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COLORADO SUPREME COURT
2 East 14th Avenue
Denver, CO 80203

Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-107
Appeal from the Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 # 127 ("Establishment of State-Owned Bank")

Petitioner: Earl Staelin and David Runco,

v.

Respondents: Barbara M.A. Walker and Don Childears

and

Title Board: Troy Bratton, David Blake, and Jason Gelender.

▲ **COURT USE ONLY** ▲

Case No. 2016 SA 148

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THE TITLE BOARD'S ANSWER BRIEF

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:

1. The brief complies with the word limits set forth in C.A.R. 28(g) because it contains 968 words.

2. The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and C.A.R. 28(b) because, for the party raising the issue, 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.

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.

s/ W. Eric Kuhn
Attorney for the Title Board

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Title Board members Troy Bratton, David Blake, and Jason Gelender (the "Board"), by and through undersigned counsel, hereby submit the following Opening Brief.

SUMMARY OF THE ARGUMENT

The Board's decision should be affirmed. Proposed Initiative #127 was changed to remove a central feature of the measure: that the state-owned bank could receive deposits from the marijuana industry. The change was not made in direct response to the review and comment process. The amended measure should have been resubmitted in accordance with § 1-40-105(2), C.R.S. Under these circumstances, the Board lacked jurisdiction to set a title for the matter.

ARGUMENT

I. The Board was without jurisdiction to set a title for Proposed Initiative #127.

A. Standard of review and preservation.

The standard of review is listed in the Title Board's Opening Brief. Respondent Childears raised this argument in his motion for rehearing. Pet. for Rev. ex. 4 at 1. That motion was granted by the Board and is the basis for the appealed action.

B. The Board correctly determined that a substantial change not in direct response to comment from the Legislative Council or Office of Legislative Legal Services had been made to the measure.

The proponents do not argue that the changes they made to the proposed initiative were in direct response to comment from Legislative Council and the Office of Legislative Legal Services. Rather, they argue that "the authority of the bank to decide whether to accept money from the marijuana industry as depositors was moved from one part of the measure where it was deleted to a new subsection 6(b) that gave the bank essentially the same authority to decide whom to accept as depositors." Op. Br. of Pet'rs Earl Staelin & David Runco at 8–9. They argue that the revision clarified the procedure for deciding whether to accept marijuana depositors. But the change was neither a relocation nor a clarification.

The first issue with their argument is that the deleted text is an explicit grant of authority that no longer exists in the measure. If the initial measure had passed, the state-owned bank would have constitutional authority to "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." Pet. for Rev. ex. 2 at 2.

The proponents' clarification was not necessary to understand that the provision itself refers to the marijuana industry. There are no other readily apparent examples of businesses that operate lawfully under the Colorado constitution and statutes but do not have a bank they can lawfully use.

The revised measure stripped out the explicit grant of authority. The state-owned bank is now required to pass rules defining "who may be a depositor at the bank." *Id.* at 4. There is no further guidance or authority on that topic for the bank's board of directors in the revised measure. *Id.*

Thus, there was a clear grant of constitutional authority for the state-owned bank to accept deposits from the marijuana industry in the original measure. The bank directors decide who should be a depositor in the revised measure, but the constitutional grant of authority is missing. At the very least, the change results in confusion over whether the bank can accept deposits from this industry. More likely, the change removes the authority for the bank to accept these proceeds at all.

Second, the measure that was presented to the public differs in a central feature from the measure presented for title-setting. It is true

that if a change is a clarification and not substantive, it need not be resubmitted for review. *In re Title, Ballot Title & Submission Clause for 1999-00 #256*, 12 P.3d 246, 252–53 (Colo. 2000).

But as this Court has previously found, a "substantial alteration of the intent and meaning of a central feature of the initial proposal in effect creates a new proposal that must be submitted to the legislative offices for comment at a public meeting." *In re Title, Ballot Title & Submission Clause for "Limited Gaming"*, 830 P.2d 963, 968 (Colo. 1992) (citing *In re Title, Ballot Title & Submission Clause, & Summary Adopted May 16, 1990*, 797 P.2d 1283, 1287 (Colo. 1990)). Such a change also deprives the public of the ability to understand the constitutional amendment at an early stage. *Id.* at 968.

The revised measure that was presented to the title board here is not a clarification. It completely deletes the measure referring to the marijuana industry. During the public review and comment process, the proponents specified that the provision was intended to apply to the marijuana industry. Members of the public who read the measure and attended or listened to the review and comment hearing were informed that the measure created a bank that could accept deposits from the marijuana industry.

Thus, the initial measure contained a central feature of explicitly permitting deposits from marijuana businesses. The proponents confirmed that fact during the review and comment process. The provision was deleted from the measure before it was submitted for title setting. The deletion was a substantial alteration of the intent and meaning of one of the measure's central features. The measure should have been resubmitted for review and comment in accordance with § 1-40-105(2), C.R.S.

CONCLUSION

The proponents do not claim that the change here was made in direct response to comment from Legislative Council and the Office of Legislative Legal Services. The change did constitute a substantial change to a central feature of #127 and the measure should have been resubmitted for review. Because that was not done, the Board lacks authority to set title in this case. Accordingly, the Court should affirm the Board's actions.

Respectfully submitted this 31st day of May, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on May 31, 2016, I electronically filed a true and correct copy of The Title Board's Answer Brief with the Clerk of the Court via ICCES and served a true and correct copy of the same on the following via ICCES in the manner specified:

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