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SUPREME COURT OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Original Proceeding Under C.R.S. § 1-40-107(2) Appeal from the Title Board	▪ **COURT USE ONLY** ▪
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2013-2014 No. 126 ("Foreclosure Due Process") **Petitioner:** **TERRY KEITH JONES;** **v.** **Respondents:** **LISA BRUMFIEL AND PETER COULTER;** **and** **Title Board:** **SUZANNE STAIERT, DAVID BLAKE, AND SHARON EUBANKS.**	Case No. 2014SA145
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ANSWER BRIEF OF PETITIONER TERRY KEITH JONES	

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).

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s/ Hermine Kallman
Hermine Kallman
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I. SUMMARY OF THE ARGUMENT

In its Opening Brief, the Title Board argues that Initiative 126 does not violate the single subject rule because the "measure does not, in fact, change the type of evidence which can be used to commence foreclosure proceedings."[1] The title set by the Title Board, in direct contrast, specifies that the Initiative changes "the existing evidentiary requirements for foreclosure of real property."[2] Furthermore, the record of the Title Board proceedings and now the Title Board's Opening Brief demonstrate that there is significant confusion as to whether:

(1) the Initiative requires that evidence of the right to foreclose be recorded with the Clerk and Recorder in addition to being filed with the Public Trustee as currently required by C.R.S. § 38-38-101, *see* April 17 title;[3]

(2) the Initiative only seeks to limit the kind of evidence which must be filed with the Public Trustee to commence foreclosure proceedings without instituting other procedural changes to the current law and only applies to previously recorded security interests, *see* April 24 title;[4] or

(3) the Initiative requires that the evidence of the right to foreclose be *filed* with the Clerk and Recorder, *see* Title Bd.'s Op. Br. at 7.

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[1] *See* Title Bd.'s Op. Br. at 6-7.
[2] Ex. F. to Pet'r's Op. Br.
[3] Ex. C to Pet'r's Op. Br.
[4] Ex. F. to Pet'r's Op. Br.

In fact, it is impossible to tell from the text of the Initiative which of the contradictory objectives listed above the Initiative seeks to accomplish. It is, however, apparent that the Board does not comprehend the purpose of the Initiative sufficiently to determine if the Initiative violates the single subject rule; and that the Title Board therefore cannot set a title that accurately reflects the Initiative's central features.

To the extent the Title Board and the Proponents argue that this Court is bound by its decision summarily affirming the Title Board's actions with respect to 2011-12 Initiative #84 without a published opinion, the Court has held that its prior decision affirming the Title Board's actions in setting a title does not preclude the Court, under the doctrines of law of the case and claim preclusion, from reviewing the Title Board's later action in setting a title for a subsequent nearly identical initiative. *See In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 276 (Colo. 2006) ("[S]tatutory proceedings require the title board and this court to review initiatives even if containing language identical to a previous initiative. Applying claim preclusion or law of the case principles would circumvent this special statutory process . . . ."); *see also id.* (holding that the Supreme Court's prior decision summarily affirming the Title Board's actions without issuing a written opinion was unpublished and had no precedential value).

II. ARGUMENT

A. The Title Board's Opening Brief confirms that the Title Board does not comprehend Initiative 126's purpose.

To be able to set a clear title, the Title Board must first ascertain the single subject of the initiative. *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 25*, 974 P.2d 458, 468-69 (Colo. 1999) ("Absent a resolution of whether the initiatives contain a single subject, it is axiomatic that the title cannot clearly express a single subject."). If the Title Board does not comprehend the meaning of the initiative, it cannot set a clear title that would not mislead the electorate. *Id.* As discussed in Petitioner's Opening Brief, Initiative 126 is vague and confusing, and the record demonstrates that neither the Proponents, nor the Title Board understand the Initiative's purpose.

The confusion centers on the issue of whether the Initiative requires recording and/or filing of the evidence of the right to foreclose with the Clerk and Recorder prior to commencement of foreclosure proceedings. As discussed below, either recording or filing of the evidence of the right to foreclose with the Clerk and Recorder constitutes a procedural change to the current foreclosure process.

There are two types of real property foreclosures under current Colorado law: (1) foreclosure in an administrative proceeding in the office of the Public Trustee under C.R.S. § 38-38-100.3 *et seq.*, accompanied by a C.R.C.P. 120

hearing in district court; and (2) a judicial foreclosure action under C.R.C.P. 105. In a Public Trustee foreclosure action, the foreclosing party must *file* with the *Public Trustee's office* an "initial foreclosure package," which includes:

- A Notice of Election and Demand for Foreclosure Sale;
- A mailing list;
- A Combined Notice of Sale and Notice of Rights;
- The original evidence of debt, including any modifications to the original evidence of debt, together with the original endorsement or assignment;
- The original recorded deed of trust and original recorded modifications of the deed of trust or any recorded partial releases of the deed of trust, if any;
- A statement of the name and address of the current owner of the property;
- A statement of the current servicer, if different than the holder, and
- A deposit check or authorization to use an ACH account.

See C.R.S. § 38-38-101(1). The statute also allows a holder to file with the Public Trustee's office copies of the evidence of debt and the recorded deed of trust in lieu of the original documents if the holder meets certain requirements, and also

allows a holder to produce a corporate surety bond in lieu of the evidence of debt if the evidence of debt is not available. *Id.* Under the current Public Trustee foreclosure procedure, the only document which *must* be recorded with the Clerk and Recorder is the deed of trust. "Recording" means submitting a document to the county Clerk and Recorder to record the document in the real property records of the county. *See* C.R.S. § 38-35-109(1). Judicial foreclosure under C.R.C.P. 105 is commenced by filing of a complaint with the court, customarily—although not necessarily—attaching copies of the evidence of debt and the recorded *or unrecorded* deed of trust as exhibits. Current foreclosure law thus does not require recording or filing any documents with the Clerk and Recorder, other than recording the deed of trust prior to commencement of Public Trustee foreclosure proceedings.

The Title Board's varying interpretations of Initiative 126 demonstrate that the Title Board has not been able to discern whether the Initiative requires recording and/or filing of the evidence of the right to foreclose with the Clerk and Recorder—a procedural change to current law—to be able to determine its single subject.

The title set on April 17 reflects the Board's initial interpretation of the

Initiative that the evidence be recorded with the Clerk and Recorder.[5] During the April 24 hearing, based on the Proponents' representation that only the security interest should be recorded with the Clerk and Recorder, the Title Board—without an independent inquiry—revised the title to remove the recording reference from the title.[6]

In its Opening Brief, the Title Board is arguing that the Initiative in fact requires *filing* of the evidence of the right to foreclose with the Clerk and Recorder—also a new procedure under Colorado law.[7] Further, the Board argues that the Initiative does not violate the single subject rule because it "***does not, in fact, change the type of evidence which can be used to commence foreclosure proceedings***."[8] This is despite the fact that the title set by the Title Board on April 24 states that the Initiative changes "*the existing evidentiary requirements* for foreclosure of real property."[9]

Accordingly, we now have three contradictory interpretations the Title Board has taken with respect to the subject and meaning of Initiative 126:

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[5] Ex. C to Pet'r's Op. Br.
[6] Ex. F to Pet'r's Op. Br.; Ex. E to Pet'r's Op. Br. at 25:16-26:17.
[7] *See* Title Bd.'s Op. Br. at 7 "the measure requires 'competent' *evidence to be filed with* the appropriate County Clerk and Recorder . . . ." (emphasis added); *see also id.* "the measure makes the *filing* of competent evidence *with the appropriate County Clerk and Recorder* a threshold requirement." (emphasis added).
[8] *Id.* at 6-7 (emphasis added).
[9] Ex. F to Pet'r's Op. Br. (emphasis added).

(1) a requirement that the evidence of the right to foreclose be recorded with the Clerk and Recorder, *see* April 17 title;[10]

(2) with respect to previously recorded security interests only, a requirement that the evidence of the right to foreclose be filed in the foreclosure proceeding and a change to the existing evidentiary requirements, *see* April 24 title;[11]

(3) a requirement that the evidence of the right to foreclose be filed with the Clerk and Recorder and no change to the existing evidentiary requirements, at least with respect to judicial foreclosures, *see* Title Bd.'s Op. Br. at 6-7.[12]

These directly contradictory interpretations reveal that the Title Board does not understand Initiative 126 and, therefore, cannot set a title. Moreover, even assuming the measure could be subject to varying reasonable interpretations, the Board did not analyze it to at least adopt *one consistent reasonable* interpretation which accurately could be reflected in the Initiative's title. The Title Board should have returned the Initiative to the Proponents. *See In re Proposed Initiative for 1999–2000 # 25*, 974 P.2d at 465.

[10] Ex. C to Pet'r's Op. Br.
[11] Ex. F to Pet'r's Op. Br.
[12] The Title Board's Opening Brief emphasizes the relevance of "judicial" foreclosures, whereas nothing in the Initiative makes a distinction between Public Trustee and judicial foreclosures.

B. The Title Board's latest interpretation of the "filing" language of the Initiative confirms that the measure violates the single subject rule.

In its Opening Brief, the Title Board argues that the subject of the Initiative is to require filing of the evidence with the Clerk and Recorder. That is a new procedural requirement which does not currently exist under Colorado law. The measure also requires recording of all assignments of the deed of trust—also a procedural change, as there is no requirement to record assignments under current law. In addition, the measure changes the existing evidentiary requirements,[13] and contrary to the Board's arguments, that substantive change is not a "secondary legal effect"[14] of the recording/filing procedural change. As discussed in the Petitioner's Opening Brief, these procedural changes are separate and distinct from the substantive evidentiary change aimed at significantly limiting the ability of secured creditors to foreclose on real property. By combing both changes in one measure, the Initiative violates the single subject rule.

C. The title does not reflect the key features of the Initiative.

The Petitioner maintains that the substantive change to existing foreclosure law—narrowly defining the type of evidence necessary to be able to foreclose—is

[13] The Title Board has taken inconsistent positions on this issue as well: on the one hand, the Board argues that the measure does not change the evidentiary requirements, *see* Title Bd.'s Op. Br. at 6-7; and on the other, it has set a title which plainly states: "changing existing evidentiary requirements," *see* Ex. F to Pet'r's Op. Br.

[14] Title Bd.'s Op. Br. at 8.

central to the Initiative, and that the title must reflect those key portions of the Initiative to adequately inform the voters. Initiative 126 is not a lengthy proposal with so many details that could not be reflected in the title without defeating the brevity requirement of C.R.S. § 1-40-106. *See In re Initiative Concerning "Taxation III"*, 832 P.2d 937, 942 (Colo. 1992), *superseded on other grounds by statute* (holding that the measure was complicated and contained numerous inclusions and exclusions, and full explanation of each in the ballot title and submission clause was not required and would only confuse voters). Its key feature defining the type of evidence which will be necessary for foreclosure should the measure pass must be reflected in the title to allow the voters to make an informed choice and not have to resort to reading and interpreting the Initiative itself. *See In re Proposed Initiative for 1999–2000 # 25*, 974 P.2d at 462 ("It will not do to say that the general subject of legislation may be gathered from the body of the act, for, to sustain the legislation at all, it must be expressed in the title.") (quoting *In re Breene*, 24 P. 3, 4 (Colo. 1890)). At a minimum, it should disclose to the voters that the Initiative is limiting or narrowing down the type of evidence which can be used to foreclose on a security interest to properly inform the voters of the Initiative's purpose.

III. CONCLUSION

The Title Board's Opening Brief confirms that it does not understand Initiative 126 and cannot set a clear title. The Initiative, it appears, requires recording and/or filing of evidence with the Clerk and Recorder, in addition to changing the evidentiary requirements for foreclosure, and thus violates the single subject requirement. Finally, the title does not accurately reflect the true intent and meaning of the Initiative as it omits its central features. The Petitioner, Terry Keith Jones, therefore, respectfully requests that this Court reverse the Title Board's actions and remand to the Board for proceedings consistent with this Court's holding.

DATED: May 29, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2014, a true and correct copy of the foregoing **ANSWER BRIEF OF PETITIONER TERRY KEITH JONES** was served via overnight mail on the following:

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