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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203	
ORIGINAL PROCEEDING PURSUANT TO C.R.S. § 1-40-107(2) Petitioners: Earl Staelin and David Runco, Proponents v. Respondents: Title Board: Jason Gelender, Troy Bratton, and David Blake v. Respondents: Don Childears, Objector Barbara M.A. Walker, Objector	▲ COURT USE ONLY ▲
Attorney for the Petitioners: Earl H. Staelin Attorney at Law 1873 S. Bellaire St., Suite 1401Denver CO 80222720-457-7057 Fax 303-753-3747Email: estaelin@comcast.net	Supreme Court Case Number: 2016SA148

OPENING BRIEF OF PETITIONERS EARL STAELIN AND DAVID RUNCO

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:

X The brief complies with C.A.R. 28(g) because it contains 2,909 words.

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

For the party raising the issue:

X 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 (R._____, p.____), 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.

X 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/ Earl H. Staelin
Attorney for Proponents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

ISSUE PRESENTED FOR REVIEW

1. Does the initiative contain a substantial revision regarding whether to accept deposits of marijuana businesses that was not in direct response to a question or comment from Legislative Legal Services and the Legislative Council?

STATEMENT OF THE CASE

I. NATURE OF THE CASE.

This original proceeding is brought pursuant to C.R.S. §1-40-107(2) seeking review of the action of the Ballot Title Setting Board on April 28, 2016. At the initial hearing on Initiative #127 held on April 20, 2016 there were no objections, and the Title Board unanimously set title. Objectors Don Childears and Barbara M.A. Walker each timely filed a motion for rehearing before the Title Board pursuant to C.R.S. § 1-40-107(1). At the rehearing on April 28, 2016 the Title Board granted the motion of Don Childears for Rehearing and declined to set title. Proponents Earl H. Staelin and David Runco timely filed their Petition for Review in this Court, together with certified copies of the required documents within five business days after the date of rehearing on the Motion for Rehearing as required by C.R.S. § 1-40-107(2).

II. NATURE OF THE MEASURE, COURSE OF PROCEEDINGS, AND DISPOSITION BEFORE TITLE BOARD.

A. NATURE OF THE MEASURE. Initiative #127 would require the state to establish a bank to be owned by the state of Colorado by adding a new section 22 to Article X of the Colorado Constitution. The purpose of the bank would be to effectively serve the public interest and promote the general welfare of the citizens of Colorado (subsection (1)(c)) by virtue of being authorized:

> to lend money at interest or at no interest; to promote sustainable development, commerce, industry, and agriculture in the state; and to promote home ownership, maintenance and construction of needed infrastructure, education, public health and safety, and other purposes that support the general welfare of the citizens of the state of Colorado (section 3).
>
> The measure states that the bank will strengthen the state's economy by:
>
> 1. Keeping the state's deposits in its own state-owned bank, working for the local economy;
> 2. Eliminating interest and fee expenses associated with the use of out-of-state banks;
> 3. Providing an additional source of income for the state;
> 4. Protecting Colorado's economy from the systemic risks of banks that are too big to fail, or the sort that caused the 2008 Great Recession; and
> 5. Protecting the state's own deposits and investments from confiscation in a "bail-in" as authorized by the Dodd-Frank Act of 2010. (Subsection 1(a)(I-V)).

The bank has an existing model in the publicly owned Bank of North Dakota, which was founded in 1919 (subsection (1)(b)).

The bank would be governed by a seven-member board of directors, to be elected from seven districts corresponding to the seven Congressional districts of Colorado (subsection 4(a)). The board of directors will appoint the president of the bank, who must have substantial experience in banking (subsection (4)(d)). The remaining management would be hired according to the standards of the state personnel system (subsection 4(d)). The management of the bank would receive advisory input from a nine-member advisory board selected from a cross-section of the economy, including two bankers from banks with majority Colorado shareholders, appointed by the Governor and confirmed by the General Assembly. (subsection 5(a)). The bank's monthly and annual financial reports will be made public and the bank will be audited annually by independent auditors (subsection 5(c)).

The bank will constitute an enterprise under §20 of Article X of the Colorado Constitution so long as it has authority to issue revenue bonds and receives less than 10% of its revenue in grants from all Colorado and local governments combined. So long as it constitutes an enterprise under this paragraph, it will not be subject to any provisions of §20 of Article X of the Constitution (subsection 4(c)).

Capitalization of the bank is provided for in section 8 and may include any proceeds from taxes, and other revenues and funds of the state, subject to sound banking practices. It may also issue revenue bonds for capitalization. The measure provides it supersedes any conflicting constitutional or statutory provisions (subsection 3(d)).

COURSE OF PROCEEDINGS AND DISPOSITION BEFORE TITLE BOARD.

At the first hearing of the Ballot Title Setting Board ("Title Board") on April 20, 2016, no objections were made and the board unanimously set a title for proposed initiative #127, finding that the initiative contained a single subject. The Objectors timely filed a motion for rehearing. At the end of the rehearing on April 28, 2016 the Title Board voted 2 to 1 to grant the motion for rehearing and declined to set title. Proponents timely filed a Petition for Review in this Court.

STATEMENT OF FACTS

The original measure (hereinafter "original version") filed with the Legislative Legal Services and Legislative Council ("LLS/LC") and the revised version (hereinafter "revised version") filed with the Secretary of State provide unchanged language in section 6(a) authorizing the management of the bank to

draft the rules and regulations of the bank subject to approval by the board of directors with advice from the advisory board.

Subsection 3(d) of the original version provided as follows:

> 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.

The LLS/LC Review and Comment Letter asked in Question 5 whether Proponents in subsection 3(d) intended for the bank to be able to accept deposits from the marijuana industry in Colorado. Proponents answered at the hearing that marijuana industry funds was the concern of the provision due to serious problems caused by the inability of such businesses to lawfully deposit their money. In the revised version that paragraph was removed and a new subsection 6(b) was added which states that the rules and regulations should include, "but not be limited to" a number of specified issues, including "who may be a depositor at the bank", as well as "any 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."

At the rehearing before the Title Board on April 28, 2016 and in their Petition for Review Proponents asserted that because under subsection 6(b) of the revised version the bank in drafting the rules and regulations will decide who may

be a depositor at the bank, the bank has the authority to decide whether to accept the deposits of marijuana businesses just as it had in the original version, and that the revised version merely clarifies that the issue as to whether marijuana businesses may be depositors at the bank is to be resolved by the rules and regulations. Proponents also assert that under the original version, while not expressly stated, the determination of whether to accept deposits of marijuana businesses would be made by the management and board of the bank after consultation with the advisory board and would logically be included the rules and regulations.

Objector Childears contends that the removal of subsection 3(d) constitutes a substantial change that was not in response to a question or comment from the LLS/LC. Proponents contend that the removal was not substantial or substantive and that moving the authority to determine whether the bank may accept marijuana deposits to the new section spelling out the authority of the bank to decide who would be a depositor along with drafting other rules and regulations was to clarify how the rules and regulations would be drafted and what they would cover, and did not provide any substantial changes.

SUMMARY OF ARGUMENT

The Title Board's decision should be reversed. The revised initiative provided essentially the same authority to the bank to decide whether or not to accept the deposits from the marijuana industry, which in any event would have been a decision made by the management with the approval of the board and advice of the advisory board, and incorporated in the rules and regulations of the bank. Thus, moving the authority to decide whether or not to accept deposits of the marijuana industry to a different paragraph provided clarification and not a change of substance.

STANDARD OF REVIEW

Whether the Title Board has jurisdiction to set title is a question of law that this Court reviews *de novo*. See e.g. In re Title, Ballot Title & Submission Clause and Summary for 1999-2000, #219, 999 P.2d 819, 820-822 (Colo. 2000) implicitly construing *de novo* C.R.S. §1-40-107(1), which grants the Title Board jurisdiction over motions for rehearing.

Proponents preserved the issue of whether the revised proposal constituted a substantial change that was not in direct response to a question or comment of the Legislative Legal Services and Legislative Council in their argument at the rehearing, and in their Petition for Review timely filed in this court.

ARGUMENT

I. THE BOARD IMPROPERLY GRANTED OBJECTOR CHILDEARS' MOTION FOR REHEARING AND REFUSED TO EXERCISE JURISDICTION TO SET TITLE BECAUSE THE REVISION IN REGARD TO MARIJUANA DEPOSITS WAS NOT A SUBSTANTIAL REVISION

C.R.S. § 1-40-105 (2) provides in relevant part:

> After the public meeting but before submission to the secretary of state for title setting, the proponents may amend the petition in response to some or all of the comments of the directors of the legislative council and the office of legislative legal services, or their designees. *If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the directors of the legislative council and the office of legislative legal services,* the amended petition shall be resubmitted to the directors for comment in accordance with subsection (1) of this section prior to submittal to the secretary of state as provided in subsection (4) of this section (emphasis added).

In re Title v. John Fielder, 12 P.3d 246, 253 (Colo. 2000) this court held that an amendment to an initiative did not constitute a substantial change and stated as follows:

> While this change was not in direct response to the directors' questions, we conclude that in the context of the amendment as a whole, it was *a clarification and not a substantive change*. Therefore, the change did not require resubmission to the directors. *In re Title v. John Fielder*, 12 P.3d 246 at 253.

In the present case, 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, while adding another layer of approval by making the rules and regulations subject to approval by the General Assembly. The revised version thus clarified that the procedure at the bank for deciding whether to accept marijuana businesses as depositors was to be decided as part of the drafting of the rules and regulations of the bank. The revised version also clarified the process for drafting rules and regulations by listing a number of issues to be covered by the rules and regulations, including the decision of whom the bank would accept as depositors.

This Court decided an analogous issue in *Acad. of Charter Schs v. Adams County Sch. Dist. No. 12*, 32 P.3d 456, 465 (Colo. 2001). In that case previous legislation implied that charter schools had the right to enforce contracts but did not expressly provide such right. This Court held that the new legislation that clearly stated the right of charter schools to enforce contracts by filing a suit merely made a clarification of the law and not a substantive change. 32 P.3d at 465. While that case involved legislation, the principle is the same and applies to this case.

Moreover, the word "substantial" is expressly used in C.R.S. 1-40-105(2). The definition of the word "substantial" in American English in the Cambridge

Online Dictionary is “large in size, value, or importance”. http://dictionary.cambridge.org/us/dictionary/english/substantial As Proponents have shown, the change is not large in importance as a practical matter. Objectors in this case have avoided looking at the substance of the changes, and have merely assumed or asserted they were substantial.

Jason Gelender, a member of the Title Board at the hearing and rehearing in this case, represented the Office of Legislative Legal Services and Colorado Legislative Council. He made the following apt statement disagreeing with the position of Childears in his Motion for Rehearing at the rehearing of April 28, 2016:

> I think, the way I see it I, I tend to see this direct response requirement, something we give a fairly liberal interpretation to, I mean to me the purpose of the review and comment hearing is to generally let the public know what’s going on, what’s in the initiative, to give the proponents an opportunity to be advised of potential sort of technical issues, and be asked questions that help them clarify their intent. I don’t think we usually get overly strict when we read this, and as I see it, there was a provision in the proposed initiative that was asked a question about it, that raised, to the proponents some concerns about it, they, first of all, they, as far as just removing the language is, removing the language is, you know, less substantive than adding a bunch of stuff that’s new, and then they said OK, a concern was raised, we’re not sure how to handle it, so instead of mandating that these (inaudible) deposits get taken, we’re going to say that we’re going to sort of punt on the issue a little bit, and let it be done by regulation down the road. I meant that’s just, to me---I don’t think that rises; I think that’s sufficiently responsive to the raising of the issue by our staff at

> Legislative Legal Services and Legislative Council—that has to be fine. http://www.sos.state.co.us/pubs/info_center/audioArchives.html (Archived Audio for Title Board; at 17:14 to 18:49 of Part 4 for April 28, 2016; time 27:10)

As Mr. Gelender said, the removal of a provision is less substantive than when new authority is added and the Title Board should avoid being "overly strict" in applying these rules. In actuality, the authority of the bank to decide whether or not to accept marijuana deposits is not taken away by the removal of subsection 3(d), rather it is moved to the new subsection 6(b) of the amended initiative and included together with the more general authority to decide whom to accept as depositors. Mr. Gelender's argument is made stronger by the fact that he incorrectly assumed that the initial provision mandated that the bank accept marijuana deposits whereas it says the bank "may" accept deposits of marijuana businesses.

The initial proposal in paragraph 6(a) provided that the management of the bank would draft rules and regulations, subject to the advice of the advisory board, and approval by the board of directors. Because the acceptance of marijuana deposits was not mandatory in the initial version, it would be up to the lawful authorities of the bank, that is, the board, after drafting by management and consultation with the advisory board, to decide whether to accept such deposits.

The revised initiative adds a new subsection 6(b) that lists a number of the issues that will be considered by the bank in establishing the rules and regulations, but without excluding others. Subsection 6(b) does not alter the authority of the bank to make rules and regulations but merely clarifies that authority by listing a number of the issues to be considered. Without the addition of section 6(b) Proponents submit that the bank had the authority to decide all these issues in the original initiative under section 6(a) because that subsection places no requirements or restrictions on what issues would be covered by the rules and regulations.

The amended proposal with the additional section 6(b) thus does not give any new authority to the bank. Specifically, the bank still "may" accept marijuana business deposits because the provision says rules and regulations will cover the issue of "who *may* be a depositor at the bank" (subsection 6(b), emphasis added). Like the original version this addition in the amended version allows the bank through its management and board, with advice from the advisory board, to consider whether to accept deposits of lawful marijuana companies. Thus, although it may not be obvious, a careful examination of the two versions shows that the bank has essentially the same authority in the revised version as in the

initial version to consider whether to permit marijuana businesses and other persons or entities to be depositors at the bank.

The courts must liberally construe statutes governing initiatives to "allow the greatest possible exercise of this valuable right", City of Glendale v. Buchanan, 578 P. 2d 221, 224 (Colo. 1978). This court has held that when reviewing an action of the Board, it must liberally construe the single-subject and title requirements to ensure that the rights of proponents are not unduly restricted. C.R.S. § 1-40-106.5(2). In re Proposed Ballot Initiative on Parental Rights, 913 P.2d 1127, 1131 (Colo. 1996).

CONCLUSION

For the foregoing reasons, Proponents request that the Court reverse the action of the Title Board granting the motion for rehearing of Objector Childears and remand the case for further action by the Title Board.

Dated: May 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, the Petitioners' OPENING BRIEF was filed with the Court and served upon counsel below via email by consent to counsel at their addresses listed below:

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