Colorado Supreme Court 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:** 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
Attorneys for Petitioner Barbara M. A. Walker Thomas M. Rogers III, #28809 Nathaniel S. Barker, #43572 ROTHGERBER JOHNSON & LYONS LLP 1200 Seventeenth Street, Suite 3000 Denver, CO 80202 Phone: 303.623.9000 Fax: 303.623.9222 Email: trogers@rothgerber.com nbarker@rothgerber.com	

OPENING 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.

☒ It does not exceed 30 pages.

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

☒ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, 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
Attorney for Petitioner Barbara M. A. Walker

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1. 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?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

On April 3, 2012, Respondents Corrine Fowler and Stephen A. Brunette (collectively, "Proponents") submitted Proposed Ballot Initiative #84 (the "Initiative") to Colorado Legislative Council for statutorily mandated review. On April 6, 2012, Legislative Council and the Office of Legislative Legal Services held a review and comment hearing at which Proponents addressed technical and substantive comments. *See generally* Legis. Council Memo. re: Init. 84, Apr. 3, 2012 (attached as Exhibit A). Later that same day, shortly after the review and comment hearing, Proponents submitted the Initiative to the Secretary of State for title setting. *See* 2011-2012 #84 – Final (attached as Exhibit B).

Subsequently, on April 18, 2012, the Ballot Title Board ("Board") convened a hearing and set the Initiative's title. Ms. Walker, a registered Colorado elector, filed a timely Motion for Rehearing. *See generally* Mot. for Reh'g on Init. 84, Apr.

25, 2012 (attached as Exhibit C). Ms. Walker's motion was denied, except to the extent that the Board made changes to the Initiative's title. *See* Init. 84 Tit. as Designated and Fixed by the Bd., Apr. 26, 2012 (attached as Exhibit D). Ms. Walker timely petitioned this Court for review of the title which the Board set. *See* Pet. for Rev. of Final Action of Tit. Setting Bd. Concerning Proposed Init. 2011-2012 No. 84, May 2, 2012.

II. STATEMENT OF FACTS

At the April 6, 2012 review and comment hearing, the Legislative Council asked Proponents whether the purpose of the Initiative was

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

Exh. A at 1. Mr. Brunette corrected the officiants, stating that, "'files' should be 'records.' . . . [T]he evidence that's filed would be evidence that has been recorded in the clerk and recorder's office." Video Tr. of Rev. and Cmt. Hr'g re: Init. 84, Apr. 6, 2012, at 00:23-01:40 (attached as Exhibit E) (statement of Mr. Brunette). Thus, on April 6, Proponents' position was that the Initiative would require recording of competent evidence of a party's right to foreclose. Just a few minutes after the review and comment hearing at which Mr. Brunette unambiguously stated

that the Initiative would require recording competent evidence, Proponents submitted the Initiative to the Secretary of State for title setting, which Initiative states, in pertinent part:

> 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 clerk and recorder of deeds. . . .

Exh. B.

On April 18, 2012, the Board convened to set the Initiative's title. Based on its own reading of the Initiative, Board staff draft a title that stated, in pertinent part:

> An amendment to the Colorado constitution concerning a prohibition against the commencement of foreclosure proceedings until the party claiming the right to foreclose *files* competent evidence of its right to enforce a valid security interest *with the clerk and recorder* of the county in which the property is located. . . .

Tr. of Tit. Bd. Hr'g re: Init. 84, Apr. 18, 2012 at 5:17-23 (attached as Exhibit F) (emphasis added). In response, for the first time and for reasons they have not disclosed, Proponents stated that the Initiative required filing of competent evidence *only* in the foreclosure proceeding, but not recording with the clerk and recorder. *Id.* at 5:22-6:2 (statement of Proponents' counsel). Instead, Proponents

claimed that the Initiative should be read to require recording of a valid security interest, a practice that is nearly universally followed already. *Id.* at 7:6-13; 29:5-12 (statement of Proponents' counsel).

As Mr. Brunette admitted, the Board had difficulty setting the title largely because of the incongruity between the clear language of the Initiative and Proponents' newly articulated intent. *Id.* at 30:2-14 (statement of Mr. Brunette). Nevertheless, at the April 27, 2012 rehearing, the Board set the title as follows:

> 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.

Exh. D. Nowhere does this title advise voters that the Initiative requires competent evidence to be recorded with the clerk and recorder.

SUMMARY OF THE ARGUMENT

The Board erred when it set a title that does not accurately reflect the actual requirements of the Initiative's unambiguous meaning. Although the Board has substantial discretion in setting titles, all titles must fairly and accurately reflect an initiative's requirements. C.R.S. § 1-40-106(3)(b). Titles that do not do so are impermissibly misleading. Indeed, Proponents' intent in proposing the Initiative is irrelevant; the language of the Initiative is what will be enacted into law, and

courts—including this Court—will apply the unambiguous meaning of that language regardless of Proponents' intent.

Here, the Initiative unambiguously requires the recording of competent evidence with the clerk and recorder prior to the filing of that same competent evidence in foreclosure proceedings, a substantial change in law affecting both recording and foreclosure procedures. But the title does not capture this requirement; rather, the title notes that only a valid security interest must be recorded prior to the initiation of foreclosure proceedings. Because the title does not reflect the requirement to record competent evidence, the Board erred in setting the Initiative's title.

STANDARD OF REVIEW

When reviewing a challenge to a title set by the Board, this Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot Title & Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1076 (Colo. 2010). However, while this Court will not determine the construction or application of an initiative until after voter approval, it will examine an initiative to facilitate sufficient review of the Board's actions. *Id.* In doing so, this Court, "accord[s] the language of the initiative its plain meaning." *Id.* Ms. Walker preserved her right to appeal the issue of the accuracy and fairness

of the Initiative's title in her motion for rehearing, Exh. C at 1-2, which was denied except to the extent the Board revised the title, Exh. D.

ARGUMENT

I. THE BOARD SET AN IMPERMISSIBLY MISLEADING TITLE BECAUSE IT DOES NOT REFLECT THE INITIATIVE'S UNAMBIGUOUS REQUIREMENT OF RECORDING COMPETENT EVIDENCE WITH THE CLERK AND RECORDER.

A ballot title must fairly express the true intent and meaning of an initiative to avoid public confusion. § 1-40-106(3)(b); *In re Ballot Initiative 1999-00 Nos. 245(b), 245(c), 245(d), & 245(e)*, 1 P.3d 720, 723 (Colo. 2000). This Court's review of the propriety of the Board's actions in setting a title is limited solely to determining whether the title reflects the actual meaning of the initiative such that voters will not be misled 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). In making this determination, this Court will interpret the unambiguous language of the initiative. *See 2009-2010 #91*, 235 P.3d at 1076. If the title contains a material omission, misstatement, or misrepresentation, this Court should remand the title to the Board for further proceedings. *In re Title, Ballot Title & Submission Clause, & Summary for 1997-98 #62*, 961 P.2d 1077, 1082 (Colo. 1998).

Additionally, courts apply rules of grammar and common usage to determine the meaning of enacted statutes and initiatives, C.R.S. § 2-4-101, and comma placement is an important indication of legislative intent, *Pena v. Indus. Claim Appeals Office*, 117 P.3d 84, 87 (Colo. App. 2004). Thus, this Court must ensure that the Board applied a grammatically correct interpretation of the Initiative in setting its title.

Here, the title does not accurately express the unambiguous meaning of the Initiative. The Initiative is designed to address Proponents' position that, under current law, a party may foreclose a deed of trust without sufficient proof of its right to do so. Thus, Proponents wish to override current provisions of Colorado law that protect creditors by allowing them to foreclose when they do not have original evidence of debt, so long as they can satisfy other requirements. *See* C.R.S. § 38-38-101(1)(b)(I)-(III), (2)(b). According to Proponents, then, the Initiative requires only the *filing* of competent evidence in a foreclosure proceeding, and the *recording* with the clerk and recorder only of a valid security interest. Exh. F at 7:6-13.

However, Proponents' intent in promulgating the Initiative is irrelevant to this Court's construction of the Initiative's plain language, as courts apply only the plain meaning of the measure. *See, e.g., Mesa Cnty. Bd. of Cnty. Commissioners v.*

State, 203 P.3d 519, 533 (Colo. 2009). Notwithstanding Proponents' newly articulated intent or any suggestion that the Initiative is subject to multiple meanings, the Initiative can only be interpreted unambiguously to require the *recording* of competent evidence with the clerk and recorder prior to the *filing* of that same evidence in a foreclosure proceeding. Omitting this requirement from the title is a material misstatement, particularly when the title states that only "a valid security interest" must be recorded and when the recording requirement drastically alters the recording and foreclosure processes.

A. The Initiative can only be read to require the recording of competent evidence with the clerk and recorder prior to initiating foreclosure proceedings.

The phrase "recorded before the foreclosure is commenced with the recorder of deeds"—set off by commas—clearly applies *only* to "competent evidence," not to "a valid security interest." Exh. B. At issue is what term is modified by this phrase, which immediately follows the term "valid security interest." *Id.*

Common English usage, which this Court must apply, *see* § 2-4-101, is that a series of modifiers set off by commas all modify the same noun, *see* The Chicago Manual of Style ¶¶ 5.51-5.52 (14th Ed. 1993). Therefore, the two clauses following the term "competent evidence" are a series of modifiers that only make sense when they are interpreted to modify the term "competent evidence." In the

Initiative, the phrase "of its right to enforce a valid security interest" directly follows and thus clearly modifies the term "competent evidence." Exh. B. Because this phrase is followed immediately by the phrase beginning with "recorded,"—which phrase is set off by a comma—the two modifying phrases must be read to apply only to the term "competent evidence." This reading clearly demonstrates that it is the competent evidence alone which must be recorded.

Proponents will likely argue that, even if this Court accepts that the Initiative *could* mean what Ms. Walker states it unambiguously *does* mean, the Initiative can be alternatively read as Proponents purportedly intend. Adopting Proponents' reading, however, renders the Initiative nonsensical.

Similarly, Proponents may also argue that the second phrase, beginning with the word "recorded," is simply a non-restrictive modifier of the term "security interest." *See* Chicago Manual of Style ¶ 5.34 (14th Ed. 1993). A non-restrictive clause is one that can be omitted without changing the meaning of a sentence, and is thus set off by commas; restrictive modifiers, on the other hand, are not set off by commas. *Id.* Here, the phrase must be restrictive if it applies to the term "security interest." If the phrase is omitted—and assuming for the sake of argument that it modifies the term "security interest"—then the Initiative would require filing of competent evidence of *any* security interest. But its inclusion

limits the universe of security interests to only those that have been recorded, and therefore cannot be omitted without changing the meaning. For this reason, the second phrase cannot be a non-restrictive modifier of the security interest that is properly set off by commas. The comma between "security interest" and "recorded" therefore, indicates that the phrases are a series that both necessarily modify the term "competent evidence."

Thus, Proponents cannot reasonably argue that the recording requirement could be read to apply to the security interest. According to common usage, the only way the second phrase could be read to apply to "a valid security interest" is if no comma appeared between the terms "security interest" and "recorded." *See* Exh. B. In fact, regardless of any assertion otherwise, the Initiative is ambiguous *only* if the comma is omitted. However, the current construction is unambiguous: competent evidence alone must be recorded.[1]

For this reason, the Initiative unambiguously requires recording of competent evidence with the clerk and recorder prior to filing the same competent

[1] Similarly, as Proponents admit, the nearly universal practice currently is that parties *already* record their security interest in the form of a deed of trust. Exh. F at 29:5-12. This practice provides notice to third parties and establishes a creditor's priority in the collateral, without which secured creditors would be unable to enforce their interest against third parties. *See* C.R.S. § 38-35-109(1). Thus, the recording requirement makes sense only if it applies to the competent evidence because there is no need to require recording of the security interest.

evidence in a foreclosure proceeding.

B. Because the Initiative's meaning is unambiguous, there is not need for this Court to apply any rules of statutory construction.

Proponents argued to the Board that the Initiative's language is ambiguous, such that it could be susceptible to multiple meaning, obviously hoping to take advantage of the liberal standard of review. *See 2009-2010 #91*, 235 P.3d at 1076. Proponents will likely urge this Court to deny Ms. Walker's requested relief because actually determining the effect of the measure is a question for another day. But that is only the case if the Initiative's meaning is ambiguous. For this reason, this Court need not resort to rules of statutory construction, such as avoiding absurd results, giving meaning to every work, or examining the legislative intent. *Id.* The Initiative clearly requires recording of "competent evidence," which the title must reflect.

C. The Initiative's title, as currently set, is misleading because it directly states that only "a valid security interest" must be recorded and because the recording requirement drastically changes both recording and foreclosure processes.

A ballot title cannot contain any material omission, misstatement, or misrepresentation. *1997-98 #62*, 961 P.2d at 1082. For example, a title is misleading when it does not state that an initiative is limited in geographic scope

because voters would likely believe that it applied to the entire state. *In re Title, Ballot Title, Submission Clause, & Summary re: Proposed Initiative 1996-17*, 920 P.2d 798, 803 (Colo. 1996). Similarly, when the Board defers to the proponents' statement of intent in setting the title simply because it does not fully understand the initiative, the title is insufficiently clear. *In re Proposed Initiative 1999-2000 No. 23*, 974 P.2d 458, 465 (Colo. 1999).

As in *in re 1996-17*, in which the title excluded a key term such that voters would likely be misled regarding the initiative's scope, 920 P.2d at 803, so too is the exclusion of the recording requirement misleading regarding the Initiative's scope. Here, the title clearly states that only a security interest must be recorded. Exh. D. Thus, not only does the title *omit* a key requirement, as in *in re 1996-17*, but also it states that the competent evidence merely must be filed (presumably in foreclosure proceedings). *Id.* This is both a material omission and a material misstatement because recording competent evidence with the clerk and recorder vastly changes both recording and foreclosure procedures. On the other hand, merely stating that the Initiative requires only filing in foreclosure proceedings of evidence of a properly recorded security interest, as the title currently states, substantially understates the actual requirement. *Id.*

Additionally, the Board itself initially read the Initiative to require recording

of competent evidence. Exh. F at 5:17-25. The Board acted improperly when it changed its position merely because Proponents articulated a different intent. *See 1999-2000 No. 33*, 974 P.2d at 465. The Board's duty is not to write a title that states what Proponents *wish* the Initiative requires. Rather, the Board's duty is to set a title that reflects what the Initiative *actually* requires. If the Board reads the Initiative to require recording competent evidence with the clerk and recorder, it must set a title that accurately summarizes that requirement. *See* § 1-40-106(b).

For this reason, the Board erred in drafting a title that did not incorporate the Initiative's requirement that competent evidence be recorded with the clerk and recorder prior to initiation of foreclosure proceedings.

CONCLUSION

For the foregoing reasons, the Board erred in setting a title that does not fairly and accurately reflect the Initiative's plain language. Ms. Walker, therefore, respectfully requests that this Court hold that the Board set a misleading title and remand to the Board for proceedings consistent with this Court's holding.

DATED: May 16, 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 PETITIONER BARBARA M. A. WALKER** was served via FedEx overnight or hand delivery to the following:

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MEMORANDUM

April 3, 2012

TO: Corrine Fowler, Stephen Brunette, and Miriam Pena

FROM: Legislative Council Staff and Office of Legislative Legal Services

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

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

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

Purposes

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

Technical Comments

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

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

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

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

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

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

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

Section 25a. Foreclosure due process - fraud prevention.

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

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

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

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

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

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

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

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

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

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

Substantive Comments and Questions

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

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

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

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

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

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

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

2011-2012 #84
Foreclosure Process
Final Text

Foreclosure Due Process Initiative 2012

Proponent representatives:

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Proposed text:

Be it Enacted by the People of the State of Colorado:

In the constitution of the state of Colorado, **add** section 25a to article II as follows:

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;

(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.

RECEIVED
By Steven Ward at 4:54 pm, Apr 25, 2012

BEFORE THE COLORADO STATE TITLE SETTING BOARD

In re Ballot Title and Submission Clause for 2011-2012 Initiative No. 84 ("Foreclosure Process")

BARBARA M. A. WALKER, Objector.

MOTION FOR REHEARING

Pursuant to C.R.S. § 1-40-107, Objector, Barbara M. A. Walker, a registered elector of the State of Colorado, by and through her legal counsel, Rothgerber Johnson & Lyons, LLP, hereby submits this Motion for Rehearing of the Title Board's April 18, 2012 decision to set the title of 2011-2012 Initiative No. 84 ("Initiative"), and states:

I. The Initiative does not fall within a single subject because it repeals multiple, loosely related, provisions of law.

The Initiative violates the single subject requirement. *See* Colo. Const., art. V § 1(5.5).

1. The Initiative is intended to require "qualified holders" to file evidence of debt, including a clear chain of recorded title and assignments, thus repealing provisions of current law allowing "qualified holders" to foreclose so long as they certify that they are entitled to enforce a debt. C.R.S. § 38-38-101(1), (6).

2. In so doing, however, the Initiative simultaneously strips all holders of the opportunity to foreclose on a debt by filing a corporate surety bond in lieu of evidence of debt. C.R.S. § 38-38-101(1)(b)(I).

Thus, although certain practices of "qualified holders," such as banks, are the target of the Initiative, its provisions necessarily affect all foreclosing parties in violation of the single subject requirement.

II. The Initiative's title is misleading because it does not reflect the plain language of the Initiative that the proponents ask the voters to enact.

At the Legislative Council Review and Comment hearing, the Initiative's proponents first stated that they intended for the Initiative to require a foreclosing party both to record with the county clerk and recorder and to file in foreclosure proceedings "competent evidence of its right to enforce a valid security interest." Then, at the Title Board Hearing, the proponents stated that the Initiative is intended merely to require a foreclosing party to file competent evidence *with its foreclosure papers*. At the April 18, 2012 Title Board hearing, the Board adopted proponents' amended position regarding the Initiative's intent and set the Initiative's title as, "An amendment

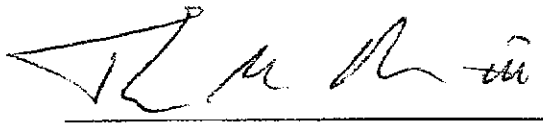
to the Colorado constitution requiring competent evidence be filed to establish a party's right to enforce a valid recorded security interest prior to deprivation of any real property in foreclosure."

However, as written, this is not what the Initiative requires. Consistent with the proponents' original position regarding intent, the plain language of proposed § 25a requires that the competent evidence *itself* be recorded with the recorder of deeds. Because courts will apply the plain language of the Initiative (if enacted), *see, e.g.*, *CLPF-Parkridge One, LP v. Harwell Invs., Inc.*, 105 P.3d 658, 660 (Colo. 2005), the title does not accurately reflect the Initiative's effect.

A ballot title must fairly express the true intent and meaning of an initiative to avoid public confusion. C.R.S. 1-40-106(3)(b); *In re Ballot Initiative 1999-00 Nos. 245(b), 245(c), 245(d), & 245(e)*, 1 P.3d 720, 723 (Colo. 2000). Here, as noted above, the title adopts proponents' newly articulated position regarding the Initiative's requirements, which position is not supported by its plain language. Proponents were correct at the review and comment hearing: the Initiative unambiguously requires recording of competent evidence prior to foreclosure. Because the title currently states that competent evidence must be filed (presumably in foreclosure proceedings), the title must be changed to reflect that the Initiative requires recording.

WHEREFORE, Objector respectfully requests that the Title Board set Initiative 84 for rehearing pursuant to C.R.S. 1-40-107(1).

DATED: April 25, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2012, a true and correct copy of this **MOTION FOR REHEARING** was served on proponents via email as follows:

Ed Ramey
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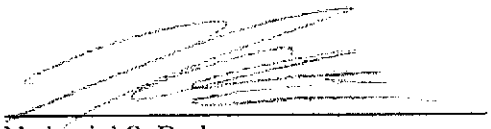
Attorney for Proponents



Nathaniel S. Barker

Ballot Title Setting Board

Proposed Initiative 2011-2012 #84[1]

The title as designated and fixed by the Board is as follows:

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.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution changing the existing evidentiary requirements for foreclosure of real property, and, in connection therewith, requiring existing 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?

Hearing April 4, 2012:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 10:35 a.m.

Rehearing April 27, 2012
Motion for rehearing denied except to the extent that the Board made changes to the title.
Hearing adjourned 11:35 a.m.

[1] Unofficially captioned **"Foreclosure Process"** by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

BEFORE THE INITIATIVE TITLE SETTING REVIEW BOARD

STATE OF COLORADO

DEPARTMENT OF STATE

April 18, 2012

INITIATIVE 84: FORECLOSURE PROCESS

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

Title Setting Review Panel:

Suzanne Staiert, Deputy Secretary of State

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

David Blake, Deputy Attorney General for Legal Policy

Proponent Representatives:

Corrine Fowler

Stephen A. Brunette

Edward T. Ramey, Esq.

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

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

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

MS. STAIERT: Sure.

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

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

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

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

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

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

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

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

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

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

the issue.

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

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

MS. EUBANKS: I like going that direction.

MR. BLAKE: And just "and require."

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

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF ARAPAHOE)

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

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

IN WITNESS WHEREOF, I have affixed my signature this 20th day of April, 2012.
My commission expires October 19, 2014.

_____ Reading and Signing was requested.

_____ Reading and Signing was waived.

_x___ Reading and Signing is not required.