SUPREME COURT OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80203	FILED IN THE SUPREME COURT MAY 16 2012 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Original Proceeding Pursuant to §1-40-107(2), C.R.S. (2011) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2011-2012, #84 **Petitioner:** Don Childears, **v.** **Respondents:** Corrine Fowler and Stephen A. Brunette, **and** **Title Board:** Suzanne Staiert, Sharon Eubanks, and David Blake	**▲ COURT USE ONLY ▲**
Attorneys for Respondents Corrine Fowler and Stephen A. Brunette (Proponents) Edward T. Ramey, #6748 Heizer Paul Grueskin LLP 2401 15th Street, Suite 300 Denver, CO 80202 Telephone: 303-376-3712 Facsimile: 303-595-4750 Email: eramey@hpgfirm.com	Supreme Court Case No. 2012SA133

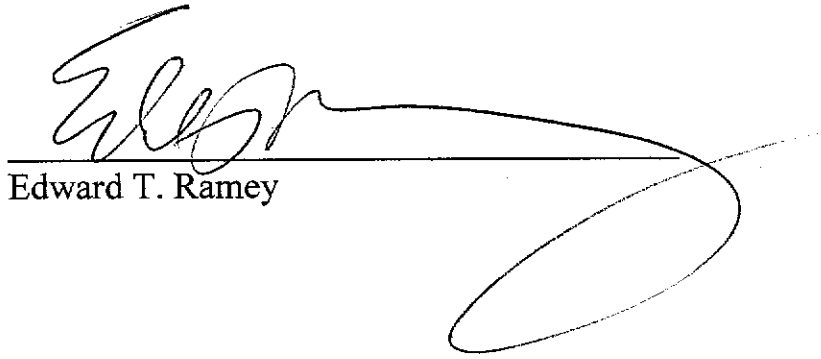
OPENING BRIEF OF RESPONDENTS/PROPONENTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g). The brief contains 3,395 words.

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



Edward T. Ramey

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

I. STATEMENT OF ISSUES PRESENTED FOR REVIEW

The following issues are identified in the Objector's Petition for Review:

1. Whether the proposed initiative is so vague and indefinite that the Title Board should have refused to set a title.

2. Whether the Proponents of the proposed initiative made substantial amendments to the text of their measure other than in direct response to comments made at the review and comment meeting, without resubmission to Legislative Council and the Office of Legislative Legal Services, as a result of which the Title Board lacked jurisdiction to set a title.

3. Whether the proposed initiative contains more than one subject.

4. Whether the title and ballot title and submission clause contain an impermissible catch phrase.

5. Whether the title set by the Title Board fails to disclose major provisions of the measure and is otherwise vague and misleading.

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

Pursuant to §1-40-106, C.R.S. (2011), the Title Board conducted a public meeting and set a title, ballot title, and submission clause for Proposed Initiative 2011-2012 #84 on April 18, 2012.[1] Petitioner timely filed a Motion for Rehearing pursuant to §1-40-107(1), C.R.S. (2011), on April 25, 2012. The rehearing was conducted on April 27, 2012. At the rehearing, the Board denied Petitioner's motion except to the extent that it revised the language of the title. Petitioner timely filed a Petition for Review with this Court pursuant to §1-40-107(2), C.R.S. (2011), on May 2, 2012.

B. Statement of the Facts.

Proposed Initiative 2011-2012 #84 would amend Article II of the Colorado Constitution to add the following section:

Section 25a. Foreclosure due process. NO PERSON SHALL BE DEPRIVED OF REAL PROPERTY THROUGH A FORECLOSURE UNLESS THE PARTY CLAIMING THE RIGHT TO FORECLOSE IN THE FORECLOSURE PROCEEDING FILES COMPETENT EVIDENCE OF ITS RIGHT TO ENFORCE A VALID SECURITY INTEREST, RECORDED BEFORE THE FORECLOSURE IS COMMENCED WITH THE RECORDER OF DEEDS, CREATED BY SECTION 8 OF ARTICLE XIV OF THIS CONSTITUTION, IN THE COUNTY IN WHICH THE REAL PROPERTY IS LOCATED. COMPETENT EVIDENCE INCLUDES:

(1) THE EVIDENCE OF DEBT;

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[1] The date of the initial meeting of the Title Board is misstated on the official record as April 4, 2012.

(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.

In the wake of the initial hearing before the Title Board, Petitioner filed a Motion for Rehearing on each of the points enumerated in the Statement of Issues, above. A rehearing was conducted, at the conclusion of which Petitioner's Motion, as well as the Motion of another objector, was denied except to the extent the Board revised the language of the title it had set after the initial hearing, incorporating Petitioner's suggested revisions. The title for the measure, as revised, reads:

> 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.

Petitioner now seeks review by this Court of each of the objections he raised unsuccessfully upon rehearing before the Title Board.

III. SUMMARY OF THE ARGUMENT

1. The text of the proposed initiative is sufficiently clear to have permitted the Title Board to set a title fairly expressing its true intent and meaning.

2. The Proponents made no changes, let alone substantial ones, to the text of their measure after the review and comment meeting other than in direct

response to comments made in the memorandum prepared by the Legislative Council Staff and the Office of Legislative Legal Services and discussed at that meeting.

3. The proposed measure contains a single subject.

4. The title set by the Title Board does not contain a catch phrase.

5. The title set by the Title Board fairly expresses the true meaning and intent of the proposed measure.

IV. ARGUMENT

A. Standard of Review.

"When reviewing a challenge to the Title Board's setting of an initiative's title and ballot title and submission clause, we employ all legitimate presumptions in favor of the propriety of the Board's actions." In re Title, Ballot Title and Submission Clause for 2009-2010 #91, 235 P.3d 1071, 1076 (Colo. 2010).

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

"We do not determine the initiative's efficacy, construction, or future application, which is properly determined if and after the voters approve the proposal." Id. "[W]e 'will not rewrite the titles or submission clause for the

Board, and we will reverse the Board's action in preparing them only if they contain a material and significant omission, misstatement, or misrepresentation.'" Id. at 58, quoting In re Title, Ballot Title and Submission Clause for 1997-1998 #62, 961 P.2d 1077, 1082 (Colo. 1998).

"[T]he Title Board has considerable discretion in setting the titles for a ballot measure." In re Title, Ballot Title and Submission Clause for 2011-2012 #3, *supra*, at **3. "In reviewing actions of the board we will give great deference to the board's broad discretion in the exercise of its drafting authority." In re Proposed Initiative Concerning "State Personnel System", 691 P.2d 1121, 1125 (Colo. 1984).

B. The text of the proposed initiative is sufficiently clear to have permitted the Title Board to set a title fairly expressing its true intent and meaning.

Petitioner's first argument is that the text of the proposed initiative is so vague and indefinite that the Title Board should have deemed itself unable to set any title at all.

As best the Proponents can determine from the Petition of Review, the basis of this argument is a misunderstanding that arose prior to the first hearing before the Title Board. The issue was whether the language of the initiative would require a foreclosing party to (1) "file[] competent evidence of its right to enforce a valid

security interest" in the foreclosure proceeding or (2) record that evidence before the foreclosure is commenced with the Recorder of Deeds (county clerk and recorder). As discussed in more detail in these Proponents' Opening Brief in Case No. 2012SA134 (concurrently pending), the latter interpretation – which found its way into the initial staff draft of the ballot title – had its roots in a misstatement in a news article and both the memorandum and associated comments presented at the review and comment meeting conducted pursuant to §1-40-105(1), C.R.S. (2011).

Noting the discrepancy in the staff draft of the title, the Proponents addressed the issue at some length at the initial Title Board hearing. The Proponents emphasized that the language of the measure required that the "competent evidence" of the right to foreclose be "filed" *in the foreclosure proceeding*, while only the "valid security interest" would be "recorded" with the Recorder of Deeds before the foreclosure is commenced. The Title Board accordingly – and accurately – initially set the title to read "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."[2]

[2] The final title was revised at the rehearing for reasons unrelated to this issue.

At the rehearing before the Title Board, Petitioner rejoined the argument that the text of the initiative was too vague to permit the Board to set a title – while another objector (the Petitioner in Case No. 2012SA134) took precisely the opposite tact and argued in favor of a different interpretation.

A member of the Board, Ms. Eubanks, noted that "Just because a measure is subject to differing interpretations, I don't think that makes it vague or that it makes it that the Title Board cannot set a title. I would think that the vast majority of measures that come before the Title Board are subject to probably more than one interpretation. And I don't believe that alone prevents us from setting a title in terms of looking at the language of the measure itself. . . . To me, I go with the language and right now I'm comfortable that the language, first of all, is not so vague that we can't proceed to set a title." Rehearing Tr. p. 25, l. 24 – p. 26, l. 8; p. 27, ll. 2-4.[3] The Board unanimously concurred. Rehearing Tr. p. 27, ll. 10-23.

The question of the proper and reasonable interpretation to be given the language of the proposed initiative is discussed at length in these Proponents' Opening Brief in the Case No. 2012SA134 – addressing the petition of the objector who raised that issue. Here, the question is not which interpretation is right, but

[3] A full transcript of the Title Board rehearing is appended as Exhibit A.

whether the text of the measure is so incomprehensible that a title cannot be set at all.

This Court has cautioned that it is not the function of the Title Board "to disclose every possible interpretation of the language" of the measure – In re Proposed Initiative Concerning "Fair Fishing", 877 P.2d 1355, 1362 (Colo. 1994) – nor even to note arguable ambiguities in the context of the old requirement of preparing summaries – In re Proposed Initiative On Surface Mining, 797 P.2d 1275, 1279 (Colo. 1990). Here, the Board addressed the arguable ambiguity by (1) considering the testimony of the Proponents regarding their intent – In re Proposed Initiative Concerning Water Rights, 877 P.2d 321, 327 (Colo. 1994); (2) applying general and accepted rules of statutory construction – In re Title, Ballot Title and Submission Clause for 2007-2008 #17, 172 P.3d 871, 874 (Colo. 2007); and (3) avoiding an "unjust, absurd or unreasonable result" – Bickel v. City of Boulder, 885 P.2d 215, 229 (Colo. 1994).[4] The Board demonstrated quite effectively that the text of the measure does not sink to the level of incomprehensibility that would altogether prevent the setting of a title.

[4] Though a bit unorthodox, in the interest of economy, the Proponents would respectfully refer the Court to the discussion of these points in their Opening Brief in parallel Case No. 2012SA134.

C. The Proponents made no changes, let alone substantial ones, to the text of their measure after the review and comment meeting other than in direct response to comments made in the memorandum prepared by the Legislative Council Staff and the Office of Legislative Legal Services and discussed at that meeting.

Section 1-40-105(2), C.R.S. (2011), states that "[i]f any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition shall be resubmitted to the directors for comment . . . prior to submittal to the secretary of state." Petitioner argues – with no specification in either the text of his motion for rehearing before the Title Board nor in his Petition for Review here as to what "changes" he is referring – that this was not done.

In fact, *no* changes were made to the text of the measure – let alone "substantial" ones – after the review and comment meeting other than in direct response to written comments set forth in the review and comment memorandum. Ms. Eubanks, a member of the Board, confirmed this at the rehearing. Rehearing Tr. p. 23, l. 25 – p. 25, l. 15.

From what can be discerned from the statements made at the rehearing itself, Petitioner bases his argument on two propositions: (1) the Proponents' clarification at the initial Title Board hearing of the interpretive issue discussed in section IV.B,

above, constituted a "substantial amendment" to the petition (though the pertinent text of the measure remained precisely the same); and (2) changing the phrase "shall include" to "includes" – which Petitioner concedes was in direct response to a grammatical technical comment – of itself engendered a "significant substantial impact" of rendering the referenced examples of "competent evidence" illustrative rather than mandatory. Rehearing Tr. p. 9, l. 11 – p. 12, l. 13. With regard to the latter point, Proponents testified that the examples were always intended to be illustrative – Rehearing Tr. p. 16, l. 20 – p. 17, l.2 – and Petitioner acknowledged that his argument was at least "an issue of sort of first impression." Rehearing Tr. p. 11, l. 17. The Board appropriately rejected both propositions. Rehearing Tr. p. 28, ll. 3-13. This Court is respectfully requested to do so as well.

D. The proposed measure contains a single subject.

Colo. Const. art. V, §1(5.5) and §1-40-106.5, C.R.S. (2011), require initiated measures to contain only a single subject. "A proposed initiative violates this rule if its text 'relate[s] to more than one subject, and [has] at least two distinct and separate purposes not dependent upon or connected with each other.'" In re Title, Ballot Title and Submission Clause for 2011-2012 #3, *supra*, at **8, quoting People ex rel. Elder v. Sours, 74 P. 167, 177 (1903). "We have previously explained that the single subject rule prevents two 'dangers' associated with

omnibus initiatives. . . . First, combining subjects with no necessary or proper connection for the purpose of garnering support for the initiative from various factions – that may have different or even conflicting interests – could lead to the enactment of measures that would fail on their own merits. . . . Second, the single subject rule helps avoid 'voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision 'coiled up in the folds' of a complex initiative.'" Id. at **9-10 (citations omitted), quoting In re Title, Ballot Title and Submission Clause for 2001-2002 # 43, 46 P.3d 438, 442 (Colo. 2002).

The proposed initiative at issue here, by its clear language, meets the single subject requirement. There is no "log rolling," and nothing has been surreptitiously "coiled up in the folds" of this measure. And the subject of the measure has been well stated in the title – "changing the existing evidentiary requirements for foreclosure of real property" by "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."

While the Petition for Review fails to identify any purported multiple subjects, Petitioner's motion for rehearing before the Title Board (appended to his Petition) posits a parade of them. Assuming the purported subjects to be argued here will be drawn roughly from that list (though hopefully winnowed),

Proponents note that they include predictions that surety bonds will be disallowed in lieu of original debt instruments, defects in endorsements will be fatal, current holders of unrecorded interests and assignments will lose their rights, access to the secondary mortgage market will be substantially burdened or eliminated, the use of the MERS tracking system will be substantially burdened or eliminated, the Uniform Commercial Code will be "implicitly" amended to prevent the free assignment of promissory notes, the real estate title process will be altered, privacy rights will be impaired through the public filing of private financial data, and all debt instruments and assignments will have to be recorded with county clerks and recorders.

In fact, Proponents submit that virtually none of this is true. More importantly, each of these prognostications is nothing more than a prediction of how the proposed initiative may be applied or what effects it may have – inadvertently or by design – if adopted. While to be expected, perhaps, in a political campaign, they are not pertinent to the title setting process or suggestive of multiple subjects. As this Court has held, "[i]n determining whether a proposed initiative comports with the single subject requirement, [w]e do not address the merits of a proposed initiative, *nor do we interpret its language or predict its application if adopted by the electorate.*" In re Title, Ballot Title and Submission

Clause for 2007-2008 # 62, 184 P.3d 52, 59 (Colo. 2008) (emphasis in original); *accord* In re Title, Ballot Title and Submission Clause for 2011-2012 #3, *supra*, at **16, ftn. 2.

The Title Board unanimously concurred that the proposed measure contains a single subject. Rehearing Tr. p. 44, l. 2 – p. 46, l. 18. Proponents respectfully submit that this determination should be affirmed.

E. The title set by the Title Board does not contain a catch phrase.

"The Title Board must avoid using catch phrases or slogans when formulating a title and ballot title and submission clause. . . . Catch phrases are words that work in favor of a proposal without contributing to voter understanding. . . . 'By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content itself, but merely on the wording of the catch phrase.' . . . Slogans are brief, striking phrases designed for use in advertising or promotion that encourage prejudice in favor of the proposal, impermissibly distracting voters from the merits of the proposal. . . . The purpose of the rule prohibiting catch phrases is to prevent prejudicing voters in favor of the proposed initiative merely by virtue of those words' appeal to emotion and to avoid distracting voters from consideration of the proposed initiative's

merits." In re Title, Ballot Title and Submission Clause for 2009-2010 #45, 234 P.3d 642, 649 (Colo. 2010) (citations omitted).

In his motion for rehearing before the Title Board, Petitioner argued that two phrases in the initial draft of the title constituted catch phrases or slogans – "competent evidence" and "deprivation of any real property." However we may react to that argument, both phrases were removed from the final draft of the title. Now, in his Petition for Review by this Court, the Petitioner submits that the title and ballot title and submission clause "contain at least one impermissible catch-phrase that could form the basis of slogans for use by those who expect to carry out a campaign in favor of the measure" – though no such phrase is identified. Search the final title as they might, the Proponents are unable to find anything remotely susceptible to characterization as a catch phrase or slogan.

F. The title set by the Title Board fairly expresses the true meaning and intent of the proposed measure.

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

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

In his Petition for Review, the Petitioner declines to identify specific defects in the title, arguing only that it "fails to disclose major provisions of the measure and is otherwise vague and misleading." In his motion for rehearing before the Title Board, Petitioner argued that the title was required to reference the citation, function, and purpose of specific statutes purportedly "overruled" and describe various existing "substantive rights" that would purportedly be impaired – tying back to his arguments on the single subject issue. Much of this is simply not true, and all of it constitutes speculation as to potential future impacts, legal effects, and applications. None of this belongs in the title.

The title set by the Title Board correctly and fairly expresses the true intent and meaning of the measure. §1-40-106(3)(b), C.R.S. (2011).

V. CONCLUSION

For the reasons set forth above, the Respondent Proponents respectfully request the Court to affirm the actions 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 the foregoing **OPENING BRIEF OF RESPONDENTS/PROPONENTS** was served via Federal Express on the following:

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TITLE SETTING BOARD MEETING

RE: INITIATIVE NO. 84

SECRETARY OF STATE BLUE SPRUCE ROOM

April 27, 2012

9:36 a.m.

Appearances:

Chairwoman Suzanne Staiert, Deputy Secretary of State for Scott Gessler

Board Members:

David Blake, Deputy Attorney General for Attorney General John Suthers

Sharon Eubanks, Deputy Director for Dan Cartin

Also present:

Steven Ward, Elections Division

Maurie Knaizer, Deputy Attorney General for the Title Board

Andrea Geiger, Legal Specialist

Also appearing:
Jason R. Dunn, Esq., Brownstein Hyatt Faber Schreck, appearing for the Don Childears, Objector, Colorado Banking Association and Colorado Mortgage Lending Association.

Thomas M. Rogers, III, Esq., Rothgerber Johnson & Lyons, appearing on behalf of Barbara M.A. Walker, Objector.

Ed Ramey, Esq. Heizer Paul Grueskin, appearing on behalf of the Proponents.

Also present: Steve Brunette and Corrine Fowler

CHAIRWOMAN STAIERT: Good morning. This is a meeting of the Title Setting Board pursuant to Article 40 of Title 1 C.R.S.

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 Services on behalf of Dan Cartin.

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

Today we are meeting to consider rehearings on four measures. And for anyone who wishes to testify, there's a sign-up sheet on the back table.

This hearing is being broadcast over the internet from 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 -- the objectors first.

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

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

MR. ROGERS: Thomas Rogers on behalf of objector, Barbara Walker.

CHAIRWOMAN STAIERT: 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.

Since you're the Petitioners, if you could start, and then we'll have the proponents come up.

MR. DUNN: 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.

CHAIRWOMAN STAIERT: Thank you.

MR. DUNN: Well, I guess I'll start by saying that from the time I've been working on Title Board cases, I think I've spent more time reading and re-reading and re-reading the language of this measure as it was originally proposed, as it's been amended, as well as the final version, as well as going back and listening to the proponent's comments at the review and comment hearing as well as the first Title Board Hearing, trying to discern not only 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 to do.

And I would submit that despite Mr. Ramey's noble effort to rehabilitate the measure at the first Title Board Hearing, if the proponents aren't

sure what the measure does.

Let me quickly walk through some of the facts. 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 that legislators killed a bill requiring that lenders prove their right to foreclose on a home, backers of the failed proposal have filed it as a ballot initiative with a harder approach: Foreclosures can't happen unless all loan papers are properly recorded with the county first."

And then Mr. Brunette, one of the proponent leaders 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, that part of the

review and comment process read to the proponents and we've quoted that 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 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 proponent, or their attorney who were sitting with the legislative staff, object? The answer is no.

Mr. Ramey nodded in agreement with that purpose and confirmed that that was their intent.

Mr. Brunette, in fact, interjected at that point and he said, quote, "filed" should be "records" in the statement of the purpose.

He went on to say, quote, I'm sorry I didn't spot that. And then Ms. Forestal from Legislative Legal Services said, well, your measure says "filed" 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.

Unquestioningly then, the proponents at least and the review and comments staff believe 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 proceedings.

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 submits a draft title to you all as part of your 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 believe 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 County Clerk and Recorder's Office prior to the foreclosure proceeding, or to paraphrase it 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 itself.

And if that's the case, 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 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 filed or recorded, um, originally, I think there can be no question that the measure required all three listed pieces, I guess, of competent evidence, uh, were required to either be filled or recorded.

It says, shall include 1, 2, and 3. 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 include 1, 2, and 3. 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. But 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 at the review and comment hearing if they're in direct response. But, 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 comment Memo and was never actually brought up at the hearing about a grammatical error that has 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 ground 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.

CHAIRWOMAN STAIERT: Mr. Rogers, do you have anything on this particular issue?

MR. ROGERS: I don't.

CHAIRWOMAN STAIERT: So, if the proponent could come forward? Can you identify yourself and identify if your proponents are present?

MR. RAMEY: Certainly. Thank you. My name is Edward Ramey. I'm counsel for the proponents.

Both of them are present, Mr. Brunette and Ms. Fowler, with photo IDs today, so hopefully we can proceed.

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

I will acknowledge that there have been various interpretative 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 when focused on one issue, I think the words that came out of my mouth could easily be interrupted as suggesting, uh, 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 off on an interpretation. And actually, there are probably three or four different interpretations that, if you look at all these things, have come out of this language.

I guess what I would first say, is one of

the values and something we're doing here is attempting to create some legislative history so that if this measure proceeds to the ballot and is adopted, and the courts someday 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 of determining what the language means, because ambiguities in language or potential divergent interpretations are not at all an uncommon thing in legislation or ballot initiatives, in particular.

We tried to clear this up with a discussion with the Board a week ago as to what the language is intended to mean.

The language of the measure, and it really hasn't changed appreciably at all. The word, "files" was 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 newspaper report, not a comment made in a discussion, or a staff draft, or anything else of an

interpretative value, but the language of the measure itself.

It says, that the party claiming the right to foreclose in the proceeding must file -- that's the first operative word -- competent evidence of its right to enforce a valid security interest, recorded before the foreclosure is commenced with the Recorder of Deeds.

I will acknowledge that at least two of the interpretations, as it's been suggested, can, consistent with normal reading be drawn from that. Either that the security interest must be recorded, which is indeed the intent of the proponents. It 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 in 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 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.

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 -- is, as it does with language that is interpreting at all times, to say well, clearly, the 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 -- evidence that are listed is, competent evidence includes those things, but it's not limited to those items. If other

competent evidence can be offered, that's fine as well.

So, that is the intent of the proponents. Now, the question is what the Board should do about it? The guidance the Supreme court has given us over the years is, I guess, number one, if the Board is so confused and flummoxed that it just can't decide what this measures does or means, then 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 potentially two interpretations that could be given to the language?

And I think the Supreme Court has pretty clearly advised 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 acceptable to more than one interpretation in the future.

That is a post-adoption process that the 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 what would appear to be potential ambiguities in language of initiatives, some of which are quite lengthy, unlike this one, ad nauseam.

And I hate to imagine what the Title Board hearings will be like in the future, but it 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.

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

I would particularly refer on the question of ambiguities to two particular cases. 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 and ambiguities in the language. The Supreme Court was very clear, we don't deal with that.

Now, if the Board feels so completely unable to have any understanding of what this measure does, then I would agree with Mr. Dunn that we cannot set a title.

I also think it's important -- Mr. Dunn hasn't 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 set a title, we can look at the Title, and if it incorporates an ambiguity or an interpretation of 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. The Board does have the jurisdiction to

decide.

That's all I have on that particular point. I now see that they're going to sandwich me here. I have one objector in front and one to respond to me. I may ask for a (inaudible).

CHAIRWOMAN STAIERT: Change your mind?

MR. ROGERS: Well, I did. I was prepared to talk about this issue, the meaning of the language as it pertains to the Title.

Mr. Dunn's 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 mind, I would like to proceed with argument. 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's been set.

CHAIRWOMAN STAIERT: Okay. So your 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 kind of reload all this stuff in a half an hour when we get 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 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 got to file competent evidence under this initiative. What competent evidence? Competent evidence of the party moving towards 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 believe 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 set is utterly inadequate and it must be completely rewritten to reflect the intent that the plain language of the initiative suggests.

I also want to point out that the rules of construction that Mr. Ramey alluded to, absurd result, 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 word, the plain rules of grammatical construction and determine what it means, and only if you or a court finds an ambiguity, you could get into those rules of construction.

You don't have to get there here. They were written in 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.

Finally, I want to point out, I think this Title Board was confused. I think on your first reading, you agreed with the interpretation that I'm giving you today.

Ms. Eubanks, I know you put an amendment to that 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 have.

CHAIRWOMAN STAIERT: Alright. So the first issue before us is a jurisdictional -- looks like there's a couple of issues, whether it's so vague and then whether it's changed.

Any discussion as to whether it changed 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 strike type showing changes and then the final version that's filed with the Title Board, one of the things 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 jurisdictional issues.

And I had, even prior to the issue being raised on Motion of Rehearing, done that with Ms. Forestal, the attorney in our office who dealt with review and comment, uh, meeting, on this particular measure.

And it was in her opinion that all the changes made were in direct response. And so, she's 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 strike type, I think those changes were made in direct response to questions.

In particular, like the arguments 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.

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 we're not in direct response.

CHAIRWOMAN STAIERT: Do you have any comment on the vagueness?

MS. EUBANKS: I guess to me, for a 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 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. You look at grammar. Usually it refers back to the first item immediately preceding the set-off phrase.

Yes, the staff draft, and whether the staff draft was done based on the conversation that occurred during the review and comment meeting and their understanding at that point in time 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 the meaning of what should be described, what is subject to being recorded, we can talk about that. But I think we have jurisdiction to set the title on the measure.

CHAIRWOMAN STAIERT: Any comments?

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

CHAIRWOMAN STAIERT: Do you want to make a motion?

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

CHAIRWOMAN STAIERT: Second? All those in favor?

(Ayes.)

So, number two -- I'm going to use yours as a template of how we go through, because I'm going

to assume Mr. Rogers' overlaps with yours, but maybe not necessarily.

MR. DUNN: I don't believe the Board took a position on changes made after review and comment. You voted on the vagueness issue, but not the changes.

CHAIRWOMAN STAIERT: 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.

CHAIRWOMAN STAIERT: All those in favor?

(Ayes.)

MR. DUNN: Let's turn then to the single-subject argument in Section 3. We have quite a few here. I won't go through them all.

I will talk about a couple because I think they are particularly substantive. Not to be repetitive, but it's a little bit hard to talk about what some of the subjects are when it's unclear in mind what the intent of the measure is and what it says, but I will try to do so.

The first one really is perhaps a combination of the first couple and that is to amend the statutory foreclosure process, which in current

law talks about the evidence that has to be filed in the foreclosure proceeding.

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 substantive change that -- if not overrules, alters, the process within 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 to eliminate the process by which an attorney representing the holder of the security interest can attest that that party is a true party in interest.

One of the issues I thought were interesting in this would be, application of the measure prospectively and retroactively.

The measure, I think -- one of the things I think it clearly does is impact current security interests 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 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 is retroactively going back to loans that are arguably decades old, amend those contracts. That's a very substantive change and is different than saying loans or security interests recorded or entered into going forward need to follow this revised process.

Number 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.

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 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, they get a quarter of a million dollars or thereabouts back from the secondary market purchaser. 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 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 the statute about two years ago that dealt with energy loans and their liens on real property.

The Federal Housing 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 agency. 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.

My only comment at this stage is 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 I've concluded the remarks, so I would be glad to answer any questions.

CHAIRWOMAN STAIERT: Any questions?

MR. BLAKE: Just so I'm understanding your argument as it dovetails with counsel. Is the argument that the two subjects that are here, is one, in fact, 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, an opposed to why there's more than one subject.

MR. DUNN: Sure. My point was, the retroactivity piece is twofold. One is the issue

that existing loans and security interests 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 the impact on the foreclosure process that it has, but the fact that it's impacting privately entered into contract that are in existence right now.

And I'm not sure the public would understand that from this measure that, gee, this impacts now the mortgage I already have? You know, you might think of it as going forward. But to alter in a substantial way, probably the 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 one of the purposes of the measure. And the same thing applied to the secondary loan. The secondary market or loan 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 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 in the measure?

MR. CHILDEARS: What I was going to volunteer is 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 go back to Mr. Dunn's first point? So, if I understand it correctly, you really focused on number one and number four, and then Mr. Childears really kind of focused on number

six in a list of ten. Is that fair?

MR. DUNN: Yes, my initial comment was in regards to one and two and then number four. And then his comment on the secondary market was number five and the MERS system is number six.

MR. BLAKE: So, on one and two, why can't it do that? Why isn't that exactly what this does? It seems to me that that's exactly what --

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

MR. BLAKE: Right. Which you articulated to be a different subject than what the proposed --

MR. DUNN: No, I think you're right. Those two are the primary purpose at least in the proponents' perspective. I'm not going to put words in their mouth, but I think that's the -- to a large extent, the primary purpose of the measure.

MR. BLAKE: Okay. So that's their (inaudible)?

MR. DUNN: Right.

MR. BLAKE: Okay.

MR. DUNN: And related, I think, to the point we were making about 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 -- we're certainly not talking about the negotiability of a financial instrument under the UCC, which is 4-3-104.

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 number 9, and I thought this was another very important and interesting purpose of the measure, perhaps, impact of the measure.

Under the case cited Charnes v. DiGiacomo, if you had 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 or banking information

would be kept private.

And so what this measure does is essentially overrule that opinion and changes the reasonable expectation that consumers can have with regard to private information that's in lending documents.

And that's because a security instrument does not have the same type of personal information that loan documents have.

And if the measure was read, as Mr. Rogers said, that lending information has to be recorded, then that information will be publically available, which obviously, none of the parties had the expectation of when they entered 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 a --

MR. BLAKE: (Inaudible).

MR. DUNN: (Inaudible) to respond 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'd be asking the County Clerk and Recorder to redact original loan documents. Either way, not a reasonable and

possible outcome. So I'll stop there before we get into title issues and let the Board discuss unless there's any questions?

CHAIRWOMAN STAIERT: Any questions?

(No response.)

Mr. Rogers, if you have a comment on that?

MR. ROGERS: No.

CHAIRWOMAN STAIERT: Mr. Ramey, you can come back up and address both comments.

MR. RAMEY: Thank you. Obviously, the proponents do believe that there are multiple subject in here. And primarily, what these ten measures or ten points that Mr. Dunn has recited, uh, do is deal with predictions of impact and effect which is exactly what the Supreme Court has suggested over, over and over again is not what the Board should be doing.

And the presentation this morning illustrates with regards to several of these measures exactly why that's the case.

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 to the secondary

mortgage market and the MERS system, and so forth.

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

MR. RAMEY: 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 affect 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. I don't think that 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 number nine of the public filing and financial date.

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.

On the prospective retroactive issue, my understanding of legislation, and I hesitate to opine on this with Ms. Eubanks present, who probably knows far more about that than 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 a problem, 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 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, though, what do I know?

I mean, we don't have a particular dispute, a particular context. We don't have anybody before us. We're not conducting an adversary hearing.

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 were also arguments -- I guess I would just boil down to the fact that -- or not the fact, but the proposition that this initiative is a 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 is submitted to them. And they would certainly have the opportunity and certainly have the wherewithal to present that argument to the voters.

So, none of these suggested items, whatever any of us in the room may think about them, constitute a second or secondary or multiple subject

of the measure.

CHAIRWOMAN STAIERT: Thank you. On the issue of the two subjects, I 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 on 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 Public Rights in Waters Two, 898 P.2d 1076.

It talks about a proposed measure violating a single subject requirement if its text 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 (inaudible) covers 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 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 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 had jurisdiction to set a title and still do.

MR. BLAKE: I think I agree with both of you. I'm liberally construing all of this. I think the other subjects that have been articulated are

really affects of the language, and therefore, I'm not really sure that in the language they conflict with one another or they really establish two different subjects.

Some of these are clearly legal arguments 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 there are two subjects in the language that's been put forward by the proponents.

CHAIRWOMAN STAIERT: And 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.

CHAIRWOMAN STAIERT: All those in favor?

(Ayes.)

I think that turns us to the Title.

MR. ROGERS: Thomas Rogers for Objector, Barbara Walker. Two quick points on the Title. First, this initiative would in effect repeal the provision 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 the foreclosure.

Competent evidence is 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 could be offered in lieu evidence of debt.

So, pretty expressly the measure eliminates the opportunity for the use of a lost instrument bond from the statute.

Now, the proponents were asked at review and comment to identify conflicting provisions of law. I think the reason that question is asked by legislative council is so the 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 provision or impact of the measure to warrant inclusion of the title. I would suggest that it is.

First, this is not kind of an attenuated impact that the measure might have. This is 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 (58:39) Colorado law.

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

Thanks.

CHAIRWOMAN STAIERT: Mr. Dunn?

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

CHAIRWOMAN STAIERT: That would be great.

MR. ROGERS: Yeah.

CHAIRWOMAN STAIERT: Thank you.

MR. DUNN: For the record, Jason Dunn. As we articulated in our motion and 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 stated, uh, I believe at review and comments 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 eliminate an alternative process and that that could be reflected in the measure.

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 said. So, it's hard to describe what I think the title should reflect without knowing what the Board thinks the measures does.

CHAIRWOMAN STAIERT: We can have Mr. Rogers come up first and have that discussed and then have you back.

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

CHAIRWOMAN STAIERT: I'm not entirely sure right now, so I might be in your position and I'm just wondering if having the proponent come back up and talk about this issue might --

MR. DUNN: You mean Mr. Ramey.

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

UNIDENTIFIED MALE: I would like -- I think that's right. I'd like to hear Mr. Ramey -- either Mr. Rogers or --

MR. DUNN: I'll hold off on the catch phase argument.

CHAIRWOMAN STAIERT: Okay.

MR. RAMEY: Madam Chair, Ed Ramey representing the proponents. I've just had a moment to look at the proposed alternative language for 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 surety bond and the language that he proposes is an amendment to the language in our measure, which I don't think -- who knows what a court's is going to do with this language, but it really doesn't talk about what you do, for example, if the evidence of debt, the original evidence of debt, recorded or unrecorded, whatever may be lost and whether it can -- 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 the somewhat different animal and that's what, I think, 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 the court someday might not disagree with my statement of the predicted effect. I don't think it will. But the language of the measure, all 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 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 adopt that interpretation in the title, I think would be inappropriate and misleading.

Now, if the Board wants to assure that the title is void of anything possible, siding one way or the other on the interpretation, that would certainly be understandable. And I don't have any (inaudible) to suggest but I think the title actually is very good.

As a matter of fact, reading the title prior to the hearing, I like 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 that this should be interpreted.

CHAIRWOMAN STAIERT: That issue with the deprivation, that's where we had our discussion last week. Does it have to 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. And last time, I think it was your interpretation that it was only prior to the actual deprivation of the property, not at the of commencement.

MR. RAMEY: 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.

CHAIRWOMAN 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, the proponents' intention is that the valid security interest be recorded, just the valid security interest, but the evidence will just be presented in the proceeding, filed in the proceeding. I think, and I probably ought to look at Mr. Rogers, who is looming.

MR. ROGERS: I am looming.

CHAIRWOMAN STAIERT: I just have some questions though. But, I mean, we have this section in here that says, "Valid security interest recorded before the foreclosure is commenced."

MR. RAMEY: I'm going to have to read it myself and see what the language says. "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. I think the title --

CHAIRWOMAN STAIERT: But your section says "recorded before the foreclosure is commenced".

MR. RAMEY: That's the recording of the valid security interest. That's the interpretative issue we were bouncing back and forth with earlier.

CHAIRWOMAN 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.

CHAIRWOMAN STAIERT: But the competent evidence doesn't have to be filed until the proceeding is underway.

MR. RAMEY: Right, there couldn't be. There would be no place to file it until the proceeding is underway.

CHAIRWOMAN STAIERT: I'm just not sure.

MR. RAMEY: And then before the end of the proceeding when there's a deprivation, yes.

CHAIRWOMAN STAIERT: There's just no set apart between the "files competent evidence" and the "valid security interest" in your language.

MR. RAMEY: Again, here's where we've got (inaudible). I don't disagree that there's less than optimal language in the text but I think the reading 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 proceedings file competent evidence of its right to enforce a valid security

interest, recorded before the foreclosure is commence."

So it is the valid security interest that needs to be recorded before the proceeding is commenced. But the competent evidence will be filed in the proceeding at any time up to the end of the proceeding which is when the deprivation would happen, which is the way the title reads.

CHAIRWOMAN STAIERT: Yeah, okay.

MR. RAMEY: I wish we could have seen all of this and could eliminate some of the less than optimal drafting. But I think that's just the (1:08) interpretation.

MR. ROGERS: This is not clear and easy stuff, but I want to work through this loss instrument bond issue one more time.

So as I read the initiative, there's this filing of competent evidence of its right to enforce a valid security interest.

And then I would go 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 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 -- 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), something that you file in lieu of original evidence of debt.

So it certainly looks to me like you can't use the lost instrument bond anymore.

MR. RAMEY: 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, 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 non-exclusive example of something -- some form of competent evidence, which a foreclosing party can present to the court to show that they have the right to foreclose.

It doesn't require that they present the original. It doesn't do anything with regard to surety bonds, 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 prevented if a court is satisfied that other evidence presented is sufficient to show a competent evidence of a right to foreclose.

Now, we can argue what kind of a context that would happen is, but the language of the measure doesn't do what Mr. Rogers is saying that it does.

Now, there may be a day when 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: I don't think we have to wait that long. Evidence of debt, I would point out, is defined in the statute. I assume that the

definition in the statute is the same definition that the proponents intend will apply to their measure.

Evidence of debt defined at 38-38-100.38 means a writing that evidence is a promise to pay, et cetera, if the promise (1:13).

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 competent evidence of what? Evidence of the debt.

They're just precluding the use of the lawsuit from (1:13). I think that has to be included in the title. We'd probably beat that one to death.

MR. RAMEY: I have one more scary one.

CHAIRWOMAN STAIERT: If you have anything else on the title itself, let's move to that.

MR. RAMEY: Can I just finish that point and then we'll be done with that piece? 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 category or not. I'm going to stop right there.

MR. ROGERS: You haven't heard from Mr.

Ramey on my argument about ambiguity. So maybe I should sit down and let you come back up.

MR. RAMEY: I think I did.

CHAIRWOMAN STAIERT: Yeah, those are my questions.

MR. ROGERS: I don't think the timing issue that Mr. Ramey raised is important for the argument I'm raising. 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 modified by of its right to enforce a valid security interest.

Using that comment correctly, interpreting this in the way that it just must be interpreted, that competent evidence has got to be recorded.

CHAIRWOMAN STAIERT: Prior to the commencement.

MR. ROGERS: I don't care when. Yeah, I think it's got to be recorded prior to the commencement. I think it's got to be filed before the deprivation.

CHAIRWOMAN STAIERT: Right.

MR. DUNN: 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.

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

CHAIRWOMAN STAIERT: Is that what you're saying, like it's prospective?

MR. DUNN: Yes.

CHAIRWOMAN STAIERT: Yeah. 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 a 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. The measure itself doesn't say one way or the other and so in terms of describing it -- I mean, I understand your argument. I'm not there, 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 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: (Inaudible). Let me state what I understand your argument to be regarding prospective, retrospective.

So there are foreclosures in process right now. What you're saying is -- I think if it's prospective, I think I understand it to be, the process kicks in tomorrow.

What you're saying is whether or not it

applied to a loan initiated the day after it takes effect, right? That's a prospective, retroactive argument --

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

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

MR. DUNN: Right.

CHAIRWOMAN STAIERT: Right.

MR. BLAKE: Even a foreclosing proceeding that's currently in process all of a sudden would be subject to the evidentiary rules, or did I miss something?

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

MR. BLAKE: Regardless of its status in foreclosure?

MR. DUNN: Right. 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.

CHAIRWOMAN STAIERT: And I don't think it's clear enough that we could put that -- 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: Based on my comments on Mr. Ramey's comments.

MR. BLAKE: (Inaudible).

MR. DUNN: The last two issues I have is with regard to impermissible catch phrases.

MR. BLAKE: Can we deal with the misleading part first?

CHAIRWOMAN STAIERT: Whatever you want.

MR. BLAKE: Can we deal with the misleading part first?

CHAIRWOMAN STAIERT: That's fine with me.

MR. BLAKE: Because I'm actually sympathetic to the -- I don't see it with quite the complexity 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 voter that this isn't something new. I mean, there's provisions in law right now that

require evidence (inaudible). The proponents says that evidence is inadequate, if I understand their point.

Mr. Dunn and Mr. Rogers are saying it substantively changes that. I think the proponents would agree with that and I think that's relevant. I think that is something that could -- should be conveyed to the voters so that they understand that if they voted against it, for example, it's not as though foreclosures can proceed without any evidence.

CHAIRWOMAN STAIERT: Right.

MR. BLAKE: And so I think the idea that this changes the landscape of how a foreclosure process occurs is, in fact, something that is relevant and should be conveyed to the voters.

And I certainly welcome the proponents to come up and opine on that, but -- I don't want to get into the merits of whether or not it's overturning 38-38-101 or anything. We think that is something that's much more meritorious than where I'm at. I'm in a much more macro level. You wouldn't be here if you weren't trying to change the law.

MR. RAMEY: Mr. Blake, all I was going to

say, you actually completed as I walked up here. Yes, I mean, obviously we intend 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. And I don't think we should be kicking off statutory amendments that would have to happen in the title or may not have to happen.

MR. BLAKE: 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.

That's going to be our challenge today. But 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 certainly makes sense.

MR. BLAKE: I don't think we need a vote. We can move 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 if they chose or not. I'm happy to move on.

MS. EUBANKS: 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 that argument much different than any of Mr. Dunn's arguments in terms of the relative impacts or potential impacts that this measure may have on current statutory law.

And again, to me, setting a title, we're supposed to be describing the text of the measure and what it impacts, what it changes. 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 we used to have to summarize measures which made it for even longer meetings, if you can 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've changed the law. But I would argue that that theory still applies in this instance and in every instance that we don't need, 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 change, whatever.

And in terms of this idea that we need to inform the voters of, well, this is a change from some type of process or some other rule or procedure, it seems to me every measure does that.

And I think it's a very slippery slope, first of all, because where do you draw the line? And two, I think, you basically, in terms of what the court has said, our charge is 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.

I know that we do that in limited context sometimes like when there's a measure, for example, that changes a tax rate and we say it changes it from five percent to four percent.

But I'm 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. 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 if I

read the title right now it say, 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 at least requiring evidence regardless of whether it's competent or not.

The proponents would acknowledge that the intent here is to modify what is a pre-existing statutory scheme. And what I'm worried about is the voter believing that 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, a default of what's already in the statute. So I view those things as being different.

I'm not as concerned about the slippery slope, because you can 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, for whatever reason, in its entirety. So I view it differently and do, I think -- I find it relevant.

MS. EUBANKS: 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 changing statutory law. I mean, just indicating that it's new constitutional provision amending an existing one, means that 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 is where the discussion is at this point.

And I think that these types of issues, those come out in a campaign. 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 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 don't think we should go there, but that's just my opinion.

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

MR. BLAKE: As I was listening to the

argument, I think it goes something like (inaudible) an amendment to the Colorado Constitution changing existing procedures or modifying existing procedures or pre-existing 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.

There's different types of evidence that are currently required. How we get there, I don't know, but that's the --

CHAIRWOMAN STAIERT: I don't necessarily have a problem with that. That's something that's implicit.

MR. BLAKE: That's the concept that I think should be conveyed to the voter.

CHAIRWOMAN STAIERT: Yeah, but we're about to hear about the word "competent evidence".

MR. BLAKE: That's why I didn't think it was worth going down the path right now because there may be other tweaks that we need to make, but that's the concept that I'm sympathetic is coming out of this. I don't think you need to get into because it may assume too much on the merits for us to 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

(inaudible).

CHAIRWOMAN STAIERT: Right. And the issue I've been sympathetic to that everybody probably understands at this point is this whole issue of when -- of within the measure that 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.

MR. BLAKE: This is not one that I heard, but looking at another ballot 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, which is really the concept (inaudible).

CHAIRWOMAN STAIERT: I don't have a problem with that. But I might eventually just suggest we take this law and (inaudible). Go ahead.

MR. DUNN: I would agree 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 regard to catch phrase arguments. So the first one is "competent evidence". And that's not a phrase, as I understand it, that's currently in 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 and other ways to describe whether or not evidence will serve a certain purpose for purposes of using that evidence 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 talking them into believing that it does something that it actually doesn't do.

And so, it actually begs the question, I think, as we say in our motion, is there currently some incompetent evidence that is allowed and maybe the proponents say there is, but it's obviously a

descriptive term that 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. I would contend if they're actually in the foreclosure process that's 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 nuance aside, the phrase I think, like competent evidence, is inflammatory and I think it listed voter approval without them actually understanding how the foreclosure process worked. So, I think both those terms need a more accurate description of what they do.

CHAIRWOMAN STAIERT: Do you have any suggestions?

MR. DUNN: 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.

CHAIRWOMAN STAIERT: Evidence of debt?

MR. DUNN: Well, but that apparently is only one example.

CHAIRWOMAN STAIERT: Well, I mean, knowing that we can't list everything. I mean, it's evidence of debt or the assignment of the debt or the recorded security interest. Do you think the public is going to make a distinction between those types of instruments?

MR. DUNN: I think if you describe it in terms of the note and the security interest they would. Beyond that, I don't know.

CHAIRWOMAN STAIERT: How about we just strike "competent"?

MR. DUNN: Well, I think that goes to Mr. Blake's point that -- is it not required now that you submit evidence?

CHAIRWOMAN STAIERT: Well, if we did a change up front, you know, to Mr. Blake's point that the (inaudible) would change and that we're now requiring -- okay. We'll take that under advisement.

Any suggestions on the deprivation?

MR. DUNN: Maybe completion of the

foreclosure process or something like that.

CHAIRWOMAN STAIERT: Okay. Mr. Rogers, did you have any comments on this?

MR. ROGERS: I don't.

CHAIRWOMAN STAIERT: Okay. Can we hear again from the proponent?

MR. RAMEY: 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" really are catch phrases that would excite or influence the voters, frankly, in the political context. I would start with that.

I should make a first statement in the context of the last thing that we want in the measure is a catch phrase because the Supreme Court is going to whack it if we have it.

I'd love to have it out, but I really don't think those are catch phrases as envisioned by the court in that they don't excite or influence support in the measure --

CHAIRWOMAN STAIERT: You don't think competent evidence excites?

MR. RAMEY: No. We're dealing with two legal terms. And a problem with every one of us sitting here, we're either lawyers or we're

legislative drafters or whatever. Those terms are terms that we hear all the time, Mr. Rogers, Mr. Dunn, the Board. I mean, they're just in use.

Now, the general public isn't as familiar with them as we are, yes and no. If they watch TV, yes. I don't know what else to put in there. This goes back a little bit, I think, to where Ms. Eubanks was going a few moments ago in response to Mr. Blake's comments.

We start down that road. You take the word "competent" out of required evidence. Does that suggest evidence isn't required right now?

You don't want to put our list in because it is a non-exclusive list and you've now honed in on the title in one particular item.

Deprivation of real property, or taking of real property, completion of foreclosure upon real property?

CHAIRWOMAN STAIERT: 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 with the Board if you come up with something even more

neutral.

I don't really think we're dealing with catch phrases here. I don't respond to them that way and I just don't know what to do that would be better.

MR. BLAKE: You're the proponent. What's the intent of changing the documents required as evidence? Right now there's some deficiency as you perceive it with the current process. So what is that deficiency compared to what your advocating?

MR. RAMEY: I should let Mr. Brunette speak to that, if you'd like to. Without going into too much detail, I think the concern right now, Courts are permitted by statute to proceed without -- I use the competent evidence because I hate to make it persuasive evidence.

Now you're stepping into the arena of the court, but evidence that establishes that the party standing 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. I don't want to go down that road now that the proponents view as extant in the present process.

MR. BLAKE: I understand that that's what

you believe these documents are incompetent. The deficiency is those documents currently not competent. It could be that they're un-competent or incompetent.

MR. RAMEY: 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.

I don't want to go 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 I don't think that is where we ought to go.

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

MR. BRUNETTE: I'll stay within the focus of this hearing if I can. I don't appear at these very much. Competent evidence, I did a quick West Law search on that yesterday. It appeared it 2646 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 court understand.

As far as deprivation of property, that's

the language used in Article 25. This is proposed as Article 25(a), a subset of Article 25.

Article 25 deals with deprivation of property without due process of law. This pertains -- the title is specifically due process to foreclosure -- foreclosure due process.

There's nothing in Article 25 that says it defines due process of law. Courts do that. That's their purview. The same would be here -- to apply common language (inaudible) to refer to competent evidence, deprivation of property without due process of law. 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), 38-38 --

CHAIRWOMAN STAIERT: We're not going to get into the specifics of the statute.

MR. BRUNETTE: I wouldn't ask you to do that.

MR. RAMEY: I think the further question, if I understood Mr. Blake is, in foreclosure proceedings -- correct me, Mr. Blake, if I'm wrong. I'm going to restate your question.

In current foreclosure proceedings, what's wrong with that? What is present if not competent evidence? Is that your question basically?

MR. BLAKE: I'm trying to understand what the proponents believe is the deficiency in the evidence as it currently exists in law in order to try and get at potentially better language that would avoid Mr. Dunn's concern that it is somehow suggested that right now the evidence required is -- in fact, that's your belief.

MR. RAMEY: We're never going to avoid Mr. Dunn's concern.

MR. BLAKE: I was concerned about deprivation (inaudible).

MR. BRUNETTE: Again, this is a constitutional initiative proposed, not legislative. There are a lot of legislative parts, specifically, 38-38-106(d), who incidentally both The Denver Post and Gazette suggested shall be passed.

That provision specifically says that even if we don't have -- premised on the assumption that we don't have valid endorsement through assignments -- if we don't have valid endorsement through assignments, we shall be deemed to have valid endorsement through assignments if we say we have

them. If the qualified holder says I'm the holder of the evidence of debt.

It doesn't require any evidence whatsoever. That is the major deficiency. That doesn't even deal with competent or incompetent evidence. That requires no evidence whatsoever. So this would definitely affect -- 38-38-101(6)(b).

38-101(6)(a) has the definition of endorsement through assignments which includes the original note or original not through assignment or a certified copy of the endorsements or assignments recorded with the clerk and recorder.

So that's what deficient (inaudible) no evidence whatsoever is required in 101(6)(b).

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

MR. BLAKE: I don't have anymore.

CHAIRWOMAN STAIERT: 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 them appearing in the title 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 (inaudible).

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 terminology.

In terms of the latter phrase, I definitely don't want to go to "taking" because I 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 taken or the person is deprived of it. Whether, you could just say prior to the foreclosure of any real property.

CHAIRWOMAN STAIERT: That will be fine.

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

MR. BLAKE: Whether or not it's a catch phrase I'm not 100 percent sold on that. Do I think

it's suggestive? It probably is. Whether or not those are one in the same, I don't think you can say it rises to the catch phrase definition of the code.

I've been reading it in the motion. When I read it out of context, I certainly had a reaction to it. I'm less concerned about deprivation in part because it's already there. But I would certainly not object to clarifying that the way that it was suggested.

CHAIRWOMAN STAIERT: Can you read yours?

MR. BLAKE: Both of you had good suggestions on both fronts.

CHAIRWOMAN STAIERT: 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.

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 --

MS. EUBANKS: Before we go too far, can I suggest that we deal with this issue.

If we lump them altogether, it may make it more difficult for me voting.

MR. BLAKE: No problem.

CHAIRWOMAN STAIERT: Let's go ahead and accept the changes.

MR. DUNN: I'm not sure if sufficiently establish is any better. It implies there's something insufficient now. I think that the difference incompetent.

I think what we're really talking about is 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.

CHAIRWOMAN STAIERT: He may be getting there a little bit.

MR. BLAKE: That's where I'm going, but I need to get there in a neutral way.

CHAIRWOMAN STAIERT: If he goes there, we might be able to just take out "sufficiently". Propose your language.

MR. BLAKE: I'm going to need help. I

think I would ask Mr. Dunn to start since it was his concept.

MR. DUNN: I'll stick with the statement I made earlier. 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.

CHAIRWOMAN STAIERT: You'll go ahead and draft it?

MR. Rogers: I'm not sure sufficiently -- I don't have a better idea. Sufficiently for what purpose? I sympathize with your struggle but I just don't think sufficiently gets it.

CHAIRWOMAN STAIERT: I'm okay with competent. I threw it out as an alternative because we were talking about alternatives. I'm fine with the language of the Title as it is.

MS. EUBANKS: You could just say that modifying the types of evidence required for foreclosure and in connection therewith.

MR. BLAKE: I was going to say changing the types of evidence.

CHAIRWOMAN STAIERT: Changing the types of

evidence required and in connection therewith requiring -- you could just take it from the language at that point.

MR. BLAKE: Modifying the existing requirements.

CHAIRWOMAN STAIERT: For foreclosure?

MR. BLAKE: Right. Establishing the right.

CHAIRWOMAN STAIERT: I don't know.

MR. BLAKE: Go head.

MS. EUBANKS: I'm uncomfortable 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, 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: My difficulty in going down this road is that I think we're supposed to describing the test of the measure. And the measure doesn't say that.

And so, in terms of describing what the measure's doing to say 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: But we're also required to convey the intent of the measure, not just the text. The proponent readily agreed it was the intent to modify and change the existing requirements. I think we need to do both, which is what we're struggling with.

MS. EUBANKS: If we go with the concept of modifying or changing, that that's sufficient notice without adding a lot of other language in there.

I'm trying to get to a place where I can agree to the change. If it throws in too much stuff, then I may not be able to and that's fine.

Obviously, the Board needs to do what it thinks it needs to do.

MR. BLAKE: (Inaudible). If you disagree that that content, if that needs to be conveyed and you disagree, then I'll shut up.

CHAIRWOMAN STAIERT: If it works, I'm not in disagreement, but if it makes it so complex --

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.

CHAIRWOMAN STAIERT: So changing the

existing evidentiary requirements for foreclosure. And in connection therewith requiring evidence be filed to establish the party's right to enforce the valid security interest prior to the foreclosure of any real property.

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

CHAIRWOMAN STAIERT: Do you want to just do it as one motion? Do you want to collapse it as one motion?

MR. BLAKE: I think we can do that. I think we're dealing with two concepts. Then I would make a motion that we adopt the changes as --

CHAIRWOMAN STAIERT: Deny the re-hearing.

MR. BLAKE: A motion to deny the re-hearing other than to adopt the language suggested.

MS. EUBANKS: Second.

CHAIRWOMAN STAIERT: All those in favor?

MR. BLAKE: Aye.

MS. EUBANKS: One question. Do we think it's sufficient in terms of single subject to talk about this foreclosure versus foreclosure of real property?

Is it important to distinguish that or is it sufficient to have that distinction in the

subsequent clause?

CHAIRWOMAN STAIERT: (Inaudible).

MR. BLAKE: I don't think it matters either way. If you think it's more clear to add it, fine.

CHAIRWOMAN STAIERT: So the final question 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 re-hearing and accept this language. All those in favor?

(Ayes.)

Opposed?

(No response.)

Unanimous.

(The meeting was concluded.)

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF ADAMS)

I, Geneva T. Hansen, do hereby certify that I am a Professional Shorthand Reporter and Notary Public within the State of Colorado.

I further certify that the foregoing transcript constitutes a true and correct transcript to the best of my ability to hear and understand the tape recording.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

IN WITNESS WHEREOF, I have affixed my signature and seal this 7th day of May, 2012.

My commission expires 11-18-15.

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GENEVA T. HANSEN