Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, Colorado 80203	FILED IN THE SUPREME COURT MAY 30 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:** Barbara M. A. Walker; **v.** **Respondents:** Proponents Corrine Fowler and Stephen A. Brunette; and Suzanne Staiert, Sharon Eubanks, and David Blake in their capacities as Ballot Title Board Members.	**▲COURT USE ONLY▲** Supreme Court Case No.: 2012SA134
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ANSWER BRIEF OF PETITIONER BARBARA M. A. WALKER

CERTIFICATE OF COMPLIANCE

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

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

Choose one:

☐ It contains _____ words.

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☐ For the party raising the issue:

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

☒ For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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

Nathaniel S. Barker
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STATEMENT OF ISSUES PRESENTED FOR REVIEW

Petitioner Walker disagrees with Respondents Corrine Fowler ("Fowler") and Stephen A. Brunette ("Brunette") (collectively, "Proponents") regarding the issue presented for this Court's review. Rather, Ms. Walker reasserts her statement as follows:

> Under the provision of Colorado law requiring an accurate title, can the Title Board set a title that does not reflect the unambiguous meaning of the initiative simply because the initiative's proponents state that they intend a different meaning?

Opening Br. of Pet'r Barbara M. A. Walker ("Petitioner's Opening Brief") at 1.

STATEMENT OF THE CASE

Petitioner Walker ("Walker") hereby incorporates the Statement of the Case as articulated in her Opening Brief. *See* Pet'r's Opening Br. at 1-4.

SUMMARY OF THE ARGUMENT

Because 2011-2012 Ballot Initiative No. 84 ("Initiative") unambiguously requires recording of competent evidence prior to filing that same evidence in foreclosure proceedings, it is unnecessary and inappropriate for the Title Setting Board ("Board") or this Court to employ any doctrines of statutory construction that apply to ambiguous statutes. The Board's duty is to set a title that accurately represents the Initiative's requirements so as to avoid misleading voters. C.R.S. §

1-40-106(3)(b); *in re Ballot Initiative 1999-00 Nos. 245(a), 245(b), 245(c), 245(d), & 245(e)*, 1 P.3d 720, 723 (Colo. 2000). The Board erred in setting a title that is inconsistent with the unambiguous meaning of the Initiative in that the title omits the Initiative's requirement that competent evidence be recorded.

STANDARD OF REVIEW

Ms. Walker hereby incorporates the Standard of Review articulated in her Opening Brief. *See* Pet'r's Opening Br. at 5-6. Notably, Proponents essentially agree that this is the proper standard of review, *see* Opening Br. of Resp'ts/Proponents ("Proponents' Opening Brief") at 5-6. Ms. Walker additionally notes that, so long as an initiative's language is unambiguous, no further analysis is necessary or proper. *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010) ("If, after review of the statute's language, we conclude that the statute is unambiguous, . . . our analysis is complete."). Additional interpretational aids are employed only if the language is ambiguous. *Id.*

ARGUMENT

I. BECAUSE THE INITIATIVE UNAMBIGUOUSLY REQUIRES RECORDING OF COMPETENT EVIDENCE, THE BOARD ERRED IN SETTING A TITLE THAT MISSTATED THIS REQUIREMENT.

A. The Initiative unambiguously requires the recording of competent evidence with the clerk and recorder prior to filing it in foreclosure proceedings.

In determining the meaning of the Initiative, courts—and the Board—apply rules of grammar and common usage, including comma placement. C.R.S. § 2-4-101, *Pena v. Indus. Claim Appeals Office*, 117 P.3d 84, 87 (Colo. App. 2004). Courts will apply the unambiguous meaning of the Initiative regardless of the wisdom of the result. *See Gerganoff*, 241 P.3d at 935. Here, the Initiative unambiguously requires recording of competent evidence. *See* Pet'r's Opening Br. at 8-11.

The sole role of the phrase "of a valid security interest" in the sentence at issue is to modify "competent evidence." As noted in Ms. Walker's Opening Brief, the phrase, "recorded before the foreclosure is commenced with the recorder of deeds" cannot apply to a "valid security interest" because it is set off by commas. *See* Pet'r's Opening Br. at 9-10. This phrase cannot be omitted without altering the meaning of the sentence, and thus it cannot be a non-restrictive clause that is properly set off by commas. *See* The Chicago Manual of Style ¶ 5.34 (14th Ed.

1993). It must be, therefore, that the phrases, "of its right to enforce a valid security interest" and "recorded before the foreclosure is commenced with the recorder of deeds" are two phrases in a series that both modify "competent evidence." *See* The Chicago Manual of Style ¶¶ 5.51-5.52 (14th Ed. 1993). Thus, there is no doubt that the Initiative unambiguously requires the *recording* of competent evidence with the clerk and recorder prior to the *filing* of that same evidence in a foreclosure proceeding.

Proponents, however, attempt to manufacture ambiguity by relying on the fact that multiple parties have assigned multiple meanings to the Initiative's recording requirement. But, the interpretive question presented in this case is not whether parties *disagree* regarding the Initiative's meaning, it is whether the Initiative's meaning in *unambiguous*. *See* C.R.S. § 2-4-101; *Gerganoff*, 241 P.3d at 935. The simple fact that multiple meanings have been proffered does not mean that the Initiative is ambiguous.[1]

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[1] Although the meaning assigned by others is not binding, it is instructive. Proponents admit that: 1) they originally stated that the Initiative requires recording of competent evidence, Proponents' Opening Brief at 3; 2) a news outlet reported that the Initiative requires recording of competent evidence, *id.* at 2; 3) the Legislative Council read the Initiative to require recording of competent evidence, *id.* at 2-3; and 4) Board staff read the Initiative to require recording of competent evidence, *id.* at 3. Thus, as Proponents acknowledge, every authority that reviewed the Initiative read it to require recording of competent evidence of a party's right to

(. . . continued.)

B. The Board erred in accepting Proponents' stated meaning in setting the Initiative's title resulting in a title inconsistent with the Initiative's unambiguous meaning.

The Board must set a title that fairly expresses the true meaning of an initiative to avoid public confusion. C.R.S. § 1-40-106(3)(b); *in re Ballot Initiative 1999-00 #245(a), et al*, 1 P.3d at 723. This Court must ensure that the title does not mislead voters into voting for or against a measure they do not understand. *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998 #105*, 961 P.2d 1092, 1096-97 (Colo. 1998). Thus, in determining the propriety of the Initiative's title, this Court must ensure that the title reflects the unambiguous language of the Initiative, *in re Title, Ballot Title & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010), and that the title contains no material misstatement, *in re Title, Ballot Title & Submission Clause, & Summary for 1997-98 #62*, 961 P.2d 1077, 1082 (Colo. 1998).

Here, the Board erred when it simply accepted Proponents' statement of intent without actually determining what it is that the Initiative requires. The title actually states that it is only the security interest that must be recorded prior to

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foreclose prior to the filing of that same evidence in foreclosure proceedings. It was only *after* Proponents first articulated their intent that the Initiative only requires the recording of a valid security interest that the Board recognized that position.

initiating foreclosure proceedings. This is certainly a material misstatement that could lead a voter to vote in favor of the Initiative because the title does not inform the voter that the competent evidence must be recorded, which requirement is a substantial change to current law and practice. Additionally, not only does it ignore that the Initiative unambiguously requires recording of competent evidence, it actually states that only a security interest must be recorded. Thus, a voter is even more likely to be misled into supporting the Initiative because the voter will assume that the title states *all* of the items that are subject to the recording requirement when it includes the requirement of recording a security interest. Therefore, the Board erred by omitting from the Title the Initiative's unambiguous requirement of recording competent evidence.

II. PROPONENTS' EFFORTS TO SAVE THE INITIATIVE BY CHANGING THEIR POSITION REGARDING THE RECORDING REQUIREMENT ARE INCONSISTENT WITH THE RULES OF STATUTORY CONSTRUCTION.

In determining the meaning of an initiative, courts shall construe words and phrases "according to the rules of grammar and common usage." C.R.S. § 2-4-101. Proponents correctly note that it is proper for the Board to "employ the general rules of statutory construction and accord the language of the proposed initiative and its titles their plain meaning." *In re Title, Ballot Title, & Submission Clause for 2011-2012 #3*, 2012 CO 25, ¶¶ 8. Proponents ignore, however, that, when the

language is unambiguous, it is improper to resort to rules of statutory construction that apply only to ambiguous language. *See Gerganoff*, 241 P.3d at 935. It is only if an initiative's language is ambiguous that courts should resort to applying doctrines of statutory construction that look beyond the plain meaning of the statutory language. *See id.*; *Mesa Cnty. Bd. of Cnty. Commissioners v. State*, 203 P.3d 519, 533 (Colo. 2009). Thus, the unambiguous meaning of an initiative will govern, even if the result would be unjust, absurd, or unreasonable. *See* C.R.S. § 2-4-201(c)-(d); *Mesa Cnty.*, 203 P.3d at 533. *See also AviComm, Inc., v. Colo. PUC*, 955 P.2d 1023, 1031 (Colo. 1998) (avoiding absurd result only when literal interpretation would defeat clear legislative intent); *Hoffman v. Hoffman*, 872 P.2d 1367, 1369 (Colo. App. 1994) (seeking to achieve just and reasonable result only after determining statute was ambiguous).

Notably, in attempting to apply rules of common usage, the Board misapplied Colorado law when it "noted that a phrase set off by commas usually refers back to the first item immediately preceding that phrase." Proponents' Opening Br. at 8. This rule, known as the doctrine of the last antecedent, has been expressly overturned by statute. C.R.S. § 2-4-214 ("[T]he rule of statutory construction . . . that '. . . relative and qualifying words and phrases, where no contrary intention appears, are construed to refer solely to the last antecedent with

which they are closely connected . . .' has not been adopted by the general assembly and does not create any presumption of statutory intent."). As such, it was improper for the Board to adopt Proponents' interpretation based on a rule that is directly contrary to Colorado law.

Most importantly for this case, however, is that the Board's task is to set a title that accurately reflects the unambiguous meaning of an initiative. C.R.S. § 1-40-106(3)(b); *see also in re 2011-2012 #3*, 2012 CO 25, ¶¶ 15-20 (examining only plain meaning of initiative—and not resorting to rules of statutory construction governing ambiguous statutes—to determine that single subject requirement was satisfied). Only if an initiative is ambiguous is it proper for the Board to inquire of proponents what is their intent and purpose. *See in re Proposed Initiative Concerning Water Rights*, 877 P.2d 321, 326-27 (Colo. 1994) ("*In re Water Rights*"). Here, because the Initiative unambiguously requires recording of competent evidence, it is neither necessary nor appropriate for the Board to engage in statutory interpretation other than to set a title that reflects the unambiguous meaning of the Initiative.

Even if it is appropriate for this Court to utilize other tools of statutory construction, the authority cited by Proponents does not govern. In arguing that, in setting the Initiative's title it is appropriate for the Board to inquire about

Proponents' intent and purpose, Proponents inappropriately rely on *in re Water Rights*. In *in re Water Rights*, a key term of the initiative was not defined therein, and thus the Board appropriately inquired into proponents' intent in setting the title. *Id.* Here, though, the Initiative's recording requirement is contained within the Initiative itself. There is no need, nor is it appropriate, to ask Proponents what is their intent—and then fashion a title solely on that basis—when the Initiative's recording requirement speaks for itself.

Proponents also inappropriately rely on *in re Initiative Concerning Unsafe Workplace Environment*, 830 P.2d 1031 (Colo. 1992) ("*In re Workplace Environment*"). In that case, proponent intentionally included vague language in order to allow courts to determine its application. *Id.* at 1034. Here though, Proponents state that their intent and purpose is clear—namely, to require recording only of a valid security interest—which would preclude the necessity for judicial interpretation. Similarly, in *in re Workplace Environment*, the title language closely tracked the initiative's language, *id.*, while here the title language substantially diverges from the Initiative's. Thus, neither *in re Water Rights* nor *in re Workplace Environment* applies in this case.[2]

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[2] Regardless, Proponents intent is irrelevant to a determination of the meaning of the Initiative. *See Mesa Cnty. Bd. of Cnty. Commissioners v. State*, 203 P.3d 519,

(. . . continued.)

Because the Initiative can *only* be read to require recording of competent evidence, a title that expressly states that only a valid security interest must be recorded is impermissibly misleading. *See* C.R.S. § 1-40-106(3)(b); *in re Title, Ballot Title & Submission Clause, & Summary for 1997-98 #62*, 961 P.2d 1077, 1082 (Colo. 1998) (stating that title cannot contain material misstatement or misrepresentation); *see also* Pet'r's Opening Br. at 8-11, and accompanying citations.[3]

CONCLUSION

Because the Initiative unambiguously requires recording of competent evidence prior to filing that same evidence in foreclosure proceedings, the Board's

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533 (Colo. 2009) ("Any intent of the proponents that is not adequately expressed in the language of the measure will not govern the court's construction of the amendment.") (internal quotations omitted).

[3] Ms. Walker agrees that requiring the recording of competent evidence would prevent valid foreclosures and unfairly burden parties properly exercising a right to foreclose. *See* Proponents' Opening Br. at 9. It is, however, the unambiguous result that is compelled by the Initiative when applying "rules of grammar and common usage." C.R.S. § 2-4-101. As is the case when applying any law, this Court cannot ignore the Initiative's "straightforward" language simply because it does not prefer the result. *Mesa Cnty.*, 203 P.3d at 533-34. Assuming, however, that it is appropriate for this Court to make such a determination at this time, it is equally absurd and unreasonable to draft an initiative to require a practice that is already nearly universally followed, and is currently required in order to perfect a security interest against third parties. C.R.S. § 38-35-109(1).

adoption of Proponents' newly articulated statement of intent in setting the Initiative's title is inappropriate. The title is misleading as currently set because not only does it *omit* this requirement, but also it states to the contrary that *only* a valid security interest must be recorded. Similarly, to the extent that the Board adopted Proponents proffered interpretation, the Board inappropriately applied rules contrary to Colorado law. Finally, this Court should not employ tools of statutory construction that apply only when an initiative's language is ambiguous because, here, the Initiative's recording requirement is unambiguous. For these reasons, Ms. Walker respectfully requests that this Court find that the title is impermissibly misleading to the extent that it does not include the Initiative's unambiguous requirement that competent evidence be recorded with the clerk and recorder prior to being filed in foreclosure proceedings, and remand to the Board for further proceedings consistent with that finding.

DATED: May 30, 2012

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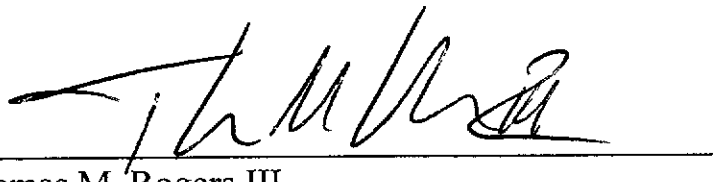

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I hereby certify that on May 30, 2012, a true and correct copy of the foregoing **ANSWER BRIEF OF PETITIONER BARBARA M. A. WALKER** was served via FedEx overnight or hand delivery to the following:

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