

<p>COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203</p>	<p>DATE FILED: May 23, 2016 6:27 PM</p>
<p>Original Proceeding Pursuant to Colo. Rev. Stat. § 1-40-107 Appeal from the Title Board</p>	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 # 127 (“Establishment of State-Owned Bank”)</p> <p>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.</p>	<p>▲ COURT USE ONLY ▲ Case No. 2016 SA 148</p>
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<p>THE TITLE BOARD'S OPENING BRIEF</p>	

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 2,040 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.

STATEMENT OF THE ISSUES

1. Whether the Board lacked jurisdiction to set a title for Proposed Initiative #127 because a substantial change not in response to comment was made to the measure and it was not resubmitted to the directors of the Legislative Council and the Office of Legislative Legal Services in accordance with § 1-40-105(2), C.R.S.

STATEMENT OF THE CASE

Earl Staelin and David Runco (the “Proponents”) seek to circulate Proposed Initiative #127 to obtain the signatures needed to place a measure on the ballot to amend the Colorado Constitution. Initiative #127 would create a state-owned bank, implemented as a TABOR enterprise. The measure also contains provisions regarding governance, operations, and capitalization of the bank.

The Proponents submitted the original version of the amendment to the directors of the Colorado Legislative Council (CLC) and the Office of

Legislative Legal Services (OLLS). A review and comment hearing was held on April 6, 2016.

The Proponents made edits to the original text and submitted their final amendment to the Secretary of State's office on April 8, 2016. The Board conducted a hearing on April 20. At that hearing, the Board determined that the initiative was limited to a single subject, and then proceeded to set a title, ballot title, and submission clause. Title Board Proceedings (Apr. 20, 2016), available at <http://pub.sos.state.co.us/20160420133806A>, at 2:37.

Don Childears and Barbara Walker objected to the title being set and timely filed motions for rehearing. A rehearing was held on April 28, 2016. In a 2-1 vote, the Board granted the Childears motion for rehearing on the ground that substantial changes had been made to the measure that were not in response to questions from the review and comment period and the measure was not resubmitted to CLC and OLLS for review. Pet. for Rev. ex. 4 at 6. Title Board Proceedings (Apr. 29, 2016), available at <http://pub.sos.state.co.us/20160428133203B>, at 25:30. On May 3, 2016 Earl Staelin and David Runco filed a petition for review in this Court.

STATEMENT OF THE FACTS

Proposed Initiative #127 originally contained subsection (3)(d), which read: “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.” Pet. for Rev. ex. 2 at 2.

During the review and comment process, CLC and OLLS issued a memorandum regarding the measure. Ex. 4 at 1. In the Substantive Comments and Questions section, CLC and OLLS raised the following question:

5. 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 from the marijuana industry in Colorado?

Id. Reportedly at the review and comment hearing, the Proponent stated 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.” *Id.* The staff present at the hearing accepted the answer and there were no other questions on this point. *Id.*

In the final text that was submitted to the Secretary of State, subsection (3)(b) was deleted in its entirety. In addition, a new subsection (6)(b) was added, which provided that the bank should draft rules that

“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 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.”

Id.

Section 1-40-105(2) provides that the proponents of a measure may make changes in response to some or all of the comments received during the review and comment meeting from CLC or OLLS before submitting the final text to the Secretary of state. However, “[i]f any substantial amendment is made to the petition, other than in direct response to the comments of the directors of the Legislative Council and the Office of Legislative Legal Services, the amended petition must be resubmitted to the directors for comment in accordance with subsection (1) of this section prior to submittal to the Secretary of State.”

§ 1-40-105(2). The requirement that the text of a measure be submitted to the legislative research and drafting offices for review and comment is constitutional. Colo. Const. art V, §1(5).

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. This change was not in direct response to a comment from CLC/OLLS. 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.

“In reviewing a challenge to the Title Board’s single subject determination, [the Supreme Court] employ[s] all legitimate presumptions in favor of the Title Board’s actions.” *Hayes v. Spalding*, 333 P.3d 76, 79 (Colo. 2014). The Court may not consider the merits of a proposed initiative. *In re Title, Ballot Title & Submission Clause for “Limited Gaming”*, 830 P.2d 963 (Colo. 1992) [hereinafter *In re Limited Gaming*] (citing *Bauch v. Anderson*, 497 P.2d 698, 699 (Colo. 1972)).

The requirement of submitting a proposed initiative to CLC and OLLS permits proponents of initiatives “to benefit from the experience of experts constitutional and legislative drafting.” *In re Title, Ballot Title & Submission Clause for 1999-00 #256*, 12 P.3d 246, 251 (Colo. 2000). It “also permits the public to understand the implication of a proposed constitutional amendment at an early stage of the initiative process.” *In re Limited Gaming*, 830 P.2d at 966 (citing *In re Title, Ballot Title & Submission Clause, & Summary Adopted May 16, 1990*, 797 P.2d 1283, 1287 (Colo. 1990)). Further, “[t]he public’s right to understand the contents of an initiative in advance of its circulation

would be completely eradicated if” the version submitted to the Board for title setting “is substantially different from the intent and meaning of the central features of an earlier version thereof that was submitted to the legislative offices.” *Id.* at 968. If the proponent does not comply with the review and comment requirements, the Board does not have jurisdiction to set the title, ballot title, and submission clause. *In re Title, Ballot Title & Submission Clause for “Tax Reform”,* 797 P.2d 1283 (Colo. 1990). “the Board has no authority to fix a title to a proposed amendment.” *Id.* (citing *In re Title, Ballot Title & Submission Clause, & Summary Adopted May 16, 1990,* 797 P.2d at 1288).

This argument was raised by Respondent Childears 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.

There are two questions for this Court to consider: (1) whether the change in the measure between the original text and final text was

substantial and (2) whether the change was in direct response to comments from CLC and OLLS.

First, the change in text was not in direct response to CLC/OLLS comment based on the record. There is no comment in the record from CLC/OLLS to which the change could be directed. The only reference to this subsection was the question directed to the proponents asking whether they “intend for this language to permit the state bank to accept deposits from the marijuana industry in Colorado.” Pet. for Rev. ex 4 at 1.

This question appears to be asked by CLC/OLLS to clarify the provision. It is not a substantive comment, and it cannot be said to explicitly or impliedly raise any point about subsection (3)(d) to which the proponents could have responded. As such, the removal of subsection (3)(d) cannot be in direct response to that clarifying question.

Second, the edits are a substantial change to a central feature of the measure. One of the purposes of the review and comment requirements is to give the public the opportunity to understand a constitutional amendment at an early stage. *In re Limited Gaming*, 830 P.2d at 966 (citing *In re Title, Ballot Title & Submission Clause, & Summary Adopted May 16, 1990*, 797 P.2d 1283, 1287 (Colo. 1990)). At the public review and comment meeting, CLC/OLLS asked whether subsection

(3)(d) was intended to address the marijuana industry. Pet. for Rev. ex. 4 at 1. The proponents responded 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.” *Id.* There was no comment after this exchange from members of the public.

The measure, as presented to the public in the review and comment period, provided that the proposed 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. *Id.* The proponents clarified that this provision was intended to address marijuana. *Id.*

This is the provision that was struck from the final measure. What the public had the opportunity to comment on was a measure to create a state-owned bank that could accept deposits from the marijuana industry. What was submitted to the title board was a measure to create a state-owned bank that lacked this explicit provision.

This Court reviewed an analogous situation in the Limited Gaming Case. *In re Limited Gaming*, 830 P.2d at 963. In that case, the original proposal submitted to CLC/OLLS would have permitted limited gaming only in the city of Idaho Springs. *Id.* at 968. After a review and comment period, the proponents submitted an amended proposal that

extended the applicability of limited gaming to other cities. *Id.* The *Limited Gaming* Court found that changing the measure from applying to one city so that it applied to many cities was a “substantial alteration of the intent and meaning of a central feature of the initial proposal [that] in effect creates a new proposal that must be submitted to the legislative offices for comment at a public meeting.” *Id.*

The edits here are similarly to a central feature of the proposed measure. The original measure, as specifically clarified by the proponents, provides a banking option for the marijuana industry. The amended measure removes that explicit feature from the amendment entirely. This change was a “substantial alteration of the intent and meaning of a central feature” of the proposal. The measure should have been resubmitted to CLC/OLLS for further review.

CONCLUSION

Because substantial changes were made to #127 that were not in direct response to comment from CLC/OLLS, the measure should have been resubmitted for review. That was not done and the Board lacks authority to set title in such a case. Accordingly, the Court should affirm the Board’s actions.

Respectfully submitted this 23th day of May, 2016.

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CERTIFICATE OF SERVICE

This is to certify that on May 23, 2016, I electronically filed a true and correct copy of The Title Board's Opening 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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