DATE FILED: May 31, 2016 5:00 PM

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
In the Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #127 (Establishment of State-Owned Bank) **Petitioners:** Earl Staelin and David Runco, v. **Respondents:** Barbara M.A. Walker and Don Childears, and **Title Board:** Jason Gelender, Troy Bratton, David Blake.	▲ **COURT USE ONLY** ▲
Attorneys for Respondent Don Childears: Jason R. Dunn, #33011 David B. Meschke, #47728 BROWNSTEIN HYATT FARBER SCHRECK LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Tel: 303.223.1100; Fax: 303.223.1111 jdunn@bhfs.com; dmeschke@bhfs.com	Case No.: 2016SA148
RESPONDENT CHILDEARS' ANSWER BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 2,305 words (principal brief does not exceed 9,500 words; reply brief does not exceed 5,700 words).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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 or 28.1, and C.A.R. 32.

/s/ Jason R. Dunn

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Respondent Don Childears, through his undersigned counsel, submits his Answer Brief in this original proceeding challenging the actions of the Title Board on Proposed Initiative 2015-2016 #127 (unofficially captioned "Establishment of State-Owned Bank").

ARGUMENT

I. Petitioners misstate the standard of review.

In their Opening Brief, Petitioners misstate the standard of review, arguing that whether the Title Board has jurisdiction to set a title is reviewed de novo. The case cited in their Opening Brief, *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 219*, 999 P.2d 819, 820–22 (Colo. 2000), concerns statutory construction and does not state that this Court reviews Title Board decisions de novo.

As the gatekeepers to the initiative process, the Title Board decides whether an initiative's amended draft violates section 1-40-105, C.R.S., the statute governing whether changes made to an initiative divest the Board of jurisdiction to set a title. Because the Board reviews a multitude of initiatives every election cycle and is in the best position

to make this determination, this Court "employ[s] all legitimate presumptions in favor of the propriety of the Board's actions." *In re Title, Ballot, Title and Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010).

II. Petitioners fail to explain how the changes made to the Initiative after the Review and Comment Hearing were not substantial.

Under section 1-40-105(2), any "substantial" change made to a proposed initiative that was not made in "direct response to the comments" of the legislative staff at the initiative's review and comment hearing must be resubmitted for a new review and comment hearing. In other words, an amended initiative that contains a substantial change not made in direct response to the legislative staff's comments is "an entirely different proposal" than the one reviewed by the staff and must go through the process again. *In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs,* 830 P.2d 963, 968 (Colo. 1992). The purpose of this requirement is self-evident; without this review, "[t]he public's right to

understand the contents of an initiative in advance of its circulation would be completely eradicated." *Id.*

Here, the Title Board correctly determined that Petitioners made substantial changes to Proposed Initiative 2015-2016 #127 (the "Initiative") after the Review and Comment Hearing that were not in direct response to the legislative staff's questions. The amended version of the Initiative (the "Amended Draft") removed a subsection meant to allow the bank to accept deposits from the marijuana industry and then added broader language in a new subsection. This new language would permit the bank to decide under its rules and regulations who could deposit money at the bank, and was not limited in scope to only the marijuana industry. Neither of these changes was in direct response to the legislative staff's question as to whether Petitioners wrote the later-removed subsection for the marijuana industry.

As an initial matter, while Petitioners argue in their Opening Brief that the changes made to the measure after the Review and Comment Hearing were not substantial, they do not address whether the changes made were in direct response to the legislative staff's

questions. Because Petitioners chose not to address that argument, this brief discusses only whether the changes were substantial. The changes to the Amended Draft were not made in direct response to the legislative staff's comments for the reasons stated in Respondent Childears' Opening Brief.

A. The authority of the bank to accept deposits from the marijuana industry was not simply moved from one part of the measure to another.

Petitioners contend that the changes at issue that were made to the Amended Draft were merely the transfer of one part of the measure to another section of the measure. Petitioners Op. Brief at 8–9. In particular, Petitioners state that "the authority of the bank to decide whether to accept money from the marijuana industry as depositors" was moved to a new subsection, which "gave the bank essentially the same authority to decide whom to accept as depositors." *Id.* This characterization significantly oversimplifies the changes made.

The difference in language between removed subsection (3)(d) and new subsection (6)(b) highlights that the changes made substantially altered the measure. Original subsection (3)(d) stated that:

> The bank may accept the deposits of any business lawfully operating under the constitution and laws of the state of Colorado but which does not have a bank or financial institution in the state of Colorado in which it may lawfully deposit its moneys.

That subsection explicitly made clear that the proposed bank could accept deposits from businesses lawfully operating in Colorado that currently lack a bank to lawfully deposit its moneys. In other words, it specifically applied to the only industry fitting that description—the marijuana industry. Petitioners confirmed this explanation at the Review and Comment Hearing.

In contrast, subsection (6)(b) of the Amended Draft, which was not in the original draft, does not target the marijuana industry. This subsection, which concerns the topics the rules and regulations must cover, states that:

> The Rules and Regulations shall cover, but not be limited to, the following issues: protection of public deposits, adequacy of capitalization, lending criteria, security for loans, accounting standards applicable to the bank, criteria for investments, who may be a depositor at the bank, policies for management of loans, the issue as to whether and to what extent, based upon differences between the bank and private banks, the administration and enforcement of such rules and regulations governing the bank should remain under the authority of the banking board or under the management of

> the board of the bank, – whether and under what conditions the bank may extend the full faith and credit of the bank to obligations that it assumes, whether the bank may guarantee the loans of other banks, and other issues relevant to the establishment and operation of the bank so as to ensure its financial soundness and its ethical management to serve the public interest of the citizens of Colorado.

Particularly relevant here is the phrase "who may be a depositor at the bank." This phrase, which Petitioners contend is just a clarification of removed subsection (3)(d), contains nothing that explicitly or implied references the marijuana industry. Rather, the phrase is much broader and explicitly provides the bank's board of directors with decision-making authority over who will, or will not, be allowed to deposit money at the bank.

Without Petitioners' explanation during the measure's Rehearing that one of the reasons they included that phrase in subsection (6)(b) of the Amended Draft was to allow the bank to accept deposits from the marijuana industry, no one would know that the phrase has a distant connection to removed subsection (3)(d). Indeed, based on that explanation, the only commonality between subsection (3)(d) and subsection (6)(b) is that on a basic level they both theoretically would

allow the bank to accept deposits from the marijuana industry if bank's board so chose. Nevertheless, subsection (6)(b) is much broader in scope. While subsection (3)(d) was narrowly tailored to the marijuana industry, subsection (6)(b) provides the bank with the sweeping authority to decide from whom it will accept or deny deposits, among other things. These changes substantially altered one of the most basic features of a bank (accepting deposits) while hiding a central provision of the original measure (the ability to accept deposits from the marijuana industry). Based on the explicit language in subsection (6)(b), the bank now could prohibit deposits from certain industries or groups if its board decided that those deposits were not in the "public interest."

B. The changes made to subsection (6)(b) were more than mere clarifications to removed subsection (3)(d).

This Court has distinguished between impermissible substantive changes and permissible clarifications. *See, e.g.*, *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 # 256*, 12 P.3d 246, 252–53 (Colo. 2000). While substantial changes relate to an initiative's

main thrust, *In re Limited Gaming*, 830 P.2d at 968 n.7., clarifications include changes to word choice, such as substituting "other" for "the" in front of "constitutional protections afforded to private property." *In re 1999-2000 # 256*, 12 P.3d at 253.

Petitioners contend that the Amended Draft clarified the bank's procedure for deciding whether to accept deposits from the marijuana industry because it explained that the decision would be made when drafting of the bank's rules and regulations. Petitioners Op. Brief at 9. Aside from the fact that this "clarification" was not in response to any question or comment from the legislative staff, Petitioners' explanation ignores that the phrase in subsection (6)(b) is not limited to the bank's acceptance of deposits from the marijuana industry. If Petitioners wanted to make that clarification, then they could have simply moved the language from subsection (3)(d) to subsection (6), which governs the rules and regulations of the bank.

Petitioners, however, did much more. They broadened the bank's authority to decide from whom it may accept deposits from just a decision as to the marijuana industry to a decision as to *any* depositor.

In addition, Petitioners' true intent in removing subsection (3)(d) was revealed at the Rehearing, where they stated that they removed that subsection to avoid potential objections that they were "trying to appeal to the marijuana industry to get it passed or it's a second subject and it unduly highlights that particular issue."[1] *See also In re Limited Gaming*, 830 P.2d at 968 (holding as substantial an alternation to "the *intent and meaning* of a central feature" of the measure (emphasis added)).

Unlike Petitioners contention, this issue is not analogous to the one in *Academy of Charter Schools v. Adams County School District No. 12*, 32 P.3d 456 (Colo. 2001). That case, which did not involve changes to a ballot initiative, concerned whether charter schools already possessed the power to sue to enforce service contracts entered into in order to carry out the educational program described in the charter before a later amendment to a statute gave charter schools that express

[1] Audio for the Rehearing can be found on the Secretary of State's website at: http://www.sos.state.co.us/pubs/info_center/audioArchieves.html by clicking on "April 28, 2016," "Part 4." The audio for Petitioners' explanation for why they struck subsection (3)(d) begins at approximately 10:43 of the recording.

authority. *Id.* at 459. This Court held that the later express grant of standing to charter schools to sue for enforcement of service contracts only clarified charter schools' original power. *Id.* at 464–65 (reasoning that the presumption that by amending the law the legislature intends to change it was rebutted). Therefore, the issue in *Academy of Charter Schools* was about whether the amendments to the statute clarified or changed the law. *Id.* at 464.

In contrast, although this Court must decide in this case whether the changes made to the Initiative were clarifications or substantial changes, subsection (6)(b) does not merely clarify removed subsection (3)(d). While subsection (6)(b) supposedly clarifies that a decision whether to accept deposits from the marijuana industry would be made as part of the adoption of the bank's rule and regulations, it was far from clear whether the bank's board already possessed the ability to decide who may be a depositor at the bank. Rather, the original draft discussed accepting deposits only from the marijuana industry, as Petitioner concedes.

Moreover, the removal of original subsection (3)(d) itself was substantial. As originally written, the Initiative highlighted that the bank would be allowed to accept deposits from the marijuana industry. Providing a lawful place to bank for the marijuana industry would be a radical departure from the current banking situation in Colorado. Subsection (3)(d)'s significance is illustrated by the fact that Petitioners placed it in the next section after the measure's statement of intent and definitions. Therefore, because the subsection was located prominently in the measure and written specifically to refer to the marijuana industry, a voter may have voted for or against the measure based on that subsection alone.

After the changes, however, Petitioners removed subsection (3)(d) and hid at the end of the measure a provision that apparently provides the same authority as subsection (3)(d) but lacks any hints that it concerns marijuana. Petitioners make a technical argument that the changes were clarifications, but a voter likely would consider the changes to have created uncertainty, not clarity. *See In re 1999- 2000 #256*, 12 P.3d at 251 ("The requirement that the original draft be

submitted to the legislative council and office of legislative legal services permits the proponents to benefit from the experience of experts in constitutional and legislative drafting, and allows the public to understand the implications of a proposed initiative at an early stage in the process."). Therefore, without resubmission for review and comment, the public would have no opportunity to understand and comment on the substantial changes made in the Amended Draft, defeating the "overriding public purpose served by the presentation of comments and review in a public meeting." *Matter of Title, Ballot Title and Submission Clause, and Summary Adopted May 16, 1990*, 797 P.2d 1283, 1287 (Colo. 1990) (noting that "[t]he comment process was opened to the public by the 1980 constitutional amendment" to "'inform the public, as well as proponents, of the potential impact of the *original* draft of any proposed initiative'" (quoting Legislative Council of the Colorado General Assembly, An Analysis of 1980 Ballot Proposals, Research Publication No. 248 (1980) at 3)).

CONCLUSION

As originally proposed, Proposed Initiative #127 contained a subsection designed to permit those in the marijuana industry to deposit their money in the bank. Its removal and the addition of subsection (6)(b) after the Review and Comment Hearing were substantial changes not in direct response to the legislative staff's comments and questions. Respondent Childears therefore respectfully asks this Court to affirm the Title Board's grant of his Motion for Rehearing.

Respectfully submitted this 31st day of May 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31st, 2016, I electronically filed a true and correct copy of the foregoing **RESPONDENT CHILDEARS' ANSWER BRIEF** via the Colorado ICCES system which will send notification of such filing and service upon the following:

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