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SUPREME COURT, STATE OF COLORADO **2 East 14th Avenue** **Denver, Colorado 80203**	
Original Proceeding Pursuant to Colo. Rev. Stat. §1-40-107(2) Appeal from the Ballot Title Board	
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2017-2018 #126 **Petitioners:** BILL FRITTS v. **Respondents:** CORRINE FOWLER AND REVEREND DR. ANNE M. RICE-JONES and **Title Board:** SUZANNE STAIERT; GLENN ROPER AND JULIE PELEGRIN.	▲COURT USE ONLY▲
Attorneys for Respondents Martha M. Tierney, No. 27521 Tierney Lawrence LLC 225 E.16TH AVE, SUITE 350 Denver, CO 80203 Phone: (720) 242-7577 E-mail: mtierney@tierneylawrence.com	Case No.: 2018SA60

RESPONDENTS' ANSWER BRIEF IN SUPPORT OF 2017-2018 INITIATIVE #126

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 the brief complies with C.A.R. 28(g). It contains 3265 words.

Further, the undersigned certifies that the brief complies with C.A.R. 28(k).

For the party raising the issue:

☐ 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.

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.AR. 32.

By: s/Martha M. Tierney

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Corrine Fowler and Reverend Dr. Anne Rice-Jones (jointly "Proponents" or "Respondents"), registered Colorado electors, through their undersigned counsel, respectfully submit this Answer Brief in support of the title, ballot title and submission clause (jointly, the "Title") that the Title Board set for Proposed Initiative 2017-2018 #126 ("Initiative #126"), and in response to the Opening Brief filed by Petitioner Bill Fritts.

SUMMARY OF ARGUMENT

The Title Board properly exercised its broad discretion in drafting the title and approving the fiscal abstract for Initiative #126.

The fiscal abstract for Initiative #126 complies with Colorado law and is neither prejudicial nor misleading. The Title Board did not seek, nor was it authorized, to return the abstract to Legislative Council. The Title Board had jurisdiction to set a title for Initiative #126, and its jurisdiction was not impacted by the Legislative Council's decision to forgo inclusion of hard numbers in its fiscal impact estimate. The Title Board relied on testimony and evidence presented at the rehearing when it approved the fiscal abstract and deferred to Legislative Council's judgment in the absence of a compelling reason that the abstract was inaccurate. Petitioner did not preserve the issue of whether inclusion of the term "payday" in the fiscal abstract is a catchphrase and, therefore, it is not properly

before this Court. The term "payday" in the fiscal abstract is not a catchphrase and does not render the fiscal abstract misleading or prejudicial.

The Title satisfies Colorado law because it fairly and accurately sets forth the major features of Initiative #126 and is not misleading. The term "payday" in the Title is not a catchphrase because it does not work in favor of the measure without contributing to voter understanding. Absent the term "payday" in the Title, which is the term used by the industry itself, the General Assembly, the Executive Branch, and the Judiciary, voters would not understand the subject matter of the measure.

The Title Board is only obligated to fairly summarize the central points of a proposed measure, and need not refer to every nuance and feature of the proposed measure. While a title must be fair, clear, accurate, and complete, it is not required to set out every detail of an initiative. There is no basis to set aside the Title, and the decision of the Title Board should be affirmed.

ARGUMENT

I. The Initiative's Abstract Is a Correct Estimate, Meets the Requirements of Colorado Law, and Is Not Misleading or Prejudicial.

A. Standard of Review and Preservation.

Proponents agree with Petitioner that when reviewing an abstract prepared and submitted to the Title Board pursuant to C.R.S. §1-40-105.5, this Court

employs “all legitimate presumptions in favor of the propriety of the Title Board's action.” *In re Title, Ballot Title & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 176 (Colo. 2014). Proponents further add that this Court only overturns the Title Board’s decision "in a clear case." *Smith v. Hayes (In re Title, Ballot Title & Submission Clause for 2017-2018 #4)*, 395 P.3d 318, 323 (Colo. 2017).

Proponents agree that Petitioner preserved the issues of whether the Title Board had the authority to return the Fiscal Abstract to the Office of Legislative Council and whether the Fiscal Abstract met the statutory requirements.

However, Petitioners did not preserve the issue of whether the abstract is misleading because it includes a prejudicial catchphrase. *Pet. Op. Brief, ¶ II(B), pp. 20-21*. Petitioner never raised this issue before the Title Board at the rehearing. *Tr. 27:15-68:22.*[1] Accordingly, the Court should not consider it. *See Brown v. Peckman (In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # 265)*, 3 P.3d 1210, 1215-16 (Colo. 2000) (“Because [Petitioners] did not raise the issue before the [Title] Board they cannot now urge

[1] A certified transcript from the Title Board rehearing on 2017-2018 Initiative #126 on March 7, 2018 was submitted with Respondents’ Opening Brief as Exhibit A. Proponents will cite to the transcript herein as “*Tr. page number:line number.*”

this contention as a grounds for reversing the Board."); *see also In re Proposed Ballot Initiative on Parental Rights*, 913 P.2d 1127, 1129 n.3 (Colo. 1996).

B. The Title Board Properly Accepted the Fiscal Abstract.

Petitioner's arguments on the Fiscal Abstract for Initiative #126 are virtually the same arguments that Petitioner's counsel made in objection to another measure, Initiative 2017-2018 #97. This Court rejected each of those arguments when it decided Initiative #97 earlier this month in a unanimous affirmance of the Title Board without opinion. *See In re Initiative 2017-2018 #97*, Case No. 2018SA31 (decided April 6, 2018). The Court should similarly reject the same arguments made against Initiative #126.

1. The Title Board Was Not Authorized to Return the Fiscal Abstract to the Office of Legislative Council.

First, Petitioner claims that the Title Board had the authority to return the Fiscal Abstract to the Office of Legislative Council ("OLC") for modification. In the appeal of Initiative #97, the petitioner in that case also objected to the fiscal abstract and argued that the Title Board should return it to OLC for modification. This Court rejected that argument for Initiative #97 and should do the same here.

There is nothing in C.R.S. §1-40-105.5 or in §1-40-107 that authorizes the Title Board to reject a fiscal impact statement or abstract and return it to the Legislative Council for modification. Instead, the statute allows the Title Board

itself to "modify the abstract based on information presented at the rehearing." §1-40-107(1)(b). Section 1-40-105.5(2)(a) states that "the director's abstract that is included in the impact statement is final, unless modified in accordance with section 1-40-107." The Title Board declined the Petitioner's request to deviate from the plain language of the statute and accepted the fiscal abstract for Initiative #126. *See Garhart ex rel. Tinsman v. Columbia/HealthONE, L.L.C.*, 95 P.3d 571, 591 (Colo. 2004). This Court should affirm the Title Board's decision to accept the fiscal abstract.

2. The Fiscal Abstract Meets the Statutory Requirements.

Second, Petitioner argues that the Fiscal Abstract lacks useful information because it does not contain an analysis of the financial or economic impact to lenders who provide payday loans. *Pet. Op. Br., pp. 18-19.* Again, this Court's recent decision in *In re Initiative 2017-2018 #*97, along with the analysis the Court provided in *Smith v. Hayes,* 395 P.3d at 324, make clear that the Title Board is in a better position to hear and consider information directly from OLC, and to determine whether the Fiscal Abstract meets the requirements of the law. That is precisely what occurred in this case. After hearing from the Proponents, the Petitioner, and from Natalie Mullis of Legislative Council, who explained that the Fiscal Abstract met the requirements of the statute, and after weighing the merits

of the evidence regarding the abstract's accuracy, the Title Board unanimously approved the Fiscal Abstract. *Tr. 48:15-49:5; 63:7-68:22.*

Contrary to Petitioner's allegation that quantitative estimates were available, Ms. Mullis stated that it was not possible to provide specific estimates for the effects of Initiative #126 on the payday lending industry because the available information is not unbiased. *Tr. 47:22–51:14; 55:14-58:10.* Ms. Mullis further clarified that "if the estimate is indeterminate, then that's what the estimate is," *tr. 51:23-52:1,* and made clear that her office had "provided a statement of the economic benefits for all Coloradans to the best of our ability and based on the economic knowledge that we have [and] our consideration of the materials that were presented to us and consideration of other resources that we have in our body of knowledge. *Tr. 49:23-50:3.* The Title Board "need not explain the fiscal impact of a proposed initiative if the impact cannot be determined from materials submitted to the Title Board due to uncertainties or variables inherent in the particular issue." *In re Proposed Initiative on Trespass-Streams with Flowing Waters*, 910 P.2d 21, 26 (Colo. 1996).

On the Fiscal Abstract, the Title Board deferred to the expertise of the fiscal analysts at OLC. *Tr. 52:14 –54:10.* The Court should defer to the Title Board. *See Trespass-Streams with Flowing Waters*, 910 P.2d at 26 ("We give great

deference to the Title Board's decisions regarding abstracts, and [] will not overturn its decision except in a clear case.")

3. The Office of Legislative Council's Use of the Term "Payday" in the Fiscal Abstract Is Not Misleading, Nor a Catchphrase.

Lastly, Petitioner contends, pursuant to section 1-40-107(1)(a)(II)(B), that the Fiscal Abstract is misleading or prejudicial because it contains the word "payday," which Petitioner maintains is a catchphrase. As discussed in Section I.A. above, Petitioner never raised this issue before the Title Board, the Title Board never ruled on this issue, it is not properly before this Court, and the Court should not consider it. *See Tr. 27:15-68:22; see also Brown v. Peckman*, 3 P.3d at 1215-16.

In any event, there is no reference in Colorado prior case law or statute regarding use of a catchphrase in a fiscal abstract. The fiscal abstract does not appear on the ballot, so it is not likely to influence voters one way or another in the same way that a ballot title might. Additionally, while a fiscal abstract does appear on petitions, the use of the term "payday" in the Fiscal Abstract for #126 does not "work to the proposal's favor without contributing to voter understanding." *In re Initiative for 1999-2000 #258(a)*, 4 P.3d 1094, 1100 (Colo. 2000). Instead, petition signers are more likely to understand the subject matter of Initiative #126 because OLC used the term "payday" in the Fiscal Abstract. And

for the same reasons made in Section II.B, below, the term "payday" is not a catchphrase.

The Title Board's decision to accept the Fiscal Abstract should be affirmed.

II. The Initiative's Title Correctly and Fairly Expresses the True Intent and Meaning of the Measure.

A. Standard of Review and Preservation.

Petitioner states part of the appropriate standard for review for evaluating whether a title fairly expresses the true intent and meaning of the measure or is misleading. Petitioner omits the important requirement that titles and submission clauses should "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Initiative for 2009-2010 # 24*, 218 P.3d 350, 356 (Colo. 2009) (*quoting In re Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990)). The purpose of reviewing an initiative title for clarity parallels that of the single-subject requirement: voter protection through reasonably ascertainable expression of the initiative's purpose. *See id.*

Proponents agree that Petitioner preserved the issue for appeal.

B. The Word "Payday" in the Title of Initiative #126 Is Not a Catchphrase.

1. The Title for Initiative #126 Does Not Contain a Catchphrase.

Petitioner errs when he alleges that the term "payday" is a catchphrase. Catchphrases are "words that work to a proposal's favor without contributing to voter understanding." *In re Initiative for 2007-2008 #62*, 184 P.3d 52, 60 (Colo. 2008), quoting *In re Initiative for 1999-2000 #258(a)*, 4 P.3d at 1100. The Title for Initiative #126 employs the terms "payday loan" and "payday lender" – drawn directly from the text of the measure – to describe precisely what the measure does, *i.e.*, create limitations on a certain type of loan known commonly as a payday loan and offered by persons commonly understood to be payday lenders. Calling these loans by any other name, including the less familiar and increasingly dated moniker "deferred deposit loan," would contribute less to voter understanding of the measure and likely foment voter confusion.

In his Opening Brief, Petitioner contends that the term "payday" is inaccurate because in the wake of 2010 legislation, Colorado's payday loans must be no shorter than six months in duration and must contain installments instead of one balloon payment. *Pet. Op. Br. Pp. 22-23.* But requiring the loans to be six months and contain installment payments does not mean that they are no longer payday loans. To the contrary, the loans are still accurately called payday loans

because the loan payments are still timed to come due on or around the borrower's payday. Indeed, as the Colorado Consumer Credit Unit of the Colorado Attorney General's Office observed, many "payday lenders write their loans for the range of installment scheduling options (monthly, semi-monthly, or bi-weekly installments) depending upon when and how often the individual consumer receives a paycheck or other income." *Resp. Op. Br., Exh. C, p. 16.* Only a small portion of payday loans today employ the largely outdated "deferred deposit" mechanism, whereby the borrower gives the lender a post-dated check for which deposit is "deferred" until such time as the borrower misses a payment when due. Today, most payday borrowers instead give the lender electronic transfer authorization, permitting the lender to transfer missed payments directly from the borrower's bank account. Thus, while nearly all the loans at issue are "payday loans," timed to the borrower's payday, only a minority can be accurately described as a "deferred deposit loan," relying on the deferred deposit of a paper check. Nevertheless, both phrases remain technically acceptable under the statute.

Wholly inaccurate is petitioner's alternative proposed term, "short term installment loan," which describes a much broader category of loans, many of which are not covered by the statutory sections amended by Initiative #126. *See, e.g.*, §5-2-214, C.R.S. (authorizing alternative finance charges for a type of non-

payday small installment loan). Neither the largely outdated phrase, "deferred deposit loan," nor the over-broad phrase, "short term installment loan" would enable the electorate, whether familiar or unfamiliar with the subject matter of Initiative #126, to determine intelligently whether to support or oppose the proposal. *See In re Initiative for 2009-2010 # 24*, 218 P.3d at 356 (citations omitted).

Indeed, as Petitioner recognizes, to market their loans to "potential customers," lenders "might refer to themselves and these types of loans as 'payday.'" *Pet. Op. Brief at p. 25*. That is, "payday" is such a widely accepted and commonly known term by both the industry and "potential customers" - in other words, voters - that the lenders themselves use it in their own marketing efforts. Accordingly, "payday" is not a misleading term.

In his Opening Brief, Petitioner also contends that the term "payday" is a catchphrase because it is a pejorative term, but he provides no context or evidence of this claim.[2] The Title Board rejected the claim that the term "payday" has a negative or pejorative connotation because the industry itself has adopted the term

[2] Petitioner attaches several exhibits to his Opening Brief that were not presented at either the initial hearing or the rehearing before the Title Board, are not certified copies, and are not part of the record in this case. *See Exhibits 2, 4, 5*. Accordingly, the Court should not consider them.

"payday loans" to describe this type of loan and uses the term almost exclusively in its marketing and communications efforts. *Tr. 85:5-11; 23-25; 86:1-5.* Indeed, Proponents introduced scores of pictures of storefronts from around Colorado, and numerous screenshots of Colorado payday lender websites demonstrating that the industry itself refers to these loans almost universally as payday loans. *See Resp. Op. Br., Exh. B.*

The Title Board agreed that voters and petition signers were not likely to know what a "deferred deposit loan" is, because the common term for these types of loans is "payday loans." *Tr. 81:9-15; 84:23-85:5.* The Title Board determined that the term "payday" contributed to voter understanding. *Id.* Instead of "provok[ing] emotion such that it impermissibly distracts voters from consideration of the initiative's merits," *Earnest v. Gorman (In re Initiative for 2009-2010 #45)*, 234 P.3d 642, 650 (Colo. 2010), the word "payday" is a descriptive term that presents the issue to voters in a manner that they will understand.

2. The Titles for Initiatives #183 and #184 Do Not Control Initiative #126.

Petitioner may argue that the Title Board's recent actions on Initiatives 2017-2018 #183 and #184 further demonstrate that "payday" is a catchphrase. For several reasons, he is incorrect.

On April 6, 2018, after the Opening Briefs were filed in this case, Petitioner introduced two new ballot initiatives, Initiatives 2017-2018 #183 and #184, both of which conflict and compete with Initiative #126. The Title Board initially heard these initiatives on April 18, 2018. Initiative #183 amends two of three same statutory sections as does Initiative #126, and, reduces the annual percentage rate for new and renewed payday loans to 36% but does not change maintenance fees or other charges charged by payday lenders. Initiative #184 amends one of the three same statutory sections as does Initiative #126 and reduces maintenance fees and other charges charged by payday lenders but does not reduce the annual percentage rate.

A different Title Board, composed of two of the same members (Deputy Secretary of State Suzanne Staiert and Assistant Solicitor General Glenn Roper) and one different member (Julie Pelegrin from OLLS was present for #126, and Jason Gelender from OLLS was present for #183 and #184), on a split vote of 2-1, set titles for Initiatives #183 and #184 using the term "deferred deposit loan" instead of "payday loan."[3]

[3] Compare members of Title Board at Rehearing on proposed Initiative 2017-2018 #126, *Tr. 3:1-12;5:20-22*, with members of Title Board at Initial Title Board Hearing on proposed Initiatives 2017-2018 #183 and #184 (Colo. April 18, 2018) (Statements of Suzanne Staiert) at Part 1 at 1:53-2:24; Part 2 at 9:54-10:01, *available at* https://www.sos.state.co.us/pubs/info_center/audioArchives.html.

First, this issue is not properly before the Court. Petitioner should not be allowed to raise a new matter in his answer brief, nor are Initiatives #183 and #184 and the Title Board's actions thereon in the record in this case.

Second, the actions of one Title Board do not somehow bind those of another, especially when, as here, the makeup of the two boards is different. Here, while Deputy Secretary Staiert voiced a concern that "payday" could be a catchphrase, Assistant Solicitor Glenn Roper had no such concerns and argued in favor of using "payday," and Jason Gelender said that he "could go either way with "payday" or "deferred deposit loan."[4] The mere fact that two different Title Boards employed different words in setting a title does not make the use of the term "payday" a catchphrase in Initiative #126. Notably, despite the Title Board using the term "deferred deposit" in the titles, the OLC used "payday" in the fiscal abstracts for both proposed Initiatives 2017-2018 #183 and #184. *See http://leg.colorado.gov/sites/default/files/initiatives/2018%2523183FI.00.pdf ; http://leg.colorado.gov/sites/default/files/initiatives/2018%2523184FI.00.pdf.*

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[4] Hearing on proposed Initiatives 2017-2018 #183 and #184 (Colo. April 18, 2018) (Statements of Jason Gelender, Suzanne Staiert and Glenn Roper) at Part 2 at 37:37-38:34, *available at* https://www.sos.state.co.us/pubs/info_center/audioArchives.html.

Third, at the Title Board hearing on #183 and #184, the proponents - one of whom is the Petitioner here - themselves requested that the titles do not contain the term "payday," and instead use "deferred deposit loan." Thus, all the Title Board did was defer to the proponents' own preference.

Fourth, at most all that the Title Board's actions on #183 and #184 indicate is that, as the statute itself provides, the two terms are interchangeable. *See* §5-3.1-102(3). It cannot be concluded from the Title Board's actions that the term "payday" somehow is pejorative or a catchphrase.

Here, the Title of Initiative #126 succinctly captures the key features of the measure, is not likely to mislead voters as to the initiative's purpose or effect, nor does the title contain a catchphrase.

CONCLUSION

The Proponents respectfully request the Court to affirm the actions of the Title Board regarding Proposed Initiative 2017-2018 #126.

Respectfully submitted this 23rd day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2018 a true and correct copy of the foregoing **RESPONDENTS' ANSWER BRIEF IN SUPPORT OF 2017-2018 INITIATIVE #126** was filed and served via the Colorado Courts E-Filing System to the following:

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In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.