

SUPREME COURT OF COLORADO  
2 East 14<sup>th</sup> Avenue  
Denver, CO 80203

Original Proceeding  
Pursuant to §1-40-107(2),  
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission  
Clause for Proposed Initiative 2013-2014, #126 (Foreclosure  
Due Process")

**Petitioner: : TERRY KEITH JONES;**

v.

**Respondents: LISA KAY BRUMFIEL & PETER  
COULTER**

**and**

**Title Board: SUZANNE STAIRT, DAVID BLAKE &  
SHARON EUBANKS**

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SUPREME COURT

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OF THE STATE OF COLORADO  
Christopher T. Ryan, Clerk

**COURT USE ONLY**

Case No. 2014SA145

**RESPONDENTS' RESPONSE TO PETITIONER'S OPENING BRIEF**

## **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 2, 547 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.

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### Constitutional Provisions

Respondents Lisa Kay Brumfiel and Peter Coulter, Proponents, respectfully submit the following Response Brief to Terry Keith Jones Opening Brief.

**I. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

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

1. Whether the Title Board erred by setting title to an Initiative it could not comprehend.
2. Whether Initiative 126, violates the single subject rule.
3. Whether the title set by the Title Board fails to reflect the central features of Initiative 126.

**II. STATEMENT OF THE CASE**

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

Initiative 2013-2014 No. 126 (“Initiative”) was submitted to the Office of Legislative Council and Legislative Legal Services by Lisa Kay Brumfiel and Peter Coulter, which held a hearing to address the questions of concern to the interested parties. The initiative was submitted to the Secretary of State for title setting. On April 17<sup>th</sup>, 2014 hearing, the Title Board set the Initiative’s title. On April 23<sup>rd</sup>, 2014, filed a motion for Rehearing stating that the initiative violated the single subject rule and that the Title Board set a misleading title. The

Petitioner's motion for rehearing was denied on April 24<sup>th</sup>, 2014 .

**B. Statement of the Facts.**

Proposed Initiative 2013-2014 #126 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;
- (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 At the April 17<sup>th</sup>, 2014 hearing, reads:

**Proposed Initiative 2013-2014 #126**

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

An amendment to the Colorado constitution requiring that a person seeking to foreclose a recorded security interest in real property file evidence of the right to foreclose before a foreclosure proceeding may occur, and, in connection therewith, changing the existing evidentiary requirements for foreclosure of real property; and specifying the evidence that must be filed to demonstrate the right to enforce the recorded security interest.

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 requiring that a person seeking to foreclose a recorded security interest in real property file evidence of the right to foreclose before a foreclosure proceeding may occur, and, in connection therewith, changing the existing evidentiary requirements for foreclosure of real property; and specifying the evidence that must be filed to demonstrate the right to enforce the recorded security interest?

Petitioner unsuccessfully raised those concerns to 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 indicative of its true intent and 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.

2. The proposed measure contains a single subject.

A. 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.

At 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).

Proponents emphasizes that the language of the measure requires 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."

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.

A measure may be subject to differing interpretations, Proponents 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 the Title Board from setting a title in terms of looking at the language of the measure itself. The Title board was comfortable with the language otherwise they would not have approved and set the title.

The question raised by the objector is identical to the question raised in the prior initiative #84 and the proper and reasonable interpretation that was given the language of the proposed initiative was discussed at length in these Proponents' Opening Brief in the Case No. 2012SA134-addressing the petition of the objector who raised that very same issue. Here, the question is not which interpretation is right, but 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 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). 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.

C. Initiative #126 is compliant with the Single Subject Rule

Petitioner's second argument is that initiative #126 violates the single subject rule.

**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, fin. 2.

The Title Board unanimously concurred that the proposed measure contains a single subject. Proponents respectfully submit that this determination should be affirmed.

**D. 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).

In the Motion for rehearing dated April 23<sup>rd</sup>, 2014 the Petitioner said

“the Title Board previously set a title for a virtually identical measure that was inconsistent with the title it set for this measure.” A Title previously approved by this Court in 2011-2012 Initiative #84.

By approving the title for the initiative, the Title Board’s reasoned that the language correlated with the title.

**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 28<sup>th</sup> day of May, 2014.

  
**LISA KAY BRUMFIEL**

  
**PETER COULTER**



## CERTIFICATE OF SERVICE

I hereby certify that on \_\_\_\_\_, 2014, a true and correct copy of the foregoing **RESPONDENTS' RESPONSE TO PETITIONERS OPENING BRIEF** was served via Federal Express on the following:

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