DATE FILED: May 23, 2016 6:15 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' OPENING 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 2,887 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, President & CEO of the Colorado Bankers Association and registered elector of the State of Colorado, through his undersigned counsel, submit his Opening 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").

ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board correctly ruled that it lacked jurisdiction to set a title for Proposed Initiative #127 because the Proponents made substantial changes after the Review and Comment Hearing that were not in direct response to questions or comments by the legislative staff.

STATEMENT OF THE CASE

This original proceeding is brought by Petitioners pursuant to section 1-40-107(2), C.R.S., as an appeal from a decision of the Ballot Title Setting Board that it lacked jurisdiction to set title on Proposed Initiative 2015-2016 #127 ("Proposed Initiative #127" or the

"Initiative").

Proposed Initiative #127 seeks to add a section to the Colorado Constitution that would establish a state-owned bank as a TABOR enterprise. Initiative § 1. Petitioners, Earl Staelin and David Runco, filed the Initiative on March 23, 2016. A required Review and Comment Hearing was held on April 6, 2016 pursuant to section 1-40-105(1). Following the hearing, Petitioners filed an amended version of the Initiative with the Title Board on April 8, 2016 (the "Amended Draft"). The Title Board considered the Initiative and set a title on April 20, 2016.

Respondents, Don Childears and Barbara M.A. Walker, subsequently filed separate Motions for Rehearing pursuant to section 1-40-107(1)(a). Both alleged that the Initiative violated the constitutional single-subject and clear title requirements. In addition, Respondent Childears argued that the Title Board lacked jurisdiction because the Amended Draft contained a change that was substantial

and not in direct response to questions or comments made by the legislative staff at the Review and Comment Hearing.[1]

At the Rehearing on April 28, 2016, the Title Board first considered the jurisdictional issued raised in Respondent Childears' motion and granted the motion on that basis. Because the Title Board determined that it lacked jurisdiction, it did not consider whether the Initiative violated the constitutional single-subject and clear title requirements. Petitioners subsequently filed on May 3, 2016 a petition for review in this Court.

This is the eighth time over the last four years that Petitioners have proposed various iterations of a proposal for a state-owned bank. In 2011-2012, this Court consolidated Initiatives #94 and #95 into one case and held that because fewer than the required two designated representatives appeared at its rehearing, *see* § 1-40-106(4), the Title Board lacked authority to set a title for those measures. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2011–2012 Nos. 94 and 95*, 2013 CO 1, ¶ 5. In 2012-2013, Petitioners

[1] Respondent Childears also raised in his motion that the Title Board lacked jurisdiction because the measure was so vague that it could not be understood.

introduced Initiatives #6 and #7, but withdrew those measures before title could be set. And in 2013-2014, Petitioners introduced Initiatives #39, #45, and #104, which all failed on single-subject grounds due to TABOR implications.

SUMMARY OF THE ARGUMENT

As amended following the Review and Comment Hearing, Proposed Initiative #127 includes changes that were substantial and not in direct response to the questions or comments made by the legislative staff at the Review and Comment Hearing. The initial draft of the Initiative contained a subsection that would allow the state-owned bank to accept deposits from businesses that are lawful in Colorado but do not currently have a bank in which to deposit their money. At the Review and Comment Hearing, the legislative staff asked whether the subsection was written with the marijuana industry in mind. Petitioners stated that "[marijuana] was the idea" behind the subsection and that the subsection's goal was providing this industry with a lawful place to deposit its money. Nothing more was said.

However, in their Amended Draft, Petitioners removed that subsection and instead inserted in a different subsection of the measure a vague clause that Petitioners asserted at the Rehearing was meant to give the bank's board broad powers to decide who may be a depositor at the bank and if it was going to accept deposits from the marijuana industry. These changes were not in direct response to the staff's question as to the original subsection's meaning. In addition, these changes were substantial because they removed a prominent aspect of the measure and then hid a broader grant of authority to the bank's board in a new subsection. Therefore, the Title Board correctly determined that it lacked jurisdiction to set title.

STANDARD OF REVIEW

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

ARGUMENT

I. The Title Board correctly ruled that it lacked jurisdiction to set title.

Article V, section 1(5) of the Colorado Constitution sets forth the review and comment process for proposed initiatives, which includes a public hearing. The specific procedures that must be followed under this process are outlined in section 1-40-105. It specifies that during the public Review and Comment Hearing, legislative staff will provide to the initiative's proponents questions and comments concerning the "format or contents of the petition." § 1-40-105(1). The proponents then may amend their proposed initiative only in response to those questions and comments before they submit it to the secretary of state for consideration by the Title Board. § 1-40-105(2). The process "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." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246, 251 (Colo. 2000).

Amendments made in response to the legislative staff's comments, however, are expressly limited. Substantial changes that are not in direct response to the legislative staff's comments are impermissible and require that the amended initiative be resubmitted for a new Review and Comment Hearing:

> 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.

§ 1-40-105(2) (emphasis added).

The requirement that improperly amended initiatives must be resubmitted serves a distinct purpose. When the proponents make substantial changes that are not in direct response to a comment, the amended initiative "in effect constitutes an entirely different proposal from the one previously reviewed by the legislative offices." *In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs,* 830 P.2d 963, 968 (Colo.1992). Thus, without resubmission for review and comment, "[t]he public's right to

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

A. The changes made to the Initiative were not in direct response to the questions and comments at the Review and Comment Hearing.

For the Review and Comment Hearing on Initiative #127, the legislative staff provided a series of substantive comments and questions. In Question 5, the staff asked for clarification as to whether a subsection of the measure was written for the marijuana industry. The question reads:

> Subsection (3)(d) of the proposed initiative states that the state bank may accept deposits of any business lawfully operating under the constitution and laws of Colorado but which does not have a bank or financial institution in the state which may lawfully accept deposit of its moneys. Do the proponents intend for this language to permit the state bank to accept deposits form the marijuana industry in Colorado?

In response, Petitioners stated verbally at the Review and Comment Hearing that "[marijuana] was the idea" and that the provision was written because the marijuana industry in Colorado needs a "lawful

place to deposit [its] money."[2] The staff accepted this answer and no person asked any follow-up questions. At no point during the hearing did Petitioners or the staff discuss removing that subsection.

Nonetheless, Petitioners removed that subsection in its Amended Draft for Initiative #127. Petitioners also added a new subsection, (6)(b), which explained topics the proposed bank's rules and regulations must cover. The middle of this subsection states that "[t]he rules and regulations shall cover . . . who may be a depositor at the bank." No clarification as to what this meant was provided in the Amended Draft, although Petitioners stated at the Rehearing that the phrase was intended to allow the bank to decide if it was going to allow deposits from the marijuana industry as part of its rules and regulations.

Petitioners argued at the Rehearing that the removal of subsection (3)(d) and the addition of the phrase in subsection (6)(b) were in direct response to the legislative staff's questions and comments, in

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[2] Audio for the Review and Comment Hearing can be found on the Colorado General Assembly's website at http://www.leg.state.co.us/clics/cslFrontPages.nsf/Audio?OpenPage by clicking on "Other Committees," "Review & Comment Hearings," and the link for "Initiative 2015-2016 #127 Review and Comment Hearing." The audio for question 5 begins at 18:18 of the recording.

particular questions 5 and 14. Question 14 asked to what extent the General Assembly would play a role in adopting the rules and regulations of the bank and whether the public would have a means for relief if the bank's board acted in ways that violated the measure's principles.

Here, the changes at issue were, at best, *indirect* responses to the staff's question. More likely, they were made strategically and independent of the staff's question.[3] Nobody at the hearing commented on removing subsection (3)(d) or questioned its inclusion—the comments related only to its meaning. In addition, while some of the language in subsection (6)(b) could be construed as responding to question 14, that question had nothing to do with allowing marijuana depositors and did not open the door to adding a phrase allowing the bank to decide under its rules and regulations to accept deposits from the marijuana industry, or any other industry.

Case law, while sparse, agrees. In *In re Limited Gaming*, for example, the proponents of the measure explained at their hearing with

[3] For example, Petitioners stated at the Rehearing that subsection (3)(d) was struck and subsection (6)(b) was added to avoid unduly highlighting the marijuana issue.

legislative staff that a subsection of their proposed measure was designed to ensure that existing constitutional provisions did not prevent regulatory entities from regulating limited gaming in Idaho Springs. 830 P.2d at 967. The proponents "consistently indicated that their proposal was directed to limited gaming in that city" only.[4] *Id.* at 967–68. Nonetheless, before the measure was submitted to set title, the proponents made changes that would provide regulatory entities the authority to regulate limited gaming in places other than Idaho Springs. *Id.* at 966, 968. Like the Petitioners in this case, who explained that subsection (3)(d) was placed in the measure for the marijuana industry but then removed that subsection without prompting, the proponents in *In re Limited Gaming* made a change contrary to what they characterized at the hearing was the measure's intent. Not surprisingly, this Court considered the changes in *In re Limited Gaming* and held that the title board lacked jurisdiction to set a title. *Id.* at 968.

[4] This Court examined the case's record and determined that a discussion between the legislative staff and the proponents showed that the proponents did not intend for the measure "to authorize limited gaming in places other than Idaho Springs." *Id.*

In contrast, changes made in direct response are those that respond to the legislative staff's specific questions. *See In re 1999-2000 #256*, 12 P.3d at 251–53. For example, the Court has held that the removal of part of a subsection after the legislative staff questioned its implication satisfies that the change was made in direct response. *Id.* at 251–52 (holding as permissible the removal of language that references urban growth boundaries and intergovernmental agreements after the legislative staff specifically asked whether the measure would curtail home-rule powers with respect to existing urban growth boundaries and intergovernmental agreements); *cf. In re Title, Ballot Title, Submission Clause for 2007-2008 #62*, 184 P.3d 52, 61 (2008) (holding that the addition of language clarifying "just cause" to account for 10 percent across-the board layoffs and the event of employer bankruptcy was in direct response to legislative staff's question as to if there was "allowance for layoffs due to a lack of work or even the bankruptcy of the employer"). Similarly, attempts "to eliminate the language creating the ambiguities that [legislative staff] pointed out" are made in direct response. *In re 1999-2000 #256*, 12 P.3d at 252.

Here, these changes were not made in direct response to the legislative staff's specific questions. Moreover, any changes made to eliminate ambiguities would have clarified subsection (3)(d)'s intent, as opposed to removing the subsection and adding language to subsection (6)(b). A person who attended the Review and Comment Hearing would not have expected the removal of subsection (3)(d) or the addition of language in subsection (6)(b). Instead, the person would have wanted clarification as to only whether subsection (3)(d) permitted deposits from the marijuana industry and then would have expected that any revisions made to the measure would clarify that the bank would be able to accept deposits from that industry.

B. The changes were substantial.

Not only were the changes made to the measure not in direct response to the legislative staff's questions, those changes were substantial. The Initiative as originally proposed contained a subsection that would have permitted the proposed state bank to accept deposits from the marijuana industry:

> The bank may accept the deposits of any business lawfully operating under the constitution and the 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.

Initiative § (3)(d). Thus, the measure as originally proposed had a significant feature of providing banking services to a major industry in Colorado that generates hundreds of millions of dollars in revenue every year, and that to date has no ability to lawfully bank in this State.

Instead, despite the fact that the legislative staff—and more importantly, the public—received the clarification it needed at the Review and Comment Hearing, Petitioners removed that subsection and inserted a veiled and broad reference in another section. They contended at the Rehearing that this new subsection (6)(b) would provide the proposed state bank with the power to create rules and regulations allowing deposits from any type of business, including the marijuana industry. This change substantially altered the measure. For example, the bank's board could choose if it wanted to accept deposits from only depositors it decides supports the general welfare or reject deposits from depositors in certain industries, such as the oil and

gas industry. In other words, Petitioners eliminated an overt reference to the bank's ability to accept deposits from the marijuana industry in favor of a new subsection that would have a broad effect and was unapparent until Petitioners addressed the purpose of that subsection at the Rehearing.

This Court has differentiated between clarifications and substantial changes. Clarifications include changes to word choice, such as adding "local government" before "revenue sharing arrangements" in a section pertaining to local governments. *In re 1999-2000 #256*, 12 P.3d at 252–53. In contrast, substantial changes relate to initiative's main thrust. *In re Limited Gaming*, 830 P.2d at 968 n.7.

Here, looking at "the context of the amendment as a whole," *In re 1999-2000 #256*, 12 P.3d at 253, subsection (3)(d) related to the main thrust of the Initiative. Providing banking services to the marijuana industry would completely alter that industry's business plans and would spark the public's interest. Many voters likely would have voted for or against the measure based on that feature alone. The addition of subsection (6)(b), on the other hand, is the opposite of a clarification and

created uncertainty as to its intent. Thus, a main thrust of the Initiative—marijuana—was removed or hidden, "substantially alter[ing] the intent and meaning of central features of the initial proposal." *In re Limited Gaming*, 830 P.2d at 968. Without resubmittal for review and comment in necessary, "[t]he public's right to understand the contents of an initiative in advance of its circulation would be completely eradicated." *See id.*

CONCLUSION

Proposed Initiative #127 seeks to establish a state-owned bank. As originally proposed, the measure 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 not in direct response to the legislative staff's questions and comments and were substantial changes, thus divesting the Title Board of jurisdiction. Respondent Childears therefore respectfully asks this Court to affirm the Title Board's grant of his Motion for Rehearing.

Respectfully submitted this 23rd day of May 2016.

BROWNSTEIN HYATT FARBER SCHRECK LLP

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CERTIFICATE OF SERVICE

I hereby certify that on May 23rd, 2016, I electronically filed a true and correct copy of the foregoing **RESPONDENT CHILDEARS' OPENING BRIEF** via the Colorado ICCES system which will send notification of such filing and service upon the following:

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