs to -- under this initiative, working in conjunction with 38-38-101, it appears to me that the evidence of debt, that is the original promissory note, must be filed before a person can be deprived of property. Okay. That's the only option.
A lost instrument bond is expressly not evidence of the original debt. It is expressly under 38-38-101(1)(b)(I) or under (1)(b) something that you file in lieu of original evidence of debt.
So it certainly looks to me like you can't use a lost instrument bond anymore. And I'm going to stand up here and hope that Mr. Ramey will come back.

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MR. RAMEY: May I respond?
MS. STAIERT: Okay.
MR. ROGERS: It's just more efficient if we both stand up here.
MR. RAMEY: Yeah, it is, and I have no objection to standing next to Mr. Rogers at any time at any place. But focusing on that precise --
MR. BLAKE: Shall we bring up Mr. Dunn?
MR. RAMEY: Sure. Where did he go?
MR. ROGERS: Can you say the same thing about Mr. Dunn?
MR. RAMEY: I need to get one of my law partners up here if we're going to do this.
The statute to which Mr. Rogers is referring permits a corporate surety bond to substitute for the original evidence of debt. Our measure, despite any non-optimalities -- God, that's a bad word -- in terms of its drafting never refers to the original evidence of debt.
Evidence of debt -- not the original anything, but evidence of debt is simply offered as a nonexclusive example of something -- some form of competent evidence in which a foreclosing party can present to the court to show that they have the right to foreclose.

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It doesn't require that they present the original. It doesn't do anything with regard to surety bonds. It does -- or one way or the other, in terms of whether they can be used. **In fact, the measure doesn't even require that the evidence of debt be presented if a court is satisfied that -- that other evidence presented is sufficient to show competent evidence of a right to foreclose.**
Now, we can argue what kind of a context that would happen in, but the language of the measure just by -- doesn't do what Mr. Rogers is saying that it does. Now, there may be a day when, again, we're in court post adoption and we're arguing exactly this point, but that's not what the language of the measure itself says.
MR. ROGERS: Well, I don't think we have to wait that long. I mean, that evidence --
MR. RAMEY: I'll stay up here then.
MR. ROGERS: Stay up here. Evidence of debt, I would point out, is defined in the statute. I assume that the same -- that the definition in the statute is the same definition that the proponents intend will apply to their measure. And evidence of debt defined at 38-38-100.38 means "A writing that evidences a promise to pay," et cetera. It's the

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promissory note. It is -- it is -- again, you don't get to "in lieu of" until you get later in the statute.
So, I mean, they've referred to a requirement of the filing of evidence of -- competent evidence of what? Evidence of the debt. They're just precluding the use of a lost instrument bond, and I think that has to be included in the title. We've probably beat that one to death.
MR. RAMEY: I have one more sur-reply.
MS. STAIERT: Okay. But do you have anything else on the title --
MR. ROGERS: Yes.
MS. STAIERT: -- itself?
MR. ROGERS: Yes.
MS. STAIERT: Okay. Let's move to that.
MR. ROGERS: Okay.
MR. RAMEY: Well, actually can I just finish that point, and then we'll be done with that piece of the discussion?
MS. STAIERT: Do you promise?
MR. RAMEY: Promise. The language of the measure says, "competent evidence of its right to enforce a valid security interest." Evidence of debt is one of the things that could fall within that

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category or not. I'm going to stop right there.
MR. ROGERS: All right. You haven't heard from Mr. Ramey on the -- on my argument about ambiguity, so maybe I should sit down and let him come back up.
MR. RAMEY: Well, I think we -- I think they've heard it before.
MS. STAIERT: Yeah, those are my questions about the --
UNIDENTIFIED SPEAKER: The answers are the same.
MR. RAMEY: I would request that other counsel in the room be admonished.
MS. STAIERT: Anybody is free to speak on your matter or any other matter.
MR. ROGERS: Well, I -- yeah. I suppose I should have been paying more attention to that. I thought we were still on that. I don't think the timing issue that Mr. Ramey raised is -- is important for the argument I'm making.
MS. STAIERT: Okay. Go ahead.
MR. ROGERS: This is simply a construction of a couple of clauses of this measure. I think they've just written a measure that requires the filing and the recording of competent evidence.

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Competent evidence is modified by "of its right to enforce a valid security interest." I think, you know, using that comma correctly, interpreting this in the way that it must be interpreted, that competent evidence has got to be recorded.

MS. STAIERT: Prior to the commencement?

MR. ROGERS: I don't care when. No, I think it's got to be -- yeah, I think it's got to be recorded prior to the commencement. I think it's got to be filed before the deprivation.

MS. STAIERT: Right.

MR. ROGERS: Yeah.

MS. STAIERT: Okay.

MR. ROGERS: Okay. Dead horse No. 2, fully beaten. Thank you.

MR. DUNN: Last man standing, I guess. So one of the things I think I heard Mr. Ramey say was that the measure is prospective in nature only, and I'll let him rebut that if that's not correct, but if that's true, then that's significant and something that should be reflected in the title, that the measure is only applicable to loans or security instruments entered into on or after the effective date of the measure. That's substantial, and that should be --

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MS. STAIERT: I don't think it says that. I mean, maybe it's prospective in terms of you're not going to use this process until it's in place, but the measure doesn't say anything about it going back to the contracts that were put into place 20 years ago.

MR. DUNN: Well, I would deem that retroactive. I'm not sure what you're saying. Are you saying it would only apply to loans entered into after the effective date of the measure?

MS. STAIERT: Well, is that what you're saying --

MR. DUNN: I think --

MS. STAIERT: -- by his prospective?

MR. DUNN: Yes.

MS. STAIERT: I mean, I don't know how you interpret that. You're the legislative drafter.

MS. EUBANKS: Well, I think what's been discussed is the fact that you've got case law that says that the measure is viewed prospective unless the language of the measure itself makes it retrospective. I mean, that's the case law. What this measure does, I'm not going there. Sorry, I'm not biting.

MR. DUNN: Sounds jurisdictional.

MS. EUBANKS: Because I -- I mean, the measure itself doesn't say one way or the other, and

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so in terms of describing it -- I mean, I understand your argument. I'm not there. I mean, because I don't believe the text of the measure itself, and the title is supposed to be describing the central features of the measure, the measure does not say one way or the other. That's to be determined after the fact if this becomes law.

And so, you know, you have your argument. I don't necessarily agree that that should be included in the title because the measure itself on its face does not say one way or the other.

MR. BLAKE: Yeah, and it's not so vague as to --

MR. DUNN: That's right. Exactly.

MR. BLAKE: -- that you can't set the title, but what -- well, somewhat.

MR. DUNN: Ms. Eubanks, I would -- go ahead.

MR. BLAKE: Let me clarify your -- what I understand your argument to be, the prospective/retrospective.

So there are foreclosures in process right now. What you're saying is -- or where -- I think if it's prospective, I think I understand it to be the process kicks in tomorrow. That doesn't

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mean -- what you're saying is whether or not it applies to a loan initiated the day after it takes effect, right? Is that the prospective/retroactive argument you're making?

MR. DUNN: I'm saying that it appears that it would apply to loans entered into after the effective date of the measure.

MR. BLAKE: That would make it prospective.

MR. DUNN: Right.

MR. BLAKE: But aren't you -- wasn't your retroactive --

MR. DUNN: Retroactive would mean it's applicable to --

MR. BLAKE: It applies to anything that's out there today?

MR. DUNN: Right.

MR. BLAKE: Right. Even, you know, meaning a foreclosure proceeding that's currently in process all of a sudden would become subject to the evidentiary rule. Did I misunderstand your argument?

MR. DUNN: Well, no. I would say that question -- that point is moot because I would view retroactivity as applicable to any loan that's in existence now. My mortgage, your mortgage.

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MR. BLAKE: Regardless of its status --
MR. DUNN: Status.
MR. BLAKE: -- in foreclosure?
MR. DUNN: Right. I would view applying it to those would be retroactive. If I refinance my loan or purchase a home after the effective date of this measure, it would apply to that, but not to the one I hold now.
MS. STAIERT: And I don't think it's clear enough that we could put that --
MR. BLAKE: Yeah.
MS. STAIERT: I think it could be misleading to say this is prospective in nature, and then have people find out that, in fact, the court is going to apply it to loans taken out --
MR. DUNN: Well, and, again, I'm basing my comments on Mr. Ramey's comments, but --
MS. STAIERT: Okay. Go ahead.
MR. DUNN: Okay. So the last -- the last two issues I have is with regard to impermissible catch phrases and that both the phrase comp --
MR. BLAKE: Are we going to move on to that or can we deal with the misleading part first?
MS. STAIERT: Whatever you want.
MR. BLAKE: I guess, can we deal with the

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misleading part first?
MS. EUBANKS: Sure. That's fine with me.
MR. BLAKE: Because I'm actually sympathetic to this. Not -- but I think I see it much -- I don't see it as quite -- with quite the complexities that Mr. Rogers does, and I think the proponents of the measure would agree that it substantively changes existing law or else you wouldn't be here, right?
So that's what's lacking in the title is advising the -- you know, the voter that this isn't something new. I mean, there's provisions in law right now that require evidence, this, that, and the other. The proponents say that evidence is inadequate if I understand their point.
Mr. Dunn and Mr. Rogers are saying it substantively changes that, and I think the proponents could agree with that, and I think that's relevant. I think that is something that could or should be conveyed to the voters so that they understand that if they voted against this, for example, it's not as though foreclosures can proceed without any evidence.
MS. STAIERT: Right.
MR. BLAKE: And so I think the idea that this changes the landscape of how a foreclosure

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process occurs is, in fact, something that is relevant and should be conveyed to the voter, and I'd certainly welcome the voter to come up and opine on that.
I don't necessarily -- I don't want to get into the merits of whether or not it overturns 38-38-101 --
MS. STAIERT: Yeah.
MR. BLAKE: -- or anything into those weeds. I think that is something that's much more meritorious than where I'm at. I'm at a much more macro level, but you wouldn't be here if you weren't trying to change the law.
MR. RAMEY: Mr. Blake, I guess all I was going to say -- and you actually completed my statement, I guess, as I walked up here. I mean, yes, I mean, obviously we intend this to change the law. I can't really comment on what you're doing yet because I haven't seen the language. I was going to caution against just what you veered away from because I don't think we should be ticking off statutory amendments that would have to happen in the title or may not have to happen.
MR. BLAKE: And I think we can get there later, if my colleagues agree. I think the difficulty in doing that is how we do it in a neutral way.

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MS. STAIERT: Right.
MR. BLAKE: That's going to be, I think, our challenge. But I'm -- I'm sympathetic at this point that it is a meritorious or substantive thing that should be conveyed to the voter.
MR. RAMEY: I don't think we would have an objection. Again, I don't know what you're going to do, so I'll withhold approval, but the concept you're stating, Mr. Blake, certainly makes sense.
MR. BLAKE: I don't know that we need a vote necessarily.
MS. STAIERT: No. I think we can --
MR. BLAKE: I think we can deal with that when we deal with the language later, but I just wanted to make that point while we were still on it and give somebody an opportunity to respond. I'm happy to move on.
MS. STAIERT: Okay.
MS. EUBANKS: Do you have --
MS. STAIERT: No, I was going to move on.
MS. EUBANKS: Oh. Well, I would like to address Mr. Rogers' argument about needing to include 38-38-101 or some reference to that.
I don't know that I'd distinguish it -- that argument much different than any of Mr. Dunn's

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arguments in terms of the relative impacts or potential impacts that this measure may have on current statutory law, and, you know, again, to me setting a title, we're supposed to be describing the text of the measure and, you know, what it impacts, what it changes. And I know I'm dating myself here, but the Title Board used to have to not only set the title and -- ballot title and submission clause, but we used to have to also summarize the measure, which made it for even longer meetings, if you could imagine. And there's case law that said that summaries don't have to describe the conflicting law that would be affected by a particular measure.

Now, we don't have to do summaries anymore. They changed the law, but I would argue that that theory still applies in this instance, and in every instance, that we don't need, as setting -- in setting a title to describe all the law that may be affected by a particular measure, whether it's a repeal, whether it's a change, whatever. And in terms of this idea that, you know, we need to inform the voters of, well, this is a change from some other type of process or some other rule or procedure, it seems to me every measure does that.

I mean, and if we start going that way, I

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think it's a very slippery slope, first of all, because, you know, where do you draw the line? And, two, I think, you basically -- in terms of what the court has said, our charge in setting the title is to describe the central features of the measure and not necessarily what all -- you know, that this is a change from this to that, you know.

I know that we do that in a limited context sometimes like when there's a measure, for example, that changes the tax rate, and we say it changes it from 5 percent to 4 percent, but I -- I'm just uncomfortable going that route because I think it's extremely difficult, and once you start doing that, I don't know where you stop.

MR. BLAKE: I would respectfully disagree. I think there are -- you know, there are ballot initiatives that are new to the law; that is, they're adding something. There are ballot initiatives that are striking things. Those are different purposes. This is changing something that's existing in law, and as I read the title right now it says, "An amendment to the Colorado Constitution requiring competent evidence."

Well, there's certainly a legitimate argument that says there's a process in place that's

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at least requiring evidence regardless of whether it's competent or not. And, I mean, the proponents would acknowledge that the whole -- not the whole, but certainly the intent here is to modify what is a preexisting statutory scheme, and what I'm worried about is the voter believing that this is -- they're creating this out of whole cloth or within a vacuum somewhere. And I think that is relevant and important because if they vote against it, for example, there's a default. The default is what's already in the statute.

So I view those things as being different. I don't -- I'm not as concerned about the slippery slope, you know, because you could envision a ballot which would say, Adding to the Colorado Constitution a new provision requiring X, and everybody would know, if that were the language, that we're creating something new or striking something that is, for whatever reason, in its entirety. So I view it differently, and I do, I think -- I find it relevant and substantive.

MS. EUBANKS: And, I guess, in -- I'll just use your example. I mean, you may have a new constitutional provision, just as this measure is a new constitutional provision. The argument is it's

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changing statutory law. I mean, so just indicating that it's, you know, a new constitutional provision versus amending an existing one, to me that doesn't get you where I think you want to be because -- I mean, it's the whole body of law, whether it's statutory or constitutional, I think, that, you know, that's where the discussion is at this point.

And I think that, you know, these types of issues, those come out in a campaign. Those -- that's the discussion that's had. In terms of the Title Board's role, I think our duty is to describe the measure and not necessarily -- I mean, because, in my mind, it -- every measure potentially changes the law either because the law currently is silent or the law provides a certain process or a certain rule of law and it's changing it, and I just -- I don't think we should go there, but that's just my opinion.

MR. BLAKE: I --

MS. STAIERT: If you told me what it would look like, I might be able to --

MS. EUBANKS: Well, I don't know --

MR. BLAKE: As I was listening to the argument, I think it goes something like -- I'm not set on this, but An amendment to the Colorado Constitution changing existing procedures or modifying

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existing procedures or preexisting procedures to require -- again, this is where I kind of get stuck about whether or not -- you have to do it in a neutral way. Different types of evidence that are currently required. I mean, how we get there, I don't know --

MS. STAIERT: Yeah.

MR. BLAKE: -- but that's the --

MS. STAIERT: I don't necessarily have a problem with that. I mean, something that simplistic --

MR. BLAKE: -- the concept that I think should be conveyed to the voter.

MS. STAIERT: Yeah. But we're about to hear about the words "competent evidence."

MR. BLAKE: Right. That's why I didn't think it was worth going down this path right now because there might be other --

MS. STAIERT: Right.

MR. BLAKE: -- tweaks that we need to make, but that's the concept that I'm sympathetic is coming out of this. I don't think we need to get into it because it may assume too much on the merits for us to, you know, adopt Mr. Rogers' argument that it's going to overturn or strike 38-38 in its entirety, but there's no doubt that we're trying to change things

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here.

MS. STAIERT: Right. And, I mean, the issue that I've been sympathetic to that everybody probably understands at this point, is this whole issue of when -- of within the measure the fact that the valid security interest is not set off in any way from the competent evidence when it talks about what must be recorded before foreclosure is commenced.

And so I have concerns about whether we've accurately stated that title, and I'm not sure we're going to get an answer to that question because I think there might be differing interpretations so --

MR. BLAKE: I just want to -- and this is not one that I heard, but I'm looking at another ballot here quickly where they do describe what the law is as it exists today, which gives the voter information that there's something out there relevant to this --

MS. STAIERT: Okay.

MR. BLAKE: -- which is really the concept I think should be conveyed.

MS. STAIERT: I don't have a problem with that, but I might eventually just suggest we take this law and --

MR. BLAKE: Fair.

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MS. STAIERT: Go ahead.

MR. DUNN: I would agree, I guess, to say initially with Mr. Blake, that the title does need to reflect those central purposes as to how it changes the current process. But let me switch to some of the language specifically with regards to a catch phrase argument.

So the first one is "competent evidence," and that's not a phrase that's currently in -- as I understand it, in, I want to say, real estate law. I don't know if I need to narrow that to foreclosure law, but I don't believe it's in property law. The courts, of course, use that in the criminal context, in other -- in other ways to describe whether or not evidence will serve a certain purpose for purposes of using that evidence to -- to justify a legal position.

But in terms of the uninformed voter, which is the standard the Supreme Court uses for evaluating how title language impacts the voting public, the phrase "competent evidence," I think, will incite voters to support the measure without actually knowing what the phrase means or, in fact, causing them to believe that it does something that it actually doesn't do.

And so, you know, it actually begs the

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question, I think as we say in our motion, is there currently some incompetent evidence that is allowed? And maybe the proponents would say there is, but, you know, it's obviously a descriptive term that I think engenders support without the voter being informed.

And the second one, of course, is the "deprivation," either that word alone or "deprivation of any real property." You know, I would contend that there, actually, in a foreclosure process is not a deprivation of real property. That what the foreclosure process itself is is the execution of rights based on a contractual agreement, and that the person who is being foreclosed upon is not deprived of property. The property is conveyed to the lienholder by execution of the contract, and they're not deprived of anything.

And that legal, sort of, nuance aside, a phrase, I think, like "competent evidence" is inflammatory, and I think it elicits voter approval without them actually understanding how the foreclosure process works. So I think both of those terms need a more accurate description of what they do.

MS. STAIERT: Do you have any suggestions?

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MR. DUNN: Well, you know, it could be that the competent evidence -- you know, we were arguing, of course, that that's an all-encompassing list as originally intended by the measure.
MS. STAIERT: Evidence of debt?
MR. DUNN: Well, but that's -- that apparently is only one example.
MS. STAIERT: Well, I mean, knowing that we can't list everything --
MR. DUNN: Right.
MS. STAIERT: -- that we're trying to -- I mean, it's evidence of debt or the assignment of the debt or the recorded security interest that's been assigned. I mean, do you think the public's going to make a distinction between those types of instruments?
MR. DUNN: I think if you describe it in terms of -- in terms of the note and the security interest, they would. Beyond that, I don't know. I mean, what I'm obviously -- luckily I'm on this side --
MS. STAIERT: How about we just strike "competent"?
MR. DUNN: Well, I think that goes to Mr. Blake's point -- Blake's point that it begs the question, are we -- is it not required now that you

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submit evidence, and I think it would inaccurately convey --
MS. STAIERT: How about if we did a change up front, you know, to the -- to Mr. Blake's point, that this was a change and that we are now requiring whatever, different evidence or where he kept getting stuck.
MR. BLAKE: Right.
MS. STAIERT: Okay. We'll take that under advisement.
MR. DUNN: Luckily I'm on this side of the table now, so I don't have to do that.
MS. STAIERT: Any suggestions on the "deprivation"?
MR. DUNN: Maybe completion of the foreclosure process or something like that.
MS. STAIERT: Okay. All right. And, Mr. Rogers, did you have any comments on this?
MR. ROGERS: I don't, Madam Chair.
MS. STAIERT: Okay. Can we hear again from the proponent?
MR. RAMEY: Madam Chair, I guess the -- obviously we don't want catch phrases in the measure. I don't think either of those terms, "competent evidence" or "deprivation of real property interest,"

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really are catch phrases that would excite or influence the voters particularly in a political context. I would start with that.
My equally large problem, however, is -- and, by the way, I made that first statement in the context of the last thing that we want in a measure is a catch phrase because the Supreme Court is going to --
MS. STAIERT: Right.
MR. RAMEY: -- whack us if we have it. So, you know, I'd love to have it out, but I don't -- I really don't think those are catch phrases as envisioned by the court, that they don't excite or influence the support of the measure independent --
MS. STAIERT: You don't think "competent evidence" excites people?
MR. RAMEY: No. I guess what I was going to say was we're dealing with two legal terms and the problem with every one of us sitting here is that we're either lawyers or we're legislative drafters or we're whatever to the point where we've driven Mr. Knaizer out of the room.
MS. STAIERT: I know. That's one down.
(At this time Mr. Knaizer left the room.)
MR. RAMEY: I mean, those terms -- those

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are terms that, I mean, we hear all the time, Mr. Rogers, Mr. Dunn, the board. I mean, they're just in use. Is the general public as familiar with them as we are? Yes and no. If they watch TV, yes.
I mean, I don't know what else to put in there. This goes back a little bit, I think, to where Ms. Eubanks was going, I think, a few moments ago in response to some of Mr. Blake's comments. If we started down that road, do you take the word "competent" out? Just "requiring evidence." Does that suggest evidence isn't required right now?
We don't want to put our list in because it is a noninclusive list, and now you've made it -- you've now honed in on the title on one particular item.
"Deprivation of real property," I mean, do you want the taking of real property? Foreclosure upon -- I mean, completion of foreclosure upon real property?
MS. STAIERT: Well, I think completion of the process through foreclosure is probably a little more neutral.
MR. RAMEY: To me "deprivation" works just fine, and that's the legal, sort of, constitutional word. I don't think I'm going to fight

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vociferously with the board if you come up with something even more neutral, but I don't really think we're dealing with catch phrases here. I don't respond to it that way, and I just don't know what to do that would be better.

MR. BLAKE: So let me -- sorry.

MS. STAIERT: No, go head.

MR. BLAKE: Well, let me ask a question. So, I mean, what is the -- you're the proponent. What's the intent of changing the documents required as evidence? I mean, right now there's some deficiency, as you perceive it --

MR. RAMEY: Right.

MR. BLAKE: -- with the current process. So what is that deficiency as compared to what you're advocating?

MR. RAMEY: Well, the concern right now -- I should let Mr. Brunette speak to that, if he would like to, without going into too much detail, but I think the concern right now is courts are permitted by statute to proceed without -- I used the word "competent evidence" because -- I hate to make it persuasive evidence because I think that -- I mean, now you're stepping into the arena of the court, but evidence that establishes that the party standing

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before the court is the party that has the right to foreclose upon the security interest that's before the court. There are all kinds of difficulties, and I don't want to go down that road now, that the proponents view as exempt in the present process.

MR. BLAKE: Well, I understand that that's what you believe these documents are, is competent. I'm asking what the deficiency is with the documents currently required.

MR. RAMEY: Well, Mr. Brunette --

MR. BLAKE: It can't be that they're non-competent. I mean, incompetent.

MR. RAMEY: The only reason -- the reason I defer to Mr. Brunette, who is one of the proponents, is he lives with this day in and day out, and I'll leave something out. He can give you an example of this, but I would caution, I don't want to go, Mr. Blake, too far down this road because then we're going to be arguing, well, could a court find this to be sufficient or not, and that isn't where we ought to go.

So I'm going to let Mr. Brunette speak if that's okay with the board.

MR. BRUNETTE: I'm going to stay within the focus of this hearing, as I understand it. I

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apologize, I don't appear at these very much.

First, the "competent evidence." I did a quick Westlaw search on that yesterday, and it appeared in 26,000 -- 2,646 cases. It's a term that's used by courts constantly to refer to evidence that is sufficient to establish, here, the right to enforce a valid security interest. It would be -- competent evidence is a term the courts understand.

As far as "deprivation of property," that's the language used in Article 25. This is proposed as Article 25A, a subset of Article 25. 25 is, "There should be no deprivation of property without due process of law. This pertains to titles specifically due process in foreclosure." Foreclosure/due process.

There's nothing in Article 25 that defines due process of law. Courts do that. That's their purview. The same would be here in applying common language used to refer to "competent evidence," "deprivation of property without due process of law." So that's what we're looking at here.

As far as the changes to the law, what puzzles me is if we were to say this changes 38-38-101(b), wouldn't we also have to say, This leaves intact and, in fact, embodies 38-38-101(a),

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38-38-101 --

MS. STAIERT: No, we're not going to get into the specifics of the statutes.

MR. BRUNETTE: We wouldn't have to do that. So, anyway, is that --

MR. RAMEY: I think -- I think the further question, if I understood Mr. Blake, is in foreclosure proceedings -- and correct me, Mr. Blake, if I'm wrong in trying to restate your question. In current foreclosure proceedings, what's wrong with them? What is present if not competent evidence?

MR. BLAKE: Yeah.

MR. RAMEY: Is that your question basically?

MR. BLAKE: I'm trying to understand what you guys -- what the proponents believe is the deficiency in the evidence as it currently exists in law in order to try and get at, you know, potentially better language that would avoid Mr. Dunn's concern that it's somehow suggestive that right now the evidence that's required is -- in fact, that's your belief, it's incompetent. It's not sufficient.

MR. RAMEY: Well, we're never going to avoid Mr. Dunn's concern, but Mr. Brunette may be able to answer that.

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MR. BLAKE: I'm less concerned about deprivation than I am about competent evidence.

MR. BRUNETTE: And, again, this is a constitutional initiative proposed, not legislative. They are not legislative parts. Let's take 38-38-101(6)(b), which coincidentally, both the Denver Post and The Gazette suggest it should be passed, that provision specifically says that even if we don't have -- it's premised on the assumption that we don't have valid endorsements or assignments. If we don't have valid endorsements or assignments, we shall be deemed to have valid endorsements or assignments if we say we have them.

If the qualified ho[redacted]er says, I am the holder of this debt, curren[redacted]y it doesn't require any evidence whatsoever. Th[redacted]is the major deficiency. That doesn't even deal wi[redacted] competent or incompetent evidence. That requires [redacted]evidence whatsoever. So this would definitely affe[redacted]38-38-101(6)(b).

38-38-101(6)(a) has a definition of endorsement or assignments, which includes the original note with original endorsements or assignments or a certified copy of the endorsements or assignments recorded with the clerk and recorder. So that's what's deficient in the language. No evidence

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whatsoever is required under 101(6)(b).

MR. RAMEY: Mr. Blake, I don't know if that answered your question, but he did a better job than I could.

MR. BLAKE: I don't have any more.

MS. STAIERT: All right. Comments from the board on the language?

MS. EUBANKS: First of all, in terms of the argument that either of these two phrases are catch phrases, I don't believe that they are catch phrases, and I'm fine with the way they're -- with them appearing in the title as it's currently -- as it currently stands.

If the board wants to change the terminology, I think -- based on some of the discussion here, I think we could say something like -- because I just -- I don't think that saying "certain evidence be filed" is very helpful, but I do believe that you could say something like, Requiring evidence to be filed to sufficiently establish a party's right to enforce a valid recorded security interest to deal with the competent evidence --

MS. STAIERT: Right.

MS. EUBANKS: -- terminology. In terms of the latter phrase, I definitely don't want to go

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into "taking" because I do think that perhaps is a catch phrase. If we want to change the last phrase, whether or not it's generally understood by most folks that when a property is foreclosed upon, it is -- it is taken or a person is deprived of it. Whether you could just say "prior to the foreclosure of any real property."

MS. STAIERT: That would be fine.

MS. EUBANKS: But I don't think we have to change it, but I just throw those suggestions out if that's helpful to the board.

MR. BLAKE: Well, whether or not it's a catch phrase, I'm not -- I'm not necessarily a hundred percent sold on that. Do I think it's suggestive? I think it probably is. Now, whether or not those are one in the same -- I don't think it necessarily rises to the catch phrase definition of the code, but I guess in reading it -- frankly, in reading it in the motion, when I read it out of context, I certainly had a reaction to it.

I am less concerned about "deprivation," in part, because it's already there, and -- but I would certainly not object to clarifying that the way that it was suggested.

MS. STAIERT: So could you read yours,

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Steven, and we'll see what that looks like?

MS. EUBANKS: In terms of the competent evidence?

MR. BLAKE: I thought you both -- I thought both of you had good suggestions on both words.

MS. EUBANKS: Okay. My suggestion would be to strike "competent," and then prior to "establish" on Line 2 insert "sufficiently." And then on Line 3 to strike "deprivation" and insert "foreclosure," and then striking through "foreclosure" at the end of the title.

MS. STAIERT: Okay. So it now reads, "An amendment to the Colorado Constitution requiring evidence to be filed to sufficiently establish a party's right to enforce a valid recorded security interest prior to the foreclosure of any real property."

MR. BLAKE: And to go to my earlier point, working off of this, I think "An amendment to the Colorado Constitution modifying the" --

MS. STAIERT: Yeah, let's put it in.

MS. EUBANKS: Can I -- before we go too far, can I suggest that we deal with this issue because --

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MR. BLAKE: Yeah. Sure.
MS. EUBANKS: -- just because if we lump them all together, it may make it more difficult for me voting.
MR. BLAKE: No problem.
MS. STAIERT: So let's go ahead and accept the changes.
MR. DUNN: Madam Chair, before you do --
MS. STAIERT: Um-hum.
MR. DUNN: -- I'm not sure "sufficiently establish" is any better. It implies there's something insufficient now, and I think that's no different than "competent."
I think what we're really talking about is -- not that I'm suggesting this language, but a greater quantum of evidence now has to be filed. So we could say "substantially increasing the evidence that must be filed to establish a party's right," or something along those lines.
MS. STAIERT: Well, he may be getting there a little bit with --
MR. BLAKE: That's where I'm going, but I need to get there in a neutral way to come up with that language.
MS. EUBANKS: Well, I mean --

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MR. BLAKE: This is your point, I suspect --
MS. STAIERT: If he goes there, we might be able to just take out "sufficiently."
MS. EUBANKS: Well, then, maybe go ahead and propose your language, and then we'll see if that changes my mind.
MR. BLAKE: I'm going to, I think, need help.
MS. STAIERT: So you all stay where you are.
MR. BLAKE: I think I would ask Mr. Dunn to start since it's his -- it was his concept. You wanted --
MR. DUNN: Well, I don't want to --
MR. BLAKE: -- to acknowledge the --
MR. DUNN: -- be in the position of drafting the -- sorry. The court reporter is going to kill me.
You know, I'll stick with the statement I made earlier. I think -- I'll leave it to the Title Board to draft the language, but I think "sufficiently" is no different than "competent." It needs to reflect that there's a substantial increase in the amount of evidence that has to be filed.

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MR. ROGERS: Madam Chair, could I --
MS. STAIERT: You'll go ahead and draft it?
MR. ROGERS: Yeah, let me get back to you in a couple of hours. I'm just not sure "sufficiently" -- I don't have a better idea. This is easy, right? Just criticize your language without proposing alternatives.
MS. EUBANKS: Nothing new.
MR. ROGERS: Yeah, right. But sufficiently for what purpose? I sympathize with your struggle, but I just don't think "sufficiently" gets it. So . . .
MS. EUBANKS: And I'm okay with "competent," but I just threw it out as an alternative because we were talking about options, but I'm fine with the language of the title as it is.
MS. STAIERT: I mean, you could just say "modifying the types of evidence required for foreclosure, and in connection therewith."
MR. BLAKE: Changing -- I was going to say "changing the type of evidence."
MS. STAIERT: "Changing the types of evidence required in connection therewith requiring." I mean, you could just take it from the language at

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that point.
MR. BLAKE: Or just modifying the -- modifying the existing evidentiary --
MS. STAIERT: Requirement.
MR. BLAKE: -- requirements.
MS. STAIERT: For foreclosure.
MR. BLAKE: Right. That's really "requirements establishing," right? The right?
MS. STAIERT: I don't know. That's the problem.
MR. BLAKE: I know. Go ahead.
MS. EUBANKS: I'm uncomfortable with the way you've suggested it, but whether or not -- if we just describe it -- and, again, I don't know that I'll support this, but -- going this direction, but if we say something about "modifying the evidence required to be filed to establish a party's right to enforce."
MR. BLAKE: How about just "modifying statutory requirements"? That's really what it's doing. No?
MS. EUBANKS: I wouldn't want to throw in -- my difficulty in going down this road is that I think we're supposed to be describing the text of the measure, and the measure doesn't say that. And so in terms of describing what the measure's doing, to say

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that it's modifying the evidence required to be filed to establish a party's right, once you start throwing in statutory or other --

MR. BLAKE: B[redacted] it also -- we're also required to convey the in[redacted]t of the measure, not just the text, and -- I mean, th[redacted] proponent readily agreed it was the intent to modif[redacted] and change the existing requirements. I mean, I think we need to do both, which is what we're struggling with.

MS. EUBANKS: And I think the fact that if you go with the concept of modifying or changing, that that's sufficient notice without adding a lot of other language in there. I'm just -- I'm trying to get to a place where perhaps I can agree to the change.

If it -- if it throws in too much stuff, then I may not be able to, and that's fine. I mean, obviously the board needs to do what it thinks it needs to do.

MR. BLAKE: Madam Chair, maybe it's -- maybe it's worth -- proper or not -- but making a motion about whether or not we need to even go down this road. If you disagree that that concept does not need to be conveyed, and you disagree, I'll shut up.

MS. STAIERT: My problem is if --

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MR. BLAKE: You want to see the language first?

MS. STAIERT: If it works, I'm not in disagreement, but if it makes it so complex, then . . .

MR. BLAKE: I think I'm back to "changing." I don't want to say "increasing." I don't want to say "supplanting." I don't want to say "modifying." I don't want to say --

MS. STAIERT: Okay.

MR. BLAKE: I just --

MS. STAIERT: So "changing the existing evidentiary requirements for foreclosure in connection therewith requiring evidence be filed to sufficiently establish a party's right to enforce a valid recorded security interest prior to the foreclosure of any real property."

MR. BLAKE: I'm comfortable with that. It addresses my concern.

MS. STAIERT: Okay. You want to just do it as one motion -- collapse it and do it in one motion?

MR. BLAKE: I'm happy to do that, but I don't know if -- I think we're dealing with two concepts.

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MS. STAIERT: Okay. I think Sharon will take it personally.

MS. EUBANKS: No, I don't take it personally.

MS. STAIERT: If we collapse it and don't vote on it three times.

MR. BLAKE: Then I would make a motion that we adopt the changes as --

MS. STAIERT: We need to deny the rehearing.

MR. BLAKE: I'm sorry. I make a motion to deny the rehearing on that, but to adopt the language suggested.

MS. STAIERT: Second.

All those in favor?

(All member of the board said aye.)

MS. STAIERT: Okay.

MS. EUBANKS: Can I ask one question? Do we think it's sufficient in terms of a single subject to talk about just foreclosure versus foreclosure of real property? Is it important to distinguish that or is it sufficient to have that distinction in the subsequent clause?

MS. STAIERT: Do you want to --

MR. BLAKE: I don't think it's -- I don't

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think it matters either way, I guess.

MS. STAIERT: Okay.

MR. BLAKE: If you think it's more clear to add it, then that's fine.

MS. STAIERT: So the final version is "An amendment to the Colorado Constitution changing the existing evidentiary requirements for foreclosure of real property and in connection therewith requiring evidence be filed to sufficiently establish a party's right to enforce a valid recorded security interest prior to the foreclosure of any real property."

We had a motion to deny the rehearing and accept this language. All those in favor?

(All members of the board said aye.)

MS. STAIERT: Opposed.

(No response.)

MS. STAIERT: Unanimous.

Okay. Let's take a five-minute break.

WHEREUPON, the within proceedings were concluded at the approximate hour of 11:31 a.m. on the 27th day of April, 2012.

* * * * *

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DOUGLAS)

I, TINA M. STUHR, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that the within proceedings were taken in machine shorthand by me at the time and place aforesaid and was thereafter reduced to typewritten form; that the foregoing is a true transcript of the proceedings had.

I further certify that I am not employed by, related to, nor counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 10th day of May, 2012.

My commission expires July 28, 2013.

_____ Reading and Signing was requested.

_____ Reading and Signing was waived.

__X__ Reading and Signing is not required.

~~FD~~ CD's RED LINE

An amendment to the Colorado Constitution concerning a prohibition against the ~~commencement of~~deprivation of real property through foreclosure proceedings ~~until~~ unless the party claiming the right to foreclose files competent evidence of its right to enforce a valid security interest, which security interest has been recorded before the foreclosure is commenced with the clerk and recorder of the county in which the property is located, and, in connection therewith, listing examples of documents that are competent evidence.