

Colorado Supreme Court
101 West Colfax Avenue, Suite 800
Denver, CO 80202

Original Proceeding Pursuant to § 1-40-107(2), C.R.S.
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title and Submission
Clause for Proposed Initiatives 2011-2012 #67, #68 and
#69

Petitioner:
Philip Hayes

v.

Respondents:
David Ottke and John Slota,

and

Title Board:
Suzanne Staiert, Daniel Domenico, and Sharon Eubanks.

Attorneys for *Amicus Curiae* Parties:

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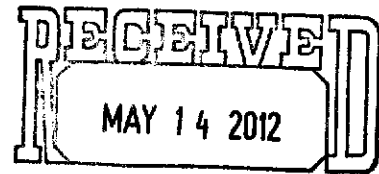
FILED IN THE
SUPREME COURT,

MAY 13 2012

OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

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Case Number: 2012SA117



CLERK
COLORADO SUPREME COURT.

**AMICUS CURIAE BRIEF FOR COLORADO CONCERN, DENVER
METRO CHAMBER OF COMMERCE, COLORADO COMPETITIVE
COUNCIL, COLORADO ASSOCIATION OF COMMERCE AND
INDUSTRY, AURORA CHAMBER OF COMMERCE, GRAND**

**JUNCTION AREA CHAMBER OF COMMERCE, ACTION 22, NAIOP
COLORADO, ECONOMIC DEVELOPMENT COUNCIL OF
COLORADO, PROGRESSIVE 15, CASTLE ROCK ECONOMIC
DEVELOPMENT COUNCIL, DENVER SOUTH ECONOMIC
DEVELOPMENT PARTNERSHIP, CLUB 20, PUEBLO CHAMBER OF
COMMERCE, VISIT DENVER, THE CONVENTION & VISITORS
BUREAU, COLORADO HOTEL AND LODGING ASSOCIATION
COLORADO OIL AND GAS ASSOCIATION, COLORADO
RESTAURANT ASSOCIATION, COLORADO ASSOCIATION OF
MECHANICAL AND PLUMBING CONTRACTORS, COLORADO
CONTRACTORS ASSOCIATION, COLORADO ASSOCIATION OF
SCHOOL BOARDS, ASSOCIATED GENERAL CONTRACTORS-
COLORADO, COLORADO BIOSCIENCE ASSOCIATION,
COLORADO'S FUTURE, COLORADO CHILDREN'S CAMPAIGN,
COLORADO EDUCATION ASSOCIATION, AND PIPEFITTERS LOCAL
UNION #208**

<p>Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, CO 80202</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Original Proceeding Pursuant to § 1-40-107(2), C.R.S. Appeal from the Ballot Title Board</p>	
<p>In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiatives 2011-2012 #67, #68 and #69</p> <p>Petitioner: Philip Hayes</p> <p>v.</p> <p>Respondents: David Ottke and John Slota,</p> <p>and</p> <p>Title Board: Suzanne Staiert, Daniel Domenico, and Sharon Eubanks.</p>	
<p>Attorneys for <i>Amicus Curiae</i> Parties:</p> <p>Name(s): Jason R. Dunn, #33011 Michael D. Hoke, #41034</p> <p>Address: BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432</p> <p>Phone Number: 303.223.1100 FAX Number: 303.223.1111 E-mail: jdunn@bhfs.com</p>	<p>Case Number: 2012SA117</p>
<p>CERTIFICATE OF COMPLIANCE</p>	

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).

Choose one:

It contains 2,088 words.

It does not exceed 30 pages.

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

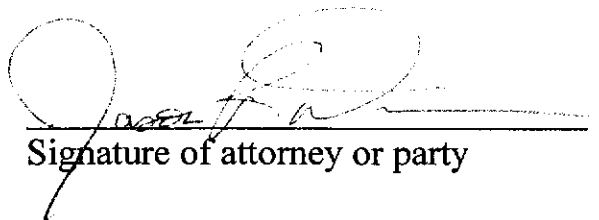
For the party raising the issue:

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.A.R. 32.


Signature of attorney or party

Pursuant to C.A.R. 29, the *amicus curiae* parties listed below, through their undersigned counsel, conditionally file this *amicus curiae* brief in support of Petitioner Philip Hayes, and state as follows:

AMICUS CURIAE PARTIES

The following organizations (collectively, the "Amicus Parties"), representing a wide array of business, labor, trade and community organizations, seek leave to participate as *amicus curiae*:

Business organizations and chambers of commerce:

- Colorado Concern
- Denver Metro Chamber of Commerce
- Colorado Competitive Council (C3)
- Colorado Association of Commerce and Industry
- Aurora Chamber of Commerce
- Grand Junction Area Chamber of Commerce
- Action 22
- NAIOP Colorado
- Economic Development Council of Colorado
- Progressive 15
- Castle Rock Economic Development Council
- Denver South Economic Development Partnership
- Club 20
- Pueblo Chamber of Commerce
- Visit Denver

Trade Associations:

- Colorado Hotel and Lodging Association
- Colorado Oil and Gas Association
- Colorado Restaurant Association
- Colorado Association of Mechanical and Plumbing Contractors

Colorado Contractors Association
Colorado Association of School Boards
Associated General Contractors – Colorado
Colorado Bioscience Association

Non-profit community organizations:

Colorado's Future
Colorado Children's Campaign

Labor organizations:

Colorado Education Association
Pipefitters Local Union #208

INTRODUCTION

The Amicus Parties are twenty-seven community business, labor, trade and community organizations that play an active role in shaping public policy in Colorado. They include statewide and local chambers of commerce, small business groups, the state's largest teachers' union, business advocacy organizations, three different rural advocacy groups representing all sixty-four counties, and children's interest non-profits.

While some of these organizations often work together on public policy issues, and even sometimes disagree on others, rarely do all twenty-seven of them come together on a single issue. Yet in 2011, they came together for one purpose: to draft and support a change in the way Colorado's citizen initiative process is conducted. The goal was to create greater transparency as to who is behind a

ballot measure and subsequent campaign, to ensure that initiative proponents would be held to a higher degree of accountability than under then-existing standards, and to improve the title-drafting process itself so as to ensure that the titles better reflect a measure's true purpose and effect. The result of this effort was House Bill 11-1072 ("HB 1072"), a bipartisan bill that received overwhelming support throughout the legislative process.

Because HB 1072 was successful in advancing these objectives, the Amicus Parties here seek to maintain that success through its participation in this case and by supporting the Petitioner's effort to reverse the Title Board's misinterpretation and misapplication of section 1-40-106(4)(a).

The language of section 1-40-106(4)(a) is unambiguous: it requires that both proponents attend every meeting of the Title Board in which the proponents' measure is considered. In refusing to conclude that it lacked jurisdiction in this matter based on the failure of one proponent, John Slota, to be present at the rehearing on April 19, the Title Board committed reversible error. The measure should therefore be returned to the Title Board with instruction to find that it lacks jurisdiction to set a title, and pursuant to 1-40-106(4)(d), shall afford the proponents the opportunity to each appear at the next regular meeting of the Title

Board and to have a title set, barring other defects in the measure or the proceeding.

ARGUMENT

I. SECTION 1-40-106(4)(a) UNAMBIGUOUSLY REQUIRED THAT BOTH PROPONENTS ATTEND THE REHEARING.

As *amicus curiae* participants in this case, the Amicus Parties primary objective is to help educate the Court regarding the legislative history and intent of Section 1-40-106(4)(a), which is set forth below. However, the Amicus Parties first argue that the Court need not reach into the legislative history of this provision because its language unambiguously requires that both proponents attended each and every hearing and rehearing at which their measure is considered. As that provision states:

each designated representative of the proponents *shall* appear at *any* title board *meeting* at which the designated representative's ballot issue is considered.

C.R.S. § 1-40-106(4)(a) (emphasis added).

Four key words in section 1-40-106(4)(a) support this conclusion. First, rather than describing the requirement as to who must attend the Title Board meetings as “a representative,” “one representative,” or even “the representatives,” the General Assembly elected to use the words “*each* designated representative.” “Each” is defined by Black’s Law Dictionary as:

a distributive adjective pronoun, which denotes or refers to every one of the persons or things mentioned; every one of two or more person or things, composing the whole, separately considered. Each is synonymous with "all" and agrees in inclusiveness¹

Black's definition is not a legal distinction differing from common usage; Webster's Dictionary defines "each" similarly as "being one of two or more distinct individuals having a similar relation and often constituting an aggregate; each one."²

Second, the legislature specifically required that the proponents both attend "any meeting" of the Title Board. The word "any" is likewise unambiguous. Webster's defines "any" as "one or some indiscriminately of whatever kind: . . . b: EVERY—used to indicate one selected without restriction"³ Thus, section 1-40-106(4) applies to "every" meetings indiscriminately and without restriction.

Third, the statute refers to the designated representatives attending any "meeting" of the Title Board, not any "hearing," which might arguably denote an intent to distinguish the first hearing of the Title Board from the subsequent rehearing. Had the legislature intended to limit the dual attendance requirement in that way, it could have easily said so, or it could have simply used the more

¹ BLACK'S LAW DICTIONARY 351 (abridged 6th ed. 1991).

² MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 391 (1985).

³ MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 93 (1989).

descriptive term “hearing” rather than the more generic “meeting.” But the legislature instead referred expressly to “any meeting” so as to require the proponents’ participation throughout the entire Title Board process.

Fourth, the statute uses the imperative “shall” in requiring each designated representative to appear. This term renders attendance at any meeting mandatory.⁴

Accordingly, the requirement that both proponents attend the rehearing is both unambiguous and inflexible, and is violated if *either* of the representatives is absent. Likewise, the statute is similarly unambiguous as to the effect of such failure:

The title board *shall not* set a title for a ballot issue if *either* designated representative of the proponents fails to appear at a title board meeting or file the affidavit as required by paragraphs (a) and (b) of this subsection (4). The title board may consider the ballot issue at its next meeting, but the requirements of this subsection (4) shall continue to apply.⁵

Thus, the Title Board simply lacks jurisdiction to set a title in such cases. Notably, this is no different than any other jurisdictional issue raised on rehearing, such as when a Title Board finds that substantive changes were made after the

⁴ See, e.g., *Colorado State Bd. of Med. Examiners v. Saddoris*, 825 P.2d 39, 43 (Colo. 1992) (“The word ‘shall’ is presumed to indicate a mandatory requirement.”).

⁵ C.R.S § 1-40-106(4)(d) (emphasis added).

review and comment hearing, that the measure is so vague as to make setting a title impossible, or that the measure contains multiple subjects in violation of constitutional single-subject requirement. In each case, the Title Board loses jurisdiction at the rehearing and must refuse to set a title. However, unlike those situations, the jurisdictional failure caused by not having both proponents at a meeting of the Title Board is not fatal, as the Title Board may reconsider the measure at a subsequent meeting if both proponents are then in attendance.

II. THE LEGISLATIVE HISTORY OF HB 1072 AND THE PURPOSES BEHIND THAT BILL DEMONSTRATES AN INTENT TO REQUIRE ATTENDANCE AT REHEARINGS.

HB 1072 (attached as Ex. 1) was the end product of the Amicus Parties and others coming together with legislative leaders and the Governor to try and improve the initiative process in Colorado. The purpose of the legislation was to create greater transparency, accountability, and clarity in the title-setting and signature-gathering process. Requiring that both proponents attend each and every hearing at which their initiative is considered was key to achieving these goals. This is particularly true in light of the fact that it is now common practice for objectors to a proposed measure to skip the initial meeting of the Title Board and object only through a subsequent written motion for rehearing and oral argument. As such, the rehearing has in reality become the “real” hearing on a measure.

Indeed, it is often the only point in the title setting process at which a detailed discussion regarding the meaning and effect of a measure occurs. Through objections raised by opponents at the rehearing, it is often the stage at which the Title Board fully examines the single-subject of the measure, whether substantive changes were made after review and comment hearing beyond those in direct response to questions or comments, and whether the title as initially adopted best reflects the true import of the measure.

Moreover, while the legislative hearings on HB 1072 did not focus on the attendance requirement (arguably because the language was so clearly unambiguous), multiple opponents of the measure testified that the idea of requiring attendance at every meeting of the Title Board was overly burdensome. For example, one opponent of the legislation expressly objected to requiring the proponents attend “all hearings” on the measure, and another testified against requiring “both representatives to show up at every single hearing” and that to “have them both show up for all of the different hearings is a complication, it’s a hurdle that is put in front of us...”⁶ Despite these protests, no one in the room—

⁶ See Exhibit 2 (audio recording of February 2, 2011 House Committee on State, Veterans, and Military Affairs hearing on HB 1072) at pt. 2 00:09:23–00:10:12 & 00:10:26–00:11:04 (testimony of Elena Nunez) & 00:13:10– 00:13:56 & 00:14:40–00:15:30 (testimony of Natalie Menten).

not the bill sponsor nor any committee member or supporter of HB 1072—
objected to this interpretation or claimed that the objectors were misreading the
proposed legislation. It appears simply that everyone present shared the same
reading of the legislation's attendance requirement as requiring both proponents to
attend every meeting of the Title Board.

Passing legislation that required both proponents to be at the rehearing not
only served the Amicus Parties policy objectives, it did not take long for their
concerns to become reality: at the April 26, 2012 rehearing on Initiative 2011–
2012 #95, the absence of both proponents became problematic when the Title
Board was left to speculate as to whether changes made to the measure by the
proponents were responsive to comments made at the review and comment
hearing. Proponents themselves were in the best position to answer these
questions, yet with both absent the Title Board was simply left to guess, relying
only on the directly contradictory statements of an objector whose counsel claimed
to have listened to the review and comment hearing, and the hearsay testimony of

one Title Board member who had apparently spoken with the staff person conducting that review and comment hearing.⁷

III. BECAUSE ONE OF THE PROPONENTS WAS ABSENT FROM THE REHEARING, THE TITLE BOARD LACKED JURISDICTION TO SET A TITLE.

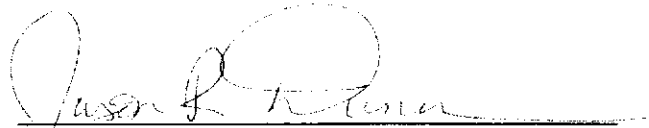
Initiatives 67, 68 and 69 were “considered” at the April 19, 2012 rehearing. Section 1-40-106(4)(a) therefore required the attendance of each proponent. Because Proponent John Slota failed to appear at that proceeding, section 1-40-106(4)(d) prohibited the Title Board from setting a title on any of the three measures. This interpretation of the relevant provisions is not only clear in the text of the statute, it is consistent with the legislative history on this provision and the intent of the Amicus Parties who were involved in the drafting of the legislation and supported it throughout the legislative process.

Accordingly, the Amicus Parties respectfully request that the Petitioner’s objection on this issue be upheld and that the Title Board be found to have lacked jurisdiction to set a title for Initiatives 67, 68, and 69 for that reason.

⁷ See Exhibit 3 (Transcript of April 26, 2012 Rehearing) at 141:25–149:4. It is also worth noting that in Initiative #95, which has been appealed to this Court by the undersigned counsel on behalf of a different objector than the Amicus Parties here (Case No. 2012SA130), the Title Board split 2–1 on whether section 1-40-106(a)(4) required both proponents to be in attendance at the rehearing. The Title Board’s handling of that issue will be more fully flushed out in the Opening Brief filed in that case, and the Amicus Parties here respectfully ask that the court take judicial notice of that pleading in this case.

Respectfully submitted this 14th day of May, 2012.

BROWNSTEIN HYATT FARBER SCHRECK LLP

A handwritten signature in black ink, appearing to read "Jason R. Dunn", is written over a horizontal line.

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CERTIFICATE OF SERVICE

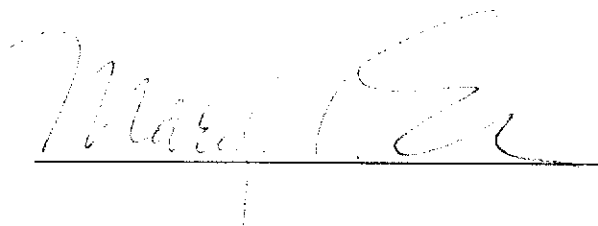
I hereby certify that on May 14, 2012, a true and correct copy of this
AMICUS CURIAE BRIEF OF COLORADO CONCERN, ET AL. was delivered
via overnight delivery service to the following:

David Ottke
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Aurora, CO 80013
Proponent

John Slota
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Denver, CO 80202
Attorney for Petitioner

Maurice G. Knaizer
Office of the Attorney General
1525 Sherman Street, 7th Floor
Denver, CO 80203
Attorney for the Title Board



A handwritten signature in cursive script, appearing to read "Mark G. Grueskin", is written over a horizontal line. A vertical line extends downwards from the center of the horizontal line.

NOTE: This bill has been prepared for the signature of the appropriate legislative officers and the Governor. To determine whether the Governor has signed the bill or taken other action on it, please consult the legislative status sheet, the legislative history, or the Session Laws.

An Act

HOUSE BILL 11-1072

BY REPRESENTATIVE(S) McNulty, Stephens, Liston, Brown, Casso, Court, Ferrandino, Gardner B., Labuda, Nikkel, Pace, Peniston, Soper, Todd, Tyler, Kerr J., Wilson;
also SENATOR(S) Morse.

CONCERNING THE RESPONSIBILITIES OF A DESIGNATED REPRESENTATIVE OF
THE PROPONENTS OF AN INITIATIVE PETITION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. Legislative declaration. According to decisions of the Colorado supreme court, an address falsely represents a person's residential address when it does not state the complete street number and name, apartment or room number, if applicable, city, and state of the place where a person makes his or her permanent domicile. The codification of the meaning of "false address" in House Bill 11-1072, enacted in 2011, is a clarification of existing law for future designated representatives.

SECTION 2. 1-40-102, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBSECTION to read:

1-40-102. Definitions. As used in this article, unless the context otherwise requires:

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

EXHIBIT 1

(3.7) "DESIGNATED REPRESENTATIVE OF THE PROPONENTS" OR "DESIGNATED REPRESENTATIVE" MEANS A PERSON DESIGNATED PURSUANT TO SECTION 1-40-104 TO REPRESENT THE PROPONENTS IN ALL MATTERS AFFECTING THE PETITION.

SECTION 3. 1-40-106 (1) and (3) (b), Colorado Revised Statutes, are amended, and the said 1-40-106 is further amended BY THE ADDITION OF A NEW SUBSECTION, to read:

1-40-106. Title board - meetings - titles and submission clause.

(1) For ballot issues, beginning with the first submission of a draft after an election, the secretary of state shall convene a title board consisting of the secretary of state, the attorney general, and the director of the office of legislative legal services or the director's designee. The title board, by majority vote, shall proceed to designate and fix a proper fair title for each proposed law or constitutional amendment, together with a submission clause, at public meetings to be held at the hour determined by the title board on the first and third Wednesdays of each month in which a draft or a motion for reconsideration has been submitted to the secretary of state. To be considered at such meeting, a draft shall be submitted to the secretary of state no later than 3 p.m. on the twelfth day before the meeting at which the draft is to be considered by the title board AND THE DESIGNATED REPRESENTATIVES OF THE PROPONENTS MUST COMPLY WITH THE REQUIREMENTS OF SUBSECTION (4) OF THIS SECTION. The first meeting of the title board shall be held no sooner than the first Wednesday in December after an election, and the last meeting shall be held no later than the third Wednesday in April in the year in which the measure is to be voted on.

(3) (b) In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board. Immediately upon completion, the secretary of state shall deliver the same with the original to the ~~parties presenting it~~ DESIGNATED REPRESENTATIVES OF THE PROPONENTS, keeping the copy with a record of

the action taken thereon. Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered "yes" (to vote in favor of the proposed law or constitutional amendment) or "no" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended, or repealed.

(4) (a) EACH DESIGNATED REPRESENTATIVE OF THE PROPONENTS SHALL APPEAR AT ANY TITLE BOARD MEETING AT WHICH THE DESIGNATED REPRESENTATIVE'S BALLOT ISSUE IS CONSIDERED.

(b) EACH DESIGNATED REPRESENTATIVE OF THE PROPONENTS SHALL CERTIFY BY A NOTARIZED AFFIDAVIT THAT THE DESIGNATED REPRESENTATIVE IS FAMILIAR WITH THE PROVISIONS OF THIS ARTICLE, INCLUDING BUT NOT LIMITED TO THE PROHIBITION ON CIRCULATORS' USE OF FALSE ADDRESSES IN COMPLETING CIRCULATOR AFFIDAVITS, AND THE SUMMARY PREPARED BY THE SECRETARY OF STATE PURSUANT TO PARAGRAPH (c) OF THIS SUBSECTION (4). THE AFFIDAVIT SHALL INCLUDE A PHYSICAL ADDRESS AT WHICH PROCESS MAY BE SERVED ON THE DESIGNATED REPRESENTATIVE. THE DESIGNATED REPRESENTATIVE SHALL SIGN AND FILE THE AFFIDAVIT WITH THE SECRETARY OF STATE AT THE FIRST TITLE BOARD MEETING AT WHICH THE DESIGNATED REPRESENTATIVE'S BALLOT ISSUE IS CONSIDERED.

(c) THE SECRETARY OF STATE SHALL PREPARE A SUMMARY OF THE DESIGNATED REPRESENTATIVES OF THE PROPONENTS' RESPONSIBILITIES THAT ARE SET FORTH IN THIS ARTICLE.

(d) THE TITLE BOARD SHALL NOT SET A TITLE FOR A BALLOT ISSUE IF EITHER DESIGNATED REPRESENTATIVE OF THE PROPONENTS FAILS TO APPEAR AT A TITLE BOARD MEETING OR FILE THE AFFIDAVIT AS REQUIRED BY PARAGRAPHS (a) AND (b) OF THIS SUBSECTION (4). THE TITLE BOARD MAY CONSIDER THE BALLOT ISSUE AT ITS NEXT MEETING, BUT THE REQUIREMENTS OF THIS SUBSECTION (4) SHALL CONTINUE TO APPLY.

(e) THE SECRETARY OF STATE SHALL PROVIDE A NOTARY PUBLIC FOR THE DESIGNATED REPRESENTATIVES AT THE TITLE BOARD MEETING.

SECTION 4. 1-40-113 (1) (a) and (3), Colorado Revised Statutes,

are amended to read:

1-40-113. Form - representatives of signers. (1) (a) Each section of a petition shall be printed on a form as prescribed by the secretary of state. No petition shall be printed, published, or otherwise circulated unless the form and the first printer's proof of the petition have been approved by the secretary of state. THE DESIGNATED REPRESENTATIVES OF THE PROPONENT ARE RESPONSIBLE FOR FILING THE PRINTER'S PROOF WITH THE SECRETARY OF STATE, AND THE SECRETARY OF STATE SHALL NOTIFY THE DESIGNATED REPRESENTATIVES WHETHER THE PRINTER'S PROOF IS APPROVED. Each petition section shall designate by name and mailing address two persons who shall represent the signers thereof in all matters affecting the same. The secretary of state shall assure that the petition contains only the matters required by this article and contains no extraneous material. All sections of any petition shall be prenumbered serially, and the circulation of any petition section described by this article other than personally by a circulator is prohibited. Any petition section circulated in whole or in part by anyone other than the person who signs the affidavit attached to the petition section shall be invalid. Any petition section that fails to conform to the requirements of this article or is circulated in a manner other than that permitted in this article shall be invalid.

(3) Prior to the time of filing, the persons designated in the petition to represent the signers shall bind the sections of the petition in convenient volumes consisting of one hundred sections of the petition if one hundred or more sections are available or, if less than one hundred sections are available to make a volume, consisting of all sections that are available. Each volume consisting of less than one hundred sections shall be marked on the first page of the volume. However, any volume that contains more or less than one hundred sections, due only to the oversight of the designated representatives of the signers or their staff, shall not result in a finding of insufficiency of signatures therein. Each section of each volume shall include the affidavits required by section 1-40-111 (2), together with the sheets containing the signatures accompanying the same. These bound volumes shall be filed with the secretary of state BY THE DESIGNATED REPRESENTATIVES OF THE PROPONENTS.

SECTION 5. 1-40-117 (3) (b), Colorado Revised Statutes, is amended to read:

1-40-117. Statement of sufficiency - statewide issues. (3) (b) In the event the secretary of state issues a statement declaring that a petition, having first been submitted with the required number of signatures, appears not to have a sufficient number of valid signatures, the ~~representatives designated by the proponents pursuant to section 1-40-104~~ DESIGNATED REPRESENTATIVES OF THE PROPONENTS may cure the insufficiency by filing an addendum to the original petition for the purpose of offering such number of additional signatures as will cure the insufficiency. No addendum offered as a cure shall be considered unless the addendum conforms to requirements for petitions outlined in sections 1-40-110, 1-40-111, and 1-40-113 and unless the addendum is filed with the secretary of state within the fifteen-day period after the insufficiency is declared and unless filed with the secretary of state no later than three months and three weeks before the election at which the initiative petition is to be voted on. All filings under this paragraph (b) shall be made by 3 p.m. on the day of filing. Upon submission of a timely filed addendum, the secretary of state shall order the examination and verification of each signature on the addendum. The addendum shall not be available to the public for a period of up to ten calendar days for such examination. After examining the petition, the secretary of state shall, within ten calendar days, issue a statement as to whether the addendum cures the insufficiency found in the original petition.

SECTION 6. 1-40-121, Colorado Revised Statutes, is REPEALED AND REENACTED, WITH AMENDMENTS, to read:

1-40-121. Designated representatives - expenditures related to petition circulation - report - penalty - definitions. (1) AS USED IN THIS SECTION, UNLESS THE CONTEXT OTHERWISE REQUIRES:

(a) "EXPENDITURE" SHALL HAVE THE SAME MEANING AS SET FORTH IN SECTION 2 (8) OF ARTICLE XXVIII OF THE STATE CONSTITUTION AND INCLUDES A PAYMENT TO A CIRCULATOR.

(b) "FALSE ADDRESS" MEANS THE STREET ADDRESS, POST OFFICE BOX, CITY, STATE, OR ANY OTHER DESIGNATION OF PLACE USED IN A CIRCULATOR'S AFFIDAVIT THAT DOES NOT REPRESENT THE CIRCULATOR'S CORRECT ADDRESS OF PERMANENT DOMICILE AT THE TIME HE OR SHE CIRCULATED PETITIONS. "FALSE ADDRESS" DOES NOT INCLUDE AN ADDRESS THAT MERELY OMITS THE DESIGNATION OF "STREET," "AVENUE,"

"BOULEVARD," OR ANY COMPARABLE TERM.

(c) "REPORT" MEANS THE REPORT REQUIRED TO BE FILED PURSUANT TO SUBSECTION (2) OF THIS SECTION.

(2) NO LATER THAN TEN DAYS AFTER THE DATE THAT THE PETITION IS FILED WITH THE SECRETARY OF STATE, THE DESIGNATED REPRESENTATIVES OF THE PROPONENTS MUST SUBMIT TO THE SECRETARY OF STATE A REPORT THAT:

(a) STATES THE DATES OF CIRCULATION BY ALL CIRCULATORS WHO WERE PAID TO CIRCULATE A SECTION OF THE PETITION, THE TOTAL HOURS FOR WHICH EACH CIRCULATOR WAS PAID TO CIRCULATE A SECTION OF THE PETITION, THE GROSS AMOUNT OF WAGES PAID FOR SUCH HOURS, AND ANY ADDRESSES USED BY CIRCULATORS ON THEIR AFFIDAVITS THAT THE DESIGNATED REPRESENTATIVES OR THEIR AGENTS HAVE DETERMINED, PRIOR TO PETITION FILING, TO BE FALSE ADDRESSES;

(b) INCLUDES ANY OTHER EXPENDITURES MADE BY ANY PERSON OR ISSUE COMMITTEE RELATED TO THE CIRCULATION OF PETITIONS FOR SIGNATURES. SUCH INFORMATION SHALL INCLUDE THE NAME OF THE PERSON OR ISSUE COMMITTEE AND THE AMOUNT OF THE EXPENDITURE.

(3) (a) WITHIN TEN DAYS AFTER THE DATE THE REPORT IS FILED, A REGISTERED ELECTOR MAY FILE A COMPLAINT ALLEGING A VIOLATION OF THE REQUIREMENTS FOR THE REPORT SET FORTH IN SUBSECTION (2) OF THIS SECTION. THE DESIGNATED REPRESENTATIVES OF THE PROPONENTS MAY CURE THE ALLEGED VIOLATION BY FILING A REPORT OR AN ADDENDUM TO THE ORIGINAL REPORT WITHIN TEN DAYS AFTER THE DATE THE COMPLAINT IS FILED. IF THE VIOLATION IS NOT CURED, AN ADMINISTRATIVE LAW JUDGE SHALL CONDUCT A HEARING ON THE COMPLAINT WITHIN FOURTEEN DAYS AFTER THE DATE OF THE ADDITIONAL FILING OR THE DEADLINE FOR THE ADDITIONAL FILING, WHICHEVER IS SOONER.

(b) (I) AFTER A HEARING IS HELD, IF THE ADMINISTRATIVE LAW JUDGE DETERMINES THAT THE DESIGNATED REPRESENTATIVES OF THE PROPONENTS INTENTIONALLY VIOLATED THE REPORTING REQUIREMENTS OF THIS SECTION, THE DESIGNATED REPRESENTATIVES SHALL BE SUBJECT TO A PENALTY THAT IS EQUAL TO THREE TIMES THE AMOUNT OF ANY EXPENDITURES THAT WERE OMITTED FROM OR ERRONEOUSLY INCLUDED IN

THE REPORT.

(II) IF THE ADMINISTRATIVE LAW JUDGE DETERMINES THAT THE DESIGNATED REPRESENTATIVES INTENTIONALLY MISSTATED A MATERIAL FACT IN THE REPORT OR OMITTED A MATERIAL FACT FROM THE REPORT, OR IF THE DESIGNATED REPRESENTATIVES NEVER FILED A REPORT, THE REGISTERED ELECTOR WHO INSTITUTED THE PROCEEDINGS MAY COMMENCE A CIVIL ACTION TO RECOVER REASONABLE ATTORNEY FEES AND COSTS FROM THE DESIGNATED REPRESENTATIVES OF THE PROPONENTS.

(c) EXCEPT AS OTHERWISE PROVIDED IN THIS SECTION, ANY PROCEDURES RELATED TO A COMPLAINT SHALL BE GOVERNED BY THE "STATE ADMINISTRATIVE PROCEDURE ACT", ARTICLE 4 OF TITLE 24, C.R.S.

SECTION 7. 1-40-135 (3) (a), Colorado Revised Statutes, is amended to read:

1-40-135. Petition entities - requirements - definitions.
(3) (a) Any procedures by which alleged violations involving petition entities are heard and adjudicated shall be governed by the "State Administrative Procedure Act", article 4 of title 24, C.R.S. If a complaint is filed with the secretary of state pursuant to section 1-40-132 (1) alleging that a petition entity was not licensed when it compensated any circulator, the secretary may use information that the entity is required to produce pursuant to ~~section 1-40-121 (1)~~ SECTION 1-40-121 and any other information to which the secretary may reasonably gain access, including documentation produced pursuant to paragraph (b) of subsection (2) of this section, at a hearing. After a hearing is held, if a violation is determined to have occurred, such petition entity shall be fined by the secretary in an amount not to exceed one hundred dollars per circulator for each day that the named individual or individuals circulated petition sections on behalf of the unlicensed petition entity. If the secretary finds that a petition entity violated a provision of paragraph (c) of subsection (2) of this section, the secretary shall revoke the entity's license for not less than ninety days or more than one hundred eighty days. Upon finding any subsequent violation of a provision of paragraph (c) of subsection (2) of this section, the secretary shall revoke the petition entity's license for not less than one hundred eighty days or more than one year. The secretary shall consider all circumstances surrounding the violations in fixing the length of the revocations.

SECTION 8. Act subject to petition - effective date - applicability. (1) This act shall take effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 10, 2011, if adjournment sine die is on May 11, 2011); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part shall not take effect unless approved by the people at the general election to be held in November 2012 and shall take effect on the date of the official declaration of the vote thereon by the governor.

(2) The provisions of this act shall apply to initiative petitions submitted to the directors of the legislative council and the office of

legislative legal services for review and comment on or after the applicable effective date of this act.

Frank McNulty
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Brandon C. Shaffer
PRESIDENT OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Cindi L. Markwell
SECRETARY OF
THE SENATE

APPROVED _____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO

1

BEFORE THE INITIATIVE TITLE SETTING REVIEW BOARD
STATE OF COLORADO
DEPARTMENT OF STATE
April 26, 2012

INITIATIVE 94: Establishment of Banks Owned by
Political Subdivision

INITIATIVE 95: Establish a State-Owned Bank

The initiatives came on for hearing at
1700 Broadway, 2nd Floor Blue Spruce Conference Room,
Denver, Colorado 80290, on April 26, 2012, at 2:46
p.m., before Lori A. Martin, Registered Merit Reporter,
Certified Realtime Reporter, and Notary Public within
Colorado.

2

1 Title Setting Review Panel:
2 Suzanne Staiert, Deputy Secretary of State
3 Jason Gelender, Office of Legislative Legal
4 Services
5 Dan Domenico, Solicitor General
6 Maurice Knaizer, Assistant Attorney General
7
8 Proponent Representative:
9 Earl H. Staelin, Esq.
10 For the Objector Don Childears, Colorado Banking
11 Association and Colorado Mortgage Lending Association:
12 JASON R. DUNN, ESQ.
13 Brownstein Hyatt Farber Schreck, LLP
14 410 17th Street, Suite 2200
15 Denver, Colorado 80202
16 THOMAS M. ROGERS III, ESQ.
17 NATHANIEL SCOTT BARKER, ESQ.
18 Rothgerber Johnson & Lyons, LLP
19 1200 17th Street, Suite 3000
20 Denver, Colorado 80202
21
22 Also Present: Steve Ward
23 Andrea Gyger
24
25

3

P R O C E E D I N G S

1 MS. STAIERT: All right. We're back on
2 the record of the title setting board. The next item
3 up is No. 94, Establishment of Banks Owned by Political
4 Subdivision. This item is scheduled for a rehearing,
5 and the time is now 2:46. And if the petitioner could
6 come forward. Or petitioners. And just to the podium.
7 We'll have some questions. First I'm going to read it
8 into the record.
9
10 This is "An amendment to the Colorado
11 Constitution concerning authorization for political
12 subdivisions to establish and operate banks, and, in
13 connection therewith, specifying requirements for the
14 governance of such banks, including capitalization
15 requirements; allowing the political subdivisions to
16 self-insure deposits with their full faith and credit;
17 and authorizing the general assembly to provide
18 regulatory guidelines for the oversight of these public
19 banks by the state banking board and the commissioner
20 of financial services."
21
22 Does the proponent have anything he would
23 like to say based on what's been filed in the petition?
24
25 MR. STAE LIN: Well, we -- we think the
petition complies with the requirements. The initial
motion didn't really detail the reasons for it, and

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1 then a motion was filed later, yesterday afternoon,
2 that spelled out, I think, more what the reasons are.
3 They seem to be based on exactly the same basis, so --
4 MS. STAIERT: Okay. All right. Thank
5 you. If the petitioner could come forward and identify
6 themselves. You can go ahead and have a seat. Thanks.
7 MR. DUNN: Good afternoon, my name is
8 Jason Dunn. I'm with Brownstein, Hyatt, Farber,
9 Schreck, and I am here on behalf of Objector Don
10 Childears and also the Colorado Banking Association and
11 the Colorado Mortgage Lending Association.
12 Before I begin, I have to say it feels a
13 little bizarre to be here without Mr. Hobbs sitting in
14 that chair. I think over the last ten years I've done
15 this, either on this side of the podium or in
16 Mr. Domenico's chair or as Mr. Hobbs' attorney while in
17 the Attorney General's office, I had a chance to work
18 with him, and he was a great public servant and I was
19 honored to work with him, and I'm sure he's not
20 listening today, but if he were, I would thank him for
21 his service on the title board, so I just wanted to
22 make that comment.
23 MS. STAIERT: Thank you.
24 MR. DUNN: Let me start with a
25 jurisdictional issue, and what I'd like to do is -- I

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1 know there's another objector with a jurisdictional
 2 issue, and I'm going to step aside and let them raise
 3 that, and then I would like to come back up and talk
 4 about some of the substantive arguments that we have
 5 before we get into the title.
 6 As the board knows, and I think it was
 7 raised last week, Section 1-40-105(4) and (4)(a) and
 8 (4)(d) of the Colorado Revised Statutes both require
 9 that both of the proponents be at the title board
 10 hearings on any measure. Subsection (4)(a) states
 11 "Each designated representative of the proponents shall
 12 appear at any title board meeting at which the
 13 designated representative's ballot issue is
 14 considered," and I think there's three primary -- three
 15 key words in that -- in that sentence.
 16 First, it says "Each designated
 17 representative." It doesn't say a designated
 18 representative, it doesn't say one of the designated
 19 representatives, it says each of the -- of the
 20 designated representatives; and I know Mr. Staelin is
 21 here as the proponent, but I believe the other
 22 proponent is not here.
 23 And it also says, in the provision,
 24 that -- that they shall appear at any title board
 25 meeting. It doesn't say the original meeting, it

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1 doesn't say the first meeting, it says any title board
 2 meeting; and I think, finally, the word "meeting" is
 3 important. It doesn't say hearing, which could then be
 4 argued, Well, maybe that doesn't mean a rehearing, it
 5 says any meeting of the title board.
 6 So on that basis, we would argue that the
 7 title board does not have jurisdiction under subsection
 8 (4)(d), which says, "The title board shall not set a
 9 title for a ballot issue if either" of the desig -- "if
 10 either designated representative of the proponents
 11 fails to appear."
 12 So I'd start with that issue. I can open
 13 that up for either questions or let the board discuss
 14 that, and as I said, I'll -- I'll step aside if we go
 15 forward and -- and let one of the other objectors
 16 speak.
 17 MS. STAIERT: Okay.
 18 MR. DOMENICO: Okay. What -- we talked
 19 about it, that basic situation last week, and I -- I
 20 guess my question is, what would -- what purpose would
 21 it serve to enforce the statute as you say it should be
 22 interpreted? Just to make it a big pain to put
 23 something on the ballot that was not a -- necessarily
 24 something that should be difficult? But, I mean,
 25 what -- what purpose does it serve to have somebody

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1 extra sitting here?
 2 MR. DUNN: Well, that's not true. I --
 3 although I'm not representing him here today, I do
 4 represent the Denver Metro Chamber of Commerce, who was
 5 a proponent and advocate of House Bill 11-1072 last
 6 year which put this change into law, and I can tell you
 7 it was their intent to have every designated
 8 representative at each of the hearings, and the
 9 purpose, as I recall, from last year, and in talking to
 10 them since then -- although talking to them since then,
 11 of course, is sort of a post-talk commentary, but the
 12 intent was to ensure that the proponents of a measure
 13 are involved in the title board process, that it's not
 14 merely drafting a measure and submitting it and letting
 15 it go through the title board process but that it's
 16 important for the title board to have both of the
 17 designated representatives here to answer questions and
 18 to inform the electorate about the nature of a matter
 19 and what it means.
 20 MS. STAIERT: But once we've already set a
 21 title, then what is the -- I mean, there's no remedy
 22 provided in that portion of the statute.
 23 MR. DUNN: Well, Madam Chair, if you mean
 24 a remedy for the proponent for failure, there -- there
 25 is. The remedy is -- is to go back and go through the

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1 process again.
 2 And let me answer it this way. I guess I
 3 should have answered Mr. Domenico's question in the
 4 first instance this way. What the intent of the
 5 legislator -- legislature is or what the intent of the
 6 advocacy groups who drafted the measure was in 2011 is
 7 not really the relevant question. The -- the statutory
 8 provision is clear on its face. It says each
 9 designated representative, it says any meeting, and it
 10 doesn't refer to hearings.
 11 I don't know how you read that provision
 12 any other way but to require both proponents be here.
 13 MR. DOMENICO: So what part of it, then,
 14 says what we're supposed to do at a rehearing where
 15 we've already set a title?
 16 MR. DUNN: "The title board shall not set
 17 a title for a ballot issue if either designated
 18 representative of" both the "proponents fails to appear
 19 at a title board meeting."
 20 MR. DOMENICO: Right. So if today I say,
 21 All right, I agree with Mr. Dunn, let's not set a title
 22 today, we're not -- what we have in front of us is a
 23 motion for rehearing and we're -- that we either deny
 24 or grant the motion for rehearing, and we can amend the
 25 title, but if we just say we deny the motion for

9

1 rehearing, we haven't set a title, the title has
 2 already been set.
 3 And so I guess my point is, and I think
 4 the question the Chair was asking was what's the
 5 remedy? So I think we all can agree at least at some
 6 point, the proponents have to show up, and they did
 7 show up at the original meeting. That serves -- and I
 8 agree with you, the intent of whoever was advocating
 9 for this is not really relevant, and it wasn't what I
 10 was asking. The question I was asking is what would be
 11 the purpose of our interpreting what I think is a
 12 somewhat -- part of it, I agree with you, is not very
 13 ambiguous.
 14 The consequences of failing to comply with
 15 it to me are at least ambiguous and our obligation that
 16 if -- if we think only -- if only one proponent is
 17 here, what we're supposed to do with that fact is
 18 ambiguous and where we sort of ran into I'm not sure
 19 what to do last time; and so I wonder what the purpose
 20 is of saying not only does that mean we're not going to
 21 listen to any arguments, perhaps, that the proponents
 22 make because they're not both here, but that the
 23 consequence should be that we go back and undo what we
 24 did last time when they did -- when they were both
 25 here, and so that's where I think the question is.

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1 Why -- why does the remedy -- why is the
 2 remedy what you suggest, that we don't have
 3 jurisdiction not only -- I mean, because what we're
 4 here for is a motion for rehearing and what you want us
 5 to do, though, is go back and undo what we did last
 6 week.
 7 Well, I would -- I would answer that two
 8 ways: First of all, section -- subsection 4(d) says,
 9 "The title board may consider the ballot issue at its
 10 next meeting, but the requirements of this Section 4
 11 shall continue to apply." That's one option, is that
 12 you can punt the measure to the next hearing.
 13 Second, there are a variety of
 14 jurisdictional issues that can be raised on a motion
 15 for rehearing, and of course vagueness is one; changes,
 16 substantial changes made after the review and comment
 17 hearing. And those, in principle, are the same issue
 18 that's being raised here. It's a jurisdictional
 19 question for the title board.
 20 Either you have jurisdiction to continue
 21 this proceeding or you don't, and if you interpret
 22 Section (4)(a) as requiring both proponents to be at
 23 any title board meeting at which the measure is
 24 discussed and you find that they are not both here,
 25 then the title board simply does not have jurisdiction;

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1 and I think the remedy, then, is either to ask the
 2 proponents to go back and start the process over or
 3 simply move into the next hearing.
 4 MR. DOMENICO: And then what if they don't
 5 show up at the next hearing?
 6 MR. DUNN: Then I think the title board
 7 has to make a decision about whether it has
 8 jurisdiction to hear the measure.
 9 MR. DOMENICO: I agree with that.
 10 MS. STAIERT: And how do you read it with
 11 the section that has to do with rehearing? Because
 12 under the section specifically with rehearing, it just
 13 says any person may bring forward a -- a petition. It
 14 doesn't say anything about their presence. I mean, to
 15 me, it appears that it might be to their detriment to
 16 not show up, but they already have a title set. If
 17 they would like to let the petitioners have the only
 18 word, take their chances, I mean, it seems to me like
 19 that's the process that's set up in that statute.
 20 MR. DUNN: Well, I think 1-40-106 is
 21 titled "Title board - meetings," not singular, plural.
 22 It talks about all the meetings of the title board, and
 23 that section involves how the title board meetings are
 24 conducted, so the fact that a particular topic is
 25 discussed there and not in a rehearing section I'm not

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1 sure is dispositive -- I think it's not dispositive of
 2 the question of whether or not both proponents
 3 have to -- have to be at that rehearing.
 4 And, again, I would just fall back on the
 5 language. I think it's completely unambiguous that the
 6 legislature intended for both proponents to be at any
 7 meeting of the title board that discusses the
 8 measure.
 9 MS. STAIERT: Although one could argue
 10 that because rehearsings is specific to rehearsings, the
 11 other one being more general, that rehearsings will
 12 apply.
 13 MR. DUNN: Well, I might agree with you if
 14 it said any title board hearing, but it doesn't. It
 15 says any title board meeting, and I think in that case
 16 that was meant to be inclusive of -- of hearings or
 17 rehearsings.
 18 MR. STAELIN: May I say something?
 19 MS. STAIERT: Sure.
 20 MR. STAELIN: From here?
 21 MS. STAIERT: No, you got to go up to the
 22 podium and just identify yourself again since we're
 23 taped.
 24 MR. STAELIN: All right. Earl Staelin,
 25 one of the proponents.

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1 I agree with Mr. Domenico, where the
 2 language in that statute is shall not set a title, the
 3 title has been set. Also, Mr. Bows would be here, but
 4 he was scheduled well before this hearing was set, not
 5 realizing that we'd be in this situation and before
 6 the earlier rehearing, to be in conference in
 7 Pennsylvania; and he left early yesterday before we
 8 knew there would be any appeal.

9 And also he's authorized me to be his
 10 representative. We don't represent other people in
 11 this particular title. We are the people who filed it,
 12 but I'm, in that sense, his authorized representative,
 13 and I think if -- if a motion were filed and had no
 14 merit, let's say, and one of the proponents was sick,
 15 had to be out of town or even died, I think it would
 16 be, if nothing else, a denial of due process to say
 17 that the board couldn't hear it.

18 MS. STAIERT: Thank you. Further
 19 discussion by the board?

20 MR. DOMENICO: Well, I'll just sort of
 21 reiterate what I said last time. I think Mr. Dunn
 22 makes a perfectly reasonable argument about the
 23 interpretation of the requirements of that statute. I
 24 do question, though, whether the consequence of that on
 25 a petition for -- on a motion for rehearing is that we

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1 somehow should go back and say that we no longer have
 2 jurisdiction over the entire proposal, measure, and
 3 undo what we did last time when all the procedural
 4 requirements -- requirements were met.

5 It may very well be that that's the better
 6 interpretation, but I think in keeping with the
 7 generally liberal interpretation of the right to
 8 petition, I am inclined to give the benefit of the
 9 doubt to the idea that whatever technical failure to
 10 comply with that -- with the first part of the statute
 11 does, in the context of a rehearing, I don't know that
 12 it means we don't have jurisdiction over the entire
 13 measure anymore.

14 MS. STAIERT: All right. Do you want to
 15 make a motion?

16 MR. DOMENICO: Sure, if that's all.

17 MS. STAIERT: Jason, do you have a
 18 comment?

19 MR. GELENDER: Yeah, there's -- I do want
 20 to comment. I think that Mr. Dunn has a very valid
 21 point. I have no doubt whatsoever that the general
 22 assembly intended to make both proponents show up at
 23 any title board meeting and the language is very clear.

24 On the other hand, I see Mr. Domenico's
 25 point that it's not an issue of -- I mean, we already

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1 have set a title, so I don't know how we really undo
 2 that as a consequence. I guess I would be curious as
 3 to what should happen were we to think we needed to
 4 amend the title we've already set, if that, then, sort
 5 of kicks it back, because then that would be setting
 6 another title or a different title. I don't know if
 7 that changes things or not.

8 MR. DOMENICO: Yeah. I mean, I -- my view
 9 is, if my -- I think you can obviously argue to the
 10 contrary that what we're actually doing is granting, as
 11 we -- as the language of the motions we actually make
 12 and adopt at the meetings says, what we're doing is
 13 granting or denying the motion except to the extent, et
 14 cetera, et cetera, other than setting a title itself.

15 On the other hand, it may very well be
 16 that -- again, I go back to sort of the point if -- if
 17 the result is we can't amend the title, it would give
 18 proponents a strange incentive if they like the title
 19 we set originally, so -- and it may very well be that
 20 the consequence of failing to have both proponents at a
 21 rehearing is that the measure goes away and can't be on
 22 the ballot. I'm just not sure that it's our obligation
 23 to enforce or -- not just obligation, our right to
 24 enforce that rule, that that may be somewhat -- there
 25 may be a -- a better way to carry that out.

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1 So I'm inclined, until told otherwise, to
 2 continue hearing these. We've never actually required
 3 the proponents themselves to speak to us directly or to
 4 hear from them directly. They can be represented, as
 5 the objector is here by counsel, and so I don't think
 6 it serves the purpose necessarily of making sure we can
 7 ask them questions if we want to.

8 I do think it serves the purpose, that new
 9 language, of ensuring that one person isn't just
 10 putting other people's names on something and filing it
 11 who may not actually understand or care about the
 12 proposal, but that's -- that purpose is served fairly
 13 well by having them come to the original meeting, which
 14 they're required to do. So that's where I am, and I'd
 15 like to say we didn't have to hear all these rehearings
 16 that we've heard in the last week or so, but I think we
 17 should do it anyway.

18 So I'll go back and finalize my motion to
 19 deny the, I guess, objection to our jurisdiction on
 20 that basis.

21 MS. STAIERT: Second. All those in favor?
 22 Aye.

23 MR. DOMENICO: Aye.
 24 MS. STAIERT: Opposed?
 25 MR. GELENDER: No.

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1 MS. STAIERT: It passes two to one.
 2 If you could just introduce yourself and
 3 present your petition.
 4 MR. ROGERS: I will. Members of the
 5 board, Thomas Rogers. I represent Barbara Walker, a
 6 registered elector, and also the Independent Bankers of
 7 Colorado. Thanks for hearing our motion this
 8 afternoon.
 9 As Mr. Dunn indicated, we have -- because
 10 we raise similar arguments in our motions, we have, for
 11 purpose of efficiency, divided those arguments. I'm
 12 going to address the proponents' failure to comply with
 13 Article V, section 1(8) of the Colorado Constitution,
 14 and C.R.S. 1-40-105(4). Mr. Dunn has addressed the
 15 requirement that the proponents be here and, if
 16 necessary, will make some further arguments, and I'd
 17 like to note for the record that we adopt those
 18 arguments.
 19 So I listened with interest at your last
 20 meeting to the discussion about the impact of the
 21 whereas clauses in this initiative, and like you, I was
 22 puzzled until I had a chance to get back to the office
 23 and do a little research. And having conducted that
 24 research, it's my position that the manner in which
 25 this initiative has been drafted does not comply with

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1 Article V, section 1(8), nor does it comply with C.R.S.
 2 1-40-105(4) and for those reasons this board does not
 3 have jurisdiction, did not have jurisdiction to set a
 4 title and must, in fact, reject this initiative and
 5 require it to be resubmitted in a proper format.
 6 The first authority I've cited, Article V,
 7 section 1(8) of the Colorado Constitution, requires an
 8 enacting clause at the top of any initiative. It is
 9 clear from the constitution that language that doesn't
 10 fall under the constitutionally required enacting
 11 clause cannot be part of an initiative and therefore
 12 cannot be -- cannot become part of the constitution.
 13 That provision, Article V, section 1(8), requires
 14 language to precede the language of the initiative.
 15 The form must be "Be it Enacted by the people of the
 16 state of Colorado," colon, and then on with the measure
 17 of the language.
 18 Here, that enacting clause appears in the
 19 middle of the text that's been filed. So the answer to
 20 the question first, I think, that you struggled with
 21 last week is that anything above that enacting clause
 22 simply is not part -- properly part of an initiative
 23 and cannot become part of the constitution.
 24 That leads to the question, what is it?
 25 What -- what do we do with it now? It's there. It

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1 can't be there. It can't have any legal effect, so
 2 what do we do with it? Well, that's where we get to
 3 C.R.S. 1-40-105(4), which requires, after review and
 4 comment hearing -- sorry.
 5 I'm sorry. Let me back up and point out
 6 that leg council pointed out precisely the argument
 7 that I've just advanced to the proponents in their --
 8 in their memo. They said, Look, if you want these
 9 whereases to be part of your measure, they need to fall
 10 under the enacting clause, so the proponents had a full
 11 opportunity to -- to cure the defects in their
 12 initiative.
 13 So, again, what do we do with these? I
 14 think we have to go on and take look at '105(4), which
 15 requires that initiatives be filed with the SOS
 16 "without any title, submission clause, or ballot title
 17 providing the designation by which the voter shall
 18 express their choice for or against" -- I'll slow
 19 down -- "the proposed law or constitutional amendment."
 20 So the fact that the whereases fall above
 21 the enacting clause violates this requirement, and,
 22 again, violates Article V, section 1(8).
 23 So, what do you do with this? Well, I --
 24 I think -- I think what is required is a
 25 determination -- if you don't have jurisdiction to set

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1 a title for this measure, what if you reduce it to do
 2 something to the contrary, if you were to move forward
 3 and -- and go ahead and deny this motion for rehearing
 4 and set a title? Well, first, I think you'd open the
 5 door for the proponents of any measure in the future to
 6 put whatever the heck they want to put above the
 7 enacting clause, whatever kind of propaganda they want
 8 to include, they can include, and I suspect they would
 9 point back to this hearing and -- and suggest that you
 10 just can't remove their stuff, that even though it
 11 violates the constitution, it violates -- it violates
 12 statute, you've got to leave it in and I would suggest
 13 that's a -- that would be a complete disaster, that you
 14 guys would radically change the way that initiatives
 15 are drafted and filed in the state of Colorado.
 16 Finally, I want to point out that -- well,
 17 two things: First, the decision about whether this
 18 initiative violates the constitution and the statute
 19 falls squarely in your court. If you look at In re
 20 Petitions on Campaign and Political Finance, which is
 21 at 877 P.2d 311, Colorado Supreme Court 1994. Let me
 22 do that a little slower, because I see Mr. Knaizer
 23 going for his pen there. That's 877 P.2d 311, Colorado
 24 Supreme Court of '94.
 25 There an objector raised an objection to

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1 the sufficiency of a submission with the Secretary of
 2 State, a petition for initiative with the Secretary of
 3 State, and the Supreme Court said that certainly the --
 4 the burden of proving that there's a defect falls on
 5 the objector but that the result of a defect is that it
 6 would deprive the title board of the -- of jurisdiction
 7 to set title. So this falls within your purview.
 8 Finally, it is certainly the case that you
 9 must lean towards setting title to provide access to
 10 the ballot, and that's clear from the case law, and you
 11 are certainly aware, and if you're not, the proponents
 12 will remind you, I'm sure, in a minute, that if you
 13 refuse to set title -- if you grant this motion for
 14 rehearing, they can't be on the 2012 ballot, and I
 15 would submit to you that's not a proper consideration.
 16 It was the proponents' choice to file with leg council
 17 on the last possible day that they could file and still
 18 get a measure on the 2013 (sic) ballot, and I would
 19 suggest to you if they had filed this effective measure
 20 in January, it would have been a very simple matter for
 21 you to say, you know, you didn't comply with the
 22 constitution or the statute, we're going to reject your
 23 filing, get it right, file it again and we'll set a
 24 title for you.
 25 The fact that they have put you in a

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1 position where that remedy is not available I suggest
 2 is not -- should not be your concern. I think you have
 3 to treat it the same way you would -- you would treat
 4 it if they had not put you in a position where refusing
 5 to set the title will preclude them from being on the
 6 2012 ballot. So with that, I'm happy to take any
 7 questions, and I'll urge you to grant our motion.
 8 MS. STAIERT: I mean, I might already know
 9 the answer to this, but explain to me the difference of
 10 how you see our lack of jurisdiction versus someone who
 11 comes in with just a blatantly unconstitutional
 12 proposal.
 13 MR. ROGERS: Well, you certainly can't
 14 consider a merits argument.
 15 MS. STAIERT: Right.
 16 MR. ROGERS: This is not a merits
 17 argument. This is a -- this is a failure to comply
 18 with a procedural requirement of the Colorado
 19 Constitution and a procedural requirement of the
 20 C.R.S., and I think that's the distinction in the -- in
 21 the scenario that you've laid out.
 22 MR. GELENDER: Given, you know, all the
 23 case law that says the right to submit, you have to
 24 liberally construe, even if we accept your argument,
 25 anything before the enacting clause -- and keep in

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1 mind, there is an enacting clause.
 2 MR. ROGERS: Sure.
 3 MR. GELENDER: And technically the
 4 constitution doesn't actually say that it has to be at
 5 the beginning of the measure, although certainly that
 6 would be the normal and expected practice, but why
 7 would it not be a -- why would we have -- why do we
 8 have to throw the whole thing out? Could we say --
 9 would a liberal construction be we're going to keep
 10 everything after the enacting clause and toss the
 11 declaration?
 12 MR. ROGERS: Well, you do have the power
 13 in the case law to make technical changes to an
 14 amendment. I've always read that to mean correcting a
 15 typographical error. I really don't think that that
 16 case law expands to allow you to knock out a page and a
 17 half of text, which is essentially what you'd be doing
 18 here, what you would have to do here to cure this
 19 problem.
 20 MR. GELENDER: Well, are we knocking it
 21 out if it's never part of the initiative to begin with,
 22 if it's not after the enacting clause, which seems to
 23 be your argument?
 24 MR. ROGERS: Yeah, I mean, it's -- it's
 25 certainly what was filed by the proponent, what was

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1 submitted to you as a properly formatted initiative.
 2 So that does seem to go beyond a mere technical
 3 amendment.
 4 You know, I'm fairly certain that the
 5 first page and a half of text was not a typographical
 6 error. They -- they had -- they had absolutely full
 7 notice from leg council that what they were doing was
 8 procedurally defective, and they -- and they chose not
 9 to fix it. And now, I think, to come to you and say,
 10 You know, that whole first page of whereas that talks
 11 about what happened in North Dakota, well, we -- just
 12 kidding. We don't really want that in the initiative.
 13 They -- they need to go back and correct this and
 14 submit it in a compliant manner.
 15 MS. STAIERT: Talk to me a little bit
 16 about the jurisdictional issue in your discussion
 17 that -- that it falls on this board. So the approval
 18 of the petition and the format is approved by the
 19 Secretary of State.
 20 MR. ROGERS: Right.
 21 MS. STAIERT: And there's some case law
 22 that talks about -- I mean, I looked at this before we
 23 came in. There's nothing really on point, but there's
 24 some case law that talks about the jurisdiction of the
 25 Secretary of State's office versus the jurisdiction of

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1 the title board.
 2 Why would you feel that this wouldn't fall
 3 in the jurisdiction of the Secretary of State's office,
 4 when they approve the petition, for them to just remove
 5 the whereas clauses?
 6 MR. ROGERS: Well, if I might, I'd like to
 7 just read a section of the case that I've cited for you
 8 earlier, In Re Campaign and Political Finance. So this
 9 is the Supreme Court in that case at 315 (sic), so the
 10 court writes, "A presumption exists" -- "exists that
 11 the secretary of state properly determines the
 12 sufficiency of the filing of a petition to initiate a
 13 measure under the initiative and referendum statute."
 14 Consistent with what you're saying, it
 15 was, in the first instance, the secretary's obligation.
 16 Then continuing, "Thus contrary to Mr. Bruce," darling
 17 of the title board; sorry, I inserted that last part --
 18 contrary to his contention that the proponents have not
 19 proved that they -- they filed the petition in
 20 accordance with the statutory procedure set out in
 21 section 1-40-105(4), the same section I'm talking about
 22 here, the burden of demonstrating procedural
 23 noncompliance rests with him, not the proponents of the
 24 initiative. Because Bruce has not shown any defect in
 25 the proceedings that would destroy the board's

26

1 jurisdiction in this matter, we reject his
 2 jurisdictional challenge.
 3 Now what I take from that language is that
 4 had Mr. Bruce met his burden, that it would have -- his
 5 argument would have, in fact, destroyed the board's
 6 jurisdiction in that matter, so that's -- so this is
 7 not a well- -- a well-trodden piece of legal ground.
 8 MS. STAIERT: Right.
 9 MR. ROGERS: But that's the conclusion I
 10 draw from that case.
 11 MS. STAIERT: Okay. Thank you. Dan?
 12 MR. DOMENICO: Well, I think it should be
 13 pretty obvious from last time, I'm very sympathetic to
 14 at least the substantive point that it's inappropriate
 15 and whatever this first page is, it's not appropriately
 16 part of an initiative.
 17 I think the direction of the two
 18 questions -- or the questions from my two fellow board
 19 members are where my -- my only real question lies, is
 20 basically whether that means we have to say we just
 21 have something we can't deal with here, we don't have
 22 jurisdiction to set title for something that has a page
 23 of something before the initiative itself, or whether
 24 we can simply say what they gave us is a proper
 25 initiative preceded by a page of something, and we'll

27

1 just say that that page of something is improper and
 2 ignore it or somehow delete it or something, and I
 3 struggle with that and, I mean, I think Mr. Rogers
 4 makes some valid points that that may not be something
 5 we can do.
 6 I might be curious about our legal
 7 counsel's advice on that aspect of it, but it seems to
 8 me there's probably agreement here that the -- the
 9 whereas section can't really properly be part of the
 10 measure. I think.
 11 MS. STAIERT: We're all going to look down
 12 this way.
 13 MR. KNAIZER: Thank you. Give me an
 14 opportunity to speak --
 15 MS. STAIERT: Here. You need a
 16 microphone.
 17 MR. KNAIZER: I think Mr. Rogers raises a
 18 number of good points. I think the real issue, though,
 19 is what the title board -- what authority the title
 20 board has to reject the measure, and historically what
 21 has happened is that the title board has
 22 jurisdictional -- the ability to exercise
 23 jurisdictional review over a limited number of items,
 24 one is whether or not the measure went through the
 25 proper review before legislative legal services and

28

1 legislative council. The other is whether or not there
 2 were substantive changes made that were not in response
 3 to suggestions made by legislative legal services or
 4 legislative council.
 5 There are also some time constraints in
 6 terms of when measures have to be filed, but I don't
 7 see anything in the statute that allows the title board
 8 to reject jurisdiction based upon the form of the
 9 measure itself. There isn't any case law that I'm
 10 aware of that allows the title board to reject
 11 jurisdiction on that basis, including the citation to
 12 Article V, section 1, subsection 8. It is true that it
 13 talks about the measure commencing "Be it Enacted," but
 14 there isn't anything in the title board's statute that
 15 allows it to reject a measure because that particular
 16 format has not been used.
 17 MR. DOMENICO: So does it allow us to
 18 do -- I mean, say someone submitted to us a measure
 19 with a "Be it Enacted" clause but it also came to us
 20 with something much more clearly advertising, a color
 21 brochure and all these great political advertisements
 22 as part of the packet we got. What -- so we may not
 23 have authority to say, well, we don't have
 24 jurisdiction. Do we have the authority to say what we
 25 have in front of us is essentially a properly formatted

29

1 measure pursuant to the constitution with an enacted
 2 clause and we're just going to ignore all this other
 3 stuff that they sent along with it, or do we have to
 4 sort of just say -- just try to figure out what we've
 5 got and then leave it to the Secretary of State or
 6 somebody else to say, Hey, you can't put all that other
 7 stuff on the ballot?
 8 MS. STAIERT: Or can we strike it as a
 9 technical?
 10 MR. KNAIZER: No, I think your -- I think
 11 your jurisdiction is -- is very limited. You know,
 12 there were some issues dealing with the timing of
 13 elections, for example, and these were some titles that
 14 addressed, I believe, land use issues back in the
 15 late '90s or early 2000s, and what the court did was
 16 distinguish between what the role of the title board is
 17 and what the role of the secretary is, and those cases
 18 dealt with when a measure would be on the ballot and
 19 things of that nature; and the court basically said the
 20 title board does not have the jurisdiction to consider
 21 some of those other issues.
 22 So in response to Mr. Domenico's issue,
 23 you know, let's assume that they started the measure
 24 with "Be it Enacted" but they had all kinds of
 25 catchphrases and let's assume pictures. That is not --

30

1 the title board does not have the discretion to not set
 2 title because the measure itself may contain
 3 catchphrases, may be designed, you know, as a pure
 4 political document. The title board just has to go
 5 ahead and set the title.
 6 MR. DOMENICO: Well, I agree with that,
 7 but that's not what we have. We have a -- we have a
 8 measure with something before it that I think I'm
 9 convinced is not part of the measure itself, is not
 10 part of the amendment that the constitution envisions,
 11 and so that's where I'm sort of troubled is if -- if
 12 all this were clearly part of it, if the "Be it
 13 Enacted" came in at the beginning, then I would -- it'd
 14 be simple. We would just -- this would all be part of
 15 it and I'd have no trouble, but -- for precisely that
 16 reason. But what we've got is sort of something that's
 17 part of it but supposedly not part of it and I just
 18 don't know what that -- what it is and what we can do
 19 with it.
 20 MR. KNAIZER: I mean, my sense is, is that
 21 just given the limits over what the title board can
 22 deal with in terms of jurisdiction, it very well may be
 23 that the measure would be subject to being stricken
 24 from the ballot through some independent action taken
 25 after the title board has set the title. But I don't

31

1 know that the title board has jurisdiction to reject
 2 the measure and not set a title based upon the form. I
 3 just don't see anything in the title board's statute
 4 10 -- 1-40-105, '106, and '107 that gives the title
 5 board that authority.
 6 MR. GELENDER: And it's your view that,
 7 because the title board is a purely statutory creature,
 8 that if it's not explicitly in the statute, there's no
 9 possibility of sort of inherent authority to execute
 10 the requirements of the constitution in the first
 11 instance before it has to go to the courts?
 12 MR. KNAIZER: You know, really my view is
 13 based upon -- and I don't remember the exact case, the
 14 exact title of the case, but it had to do with, you
 15 know, when a measure is put on the ballot and what
 16 role -- what role the title board can play in terms of
 17 when a measure is set on the ballot, and in that
 18 case -- I -- I know it's a 954 P.2d, but I don't
 19 remember the -- the name of the case at this point.
 20 But what the court did was distinguish
 21 between the title board's role and the secretary's
 22 role; and in this case, to answer your question
 23 directly, I think the title board's jurisdiction is
 24 fairly limited, it has been limited historically, and I
 25 just don't know of anything in our statute that allows

32

1 us to make a determination not to set a title based
 2 upon the form of the measure itself other than what is
 3 specifically mentioned in 1-40-105(4).
 4 MS. STAIERT: Go ahead.
 5 MR. ROGERS: If I could, and I -- I've
 6 learned over the years that it's generally a fool's
 7 errand to disagree with Maury Knaizer, but I'm going to
 8 take a run at it.
 9 THE REPORTER: I'm sorry. I couldn't hear
 10 you.
 11 MR. ROGERS: Never mind. That's fairly
 12 extraneous.
 13 Just a couple of points -- first, again, I
 14 think, Mr. Knaizer, the authority you're -- you're
 15 looking for is in the case I've cited, which -- which
 16 seems to make it pretty clear that where there is an
 17 alleged failure to comply with 1-40-105(4), the very
 18 statute I'm moving through here, that if the objector
 19 meets their burden of proving noncompliance, procedural
 20 noncompliance, that meeting that burden would destroy
 21 the board's jurisdiction. So I -- I would just submit
 22 that is, I think, the authority that answers the
 23 question.
 24 I would also point out that there -- the
 25 statutes may not expressly give the title board the

33

1 authority to reject title in this circumstance.
 2 Certainly the -- the statutes don't give an objector
 3 any other opportunity, other than a Supreme Court
 4 appeal, to raise this objection. I mean, there is
 5 certainly no opportunity between the filing of an
 6 initiative with the secretary's office and the first
 7 meeting of the title board or rehearing before the
 8 title board to raise this kind of an objection.
 9 And it seems odd to me that the general
 10 assembly would craft a statutory scheme in which my
 11 client has to see a defective title set through the
 12 title board process and then wait -- actually, that's
 13 not true. I'd have to file a motion for rehearing,
 14 which you guys could, by definition, not bring it; and
 15 then I'd have to go to the Supreme Court to get my
 16 remedy. That doesn't make any sense to me. It seems
 17 to make more sense that the jurisdictional question is
 18 yours, and I think the case confirms that.
 19 MR. STAELIN: May I have a -- I'm looking
 20 at what is a copy that I pulled of 1-40-105, and I
 21 don't see what language in paragraph (4) is actually
 22 being referred to. It wasn't in their motion, so it's
 23 pretty hard for me to respond. I don't see any
 24 language in what I see as (4) that would substantiate
 25 that position. The (4) I'm looking at starts out

34

1 "After the conference." I'd just like to know what --
 2 what language is being referred to here.
 3 MS. STAIERT: Very quick.
 4 MR. ROGERS: Can I address that?
 5 MS. STAIERT: Sure.
 6 MR. ROGERS: Well, 1-40-105(4) describes
 7 what the proponents must do after review and comment,
 8 and it kind of moves through that process and concludes
 9 with that the proponents are required to file -- "an
 10 original final draft which gives the final language for
 11 printing shall be submitted to the secretary of state
 12 without any title, submission clause, or ballot title
 13 providing the designation by which the voters shall
 14 express their choice for or against the proposed law or
 15 constitutional amendment."
 16 I mean, the -- two arguments there:
 17 First, perhaps these whereases were intended --
 18 intended to be a title, a submission clause or a ballot
 19 title.
 20 Second, I think it's pretty clear from
 21 that section that you don't submit anything other than
 22 the final language for printing. You submit the change
 23 you want to make to the Colorado law. So that's --
 24 that's the section that I think is operative here.
 25 MR. STAELIN: Well, I'll just concur in

35

1 the comments of the members of the board that what we
 2 submitted complies exactly with this, and it's very
 3 clear from the "Be it Enacted" clause that the whereas
 4 clauses are not to be part of the constitution.
 5 MR. DOMENICO: But are they part of the
 6 initiative or the measure or however you want to phrase
 7 it?
 8 MR. STAELIN: I guess I haven't seen a
 9 clear answer to that. That discussion came up
 10 apparently with -- if I remember correctly, at the
 11 hearing last week on Measure 91, where there was some
 12 similar material, and the -- the board approved that,
 13 set a title with that language in there.
 14 I do think, for that reason, that --
 15 because it's not part of the actual language to be put
 16 in the constitution, it is a technical thing, as
 17 mentioned by Mr. Knaizer, that it would not in any way
 18 prevent setting a title by this board; and I'd also add
 19 that the -- the council specifically commented on two
 20 factual parts of the whereas clauses and they asked
 21 us -- raised the point whether those were actually
 22 accurate, and we double-checked and we concurred that
 23 we couldn't document that. We removed both of those --
 24 a phrase and then one of the clauses were removed.
 25 Everything else, we felt, in responding to the

36

1 legislative council, could be verified. A lot of it is
 2 from the Bank of North Dakota annual reports. So . . .
 3 And at the hearing last week, no one
 4 signed up to speak against the measure, although I -- I
 5 know one person did speak up at that time, and very
 6 little information has been provided to us except for
 7 the motions that were filed yesterday, and I think we
 8 have responded to those.
 9 MR. DOMENICO: If I -- I'm sorry to
 10 interrupt you. My question, I guess, was going to be
 11 if we -- if we were to decide that we could and were
 12 inclined to simply assert that this -- that the -- all
 13 the language that was presented to us that comes before
 14 the "Be it Enacted" clause is extraneous, is not part
 15 of the measure, we're not going -- we don't consider it
 16 part of the measure, we're deleting it from whatever we
 17 have in front of us as a technical change or just --
 18 just because, would you object to that or do you insist
 19 that the -- this be part of what comes out of the title
 20 board?
 21 MR. STAELIN: Well, we would prefer that
 22 it be part of it, but we could -- you know, if it had
 23 to be stricken, we could probably live with --
 24 THE REPORTER: I'm sorry. I didn't hear
 25 that last part.

37

1 MR. STAELIN: I'm sorry. We could
 2 probably live with that if it had to be excluded.
 3 There's also the -- you know, the next
 4 step is, you know, getting the form of the petition
 5 approved. I assume that would be the place where that
 6 could also be addressed, but -- although that's an
 7 assumption.
 8 MR. DOMENICO: Great. Mr. Knaizer wants
 9 to help us out.
 10 MR. KNAIZER: Can I add a comment based
 11 upon what was just said?
 12 MS. STAIERT: Thank you.
 13 MR. KNAIZER: My -- my interpretation has
 14 always been that whatever is presented to the title
 15 board is part and parcel of the measure, and so when I
 16 was talking to the board before, I was working under
 17 the assumption that the whereas clauses were part of
 18 the measure that was presented to the board. And if,
 19 in fact, there -- the whereas clauses are not part of
 20 the measure and are going to be withdrawn or not
 21 intended to be printed, then I think that presents a
 22 whole different issue. I was working under the
 23 assumption that the whereas clauses were part of the
 24 measure.
 25 MS. STAIERT: What different issue does

38

1 it --
 2 MR. KNAIZER: Well, the -- the issue,
 3 then, is if they're not part of the measure, then I --
 4 I think there's a question as to whether or not what
 5 was presented to leg council and legislative legal
 6 services is substantially different from what was
 7 presented to the title board and what's supposed to be
 8 a part of the measure.
 9 MR. DOMENICO: Well, let's just say that
 10 somebody included a cover letter with their measure
 11 that included this -- this kind of language and other
 12 sort of "Here is why our measure is so great," and it
 13 somehow just got in with the packet and kept -- and
 14 nobody really bothered to deal with it, and -- but
 15 everybody sort of recognized it wasn't really part of
 16 the measure, the measure is what comes after the "Be it
 17 Enacted" clause, but it ends up in here, it ends up in
 18 front of leg council and then what?
 19 MR. KNAIZER: Well, you know, I think
 20 that's the whole purpose -- I mean, I think the
 21 argument back would be that's the whole purpose of the
 22 hearing before leg council at least to say that it
 23 shouldn't have been included or leg council could
 24 comment on it and it could have been withdrawn prior to
 25 the time it's presented to the title board.

39

1 MR. GELENDER: So?
 2 MR. KNAIZER: I mean -- because I was
 3 working under the assumption that this was part of the
 4 measure. What I'm hearing is that the recital clauses
 5 are not part of the measure, yet were presented to the
 6 title board for review, which I think presents a
 7 substantially different issue.
 8 MR. STAELIN: Well --
 9 MR. KNAIZER: It really goes to the
 10 question of whether or not, you know -- of what the
 11 content of the measure really is, which is -- which is
 12 what the Supreme Court has already held is the primary
 13 question that the board has to answer. They have to
 14 define what the measure is and understand the measure
 15 prior to the time that the board sets the title.
 16 MR. STAELIN: Yeah, but we -- we
 17 considered this part of the measure and the council did
 18 not give any indication that it could not be. Their
 19 only question was can you verify what's in it.
 20 MS. STAIERT: So they didn't suggest you
 21 take it out?
 22 MR. STAELIN: No.
 23 MR. GELENDER: And they also didn't
 24 suggest that it be numbered somehow or put after the
 25 enacting clause or anything like that?

40

1 MR. STAELIN: I'm not sure I understand
 2 the question.
 3 MR. GELENDER: The whereas clauses are
 4 before the enacting clause.
 5 MR. STAELIN: Absolutely.
 6 MR. GELENDER: At the review and comment
 7 hearing, did they -- was it suggested to you that it be
 8 placed after the enacting clause?
 9 MR. STAELIN: No, not at all. They --
 10 they suggested clarification of how we worded and
 11 placed the "Be it Enacted" because we did that in a
 12 slightly imperfect way, and the final draft corrected
 13 that, but the purpose all along was to have it part of
 14 the measure but not have it to be part of the actual
 15 constitution.
 16 MS. STAIERT: It's certainly one of the
 17 purposes in the legislative comment, major purposes of
 18 the proposed amendment, and 1 is to make statements and
 19 findings about Bank of North Dakota.
 20 MR. ROGERS: Madam Chair, could I --
 21 MS. STAIERT: Sure.
 22 MR. ROGERS: I'm sorry to have to say
 23 this, but I think what the proponents just told you is
 24 not accurate. The leg council memo very clearly says,
 25 "Article V, section 1(8) of the Colorado constitution

41

1 requires that the following enacting clause be the
 2 style for all laws adopted by the initiative, 'Be it
 3 Enacted by the People of the State of Colorado.' To
 4 comply with this constitutional requirement, this
 5 phrase should be added to the beginning of the proposed
 6 initiative directly above the text to be added to the
 7 Colorado Constitution."
 8 Leg council very clearly told proponents,
 9 your initiative falls under the enacting clause, so
 10 they're really in a box here. The constitution
 11 requires the enacting clause to be at the beginning,
 12 which council told them it needs to be at the
 13 beginning. I believe Mr. Knaizer is advising you it
 14 needs to be at the beginning; and, yet, they've now
 15 told you that they want it to stay in the initiative.
 16 I -- I really struggle with your opportunity to make an
 17 amendment -- even a technical amendment to an
 18 initiative where the proponents have asked you not to
 19 do so.
 20 MR. DOMENICO: What if we just moved the
 21 enacting clause to the beginning?
 22 MR. ROGERS: Well, I -- I believe that
 23 would be more than a technical amendment. I think it
 24 would -- I think you would exceed your authority if you
 25 moved the enacting clause.

42

1 MR. DOMENICO: Yeah. I mean, that may be,
 2 although I think we decided last time all the whereas
 3 are essentially not material in at least one sense of
 4 the many senses we use the word "material" around here.
 5 So whether they're included -- I mean, obviously the
 6 constitution would look a lot different with a bunch of
 7 discussion of the Bank of North Dakota than it would
 8 without it, but in effect, I don't know that it would
 9 make a big difference.
 10 MR. DUNN: Madam Chair, may I?
 11 MS. STAIERT: Sure.
 12 MR. DUNN: For the record, Jason Dunn for
 13 Don Childears. I thought Mr. Rogers actually argued
 14 that pretty well and I would incorporate into our
 15 motion all those arguments -- our objection, all those
 16 arguments as well; but let me make a couple points. I
 17 think Mr. Domenico asked the right question. Is it --
 18 is it part of the initiative or measure? And the
 19 proponent just said, I haven't heard a good answer to
 20 that, I think, is a fair phrase or -- or a quote, and
 21 so the proponent doesn't know.
 22 But Mr. Domenico talked about, Well, maybe
 23 you'll put a color brochure and some campaign material.
 24 I'm just sitting here thinking, Well, maybe I'll put in
 25 some case law or maybe I'll put in a letter explaining

43

1 how I want the measure interpreted by the title
 2 board.
 3 MR. DOMENICO: But it's pretty clear that
 4 if that came after the "Be it Enacted" clause, that
 5 that's perfectly fine, right?
 6 MR. DUNN: Absolutely.
 7 MR. DOMENICO: So, then, why should that
 8 be such a huge deal? I mean, that would seem to be --
 9 this would seem to be -- to the extent that's
 10 problematic, this would seem to be less problematic
 11 than that, because then at least it's not in the
 12 constitution, your -- your propaganda.
 13 MR. DUNN: Well, the important part is
 14 that the title board understand what it's considering.
 15 That was Mr. Knaizer's point, I think. You have to
 16 know what measure you're considering. And if you --
 17 you know, if the proponent is saying, Well, to
 18 paraphrase, jeez, we'd like that to stay in, but if
 19 it's not, that's okay, too, and he's saying, Well,
 20 maybe we can move the "Be it Enacted" clause. Well, if
 21 there's a lot of material, where do you move it? Do
 22 you include some of it? Do you leave the pictures out?
 23 Do you put it in? The title board shouldn't be in a
 24 position of picking where to move the "Be it Enacted"
 25 clause.

44

1 MR. DOMENICO: Well, it's pretty easy,
 2 right? It's either at the beginning of everything or
 3 you leave it. So that doesn't seem that -- I mean,
 4 either everything in front of us comes after it because
 5 that should be at the beginning of the initiative, or
 6 we just leave it and then try to deal with what it
 7 means if it's in the middle of what we've got. I mean,
 8 I agree with you, I would not want to get in the
 9 business of saying, Well, it should go here, here or
 10 here. It seems to me we either leave it where it is
 11 and deal with that problem or we discuss whether we can
 12 or should move it to the beginning of everything we
 13 have.
 14 MR. DUNN: Well, if the title board has
 15 the authority to move the "Be it Enacted" clause to the
 16 beginning of a measure, then what's the purpose of the
 17 "Be it Enacted" clause? Why not just say, Look,
 18 everything that's submitted, that's the measure. The
 19 "Be it Enacted" clause requirement then becomes moot.
 20 There is no purpose to it. If -- we'll just assume
 21 that if there's anything before it in the measure,
 22 we'll just move it up to the front.
 23 MR. DOMENICO: Well -- but then that would
 24 suggest that -- that would mean that -- the requirement
 25 to have a "Be it Enacted" clause sort of envisions that

45

1 you'll have a bunch of introductory material and then
 2 the measure itself, right?
 3 MR. DUNN: No. I would say the opposite.
 4 I would -- I would think what Mr. Rogers argued is
 5 accurate, that '10 -- '105(4) specifically enumerates
 6 what needs to be submitted to the title board, and
 7 there is a purpose for that. It's to submit the final
 8 language so there's no question, there's no doubt about
 9 what the title board is considering and what's going to
 10 wind up on the ballot.
 11 You know, the -- I would disagree, as
 12 Mr. Rogers did, that leg council was concerned about --
 13 wasn't concerned about this. They were.
 14 As you said, Madam Chair, they put it as
 15 one of the purposes. They raised the question about
 16 whether it was properly above the "Be it Enacted"
 17 clause, and the proponents actually made red-line
 18 changes to it when submitting it here. It's -- it's
 19 extemporaneous, additional language that has no
 20 meaning, why make changes to it?
 21 So I think the proponents would like it to
 22 be part of the measure. I think that the title board
 23 can't be choosing from measure to measure what's going
 24 to be in -- in the measure and having to put itself in
 25 the situation of having to figure that out on a

46

1 case-by-case basis; and maybe it's a little easier in
 2 this one than it will be next time, but I think that's
 3 opening a Pandora's box for the title board, that you
 4 don't want to go there.
 5 MR. DOMENICO: Can I try to narrow this
 6 down, our discussion a little bit?
 7 MS. STAIERT: Thank you.
 8 MR. DOMENICO: It seems to me we have
 9 three options. Tell me if I'm wrong. One is leave it
 10 as is and try to figure out what it means just as it
 11 is. One is essentially just for us to remove the
 12 recitals, and the third would be to move the -- the "Be
 13 it Enacted" language. I don't -- I don't see any
 14 other -- I don't think I see any other fourth option,
 15 but I could be . . .
 16 MR. DUNN: Well, Mr. Domenico, I --
 17 MS. STAIERT: We can vote it down.
 18 MR. DOMENICO: Well, I didn't -- the
 19 consequences of leaving -- of any of those -- I'm
 20 setting aside whether any of those are okay or all of
 21 them are okay, just we have to do one of those and then
 22 figure out which -- whether it's okay.
 23 MS. STAIERT: Right. I mean, I think I am
 24 more comfortable leaving it where it is. I don't
 25 think, given the comments by the proponent, that it

47

1 would be considered technical and as well as the fact
 2 that it's then commented on by legislative legal as
 3 sort of the purpose of the initiative. So to strike it
 4 as technical I think is a -- probably not proper.
 5 I'm also not comfortable moving the
 6 whereas clause. I'm not sure yet that I necessarily
 7 agree that leaving it the way it is divests us of
 8 jurisdiction, but I think we have to accept it the way
 9 that it came in.
 10 But Mr. Gelender might have a different --
 11 MR. DUNN: I would add, if I could, Madam
 12 Chair, that this very conversation is the reason why
 13 you need a bright-line rule, that it puts the title
 14 board in an untenable situation of having to figure out
 15 what's in the measure, what are we writing the title
 16 on, and -- and you can easily see this is getting into
 17 a much more complicated decision.
 18 MS. STAIERT: Well, I have Bill Hobbs'
 19 cell phone if we can't . . . We can have a fourth
 20 vote.
 21 MR. GELENDER: Excuse me. I do find that
 22 last point by Mr. Dunn quite persuasive in that it's --
 23 you know, it would -- it's easy to say, Well, in this
 24 case, it's sort of my initial inclination to just get
 25 rid of this line because whether it's in or it's out

48

1 doesn't really change what the title is that we set or
 2 the legal effect of the measure, as far as I can tell.
 3 That said, I would hate to see the time
 4 when we get one with some substantive stuff in front of
 5 an enacting clause and we've set a precedent of
 6 accepting a measure in whole or in part that had that
 7 flaw.
 8 So given that, the question seems to
 9 become is the fact that the enacting clause is in the
 10 middle of the measure rather than at the beginning of
 11 the measure a fatal jurisdictional flaw.
 12 MS. STAIERT: I agree.
 13 MR. GELENDER: And whether that is a --
 14 Maury is looking right through my head right now --
 15 that we have jurisdiction to decide.
 16 MR. KNAIZER: To my mind, the question
 17 that the board has to answer is whether or not the
 18 measure is sufficiently clear and the intent of the
 19 measure is sufficiently clear to allow the board to set
 20 a title.
 21 So -- so if the -- so if the board
 22 determines that because of, for example, the placement
 23 of the "Be it Enacted" clause, that it's -- it's not
 24 sufficiently clear to the board what the meaning of the
 25 measure is and what is included, then the board, under

49

1 Supreme Court precedent, should not set a title.
 2 MR. DOMENICO: Well -- maybe this is the
 3 same question, but part of Mr. Rogers' argument was
 4 that by constitutional definition, the only thing that
 5 can be a measure is what comes after -- an initiative
 6 is what comes after the "Be it Enacted" clause, and so
 7 if that's right, then the question becomes, Okay, so
 8 we've got a measure, which is what comes after "Be it
 9 Enacted," with an extra page of recitals and what does
 10 that -- what does that allow us or require us to do.
 11 I'm not sure if that's the same basic
 12 question or a slightly different one, but, I mean, in
 13 some ways, Mr. Rogers' argument answered the question
 14 of what is the -- the initiative. It can only be
 15 what's after "Be it Enacted," and then the question is
 16 what does the fact that we have a bunch of other things
 17 in front of us do if we accept that part of his
 18 argument.
 19 MR. GELENDER: Part of the difficulty
 20 is -- is because I don't think that this -- these
 21 whereas clauses have any substantive legal effect, then
 22 the measure is not unclear to me, because whether
 23 they're there or not, the measure, to me, does the same
 24 thing and the law will be changed in the same way.
 25 So if that's really the question, then it

50

1 seems to me that we can set, but I also do agree with
 2 Mr. Domenico, it seems like we should be setting only
 3 on the basis of what's after that enacting clause. The
 4 rest isn't an initiative. So --
 5 MR. DOMENICO: Well, and I guess the other
 6 question is if we accept that, that really the
 7 initiative is just what's after it, is the consequence
 8 of -- of presenting us with this extra page of recitals
 9 just for somebody else to deal with? Which it may be.
 10 And one of Mr. Rogers' arguments, I thought, was that
 11 the people who object to this don't have a lot of
 12 opportunities to have their objection heard, although I
 13 suppose they could object to the secretary of state, as
 14 it goes to the petition process, that it's
 15 inappropriate to include this sort of thing.
 16 I mean, I -- anyway, I like the -- I do
 17 like the bright-line rule that either, as I
 18 suggested -- it seems to me we could either have a rule
 19 that says we're going to take you at your word and
 20 where you stick the "Be it Enacted" is it and we're
 21 only going to deal with what comes after that, or
 22 everything you present to us is what's going to be the
 23 initiative. It doesn't sound like there's much
 24 sympathy for that idea. But I -- I do think it's
 25 problematic, even though these are sort of

51

1 non-substantive, if we really aren't sure what's going
 2 to go on the ballot, that we can set a title, which
 3 is -- was my problem last time.
 4 MS. STAIERT: Well -- because I think we
 5 become unsure of the purpose when purpose No. 1 is to
 6 discuss the Bank of North Dakota.
 7 MR. DOMENICO: Right.
 8 MS. STAIERT: And when we're hearing from
 9 the proponent that he's not sure if that's the purpose,
 10 I think it just adds some confusion and, I mean, I
 11 suppose it would be nice if we knew what was going to
 12 happen as it went forward, but I guess it's not
 13 particularly relevant whether the Secretary of State's
 14 office is going to take care of it or whether it's
 15 going to end up in the constitution.
 16 I mean, it sounds like, from Mr. Knaizer,
 17 that he has previously advised whatever comes out of
 18 the title board is what you print on the petition,
 19 which means that all these whereas clauses go on the
 20 petition and then the petition is adopted, that's
 21 what's going to go in the constitution. So all these
 22 whereas clauses are going to go in the constitution.
 23 I don't know. It makes it unclear to me
 24 what I'm trying to set. Should I -- should my --
 25 should my title start, "An Amendment to the Colorado

52

1 Constitution to talk about the Bank of North Dakota
 2 and, in connection therewith, establish a similar bank
 3 in Colorado?" Is that really what I'm doing or am I
 4 doing something else?
 5 MR. STAELEN: Well, our -- our intent, as
 6 far as what goes in the constitution, in each draft,
 7 has been what follows the "Be it Enacted" clause.
 8 That's a gratuitous statement.
 9 MS. STAIERT: I'm not sure that's the
 10 practice.
 11 MR. DOMENICO: So what section I or V,
 12 1(8) says is the style of all laws adopted by the
 13 people through the initiative shall be "Be it Enacted
 14 by the People of the State of Colorado." So what the
 15 proponents are saying is the actual law that they
 16 wanted to have adopted does follow that particular
 17 language.
 18 And then you've also got something else
 19 that they want the people to vote on that's not part of
 20 the law in question. I find that -- I'm just confused
 21 about what that is -- what that means. And I agree, if
 22 we were to get one that said -- that did have sort of
 23 substantive or -- discussion, as I think Mr. Dunn
 24 pointed out about here is how this should be
 25 interpreted, et cetera, et cetera, that could be fairly

53

1 substantive, just what you would -- what you would be
 2 asking the people to do.
 3 I mean, it seems to me fairly clear that
 4 any of the alternatives that I've sort of tried to work
 5 through are not really consistent with what the
 6 proponents wanted to try to do. The question -- so I
 7 don't -- making any of these proposed changes seems
 8 improper. The question then is does that mean we can't
 9 set a title with what's in front of us?
 10 MS. STAIERT: See, and I feel like we
 11 can't because this is the intent -- even though it
 12 doesn't say interpret it this way, if there's ever a
 13 question as to the language, the court is going to go
 14 back and it's going to say, Well, look at this whereas
 15 clause where it said small businesses have experienced
 16 great difficulties, so, you know, based on that, this
 17 must have been a measure to assist the small
 18 businesses, so we're going to err on that side or we're
 19 going to err on this side.
 20 I mean, I think when you -- the whole
 21 purpose of these kinds of whereas clauses is to
 22 establish your legislative history, and I guess that's
 23 what I'm struggling with.
 24 MR. DOMENICO: Well -- and I agree with
 25 that, I just -- I just wonder what -- why that -- why

54

1 the consequence of that is that we have to -- well, I
 2 guess what the consequence of that is.
 3 MS. STAIERT: Well, I think the
 4 consequence would be if we're going to set a title,
 5 we're going to have to consider these whereas clauses
 6 and whether they have any substantive --
 7 MR. DOMENICO: I think that's right.
 8 MS. STAIERT: But these two might have
 9 another idea.
 10 MR. GELENDER: I'm sorry.
 11 MS. STAIERT: You're fine.
 12 MR. GELENDER: I think maybe this is the
 13 time to throw out a trial motion for action and see
 14 what happens.
 15 MS. STAIERT: All right.
 16 MR. GELENDER: All right. I'm going to
 17 make a motion that because -- for -- well, for a
 18 variety of reasons: One, as Mr. Domenico says, it
 19 doesn't seem possible to both comply with the
 20 constitution and execute the proponent's stated intent
 21 of having this preamble language included in the
 22 measure, and because while it's maybe sufficiently non-
 23 substantive, a tough one like this, I don't know how we
 24 can in the future -- how we can set a precedent for in
 25 the future having a measure like this come up that has

55

1 very substantive integral language in front of an
 2 enacting clause and then more of the same after it,
 3 where we can't toss it, come to a different conclusion.
 4 So I'm going to actually move that we not set a title
 5 on the basis of not having jurisdiction.
 6 MS. STAIERT: So you're going to move --
 7 you're going to move to grant the motion --
 8 MR. DUNN: Lack of jurisdiction.
 9 MR. GELENDER: To grant the motion to --
 10 for rehearing.
 11 MS. STAIERT: And strike the title?
 12 MR. GELENDER: Yes, and strike the
 13 title.
 14 MR. STAELIN: Well, can I respond? I --
 15 our intent was not to have the whereas clause be part
 16 of the constitution. I think you've properly set title
 17 based on what we intended and expected would become
 18 part of the constitution.
 19 We're perfectly content with not having
 20 the whereas clauses be considered part of the measure.
 21 I think that's the issue. We were not discouraged from
 22 having the material in the whereas clauses. It was
 23 simply a matter of what you plan to put in the
 24 constitution should be only what follows the "Be it
 25 Enacted" clause, and that's what we did, and that's how

56

1 you set title.
 2 (At this time Mr. Knaizer left the room.)
 3 MR. STAELIN: We're not asking that the
 4 whereas clauses be part of the constitution in any way.
 5 MR. DUNN: Mr. Domenico, would this help?
 6 MR. DOMENICO: No, I've got something even
 7 better here, actually.
 8 MS. STAIERT: I'm going to second the
 9 motion just so that we can continue discussion.
 10 MR. DOMENICO: Yeah, I -- I know I started
 11 all this, but I just can't -- there is two steps in
 12 that analysis I'm not convinced enough of to go along
 13 with. One is, as I -- as I said, the constitutional
 14 provision just says that the laws enacted by initiative
 15 shall start with this language and, in fact, the law
 16 that the proponents want to enact does begin with it.
 17 Now, whether that causes another problem is a different
 18 question. I mean, I just -- but technically I think it
 19 doesn't violate that part of the constitution to do
 20 this.
 21 So then the question is, all right, so
 22 the -- so you've got the law you want to add, amend,
 23 plus this other page, and -- and the step in getting to
 24 why that deprives us of jurisdiction as opposed to
 25 causing potential problems with what if somebody puts

57

1 in there some really sort of clearly obnoxious,
 2 tendentious argument, advertising propaganda or, on the
 3 other hand, some substantive things, those are
 4 certainly problems that I can see, but I don't get why
 5 that deprives us of jurisdiction. I'm not there yet.
 6 I don't -- so that's why I'm -- I would vote against
 7 the motion to grant the petition to the extent it says
 8 we don't have jurisdiction.
 9 MS. STAIERT: Okay. Let's take a vote on
 10 the motion that we approve the motion for rehearing and
 11 strike the question. All those in favor?
 12 MR. GELENDER: Aye.
 13 MS. STAIERT: Opposed?
 14 MR. DOMENICO: No.
 15 MS. STAIERT: No.
 16 Okay. So that motion failed. So we still
 17 haven't done anything.
 18 MR. DUNN: So, in other words, it's a
 19 normal title board.
 20 MR. DOMENICO: That's right.
 21 MR. DUNN: Well, let me continue with some
 22 of the jurisdictional issues, then. There were two
 23 substantive changes made to the measure after the
 24 review and comment hearing that were not discussed.
 25 Actually, I should say at least three.

58

1 I would say that there were changes to the
 2 whereas clauses, I guess I'll make a record on that,
 3 that were not discussed. But, more substantively, in
 4 paragraph 1 of the measure or what is -- what is now
 5 paragraph 1 of the final measure, there were two
 6 additions and I guess one change made to the measure,
 7 and if you look at the red-lined amended version,
 8 the -- the paragraph 1 of the measure requires that
 9 the -- or allows that the political subdivision of the
 10 state may engage in banking or establish a bank and may
 11 lend money at interest to promote development and
 12 enterprise in the state. That was the original
 13 version.
 14 The proponents inserted "or at no
 15 interest" after the phrase "may lend money at
 16 interest." That was a phrase that was not discussed at
 17 the review and comment hearing and it substantively
 18 changes the measure. It's one thing to allow the
 19 political subdivision to operate a bank and to lend
 20 money at interest, and -- which voters will think will
 21 produce revenue for the bank and for the political
 22 subdivision, and it's another to change the substantive
 23 power of the bank to lend money at no interest for
 24 whatever purpose.
 25 So we'd raise that change, and that was

59

1 not discussed at the review and comment.
 2 Second, later in that -- in that
 3 paragraph -- I'm happy to stop there and answer any
 4 questions.
 5 Second, later in that paragraph, the --
 6 what I think is on the one, two, three, four -- begins
 7 at the end of the fifth line, the measure is -- is
 8 talking about the -- well, I guess the easiest thing to
 9 do is read the sentence. "Any such bank shall have the
 10 same powers and authorities of other banks chartered by
 11 the state of Colorado as well as the power and
 12 authority to deposit public revenues and funds in its
 13 own bank," and the original version then said, "except
 14 as limited by the legally established purposes of the
 15 government of the political subdivision."
 16 The proponents, without response -- not in
 17 response to review and comment, changed that to say
 18 that the power is limited, at the end of the clause, by
 19 the general assembly -- assembly rather than the
 20 political subdivision and it can be expanded by the
 21 general assembly, two substantive changes made to the
 22 measure not in response to the review and comment
 23 hearing or questions raised therein.
 24 Those are both jurisdictional concerns.
 25 They, of course, divest the title board of jurisdiction

60

1 to set a title, and the measure should be sent back to
 2 legislative staff for another review and comment
 3 hearing so that those provisions can be considered by
 4 the public and by legislative staff.
 5 I also have single subject concerns, but
 6 I'll pause there to see if there's any questions or
 7 discussion on that.
 8 MR. GELENDER: Mr. Dunn, did you listen to
 9 the hearing or just look at the review and comment memo
 10 in terms of knowing what was discussed or not discussed
 11 at the hearing?
 12 MR. DUNN: I attended the hearing, we had
 13 it videotaped, and I've probably watched that videotape
 14 a dozen times.
 15 MR. GELENDER: Interesting. 'Cause I
 16 spoke to the attorney who conducted the hearing, and it
 17 was his view that these things were discussed in one
 18 form or another.
 19 MR. DUNN: I'm not sure what that other
 20 form would be.
 21 MR. GELENDER: Well, specifically, he
 22 indicated -- I got this motion, of course, yesterday
 23 and did not have time to listen to the tape. That
 24 there were -- there was a question asked about, you
 25 know, who had sort of authority over this kind of bank

61

1 and there was a discussion of that issue to which he
 2 felt that this change to having the general assembly
 3 regulate versus the subdivision, for one, was a
 4 responsive change.
 5 MR. DUNN: I just don't remember that
 6 discussion. I certainly don't remember it, either, as
 7 expanding the authority of -- of the controlling body
 8 to regulate the bank. One said limited by the
 9 political subdivision, the other one says expanded or
 10 limited by the general assembly, two different changes.
 11 And I'd be curious, did -- did that
 12 discussion include the discussion of the "at no
 13 interest" change, as well?
 14 MR. GELENDER: Yes, and I don't know if
 15 that phrase was used specifically. I think there was
 16 comment -- I was told that there was discussion of sort
 17 of the general lending authority; however, like I said,
 18 I have not listened to the tape, so . . .
 19 MR. STAELIN: May I comment?
 20 MS. STAIERT: Uh-huh, please.
 21 MR. STAELIN: I forget the name of the
 22 attorney who was present --
 23 MR. GELENDER: Yes.
 24 MR. STAELIN: Robin Jones?
 25 MR. GELENDER: No, Bart Miller.

62

1 MR. STAELIN: Okay. But I do recall
 2 discussing the issue of interest. I don't think it's a
 3 substantive change. Interest and the ability to charge
 4 interest does not limit in any way what that interest
 5 rate can be. It could be 1 percent interest or .00, ad
 6 infinitum, and so it's quite possible to lend at
 7 interest in a way that doesn't actually produce any
 8 interest. I did a quick calculation. If you have
 9 seven zeroes before your number or up to 12, depending
 10 on how much you're lending, you can have interest over
 11 15 or 30 years that doesn't actually produce a penny in
 12 interest, and so saying "or at no interest" doesn't
 13 actually produce a substantive change.
 14 And I -- I can't recall the -- the
 15 specifics of the discussion about expanding or
 16 limiting, but I believe we were justified in doing that
 17 based on those discussions.
 18 MR. DOMENICO: Well, why did -- why did
 19 you think it was preferable to include that language?
 20 What's the difference as you see it? Why -- why is it
 21 better?
 22 MR. STAELIN: Simply to give the general
 23 assembly more flexibility.
 24 MR. DOMENICO: Okay.
 25 MS. STAIERT: But it was not in response

63

1 to a suggestion by legislative legal?
 2 MR. STAELIN: If I could, I'd like to look
 3 at their comments again. I think --
 4 THE REPORTER: I didn't hear you.
 5 MR. STAELIN: I'd like to look at their
 6 comments again so I can address that.
 7 MR. DUNN: Jason Dunn again, Madam Chair.
 8 If the purpose was to give the general
 9 assembly more flexibility, that, I would propose, is
 10 substantive by definition. And if -- if the phrase
 11 "may lend at interest" includes no interest, then I
 12 would ask why include the phrase in the original
 13 version? That makes the language meaningless, and why
 14 change it on the amended version to say also "at no
 15 interest"?
 16 And as you know, common statutory rules of
 17 interpretation, especially in the constitutional
 18 nature, require that courts and presumably the title
 19 board give meaning to words that are in a measure,
 20 particularly a constitutional amendment.
 21 MS. STAIERT: Okay. Did you find it?
 22 MR. STAELIN: No, not yet. I think
 23 consistent with the rules governing how the board sets
 24 a title, one of the standards is to make it clear, in
 25 plain language, and because interest includes the

64

1 possibility of having interest so low that in effect it
 2 does amount to no interest, it's actually more clear
 3 and plain to add the language "or at no interest."
 4 MR. DUNN: Jason Dunn again. The only
 5 response I would have to that is that I believe the
 6 reference to plain language is in reference to the
 7 title, not the measure itself.
 8 MR. DOMENICO: How specific is -- do you
 9 think are -- how specific do you think the changes have
 10 to be in response to the question? I mean, how tightly
 11 tied together do they have to be?
 12 MR. DUNN: That's a great question. One,
 13 again, that I have -- I have not known the answer to
 14 for ten years. But I don't think you have to answer
 15 that question today. I think there is a significant
 16 substantive difference between a public bank that can
 17 lend at interest for the purpose, as stated in the
 18 measure, to promote development and enterprise versus a
 19 bank that's lending at no interest, presumably then at
 20 taxpayer expense to achieve those purposes. I can see
 21 a legitimate public debate about that point. I can see
 22 articles on why that's a good idea or a bad idea. I
 23 don't think there's any way you can say that's not
 24 substantive.
 25 MR. DOMENICO: Well, say that I -- no, my

65

1 question is not -- let's assume we think both of these
 2 are substantive changes. The question then is how
 3 tightly tied to the discussion between the proponents
 4 and leg council does it have to be if they sort of
 5 trigger something and they're like, You know what?
 6 Actually, that might be a good idea to allow no
 7 interest or to make it clearer.

8 Or does it have to be a question like why
 9 did you not include "or at no interest" or why not make
 10 this expanded or limited by the general assembly or can
 11 it be more kind of a general discussion?

12 MR. DUNN: No, I think that's a
 13 case-by-case analysis. I think you can have general
 14 discussions about, you know, who should be the
 15 controlling authority, do you think -- do you think
 16 it's a good idea that the local government control this
 17 or do you think it should be the general assembly and
 18 the proponents then changed the measure afterward.

19 I will say, Mr. Gelender, I don't recall
 20 any discussion about the general assembly's authority
 21 to -- to limit the authority of the bank, and I don't
 22 recall hearing that in the video, but I think there's
 23 situations where a general discussion can trigger a
 24 change that's valid.

25 I don't recall any discussion in this

66

1 measure about whether or not the bank should charge
 2 interest or whether they should be allowed to charge no
 3 interest, and I think the proponent explained why
 4 that's not the case. He -- his argument is that --
 5 that it encompasses both already, and I think the
 6 language of that clearly says to the contrary.

7 MS. STAIERT: With the second change, the
 8 one about the general assembly, can you explain that
 9 one to me? Where is it in here?

10 MR. DUNN: Sure. It's line 1, 2, 3, 4, 5,
 11 6 -- 6 and 7 of the measure.

12 MS. STAIERT: Oh, okay.

13 MR. DUNN: "The power and authority to
 14 deposit public revenues and funds in its own bank," and
 15 then it originally said "except as limited by the" --
 16 "by the general" -- I lost my place, "except as limited
 17 by the authority" -- legal -- sorry, "legally
 18 established purposes of the government of the political
 19 subdivision."

20 MS. STAIERT: Okay.

21 MR. DUNN: So it changed the regulatory
 22 authority on whether or not the bank could put funds in
 23 its own bank to its own governing -- from its own
 24 governing body to the general assembly, and then it
 25 just -- it didn't say -- it didn't change it from --

67

1 from just who makes that decision but whether or not
 2 that's a limiting authority or a limiting and expanding
 3 authority.

4 MS. STAIERT: Okay. And then did it take
 5 the authority away from the political subdivision?

6 MR. DUNN: I -- I would certainly argue,
 7 to the extent it controls the issue of whether or not
 8 the political subdivision can put its own funds in that
 9 bank, yes.

10 MS. STAIERT: Maybe if the proponent can
 11 come back up, why did you make this change where the
 12 municipality couldn't put the funds in the bank? Was
 13 that in response to a question?

14 MR. STAELIN: No. Yes. Are you talking
 15 about the capitalization?

16 MS. STAIERT: No, I'm talking about on --
 17 in No. 1, on line 6, where it says "the authority to
 18 deposit public revenues and funds in its own bank
 19 except as expanded or limited by the" -- and then you
 20 struck "purpose of the government of the political
 21 subdivision" and you put in the "general assembly."

22 MR. STAELIN: You know, frankly, I don't
 23 think I can answer that.

24 THE REPORTER: I'm sorry?

25 MS. STAIERT: He said he can't answer

68

1 that.

2 Okay. Any discussion by the board?

3 MR. DOMENICO: Well, I mean, I guess it's
 4 a bit of a debate between Mr. Gelender's hearsay and
 5 Mr. Dunn's watching the videotape and then us sort of
 6 trying to figure out who has the burden on a rehearing
 7 to persuade us. I'm -- I'm not entirely convinced that
 8 the first change about the interest rate is
 9 substantive.

10 The second one is clearly a substantive
 11 change. It's really two changes.

12 MR. STAELIN: Could I ask a question
 13 about --

14 MR. DOMENICO: Yeah.

15 MR. STAELIN: Could we -- are we in --
 16 permitted to withdraw language like that?

17 MR. DOMENICO: No, no. I mean, as we just
 18 discussed, what you give to us has to be what ends up
 19 on the -- I mean, you could change a typo, but I don't
 20 think we can change that.

21 So the question for me, for sure on the
 22 second one, is whether it was in response to questions
 23 or discussion at the review and comment. I think
 24 that -- that that standard is fairly broad in response
 25 to sort of my own question, that the -- that as long as

69

1 the basic ideas were triggered by the public comment,
 2 that that is satisfied.

3 I, too, have not listened to the video or
 4 anything like that, so we're in a little bit of a tough
 5 spot, but if Mr. Gelender's convinced that both of
 6 these changes were triggered by the discussions, I
 7 think at this stage we should accept that and deny the
 8 motion for a rehearing on that basis as not having
 9 carried their burden of convincing us, but I will say
 10 that could certainly be something they could prove in a
 11 challenge that went forward.

12 MS. STAIERT: Well, who defines what a
 13 comment is? I always just used the comments of -- that
 14 are in written form.

15 MR. GELENDER: I haven't conducted --

16 MS. STAIERT: Is there a definition of
 17 "comments"?

18 MR. GELENDER: Well, I think it's --
 19 sorry. What's in there, having done a number of review
 20 and comment hearings before getting assigned to the
 21 title board, I'll say that what typically happens and
 22 not always, depending on the proponent, what happens at
 23 the hearings is we'll ask the questions in the memo and
 24 then there's follow-up -- there's sometimes this
 25 follow-up where they trigger more questions and some

70

1 back and forth.

2 My understanding from Bart Miller, who
 3 conducted this review and comment hearing, was that on
 4 the second issue about the, you know, change to the
 5 general assembly was that some sort of question was
 6 asked, and I don't know -- that had to deal with sort
 7 of who would regulate the banks -- the bank or how -- I
 8 think this is the one that says it's the bank, whose
 9 authority they would be subject to, and there was some
 10 sort of response, Well, we should probably have the
 11 general assembly doing that.

12 Like I said, I can't prove that, and I
 13 don't know if Mr. Dunn has a transcript of the whole
 14 thing on hand or not, but --

15 MR. DUNN: I don't. I want to make sure,
 16 though, Mr. Gelender, you're not talking about
 17 initiative No. 95 as it relates to state banks and
 18 regulation by the general assembly of those -- of that
 19 entity.

20 MR. GELENDER: Where am I?

21 MS. STAIERT: 95 is the next initiative.

22 MR. GELENDER: Right. So on the screen --
 23 oh, this is the -- okay. So here is '4. This talks
 24 about the subdivision. What's it say? Stop.

25 The political sub -- okay, this has to do

71

1 with the -- okay. I think it has to do with the
 2 subdivisions.

3 MS. STAIERT: Yeah, that question appears
 4 in this one, too.

5 MR. GELENDER: Yeah, well, it will. I
 6 just -- and I -- see, I don't know if it's something
 7 that came up in response. I don't know what to do here
 8 because all I know is, you know, what I was told by one
 9 of the people in my shop, and then I have contradictory
 10 here, and there's no way, absent a transcript or a
 11 videotape, to --

12 MS. STAIERT: Well, that's why I asked the
 13 question about what's a comment, because if the comment
 14 is this document --

15 MR. GELENDER: I don't think we've already
 16 treated it as limited to the review and comment.

17 MR. DOMENICO: Yeah. I mean, we've sort
 18 of viewed it, the purpose of this requirement is to
 19 make sure that any changes -- people have had an
 20 opportunity -- the public has had an opportunity to
 21 discuss the basic issues that are going to be
 22 presented, that essentially we're not going to be
 23 presented with a measure that is substantively --
 24 substantively different than anything anybody's had a
 25 chance to discuss, that adds any provisions that nobody

72

1 got to talk about and that sort of thing.

2 And so I think if -- if the purpose of
 3 allowing the public to comment on what's in front of us
 4 was served by the -- by the discussion, then we'd sort
 5 of view that as kind of the comments and in response to
 6 the comments, even if it took sort of a follow-up
 7 question.

8 So I -- I think we have interpreted that
 9 fairly broadly in the past. I mean, we've only really
 10 rejected measures on this basis when they've sort of
 11 just made new changes, added -- changed the percentage
 12 of a tax or something like that just because they
 13 thought it was a better number, that sort of thing.
 14 And so that's kind of where that -- that is.

15 MR. GELENDER: Yeah, and my suspicion
 16 is -- I'm looking at question 9, which says "The Bank
 17 of North Dakota has no formal regulatory oversight of
 18 its activities" to the -- I'm skipping some language
 19 now, but "Do the proponents intend for there to be any
 20 regulatory oversight over banks created under the
 21 proposed initiative?" My position is that, you know --
 22 or at least what Mr. Miller thought was that there was
 23 some response of, Well, maybe the general assembly
 24 should do so probably in response to that question or a
 25 follow-up to that question.

73

1 MR. DUNN: Well, I would say this to that:
 2 First of all, I think the response to that one was the
 3 addition of paragraph 5 in the measure. That's --
 4 that's an entirely new paragraph entitled Regulatory
 5 Oversight. It says, "The general assembly may provide
 6 guidelines enforced by the Colorado Banking Board and
 7 the Colorado Commissioner of Financial Services for
 8 oversight of banks."
 9 The question of whether the general
 10 assembly was discussed in the context of having general
 11 regulatory oversight, I think, is an entirely different
 12 question than whether or not the general assembly or
 13 the political subdivision should control the authority
 14 of the political subdivision to put funds in its own
 15 bank, which was expressly spelled out previously in the
 16 measure.
 17 I have -- and you'll notice we did not
 18 raise the addition of paragraph 5 as an addition after
 19 review and comment, and the reason for that is because
 20 I recall that discussion in response to the comment and
 21 question in the memo; but the -- the substantive
 22 discussion about who controls whether the political
 23 subdivision can put funds in its own bank was not
 24 discussed, and I think, you know, if you look at
 25 the order of the questions, the fact that that's

74

1 No. 9 -- the review and comment memo obviously follows
 2 the sequence of the measure. So the fact that that was
 3 sort of at the tail end, and then paragraph 5 wound up
 4 in the tail end there, I think, demonstrates that that
 5 was not a direct question or comment, as the
 6 constitution requires, regarding something that was in
 7 the first paragraph of the measure.
 8 MR. DOMENICO: Well, wait a minute. So
 9 are you reading the changes as modifying only the power
 10 and authority to deposit public revenues and funds in
 11 its own bank or is the change you were talking about,
 12 about expand -- expanding or limiting by the general
 13 assembly, meant to modify that whole sentence about
 14 having the same powers and authority of other banks
 15 chartered by the State of Colorado? Because if you
 16 look at the original language, he didn't have anything
 17 about this depositing public revenues, right? You had
 18 the initial language about power and authority of any
 19 other bank and then except as limited by the political
 20 subdivision, essentially, and then you both added the
 21 language about depositing public revenues and changed
 22 the end of it to refer to the general assembly and to
 23 allow for expanding authorities.
 24 To me, I think you could read it either
 25 way, but it makes more sense to say that that last part

75

1 of the sentence still modifies the whole thing and
 2 doesn't just modify the discussion of depositing public
 3 revenues. I'm not sure that changes the analysis, but
 4 it's just trying to figure out what that change is
 5 limited to.
 6 MR. GELENDER: I think it -- to me, it
 7 does at least potentially change the analysis. I think
 8 it shows like -- we've had the question of the
 9 regulatory oversight, and I don't think we can hold the
 10 proponents to sort of this standard of a highly
 11 proficient lawyer and knowing what -- exactly what
 12 they're doing. I think the general question was raised
 13 about regulatory oversight and they respond with the
 14 subjects in 5 and then further may or may not -- may
 15 have responded by, you know, saying, Well, maybe the
 16 general assembly should be sort of in charge of their
 17 powers and authorities instead of the subdivision
 18 itself for a sort of -- that doesn't seem like an
 19 unreasonable scenario to me.
 20 MR. DUNN: I guess I would ask the
 21 question, Mr. Gelender, is there a difference between
 22 what is the regulatory oversight? Do the proponents
 23 intend, as the question 9 asks, for there to be a
 24 financial services commission or, in the case of North
 25 Dakota and -- and whatever we have in Colorado, banking

76

1 commissioner? Is the -- is the regulatory concept who
 2 is going to write the rules and those kind of things
 3 about what banks have to do and the question of what
 4 are the organic powers of the bank itself under the
 5 constitution? I think, you know, those are two
 6 different subjects.
 7 MR. GELENDER: I think they're two very
 8 different subjects to you or to an accomplished
 9 administrative law practitioner. I don't know that
 10 they're that different of subjects to your average ini-
 11 -- your average initiative proponent, and I actually
 12 don't know our proponent's background, but --
 13 MR. DUNN: I think he is a lawyer, in
 14 fact, if I'm not mistaken.
 15 MR. STAELIN: I am a lawyer, but this is
 16 not my field.
 17 MR. DUNN: I could attest that banking is
 18 not my field, either.
 19 MR. GELENDER: I guess -- I guess the
 20 point is -- no, in light of, you know, our general
 21 default of having to sort of promote the right of
 22 initiative unless it's perfectly clear that there is a
 23 reason not to, you know, I don't know that -- I don't
 24 know that you're wrong, but I don't know that -- I
 25 don't think you've convinced me that you're right, and

77

1 I think it is your burden to do so.
 2 MR. DUNN: I have an idea, but I'll wait
 3 to see what Mr. Domenico might have to say.
 4 MS. STAIERT: We're just looking at the
 5 questions. You can go ahead.
 6 MR. DUNN: Okay. I should be careful what
 7 I ask for here, but we have -- the videotape that we
 8 have of the hearing I will make a copy of before I -- I
 9 offer this. The first couple minutes of it are missing
 10 because our videographer didn't get there at the start
 11 of the meeting with leg council, but we have it
 12 available online. We use Dropbox, which I've now
 13 become familiar with in -- in how to use and to view
 14 the video and the quality is good and the sound is
 15 good. We can make that available to you and the
 16 proponent this evening and the hearing can be continued
 17 on the limited basis for the question of whether or not
 18 there were changes made to the review -- after review
 19 and comment and can be decided tomorrow.
 20 I actually think we have other wonderful
 21 reasons that you can use to reject the measure that we
 22 have yet to talk about, but on that one, I'm -- I'm
 23 happy to make the video available to -- to the board
 24 and -- and the proponents.
 25 MS. STAIERT: I think Mr. Domenico might

78

1 be ready to make a motion.
 2 MR. DOMENICO: I'm guess I'm pretty
 3 satisfied that this is in response to 5(b) or at least
 4 that it seems to be in response to 5(b) of the
 5 questions that discusses whether it would be necessary
 6 for the general assembly to change the system to
 7 account for governments depositing public money in
 8 their banks, and then -- so the response is to say
 9 something about allowing people to deposit --
 10 governments the power to deposit public revenues and
 11 clarifying that the general assembly, as the question
 12 refers to, has the authority to allow that.
 13 MR. DUNN: Well, Mr. Domenico, I'll answer
 14 that in two ways: One, the proponents answered that
 15 question on 5(b) by stating that it was -- saying that
 16 the -- the system would stay as is, to use their
 17 language.
 18 MR. DOMENICO: Right.
 19 MR. DUNN: So they felt that no change was
 20 needed.
 21 Second, that question doesn't have
 22 anything to do with regulatory oversight of the bank;
 23 what that question is about, what No. 5 is about in
 24 general is about the -- the regulation of banks
 25 differently when public funds are deposited, and

79

1 Colorado has an extensive statutory scheme called the
 2 Colorado Deposit Protection Act. I'm told that's
 3 close.
 4 MR. DOMENICO: Exactly, and that's what
 5 this is trying to deal with, right, to say that, Yeah,
 6 you've got all these -- so they say, you know,
 7 Colorado's got all these complicated rules about public
 8 funds, so don't you need to do something, and then
 9 maybe they said it should stay the same, but they
 10 also -- I mean, the first part of this that you don't
 11 object to clearly is in response to that, and so in the
 12 end, the part you object to is this -- allowing
 13 "expanded" in addition to "limitation" and then
 14 "general assembly," which also strikes me as directly
 15 in response to the point made in 5(b) that you might
 16 need to get the general assembly to do something, and
 17 so maybe they responded initially by saying, No, we
 18 don't think so, but it looks like it turns out they
 19 were convinced perhaps during the discussion that they
 20 did need to amend it.
 21 I mean --
 22 MR. DUNN: Well, first of all, I would say
 23 the proponent was up here and had an opportunity to
 24 express that and did not.
 25 But, second, the Public Deposit Protection

80

1 Act has -- has extensive requirements for what banks
 2 must do to actually be listed as a bank that can accept
 3 public deposits, and it makes sense, if you think about
 4 it, that they need heightened protections for public
 5 funds; and so any bank that wants to be registered as a
 6 bank authorized to accept such -- such funds has to
 7 meet higher requirements in terms of capitalization and
 8 all kinds of other things.
 9 So adding in that a bank can deposit funds
 10 in its own bank doesn't answer that question. The
 11 question here is, is would they fall under the Public
 12 Deposit Protection Act if they did so, and the
 13 proponents said yes, the -- the act appropriately
 14 covers that.
 15 One of our single subject arguments that
 16 we have yet to make is that this measure completely
 17 voids that statutory scheme. It -- no longer is there
 18 a requirement in statute that public funds deposited
 19 in -- in a bank need to comply with a higher
 20 requirement, that the bank needs to comply with a
 21 higher requirement.
 22 MR. DOMENICO: Yeah, well -- and I
 23 appreciate we put -- everybody's in kind of an awkward
 24 position when we get to the end of the process because
 25 we're sort of asking you to prove a negative if we put

81

1 the burden on you to show us that this wasn't in
 2 response to something; on the other hand, you know, you
 3 submit something yesterday and then if we put the
 4 burden on the proponents to refute what you say 16
 5 hours later, that's also unfair, but I'm inclined to
 6 lean towards the burden being more strongly on the
 7 movants for a rehearing, and to me, it's not clear
 8 enough that -- that this was just made up out of whole
 9 cloth and not in response to 5(b) or the discussion
 10 that 5(b) probably engendered.
 11 So I would move that we probably just can
 12 move to the other arguments Mr. Dunn has. I don't know
 13 that we need a motion on every issue, but . . .
 14 MR. DUNN: Well, I mean, I don't want
 15 to -- I don't want to get in the way of anyone who
 16 would like to say anything contrary to Mr. Domenico.
 17 MS. STAIERT: I mean, I just think that
 18 since we've spent time on the issue, we ought to vote
 19 on it for purposes of the record, so --
 20 MR. DUNN: If we're going to -- if the --
 21 if the board is going to vote on the question of
 22 whether changes were made after review and comment,
 23 then I -- I would like to circle back to the "at no
 24 interest" addition. I don't believe that was in any
 25 way discussed in direct response to question or

82

1 comment, as the statute requires or the constitution --
 2 or statutory provision requires.
 3 Mr. Domenico said, Well, I'm not sure
 4 that's a substantive change. You know, I -- I outlined
 5 already why I think that is substantive. A public
 6 entity that is capitalized with public funds which is
 7 backed by the full faith and credit of the institution
 8 of the -- of the political subdivision to be able to
 9 operate it ostensibly as a business and eliminate the
 10 primary source of revenue for that business through a
 11 change to the measure has to be substantive. I don't
 12 know how you can interpret it to say interest or no --
 13 at no interest is not substantive.
 14 MS. STAIERT: All right. You want to make
 15 a motion?
 16 MR. GELENDER: I think Mr. Domenico
 17 has the motion.
 18 MS. STAIERT: He doesn't want to make the
 19 motion.
 20 MR. DOMENICO: I'm happy to move that we
 21 deny the motion for rehearing to the extent it argues
 22 that we don't have jurisdiction based on changes made
 23 after review and comment.
 24 MR. GELENDER: Second.
 25 MS. STAIERT: Okay. All those in favor?

83

1 MR. GELENDER: Aye.
 2 MR. DOMENICO: Aye.
 3 MS. STAIERT: Opposed, no. So we get to
 4 hear your next argument.
 5 MR. DUNN: Let me turn now to single
 6 subject. It is our argument that the measure
 7 contains -- this is on page 2 of the memo, or, excuse
 8 me, the motion. The measure contains at least five
 9 distinct subjects. Of course, the primary one is, as
 10 the proponent suggests, authorizing certain political
 11 subdivisions of the state to establish and operate a
 12 bank.
 13 In addition and -- well, I'll take them in
 14 order. Number one, obviously, is an amendment or
 15 actually, I was thinking about this morning, perhaps
 16 overruling the requirement of TABOR by allowing
 17 political subdivisions to engage in multiyear fiscal
 18 obligations. Of course, Article X, section 20 of the
 19 constitution prohibits political subdivisions of the
 20 state from -- from incurring multiyear fiscal
 21 obligations, and I don't think it's hard to envision a
 22 scenario where, because the purpose of this measure is
 23 stated as promoting development and enterprise in the
 24 state, or, excuse me, for -- yeah, for the state, that
 25 banks could or the state could use this mechanism, the

84

1 ability of the bank to lend funds or to incur debt, as
 2 a means of getting around that requirement of the
 3 state.
 4 So the -- so the bank could take on
 5 multiyear debt and use that for the state's benefit,
 6 whether it's to promote economic development and
 7 enterprise, whatever that means, or simply put it in
 8 the general fund for those purposes and to allow the
 9 state to borrow funds for that purpose.
 10 I think a good example of that, actually,
 11 is -- if you've been reading the newspapers, the state
 12 has been struggling over how to come up with, I think
 13 it was, \$5.7 million for the state strategic fund.
 14 That is a fund that resides in the state Office of
 15 Economic Development and is used as an incentive
 16 program to give cash awards to employers to move jobs
 17 here, and the joint budget committee refused to include
 18 that line in the budget, and the governor's office was
 19 pushing hard to put that back in.
 20 You can envision a scenario where the
 21 governor's office pushes for the state bank to incur
 22 multiyear debt to bring in those funds so that the
 23 governor's office can promote economic development, and
 24 that would clearly be in violation of TABOR but for
 25 this not being a constitutional provision, which would

85

1 then supersede that or conflict with it.
 2 MR. STAELIN: I have a response.
 3 MS. STAIERT: Uh-huh.
 4 MR. STAELIN: In lending money, the state
 5 would not be taking on debt. It's lending money. The
 6 party undertaking the debt would be the party at the
 7 other end. In North Dakota, as -- we envisioned here
 8 actually, the -- the subdivision banks would ordinarily
 9 be entering into correspondent-type relationships with
 10 community banks to lend money. That would be done
 11 through the bank, through the community banks.
 12 And also there is no requirement that in
 13 amending the constitution -- because we have a
 14 superseding clause, there's no requirement that we
 15 spell out every provision of the constitution that
 16 might be in conflict with it. That's more the nature
 17 of cleanup that can be done later, but we make it clear
 18 the single issue is to authorize political subdivisions
 19 to establish their own banks and generally what
 20 those -- what the guidelines for -- for doing that will
 21 be.
 22 MR. GELENDER: I have a question or two
 23 for the proponent briefly.
 24 MS. STAIERT: That's you. You.
 25 MR. STAELIN: Oh, okay. I'm sorry. I was

86

1 thinking the proponent of the motion.
 2 MR. GELENDER: I'm sorry. So is -- in
 3 your view, is TABOR a conflicting state constitutional
 4 amendment that would be superseded by this or would --
 5 for example, if one these banks, and assuming it didn't
 6 qualify for enterprise status, was going to take on
 7 a -- was going to incur a multiple fiscal year
 8 obligation, that they would not need a vote of the
 9 people? Would they or would they not need a TABOR
 10 vote?
 11 MR. STAELIN: I don't think so. I don't
 12 think it conflicts with TABOR. This -- this isn't
 13 authorizing the bank to borrow money. So . . .
 14 MR. GELENDER: So if it -- if the bank
 15 chose to, your assumption is that would be subject to
 16 TABOR requirements?
 17 MR. STAELIN: If the bank chose to --
 18 MS. STAIERT: Borrow.
 19 MR. GELENDER: To incur multiple -- to
 20 borrow, to issue bonds or something like that.
 21 MR. STAELIN: I believe so.
 22 MR. GELENDER: Thank you.
 23 MR. DUNN: Jason Dunn again.
 24 I was just speaking with Mr. Childears,
 25 the -- the objector on this. He indicated to me, and

87

1 Mr. Childears runs the Colorado Banking Association,
 2 that typically a bank is funded 80 percent by borrowed
 3 funds. Banks routinely borrow money for their purposes
 4 and for presumably lending at higher rates. So I don't
 5 think a bank can operate without -- without engaging in
 6 multi- -- in multiyear debt.
 7 MR. STAELIN: The political subdivisions
 8 have a power that the banks don't have and that is they
 9 can levy taxes and assess fees. The basis for the
 10 funding, the capitalization of the bank is the tax
 11 money and fees that come in, and all of that becomes
 12 available, then, to lend out. There's no need to
 13 borrow.
 14 MR. DUNN: Jason Dunn again. I would -- I
 15 would direct the title board back to the language we
 16 discussed a moment ago where it says the bank has
 17 the -- all the powers -- let me make sure I get the
 18 right language. "Any such bank shall have the same
 19 powers and authority as other banks chartered by the
 20 State of Colorado." Banks have the authority to incur
 21 debt, multiyear debt, for purposes of the operation of
 22 the bank.
 23 MS. STAIERT: Mr. Dunn, when you say
 24 superseding TABOR to allow the state to retain excess
 25 revenue, where is that in the proposal? Where does it

88

1 say that they can keep the revenue?
 2 MR. DUNN: I'm sorry?
 3 MS. STAIERT: Well, in your memorandum,
 4 you state that one of the violations of the single
 5 subject is that it -- it supersedes TABOR and that it
 6 allows -- am I on the right one?
 7 MR. DUNN: Are you on 95?
 8 MS. STAIERT: I may not have the right
 9 one. Yeah, I'm on 95. Or 94.
 10 MR. DUNN: Unfortunately we're not to 95
 11 yet.
 12 MR. DOMENICO: Well, what -- what -- I
 13 mean, what difference does it make? Why is it --
 14 that's not a separate subject, right? I mean, running
 15 a bank -- if running a bank means that certain other
 16 provisions can't be applied to you, then that doesn't
 17 seem to be a -- maybe it's a separate -- a second
 18 implication, a fact. I don't even know if I would call
 19 it a purpose, but the -- the question is whether it's a
 20 separate unrelated subject, and to me, it -- it's not.
 21 MR. DUNN: Well, what's, I think, a
 22 separate subject is not whether so much the bank has
 23 the authority, it's that the political subdivision has
 24 the authority now to generate revenue through multiyear
 25 debt, that the stated purpose of the bank is to promote

89

1 economic development and enterprise in the state so the
 2 political subdivision, or in the case of 95, to jump
 3 ahead a little bit, can then incur multiyear debt
 4 through the bank and use that for economic development
 5 purposes.
 6 MS. STAIERT: Okay. I'm going to rely on
 7 hopefully your memory a little bit better than mine.
 8 The case that talks about -- and it might specifically
 9 reference TABOR, but that you can't have a spending
 10 restriction in the same initiative as you have another
 11 type of restriction, that those are two subjects, do
 12 you know which case I'm talking about?
 13 MR. DUNN: I don't -- I do, but I don't
 14 have a citation for that.
 15 MS. STAIERT: Okay. Is that similar to
 16 the argument you're making here?
 17 MR. DUNN: It is. I think we do have a
 18 measure that -- well, let me back up. I think -- I'm
 19 trying to remember the case that it was in, where the
 20 Supreme Court said or implied that if TABOR were to
 21 be -- to be enacted today, it would -- it would violate
 22 the single subject requirement.
 23 MS. STAIERT: Right.
 24 MR. DUNN: And I think it's along that
 25 lines that if you have a measure that were to impact

90

1 both the spending limitation in TABOR and the revenue
 2 limitation, that that would violate the single subject
 3 requirement.
 4 MS. STAIERT: And you think this does
 5 that?
 6 MR. DUNN: Absolutely.
 7 MS. STAIERT: Okay. And how?
 8 MR. DUNN: It allows the state of the
 9 political subdivision to incur multiyear debt which
 10 would then presumably allow it, if it chose to exceed
 11 spending limitation -- revenue limitations and then of
 12 course exceed the spending limitations of that
 13 revenue.
 14 MR. DOMENICO: But those, as you pointed
 15 out, are just sort of natural implications of
 16 establishing a bank by a -- that is a regular old bank
 17 but run by the government. I mean, that's an
 18 implication, as you pointed out, of -- of having the
 19 authority of other banks, it's not some special
 20 additional thing snuck in there that -- that if they
 21 just established a bank, they wouldn't have the power
 22 to do and that should shock everyone. I mean, banks
 23 are highly leveraged, typically, institutions and it's
 24 not as if they said let's start a bank and let's carve
 25 a chunk out of TABOR. To the extent that's true, it

91

1 seems to me it's just an implication of -- of the
 2 subject here, which is authorizing banks and the only
 3 way to remedy what you say is a problem would be to
 4 have to specifically limit these banks in a way that
 5 just naturally they wouldn't be limited.
 6 MR. DUNN: Well, I think I would agree
 7 with you. If the -- if the revenue and income to the
 8 bank was somehow exempted from TABOR as part of this
 9 measure, I would agree with you. But what this does is
 10 it guts the TABOR requirements that apply to the -- not
 11 the bank, but the political subdivision. The bank now,
 12 by use -- or, excuse me, the political subdivision, by
 13 using the bank as the vehicle, has a means to just
 14 circumvent TABOR completely.
 15 MR. GELENDER: That seems, Mr. Dunn, to be
 16 a possibility but by no means a certain consequence of
 17 this thing. It seems to me, for one, the bank could be
 18 funded just with tax revenues in that way. If it's not
 19 funded with tax revenues, it's not entirely clear to me
 20 that it couldn't possibly be an enterprise and fund
 21 itself by issuing its own bonds, in which case it's not
 22 subject to TABOR.
 23 So I -- I don't disagree with you that
 24 there might be -- there might be TABOR consequences,
 25 but I don't see clearly in the language or the measure

92

1 or in the way courts might interpret it, that it
 2 necessarily would implicate TABOR. And then
 3 secondly -- that necessarily would, as you put it, gut
 4 TABOR.
 5 And then secondly, even if it did have
 6 some of those effects, I think I agree with
 7 Mr. Domenico, that, you know, they're -- they're
 8 results and consequences, but I don't know that they're
 9 purposes or subjects.
 10 MR. DOMENICO: It also seems to me, and we
 11 had this discussion last time, although it didn't, I
 12 don't think, focus directly on the ability to issue
 13 debt, but the proponents said, and this seems like a
 14 fairly reasonable reading of it, that -- that TABOR
 15 sort of is a filter that before the money gets into
 16 the -- the bank, it has to go through TABOR, and so to
 17 the extent it might apply, it's not, again, clear to me
 18 that you could sort of use this, for example, to get to
 19 your second point, to raise taxes. We specifically
 20 discussed that last time, and I think I -- I ended up
 21 being convinced that, no, you still have to comply with
 22 TABOR to get your revenue, and so I'm not quite sure
 23 that I agree with the premise, even if I did think it
 24 was a second subject.
 25 So I don't know. I -- I definitely don't

93

1 think we need a motion on every (a), (b), (c), (d).
 2 MS. STAIERT: No. We can take them all
 3 when we're done.
 4 MR. DOMENICO: I mean, the second -- the
 5 second point strikes me as just being a -- III(b), I'm
 6 talking about -- not a likely interpretation of the
 7 measure, just as a matter of fact, whether it would be
 8 a second subject or not. I don't see anything that
 9 says you have the authority to cover your related
 10 losses by raising taxes without complying with TABOR.
 11 MR. DUNN: Well, I -- I would answer that
 12 by asking a question. I guess what happens when -- if
 13 the bank fails and it's pledged its full faith and
 14 credit for the measure -- for the failure?
 15 MR. DOMENICO: Well, it would just be just
 16 like anything else. The full faith and credit of a --
 17 of an institution only extends as far as its assets.
 18 And if --
 19 MR. DUNN: And its credit.
 20 MR. DOMENICO: And if the constitution
 21 requires that you get a vote to come up with more
 22 assets, that doesn't seem to -- I mean, that seems
 23 far-fetched to me to say, Well, that means you just get
 24 to -- that basically the creditors of this bank enforce
 25 a tax increase on the -- on the people of the

94

1 subdivision. I just don't see it.
 2 MR. GELENDER: What, in fact, they could
 3 do -- I mean, it could just have a municipal default,
 4 it seems, or a county default, I suppose, in lieu of
 5 the raising of taxes if they can't get voter approval.
 6 I mean, that's a horrific consequence to be sure, but I
 7 don't know that it's -- it's not an impossible . . .
 8 MS. STAIERT: See, I disagree with that,
 9 because it says the revenue, income and assets of such
 10 banks shall not be limited, nor shall expenditures and
 11 management of its revenues be restricted except upon
 12 sound financial public policy considerations. All
 13 provisions of this section are self-executing, and
 14 severable and supersede any conflicting state
 15 constitution.
 16 So this supersedes TABOR, it doesn't go
 17 with TABOR because the revenue, income and assets are
 18 not limited. That means that they can go above the
 19 cap.
 20 MR. DOMENICO: Yeah, but that's only to
 21 the -- that's only to the extent they conflict, and
 22 this is exactly what we talked about last time. The --
 23 the revenue is the revenue that comes into it. It
 24 doesn't mean that none of the rest of the constitution
 25 applies and this bank can go around and take money out

95

1 of people -- people's personal bank accounts because it
 2 wants it, because -- just because anything else would
 3 be a limit on its -- on its revenue. I mean, that --
 4 I'm convinced that the best way to read that is once
 5 you get through TABOR, this is not a -- you can't limit
 6 it in this -- in any other way besides these ways.
 7 It doesn't mean that -- that it can print
 8 its own money or that it can go around robbing people
 9 because any other limit would -- would conflict, and so
 10 I'm -- I'm not convinced. In fact, I'm convinced of
 11 the contrary, that TABOR still would apply to the money
 12 coming in and that reading it otherwise, even though I
 13 raised this very question last time is --
 14 MS. STAIERT: Well, what if you put all
 15 the tax into the bank and your tax revenue that year
 16 was 10 percent above your cap? Then would you refund?
 17 MR. DOMENICO: Right. No. So my -- so it
 18 seems to me if your tax revenue is excessive, then
 19 TABOR applies and you have to refund it, and --
 20 MS. STAIERT: But then it's going to
 21 affect the --
 22 MR. DOMENICO: -- you put it in the
 23 bank -- sure.
 24 MS. STAIERT: It's going to affect the
 25 revenue, income and assets of the bank, which cannot be

96

1 restricted.
 2 MR. DOMENICO: Right, but that doesn't --
 3 I mean, again, that doesn't mean that no other law
 4 applies and that just the bank can do whatever it
 5 wants.
 6 MR. GELENDER: Actually, it won't, because
 7 you'll refund in the next year, and what they'll do is
 8 they'll just take half -- let -- the refund, over the
 9 next year and not deposit as much to the bank in the
 10 next year.
 11 MS. STAIERT: Yeah, but those deposits
 12 shouldn't be restricted.
 13 MR. GELENDER: Well, but it's always -- I
 14 believe -- I feel a little concerned that we're getting
 15 into the merits of the measure here, which is --
 16 MS. STAIERT: Well, I'm just trying to get
 17 to the subject.
 18 MR. GELENDER: -- not -- it says that --
 19 MR. DOMENICO: I mean, the fact of the
 20 matter is that --
 21 MR. GELENDER: -- a political subdivision
 22 doesn't have to put -- I mean, it -- I think it has to
 23 be read as a whole with the language, which is sort
 24 of -- I believe it's "may" language as to what
 25 assets -- a political subdivision may put assets in the

97

1 bank, not that it has to. Now, the other one, I think,
 2 is a little different.

3 MR. DOMENICO: Comply -- I mean, TA -- it
 4 doesn't mean that there's no -- can't be any limits and
 5 that the subdivision could just say, Hey, we want some
 6 more revenue this year, let's go take all this private
 7 property and that you couldn't go in and say, Well, you
 8 can't prohibit us from doing that because that would be
 9 a limit on our revenue and this supersedes any other
 10 law. I mean, that's -- that's not the intent.

11 TABOR can be applied to prevent tax
 12 increases, and so any revenue obviously has to be sort
 13 of legally obtained, and TABOR is part of that regime,
 14 and I just -- I don't --

15 MS. STAIERT: Okay.

16 MR. DOMENICO: I don't like that language
 17 because it raises this confusion, and I raised it last
 18 time, but I think that's the only way you can really
 19 read it.

20 MS. STAIERT: Okay. All right. I'm --
 21 I'm ready for a motion.

22 MR. DUNN: Are we going to continue
 23 through the other single subject arguments?

24 MR. DOMENICO: Mr. Dunn has a couple other
 25 issues. Where did it go?

98

1 MR. DUNN: I think we're on III(c),
 2 the Public Deposit Protection Act, which we've
 3 previously discussed the statutory scheme designed to
 4 ensure that public deposits in banks are -- protected
 5 through a statutory scheme require higher standards and
 6 registration by banks that take those funds.

7 Certainly the provision has to be read to
 8 supersede that act, and I don't think that's a natural
 9 consequence, is I think the language Mr. Domenico may
 10 have used, of the measure, but, rather, a separate
 11 purpose because all the public funds -- not all, a
 12 large percentage of the public funds of political
 13 subdivisions will likely be deposited in these banks,
 14 and the statute providing the heightened regulatory
 15 scheme increase -- is eliminated for purposes of these
 16 banks; and as the proponents said at the review and
 17 comment hearing, it was not their intend to -- to
 18 change that requirement, but the requirement in the
 19 provision and the measure gives them the authority and
 20 powers of other any state-chartered bank and -- and
 21 does not require any adherence to the Deposit
 22 Protection Act.

23 MS. STAIERT: Okay.

24 MR. DOMENICO: I think I agree with that,
 25 and that may be a fairly important point to -- to some

99

1 people. It doesn't seem like a separate subject,
 2 though. I mean, as I sort of understand it, I could be
 3 wrong, partly for some of the reasons you pointed out
 4 before, these banks, because of kind of some of the
 5 inherent limits or the fact that they're going to be
 6 lending at very low interest rates to places that
 7 normal banks might not, if they couldn't get
 8 governmental deposits, would have trouble succeeding, I
 9 suppose, and so wouldn't kind of the whole point of
 10 this be that this is a place for local governments to
 11 put their money and if you don't make it so they can
 12 put their money in there, the whole project fails?

13 MR. DUNN: That may be a question that I
 14 think the proponent is better suited to answer about
 15 the intent of the measure. I think the -- the bank
 16 could be established with having -- either it's
 17 subjected to the act or distinguishing between public
 18 funds and private funds, but it doesn't do that. I
 19 think then it, by its own terms, supersedes any
 20 conflicting provisions that allow -- because the
 21 measure allows it to operate as a private -- as a
 22 private bank would, that it -- that it -- for purposes
 23 of allowing it to -- the public entity to deposit those
 24 funds in its own bank would not comply with that.

25 MR. DOMENICO: I guess it's not even

100

1 totally clear to me that that's true. I mean, what --
 2 is this the provision you cited earlier that we were
 3 discussing that you think does this?

4 MR. DUNN: Actually, are you talking about
 5 the statutory provision?

6 MR. DOMENICO: No. What provision of the
 7 measure would have the effect of voiding this act?

8 MR. DUNN: Well, I don't know if there's
 9 a -- you can pinpoint a specific provision. As I said,
 10 the measure, in paragraph 1, allows it to operate,
 11 shall have all the same powers and authority of banks
 12 chartered by the state and then only limits them as,
 13 then, the general assembly chooses to do so, and then
 14 goes on at the -- at the conclusion of paragraph 1 to
 15 say all provisions of this section are self-executing,
 16 and severable and supersede any conflicting state
 17 statutory provisions.

18 MR. GELENDER: Mr. Dunn, could the measure
 19 be interpreted to say that, okay, has the same powers
 20 and authority except as expanded or limited, and one of
 21 the limits that it's subject to is the existing limit
 22 on, you know, the cap -- the higher capitalization
 23 requirements you were talking about for having public
 24 funds deposited in it? I mean, it doesn't say, you
 25 know, except as subject to future limits.

101

1 MR. DUNN: Well, I think that's a question
 2 for the proponents as to whether or not they believe
 3 the bank, if it accepts public funds, has to be
 4 capitalized to the same extent and meet the other
 5 registration requirements of the protection act. I
 6 don't think it does that, because it sets up a scheme
 7 for the operation and regulation of a -- of the
 8 political subdivision banks that are chartered.

9 MR. GELENDER: And I -- and it says that,
 10 you know, on average, they should be essentially --
 11 granted, it says it on the authority side, not
 12 regulated side, but it does say same powers and
 13 authority, so there's the suggestion that they should
 14 be treated like other banks, and to the extent they're
 15 similarly situated seems to me that maybe that should
 16 include that reserve requirement. Now, I don't know
 17 that act. I don't deal -- it may be the act has
 18 definitions that say a bank only includes a private
 19 bank. I have no idea. It probably doesn't, because we
 20 don't have public ones --

21 MR. DUNN: Exactly.

22 MR. GELENDER: So it's -- the problem I'm
 23 having is with the law being silent on it, again, I
 24 can't say that the measure won't do what you say, but
 25 I -- I can't say that it will, either, and I think, you

102

1 know, there's a lot of room for interpretation, further
 2 action by the general assembly, et cetera.

3 MR. DOMENICO: Well, section 3 also says
 4 that these banks may be capitalized by the same means
 5 available to and subject to the same minimums
 6 prescribed for banks that are privately owned, and it
 7 seems to me that sort of tries to say these kind of
 8 background rules, for the most part, still apply and
 9 avoid this -- this potential interpretation, but I
 10 don't know. I'm certainly not a banking lawyer, and so
 11 I don't know that I can say for sure that this isn't
 12 true, but again, it doesn't strike me as a separate
 13 subject. It's just sort of part of establishing a
 14 government-run bank.

15 MR. GELENDER: Right.

16 MS. STAIERT: Okay. So the last one is
 17 pledging credit?

18 MR. DUNN: And I -- if I could ask in
 19 advance, perhaps before we get on to title, if we get
 20 there, if we could take a couple-minute break.

21 MS. STAIERT: Yes.

22 MR. DUNN: And I may have one other issue
 23 to raise on the single subject requirement.

24 And just to finish the discussion on the
 25 public deposit protection, I mean, I think that's a

103

1 valid question I won't ask of the proponents, because I
 2 don't think that's -- that's appropriate for me to do
 3 here, but perhaps the board wants to ask the proponent
 4 if they intend for the act to apply to these types of
 5 banks.

6 Turning, I guess, to the last one, and
 7 this was an issue that was raised by legislative staff
 8 at the review and comment hearing, that Article XI of
 9 the constitution prohibits a political subdivision from
 10 pledging its credit. That was an issue that was raised
 11 and the proponents said that they did not see that as
 12 an issue. In fact, I think the -- the memo said would
 13 the proponents consider amending Article XI to conform
 14 with the authority granted in the proposed initiatives,
 15 and the proponents said that that was not necessary.

16 We would argue that the authority
 17 necessary for the operation of the banks here is for
 18 the political subdivision to pledge the credit of the
 19 political subdivision through the bank and that that's
 20 impermissible through -- by Article XI or as a separate
 21 subject to strike that constitutional provision as it
 22 applies to all political subdivisions.

23 MS. STAIERT: I mean, I agree it's a
 24 conflict. Clearly it's established law, you can't
 25 pledge credit, but, again, I don't know that it makes

104

1 it a separate subject. I mean, it makes it a problem
 2 that the proponent believes that it's not effective,
 3 because it clearly is effective, but having chosen not
 4 to change that language, there will just be a conflict
 5 in the constitution and it sounds like from the
 6 language in sub 1, he's trying to say that we won't be
 7 limited in any other restrictions.

8 MR. DUNN: Well, I think the question is,
 9 then, at what point does an effect of the measure
 10 become so substantive that it's a separate subject?
 11 And if the board is in agreement that Article XI is
 12 voided as it applies to every political subdivision in
 13 the state, and that we have a --

14 MS. STAIERT: That would have a bank.

15 MR. DUNN: That establishes a bank, you're
 16 right.

17 MR. DOMENICO: Yeah, it's not voided. I
 18 mean, it just means that if a -- one of these
 19 subdivisions creates a bank and chooses to forgo FDIC
 20 insurance and self-insure, that to that extent,
 21 Article XI wouldn't apply to that particular form of
 22 pledging credit. It doesn't mean that Article XI
 23 doesn't apply to them anymore, it's just that this one
 24 particular form of pledging of credit is okay.

25 MR. DUNN: Except that, as I discussed

105

1 earlier, a political subdivision bank could then use
 2 the bank as a vehicle to incur debt for all kinds of
 3 things as long as they could tag it to development --
 4 to promoting development and enterprise, and you could
 5 see, especially in a downturn like we've had recently,
 6 where a political subdivision uses that as a vehicle to
 7 fund all kinds of things when revenues are down and to
 8 pledge its credit through the bank to do that.

9 MS. STAIERT: Well -- and fundamentally
 10 the problem is we may agree with you, but what you're
 11 making are policy arguments and --

12 MR. DUNN: I don't know -- I think the
 13 point is that -- as I started to say, at what point if
 14 the substantive impact of the measure, I guess, is so
 15 substantive, to be repetitive -- at what point is that
 16 a separate subject?

17 MR. GELENDER: And I'm sorry. I had my
 18 nose in my statute book. I believe -- did I hear you
 19 make the argument that sort of for these banks to
 20 function, they would kind of have to pledge their faith
 21 -- their full faith and -- the subdivisions would have
 22 to do this pledging of the credit in Article XI,
 23 section 1, that you couldn't see them functioning
 24 without that?

25 MR. DUNN: That's correct.

106

1 MR. GELENDER: Okay. Then, to me, it
 2 seems like we have two different kind of issues,
 3 because to me that says, Well, then, if you want to
 4 establish this sort of bank, then it's necessarily and
 5 properly connected that you do this, which I think
 6 works against you as a single subject argument.

7 Now, what -- what I'm trying to get my
 8 head around is whether, in lieu of that, you just sort
 9 of have a broadness argument that, Well, that may be
 10 true but you've connected so many things that it's just
 11 too big, you know. It's like concerning water or some
 12 of the things that the courts have ruled on that it's
 13 just too big to be one subject.

14 MR. DUNN: Yeah, I think -- I think that's
 15 right. If you're going to have a measure that has
 16 impacts that are so -- impacts that are so significant
 17 to the operation of -- of governmental entities, then
 18 that's a separate subject.

19 MR. STAELIN: Well, I -- I'll repeat what
 20 I said before. I don't think this requires a
 21 subdivision to pledge its credit, and the overall --
 22 the vision, purpose, and intent is very much a single
 23 purpose, to establish the authority of political
 24 subdivisions to operate and run a bank.

25 MR. DOMENICO: None of these things are

107

1 unusual for a bank, right? This is -- all these things
 2 are just made -- are just making the oddity of a
 3 government-run bank within the extreme oddity of our
 4 state constitution operate more and more like a regular
 5 bank and -- and that, to me, is a little bit strange,
 6 that you think you have to make a very -- that you
 7 can't make this operate like a regular bank, that it
 8 has to be -- that you have to have all these exceptions
 9 or it's a single subject violation.

10 MR. DUNN: Well, I mean, and our argument
 11 is not that each element of the way the bank operates
 12 is a separate subject, but when you have provisions in
 13 the Colorado constitution that are particularly
 14 fundamental provisions in the constitution like TABOR
 15 or the ability of -- of governmental -- governmental
 16 entities to pledge credit and the measure strikes those
 17 as they apply to all those governmental entities and
 18 that is a significant change in the way our governments
 19 operate, then that has to be a separate subject.

20 MR. DOMENICO: Yeah, but see, that --
 21 that, to me, shows what really would be problematic.
 22 If what we had was a measure that said, Hey, you can
 23 create a bank that's a government-run bank and, oh, by
 24 the way, any subdivision -- we are also repealing
 25 Article XI, period, and because it would help run the

108

1 bank, we're also going to repeal half of TABOR and --
 2 that would strike me as sort of using the bank as a way
 3 to sneak in these separate subjects.

4 But here they've -- they've not done that.
 5 They've just created the bank and to the extent
 6 creating the bank requires specific bank --
 7 bank-specific exemptions to the various constitutional
 8 provisions, that's what they've tried to do and this
 9 doesn't seem like a separate subject to me. It seems
 10 like potentially serious policy problems, but, again, I
 11 don't see it's a separate subject like I would if it
 12 really did say in addition to this bank, everybody's
 13 exempt from Article XI, everybody's exempt from
 14 section 7 of TABOR, et cetera.

15 Can we take a break?

16 MS. STAIERT: You want to make a motion?

17 MR. DOMENICO: Well, can we take our
 18 break? I think he wanted to take a break first.

19 MS. STAIERT: Okay. We'll take a break.

20 MR. STAELIN: For what it's worth, this
 21 comes first, but because of the hearing, I rescheduled
 22 a flight myself from 7:05 this morning to 7:33 this
 23 evening, thinking we'd have time, and I don't know if
 24 there's time. I'll certainly stay if I have to.

25 MS. STAIERT: Sure. Well, as you know,

109

1 that'll be your choice based on -- you know the state
 2 of the law.
 3 MR. DOMENICO: Yeah, I mean, I think we're
 4 going to proceed, right?
 5 MS. STAIERT: Yes.
 6 MR. DOMENICO: And I think you can --
 7 MR. DUNN: If we can just take five
 8 minutes.
 9 MS. STAIERT: Yes.
 10 (Recess taken, 5:18 p.m. to 5:32 p.m.)
 11 MS. STAIERT: All right. We're back on
 12 the record. We were -- we had just got done talking
 13 about (d), III(d) of the petition. Did you have
 14 something you -- oh. We're back on the record, sorry.
 15 Now we're back on the record, and we're on
 16 III(d) of the petition for No. 94, and when we took a
 17 break, you indicated you might have a --
 18 MR. DUNN: All right. We have nothing
 19 further.
 20 MS. STAIERT: Okay. All right. You want
 21 to make a motion on III?
 22 MR. DOMENICO: I will move that we deny
 23 the motion for rehearing on the single subject issue.
 24 MS. STAIERT: Second. All those in favor?
 25 Aye.

110

1 MR. DOMENICO: Aye.
 2 MR. GELENDER: Aye.
 3 MS. STAIERT: Okay. And moving on to
 4 No. 4, that's the title.
 5 MR. DOMENICO: May I make a suggestion
 6 that to the extent -- we can go through the details of
 7 this later, but to the extent that the same objections
 8 and issues are raised in the motion for rehearing on
 9 No. 95, that we kind of -- everybody incorporate what's
 10 already been said and ruled upon, and then to the
 11 extent that helps with the fact that now we've begun
 12 the rehearing already on 94 and 95, in case the
 13 proponent feels the need to leave, I think he's been
 14 here for both hearings.
 15 MS. STAIERT: Okay. All right. The first
 16 point -- and maybe you want to just go ahead and talk
 17 about it.
 18 MR. DUNN: Sure. Thank you. Turning to
 19 the title, our first objection is that the title
 20 contains an impermissible catchphrase in that it
 21 describes that the bank will be backed by the full
 22 faith and credit of the political subdivision, I think,
 23 is -- actually, as Mr. Gelender already articulated, I
 24 think some of us who work in the legal profession or in
 25 municipal finance or municipal government may know what

111

1 that means, but it occurred to me that I don't think
 2 the average voter will understand what that really
 3 obligates the political subdivision to, that it could
 4 mean a bank failure, at an extraordinary level, that
 5 the political subdivision would have to account for;
 6 that particularly with the broad nature of this
 7 measure, which allows it to use funds for economic
 8 development and enterprise purposes throughout the
 9 state, you could have a political subdivision winding
 10 up in a -- in a -- as Mr. Gelender said, even in a
 11 municipal failure, and to pledge the full faith and
 12 credit and to use that phrase, I think, will not --
 13 does not convey the true extent of that obligation and
 14 is more of a -- a phrase that us in the legal business
 15 know that the average voter would not understand.
 16 MS. STAIERT: So what would you propose?
 17 MR. DUNN: I think the measure needs to
 18 articulate that all the potential revenue and credit of
 19 the municipality could be at risk should it be
 20 necessary to -- to cover bank losses.
 21 MS. STAIERT: So would it be good enough
 22 to strike "full faith" and just say "with their
 23 credit"?
 24 MR. DOMENICO: Or just to say to
 25 self-insure deposits?

112

1 MR. DUNN: I think the title needs to
 2 reflect that the bank -- that the political subdivision
 3 could be liable for all losses of the bank. Or
 4 potentially a bank failure.
 5 MS. STAIERT: So it could be self-insured
 6 deposits with liability for losses or -- I mean, what
 7 would --
 8 MR. DOMENICO: Well, what if --
 9 self-insured deposits with the subdivision' --
 10 MS. STAIERT: Assets?
 11 MR. DOMENICO: -- assets. I mean, I think
 12 that's sort of fairly included in the concept of
 13 self-insurance, but if we want to add a little bit of
 14 extra, that's fine, too.
 15 MR. STAELIN: My only comment is that that
 16 language, "full faith and credit," is old language. I
 17 mean, that appeared on --
 18 MR. DOMENICO: Yeah, but -- it's in the
 19 constitution, but it has a totally different meaning in
 20 the constitution, right? Doesn't it mean like -- that
 21 I get to use my driver's license in Wyoming?
 22 MR. STAELIN: Oh, okay. I'm thinking of
 23 the -- the Greenbacks issued by --
 24 MR. DOMENICO: Yeah.
 25 MR. STAELIN: -- the Lincoln

113

1 administration, the dollar. It says right on it, full
 2 faith and credit
 3 MR. DOMENICO: It's used a lot of
 4 different ways, but I think that's part of Mr. Dunn's
 5 point is that it sort of has some meaning but maybe not
 6 the sort of technical meaning that it has here and that
 7 we should avoid potentially misleading people about
 8 what it might mean. I don't -- I wouldn't be okay
 9 leaving it there.
 10 MR. GELENDER: We're just slightly
 11 grammatically off because we have a "political
 12 subdivisions" and then we have a singular
 13 "subdivision." I just would suggest maybe just to say
 14 "with all of their assets." I think that conveys the
 15 meaning of it, because I don't -- I think the "all of
 16 their" is -- more clearly communicates what's really
 17 going on.
 18 MR. DUNN: We would support that change,
 19 and I think this sort of ties in with the -- with the
 20 second title -- concern we have, that the title
 21 erroneously states that the measure allows the
 22 political subdivision to self-insure. There's only two
 23 kinds of insurance. It's self-insurance and it's FDIC
 24 insurance, and it is a practical -- practical
 25 impossibility that any political subdivision bank would

114

1 be able to meet the requirements of the FDIC to be
 2 insured, and maybe the proponents have a -- have a
 3 comment on that, but if that's the case, then we would
 4 argue that it should say, "The political subdivision
 5 will be required to self-insure deposits with all" --
 6 "with all subdivision assets."
 7 MR. STAELIN: The FDIC only insures
 8 deposits up to \$250,000, which would mean nothing to a
 9 political subdivision. The work would -- and not only
 10 that, the -- the FDIC, as of August 2010, was
 11 essentially bankrupt. That's not a significant factor
 12 here.
 13 MS. STAIERT: So you would agree --
 14 MR. STAELIN: And -- and political
 15 subdivisions could, at least, for the outset, until
 16 they establish their, you know, full financial
 17 viability, they could go to the Lloyds or someone like
 18 that and provide some insurance to back them up. I
 19 would prefer the provision as it's -- it's written, but
 20 I think in any event, that there's no problem
 21 with --
 22 MS. STAIERT: Well, I mean, we could say
 23 requiring political subdivisions to insure or
 24 self-insure deposits. I don't know if that makes a lot
 25 of difference.

115

1 MR. DUNN: I like "insure."
 2 MR. GELENDER: One -- one question I would
 3 have is are they actually required to issue one way or
 4 another? I mean, it's like when I deposit -- if I --
 5 excuse me. I'm sorry. If I happen to have more than
 6 250,000 -- say I wanted to borrow money, theoretically
 7 you could have part of your stuff uninsured, correct?
 8 MR. DOMENICO: Well, but that's -- I don't
 9 quite understand that part of it. How is the -- the
 10 political subdivision insuring its own deposit with its
 11 own assets?
 12 MS. STAIERT: Right.
 13 MR. DOMENICO: It doesn't really make
 14 sense to me. The question here is insuring other --
 15 other deposits, right?
 16 MR. GELENDER: Right.
 17 MS. STAIERT: Well, it depends whose
 18 deposits --
 19 MR. DOMENICO: I'll -- I'm willing to take
 20 sort of Mr. Dunn's word about the practical reality,
 21 but I'm not willing to write it into the title, not --
 22 not because I don't believe him but just because, Well,
 23 we're supposed to write a title about the measure, not
 24 about its consequences, necessarily, and I would leave
 25 it as is on that point.

116

1 MS. STAIERT: Okay.
 2 MR. STAELIN: Just to clarify, this
 3 provision does not authorize private depositors,
 4 individuals or private entities to put money into this
 5 bank. I mean it clearly contem -- or these banks. It
 6 clearly contemplates public money from that subdivision
 7 only going into the bank.
 8 MS. STAIERT: Right. Okay.
 9 MR. DOMENICO: That would be a pretty neat
 10 trick, then, if you could get the FDIC to insure you,
 11 bring your own deposits, and then blow it all and get
 12 the federal government to back it up. We should see if
 13 we can pull that off.
 14 MS. STAIERT: Or you could loan it all out
 15 at zero interest and then --
 16 MR. DOMENICO: Right. Exactly.
 17 MS. STAIERT: We had another one?
 18 MR. DUNN: Sure. It's the same issue
 19 we've talked about with regard to the Public Deposit
 20 Protection Act and that -- that the bank would, in our
 21 reading of the measure, no longer -- would not be
 22 subject to those requirements for purposes of the
 23 political subdivision deposits.
 24 MR. DOMENICO: So what do you think it
 25 would have to say to address that?

117

1 MR. DUNN: I think it would need to state
 2 that allowing political subdivision deposits to be
 3 exempted from the requirements of the Public Deposit
 4 Protection Act, or there may be some other colloquial
 5 way of describing the act, but I think the key is that
 6 the public needs to understand that this measure allows
 7 public funds to be put into a bank that does not have
 8 the same security level that a traditional bank would
 9 have for such deposits.

10 Maybe the thing to do is to say allowing
 11 political subdivisions to self-insure deposits with all
 12 their assets excluding public deposits in such banks
 13 from protections otherwise afforded to public funds in
 14 private banks.

15 MS. STAIERT: Well, I didn't think there
 16 are going to be any public funds.

17 MR. DOMENICO: Let's don't do that.

18 MR. GELENDER: You know, I think the
 19 difficulty, I believe, a little while back we had sort
 20 of a substantive discussion of this in deciding that it
 21 wasn't entirely clear that it would in fact do that.
 22 So it's hard to include it in the title if we're not
 23 sure it does it.

24 MS. STAIERT: And I'm fine with it,
 25 though.

118

1 MR. DOMENICO: I don't think it -- I
 2 don't -- I don't think it does that, frankly, and to
 3 the extent it does, I think it's kind of captured by
 4 the point that --

5 MS. STAIERT: Right.

6 MR. DOMENICO: -- it specifies the
 7 governance and capitalization requirements.

8 MR. STAELIN: Yeah, I'll -- I'll repeat
 9 what I said before, that these publicly owned banks
 10 have a -- a right and a power, a responsibility that
 11 private banks don't, and that is they -- they have the
 12 power of taxation. They have receipts coming in that
 13 are basically, if not guaranteed, are a sure thing, but
 14 private banks don't have that. This is a much more
 15 secure institution. That's why the Bank of North
 16 Dakota, for example, is the only bank in the country
 17 that -- the only state in the country that has not had
 18 a bunch of deficits for the past four years, going on
 19 over ten years, actually, and turned back \$61 million
 20 to the state of North Dakota in the last fiscal year.

21 MR. DOMENICO: Isn't North Dakota cheating
 22 a little bit, since they found the whole state is
 23 floating on a pool of oil?

24 MR. STAELIN: Well, there's -- there's
 25 similar oil in Alaska and Montana and --

119

1 MR. DOMENICO: It's harder to get at,
 2 though.

3 MR. STAELIN: -- they have high
 4 unemployment and they have budget problems, so it --
 5 it's not the oil.

6 MS. STAIERT: We're not helping you catch
 7 your flight. So -- all right.

8 MR. DUNN: Can I ask Mr. Childears, the
 9 objector, to come up? He's going to explain why he
 10 thinks the title should reflect that the political
 11 subdivision has the option of being -- going uninsured,
 12 which obviously would be significant and should be
 13 reflected in the title. His knowledge of that is
 14 significantly beyond mine.

15 MR. CHILDEARS: Don Childears with the
 16 Colorado Bankers Association. There are two ways that
 17 this state and any other state protects public
 18 deposits. That's with the primary layer of FDIC
 19 insurance and then requiring collateral above and
 20 beyond that, and that is the only instance in federal
 21 banking law that allows a bank to pledge collateral to
 22 a particular depositor. In no other case may a bank do
 23 that.

24 In this case, you effectively would have
 25 no FDIC insurance or you submit to all the regulation

120

1 of the federal government if you have FDIC insurance,
 2 and I'll explain in a second why I think you will never
 3 be able to obtain FDIC insurance, but that means you
 4 don't have that initial layer, so the alternative way
 5 of having the deposits of the public entity protected
 6 is by pledging collateral, but effectively this entity
 7 will not have any collateral that is pledgeable. It's
 8 basically backing its own deposits or the deposits of
 9 its parent so that you end up with this kind of
 10 self-insuring there and you've got the assets going in
 11 a circle.

12 The state law specifies the kinds of
 13 collateral -- collateral that are acceptable, and it's
 14 basically U.S. treasuries and other kinds of federal
 15 securities, and those are closely monitored by the
 16 division of banking. I don't believe that this entity,
 17 if it is able to operate, would have the excess funds
 18 to put into those kinds of securities that would be
 19 available for pledging, so in essence, when you remove
 20 both of those options for protecting public deposits,
 21 they go uninsured and unprotected.

22 MR. DOMENICO: But it's -- it's its own
 23 money, right? The deposits are the government's money,
 24 so the real -- the -- you know, you get -- FDIC
 25 insurance is meant to protect depositors. When I go

121

1 put my money in a bank, if the bank screws up and
 2 spends -- and loans my money out to people building all
 3 these subdivisions that no one lives in and then my
 4 bank fails and they can't pay me back, that's what FDIC
 5 insurance is for.
 6 This is -- there aren't -- the -- the
 7 money in here is basically tax money, and it sort of
 8 seems not surprising, if I'm going to say -- if I'm
 9 authorizing a bank to hold all of my subdivision's
 10 assets, that if the bank fails because it lends it out
 11 to people it shouldn't have loaned the money to or
 12 that -- that it just, for whatever reason, couldn't pay
 13 it back, that then my subdivision won't have that money
 14 anymore.
 15 I mean, I guess that's my confusion is --
 16 is the -- if the -- if the bank screws up, it seems not
 17 surprising that your subdivision is going to have
 18 trouble and -- and it seems very different than if the
 19 bank is going to be insuring other people's deposits.
 20 MR. CHILDEARS: I think that's the very
 21 point we're trying to make, that those deposits of the
 22 local government would not have any protection, they
 23 would not have any insurance or collateral to back
 24 them, and so they basically go uninsured, and that's
 25 such a key concept that we believe it ought to be in

122

1 the title.
 2 MR. DOMENICO: Yeah, and I guess I'm just
 3 saying that sort of seems inherent to me in running --
 4 if you're putting all your money into your own bank, as
 5 opposed to if this were authorizing them to deposit it
 6 in private banks and exempting them from insurance,
 7 that what we have there kind of -- is sufficient to say
 8 what the measure does, and to the extent that exposes
 9 these municipalities to really bad risks, which it very
 10 well might, then that strikes me as a matter for the
 11 public debate.
 12 MS. STAIERT: And I don't see it a lot
 13 differently than municipalities deciding not to take
 14 out insurance for claims and deciding to self-insure.
 15 That's what they're self-insuring with is their assets.
 16 If they get an \$8 million lawsuit and they lose it,
 17 then that was a bad policy decision, you know. They
 18 didn't have insurance. I mean, it's sort of the same
 19 thing. If they loan out \$8 million to a developer and
 20 they go bankrupt, then you're right, there is no
 21 insurance, but that is basically what's known as
 22 self-insuring.
 23 MR. CHILDEARS: Correct, but you're not
 24 asking voters to make a decision on a provision where I
 25 don't believe self-insurance truly reflects the risk

123

1 that is inherent in that. I think that you're
 2 basically going with self-insurance or uninsured
 3 deposits.
 4 MR. DUNN: Is it -- my client may correct
 5 me if I'm wrong. Is the way to describe it to say
 6 allowing political subdivisions to insure deposits only
 7 with the assets of the subdivision?
 8 MS. STAIERT: Oh, they could go get an
 9 insurance policy, somebody to underwrite it, I suppose.
 10 Maybe they can get their intergovernmental risk people
 11 to underwrite their banks, I don't know, you know,
 12 but --
 13 MR. DUNN: I don't know if that's possible
 14 or not.
 15 MS. STAIERT: Yeah, I mean, I don't know.
 16 They offer insurance for other things, maybe they'd
 17 offer for that. But I think the point is that that
 18 really is what self-insurance is. I mean, I guess we
 19 could have a debate about whether that really means no
 20 insurance, and I guess it really does mean no
 21 insurance, but for most people, they understand that to
 22 self-insure means you pledge your own credit.
 23 MR. DOMENICO: Maybe, to me, the important
 24 point that the title doesn't really reflect is that
 25 these -- these banks can hold all those -- all the

124

1 money of the subdivision.
 2 MS. STAIERT: Right.
 3 MR. DOMENICO: To me, this could be we're
 4 just going to set up our own little community bank and
 5 take deposits and money --
 6 MR. DUNN: Well, I was going to say one of
 7 the things I think needs to be reflected in the title,
 8 and I was going to bring this up in '95, but I did not
 9 realize until the proponent said it a moment ago that
 10 it was part of this measure as well, is that
 11 individuals and private entities cannot deposit funds
 12 in this bank. I think most voters who read this, when
 13 they think establish and operate banks, it means, oh,
 14 great, I have a -- a government bank that I can go put
 15 my money in and probably get either higher a interest
 16 rate or borrow money at a cheaper rate from like a
 17 credit union or even at lower rates and that that ought
 18 to be reflected in the title because I think people
 19 will assume that they could -- they would -- could
 20 avail themselves of -- of these types of banks.
 21 MS. STAIERT: Or maybe in connection
 22 therewith, allowing only the subdivisions to deposit or
 23 some language like that, allowing deposits from only
 24 the subdivision of the bank.
 25 MR. DOMENICO: Yeah, I guess I'm not

125

1 totally clear that this actually forbids other people
 2 from depositing. It does say that it may include --
 3 the capitalization can include all the assets and the
 4 revenue of the municipality and that it may accept its
 5 own public revenues, and it may be that if you're -- it
 6 would be hard to convince other people to put their
 7 money in there for some of the reasons we've discussed,
 8 but I don't see an actual prohibition on it.
 9 MS. STAIERT: Is there?
 10 MR. STAE LIN: I think you're right.
 11 There's not an actual prohibition. The -- the measure
 12 does specifically talk about all of the money of the --
 13 what goes in there, and that's the money of the taxes
 14 and revenue of the city, but it doesn't
 15 expressly prohibit --
 16 MS. STAIERT: Okay.
 17 MR. DOMENICO: So -- but I do think that
 18 the point that's maybe best stated in II(b) about --
 19 that the bank -- banks -- that the municipalities can
 20 deposit all their revenues, funds and other assets into
 21 the bank is an important one that the title doesn't
 22 reflect as it's written, I don't think.
 23 MS. STAIERT: No.
 24 MR. DOMENICO: And that is sort of
 25 necessary to -- to go with the concept of

126

1 self-insuring, that -- that they -- it's not -- to me,
 2 the question of them insuring themselves is not as
 3 problematic, necessarily, as the fact that all their
 4 money can be in this institution that they are running,
 5 and if they don't do a good job of it, they can lose
 6 their assets.
 7 MS. STAIERT: So maybe allowing political
 8 subdivisions to --
 9 MR. DOMENICO: To deposit --
 10 MS. STAIERT: -- to deposit --
 11 MR. DOMENICO: -- all revenues, funds and
 12 other assets of the county --
 13 MS. STAIERT: Right, or of the
 14 subdivision.
 15 MR. DOMENICO: -- into the -- the bank and
 16 to self-insure deposits.
 17 MS. STAIERT: Yeah.
 18 MR. DOMENICO: Revenues, funds, and other
 19 assets.
 20 MR. GELENDER: I can help.
 21 MR. DOMENICO: And to self-insure.
 22 MR. GELENDER: It limits it to revenues,
 23 funds and other assets that would normally be deposited
 24 or held in a financial institution designated as
 25 collateral. Is there anything else out there? I'm

127

1 just -- I don't know if that language actually limits
 2 them at all. If it does, it might be worth noting.
 3 MS. STAIERT: Well, what other
 4 collateral --
 5 MR. DOMENICO: I mean, I'm sure you could
 6 imagine perhaps some assets that couldn't be designated
 7 as collateral, but I'm not sure it's material enough
 8 for the title.
 9 MS. STAIERT: No.
 10 MR. DOMENICO: You know what I mean? Does
 11 this make sense?
 12 MS. STAIERT: Let me read it. "An
 13 amendment to the Colorado Constitution concerning
 14 authorization for political subdivisions to establish
 15 and operate banks, and, in connection therewith,
 16 specifying requirements for the governance of such
 17 banks, including capitalization requirements; allowing
 18 political subdivisions to deposit all revenues, funds,
 19 and other assets into the bank and to self-insure
 20 deposits with all of their assets; and authorizing the
 21 general assembly to provide regulatory guidelines for
 22 the oversight of these public banks by the state
 23 banking board and the commissioner of financial
 24 services."
 25 MR. STAE LIN: Yeah, no. I think that's

128

1 okay.
 2 MR. DOMENICO: I have one suggestion.
 3 MS. STAIERT: Okay.
 4 MR. DOMENICO: Deposit all of their
 5 revenue or all of the subdivision's --
 6 MR. STAE LIN: Of its revenues?
 7 MR. DOMENICO: Yeah, well, if you wanted
 8 to change it to say allowing a political
 9 subdivision --
 10 MR. STAE LIN: Oh, I see, yeah.
 11 MR. DOMENICO: -- you'd have to change
 12 that, which might work better, but the way it is now,
 13 that strikes me as an improvement.
 14 MS. STAIERT: Okay.
 15 MR. DUNN: Are we -- this is Jason Dunn.
 16 Are we -- are we discussing just those changes or --
 17 MS. STAIERT: Do you have others?
 18 MR. DOMENICO: You do have one more,
 19 right?
 20 MR. DUNN: I do. The last one that I
 21 think is -- is relevant to, I think, how the average
 22 voter will view what a bank does, and I know it was
 23 surprising to me when I learned this that -- that banks
 24 have the -- have powers beyond just accepting deposits
 25 and lending funds, but as we cite in the -- in the

129

1 motion, banks have the authority to invest in real
 2 estate, to manage 401(k) plans, and a variety of other
 3 powers, one of which I was unaware of, that banks can
 4 set up loan -- what's the phrase for the branch --
 5 MR. CHILDEARS: Loan production offices.
 6 MR. DUNN: -- loan production offices,
 7 which are essentially branch banks set up only for the
 8 purposes of -- in other states -- for the purpose of
 9 making loans. They don't accept deposits at those --
 10 at those offices, and I think the average voter would
 11 want to know that -- that the powers of the bank go way
 12 beyond just accepting deposits and lending, that it --
 13 with it comes substantial risks.
 14 MR. DOMENICO: Well, to me, we might want
 15 to include something mentioning that, in general, they
 16 have all the powers of any other bank, but specifying
 17 what they are seems inappropriate.
 18 MR. GELENDER: I agree.
 19 MR. STAELIN: I agree with that, and they
 20 mentioned a 401(k) and IRAs. That -- that really
 21 applies to individual depositors and does not apply
 22 here.
 23 MS. STAIERT: Well, they could have a
 24 pension in there, right?
 25 MR. STAELIN: And with real estate,

130

1 ordinarily that would be done as a correspondent bank,
 2 and the Bank of North Dakota has enabled North Dakota
 3 to avoid a foreclosure problem, but they've done that
 4 as a correspondent bank, with private community banks
 5 rather than directly.
 6 I'm a little concerned about my time and
 7 we're getting close here.
 8 MS. STAIERT: Well, it's really your
 9 choice. They are -- you know, they have already made
 10 the argument that you needed two, so to the extent
 11 that, you know, you've taking that risk, I don't
 12 know.
 13 MR. DOMENICO: We won't be offended if you
 14 leave.
 15 MR. STAELIN: Okay. Could I say something
 16 about 95?
 17 MS. STAIERT: Sure.
 18 MR. STAELIN: There is a comment in II(b)
 19 of the motion for rehearing, "changing the mandatory
 20 requirement that the capitalization of the bank 'shall'
 21 include all tax and other revenues and funds of the
 22 state, to the permissive 'may' exclude such sources,"
 23 that's really a response to paragraph 6 of the
 24 legislative council's comments, and they were pointing
 25 out that some of the money may be used immediately for

131

1 purposes of the subdivision, and for that reason we
 2 wouldn't want to require all money to be considered as
 3 capitalization.
 4 MS. STAIERT: Okay. Thank you.
 5 MR. STAELIN: So if I may have all my
 6 comments applied, and as you've indicated earlier,
 7 their -- the board's comments be applied to 95, with
 8 your permission.
 9 MS. STAIERT: We'll do that.
 10 MR. STAELIN: Thanks very much for your
 11 time.
 12 MS. STAIERT: Thank you.
 13 MR. DOMENICO: Good luck.
 14 MR. STAELIN: Thank you.
 15 MR. CHILDEARS: I hope you catch your
 16 flight.
 17 MR. STAELIN: Thanks.
 18 (At this time Mr. Staelin left the room.)
 19 MR. DUNN: I think I'll wait to address
 20 any comments on 95 until we -- until we get there. I
 21 guess I should ask the question, for purposes of the
 22 record, is -- you made a comment earlier, is this
 23 hearing applicable to 95, or are we going to sort of
 24 incorporate comments when we get to 95?
 25 MS. STAIERT: It's -- we are doing them

132

1 together, was my understanding. Is that yours?
 2 MR. DOMENICO: Yes.
 3 MS. STAIERT: Okay.
 4 MR. DUNN: Well, obviously I'll have an
 5 opportunity to go address -- go back and address
 6 jurisdictional requirements and that --
 7 MS. STAIERT: Oh, certainly, yes.
 8 MR. DUNN: The only other comment I'd make
 9 on the title is that I think what might make sense is
 10 to say that specifying requirements for the governance
 11 of such banks, granting such banks all powers and --
 12 MS. STAIERT: All powers?
 13 MR. DUNN: All.
 14 MS. STAIERT: All powers.
 15 MR. DOMENICO: Well, I -- I can make a
 16 suggestion, you know, when we do use these -- the
 17 traditional subject and then action part of the title
 18 after "in connection therewith," we've gotten into kind
 19 of this habit of skipping the main point because it's
 20 part of the subject, but what we could do is -- is
 21 after "in connection therewith," say something like
 22 authorizing subdivisions to create banks with what
 23 are -- however we worked it out, the powers and
 24 authorities of -- however the language we --
 25 MR. DUNN: The point I was trying to get

133

1 at is I think it's important to reflect that banks not
 2 only have the powers of private banks but also the
 3 risks and that they -- that voters need to know that
 4 there's substantial risk in the operation of a bank and
 5 those are at least --
 6 MS. STAIERT: Okay.
 7 MR. DUNN: -- as -- as strong as the
 8 private bank.
 9 MS. STAIERT: How about authorizing the
 10 formation -- authorizing the political subdivision to
 11 operate such bank with all the powers and risks
 12 associated with -- well, how does the language read in
 13 the actual --
 14 MR. DOMENICO: It doesn't say anything
 15 about the risks. I think that was pretty close. It
 16 just said such banks shall have the powers and
 17 authority of other banks chartered by the state as well
 18 as the such-and-such power and authority to deposit --
 19 MR. GELENDER: Something like granting
 20 such banks similar powers to a private bank?
 21 MR. DOMENICO: Yeah, I mean, we still
 22 haven't sort of addressed my issue about -- I mean, I
 23 would suggest starting it out by just saying allowing
 24 subdivisions --
 25 MS. STAIERT: You can read that in it.

134

1 MR. DOMENICO: -- to establish banks with
 2 the same powers and authority of other banks or --
 3 MS. STAIERT: Yeah.
 4 MR. DOMENICO: -- I think something like
 5 that.
 6 MR. DUNN: My point is that I think it
 7 needs to reflect that they're also taking on the risks
 8 of such banks.
 9 MR. DOMENICO: Right. I know, and, I
 10 mean, I think that to the extent that it takes on the
 11 risks, our job is to lay out the provisions that do so
 12 and it's your job, if this gets on the ballot, to
 13 explain why those are really bad risks. And I think we
 14 added that sentence or that clause on 4 and 5, because
 15 I do think that before it -- it wasn't clear what some
 16 of the risks were; but, I mean, I think -- I don't
 17 think we can write into the title sort of our
 18 understanding that this creates certain risks because
 19 that's just sort of our understanding.
 20 MS. STAIERT: What was your language?
 21 MR. DOMENICO: Mine would have been that
 22 in connection therewith, allowing subdivisions of the
 23 state to establish banks with the same power and
 24 authority of other banks, and then I think I would go
 25 straight to -- I mean, personally, I would probably

135

1 consider moving up the language about allowing
 2 deposits, because I -- do you think it's -- it's more
 3 important than the kind of boilerplate business about
 4 require -- specifying requirements for governance?
 5 MS. STAIERT: Right. I would agree.
 6 MR. DOMENICO: So then I would sort of
 7 suggest deleting the highlighted language and
 8 moving --
 9 MS. STAIERT: Yeah, there to -- yeah.
 10 MR. DOMENICO: All the way up, yeah.
 11 Moving that to after "banks" on line 3.
 12 MS. STAIERT: Okay. So now we have "An
 13 amendment to the Colorado Constitution concerning
 14 authorization for political subdivisions to establish
 15 and operate banks, and, in connection therewith,
 16 allowing subdivisions of the state to establish banks
 17 with the same power and authority of other banks;
 18 allowing political subdivisions to deposit all of their
 19 revenues, funds and other assets into the bank and to
 20 self-insure deposits with all of their assets;
 21 specifying requirements for the governance of such
 22 banks, including capitalization requirements; and
 23 authorizing the general assembly to provide regulatory
 24 guidelines for the oversight of these public banks by
 25 the state banking board and the commissioner of

136

1 financial services." Okay.
 2 MR. DOMENICO: I like that.
 3 MR. GELENDER: The only thing -- I think
 4 we should use sort of consistent terminology. I'd
 5 suggest maybe saying -- if we're going to say
 6 "political subdivisions of the state," it should say it
 7 in the single subject and then just say "political
 8 subdivisions" every time down the line.
 9 MR. DOMENICO: That's fine.
 10 MR. GELENDER: I think you just want to
 11 add "political" before "subdivision."
 12 MS. STAIERT: Right, on 3.
 13 MR. DOMENICO: My only other suggestion is
 14 after "establish," to say, "to establish and operate
 15 banks" on line 3.
 16 MS. STAIERT: Okay. All right. And the
 17 final version, "An amendment to the Colorado
 18 Constitution concerning authorization for political
 19 subdivisions of the state to establish and operate
 20 banks, and, in connection therewith, allowing political
 21 subdivisions to establish and operate banks with the
 22 same power and authority of other banks; allowing
 23 political subdivisions to deposit all of their
 24 revenues, funds, and other assets into the bank and to
 25 self-insure deposits with all of their assets;

137

1 specifying requirements for the governance of such
 2 banks, including capitalization requirements; and
 3 authorizing the general assembly to provide regulatory
 4 guidelines for the oversight of these public banks by
 5 the state banking board and the commissioner of
 6 financial services."
 7 You want to make a motion?
 8 MR. GELENDER: The only thing is I think
 9 instead of "the bank," at the beginning of line 5,
 10 "such banks" since we're talking about political
 11 subdivisions.
 12 MS. STAIERT: Okay.
 13 MR. GELENDER: In that case, I make a
 14 motion to deny the motion for rehearing and set the
 15 title as amended on the screen.
 16 MR. DOMENICO: Second.
 17 MS. STAIERT: All those in favor?
 18 MR. DOMENICO: Aye.
 19 MR. GELENDER: Aye.
 20 MS. STAIERT: Aye.
 21 All right. So on 95 --
 22 MR. DOMENICO: So my -- my personal
 23 suggestion would be for -- for the petitioners' movant
 24 to tell us which of their points they don't think we've
 25 already dealt with. And then we'll --

138

1 MR. ROGERS: Thomas Rogers for Barbara
 2 Walker and Independent Bankers of Colorado. I'd like
 3 to incorporate my comments on 94 to apply to 95 as
 4 well. I have only one further point, and that is when
 5 you denied the motion on 94 with regard to the whereas
 6 clauses, I don't think we got a clear record on why you
 7 denied that, that portion of the motion. I wasn't
 8 clear on whether that was a jurisdictional decision or
 9 whether you thought that the initiative was perfectly
 10 clear.
 11 I think it matters because those two
 12 decisions, I believe, will be reviewed under different
 13 standards. For instance, your decision about title
 14 receives great deference from the court. I believe if
 15 you have made an error in -- in determining what your
 16 jurisdiction is, that the court will likely review that
 17 decision de novo, and so my only request is that --
 18 that as you consider the motion with regard to 95's --
 19 I would suggest that 95 violates Article V,
 20 section 1(8) and C.R.S. 1-40-105(4), that you please
 21 create a record on the basis for the rejection. I
 22 think that will make the task easier for all of us at
 23 the Supreme Court level. Unless you've got questions,
 24 that's all I've got on 95.
 25 MR. DUNN: Give me a moment, please.

139

1 MR. DOMENICO: Well, I guess I should -- I
 2 should explain the reason I think that -- that the
 3 motion was denied as to the -- on the extraneous
 4 language, I think, was that -- was the -- was the point
 5 that I didn't think that whatever error might have been
 6 there was -- deprived us of jurisdiction, that it
 7 didn't -- that to the extent that we were provided with
 8 something in improper form, that it wasn't a
 9 jurisdictional problem and that in this case, at least,
 10 we could still write a title even though we had a
 11 somewhat confusing situation about what the actual
 12 measure may be.
 13 But that's sort of somewhat similar to the
 14 reason I rejected the argument as to the two proponents
 15 having to be here, that it's just not clear to me that
 16 that's the proper remedy for whatever violation there
 17 might be and that there may be a remedy at the
 18 Secretary of State or some other enforcement mechanism,
 19 and I'm just not sure the title board is the proper
 20 enforcement mechanism.
 21 MS. STAIERT: Well, I think as to No. 1,
 22 we were answering your question, which is whether the
 23 title board lacked jurisdiction to set a title because
 24 the measure failed to comply with Article V and C.R.S.
 25 1-40-105, and the board's finding was that we did have

140

1 jurisdiction. Does that answer the question?
 2 MR. ROGERS: Thank you very much.
 3 MS. STAIERT: You want to take that vote
 4 again on this one?
 5 MR. DOMENICO: Sure, yeah.
 6 MS. STAIERT: Okay.
 7 MR. DOMENICO: I guess we might as well,
 8 just -- I will move to -- for the same reasons we
 9 already stated, move to deny the motion, both motions
 10 for rehearing No. 95 as they relate to '105(4) and our
 11 jurisdiction.
 12 MS. STAIERT: On No. 1?
 13 MR. DOMENICO: Well, there's two motions
 14 for rehearing, and one of them is No. 1 and one of them
 15 is No. 2.
 16 MS. STAIERT: Oh, are we doing different
 17 motions? Okay. Second.
 18 All those in favor? Aye.
 19 MR. DOMENICO: Aye.
 20 MS. STAIERT: Opposed?
 21 MR. GELENDER: No.
 22 MS. STAIERT: All right.
 23 MR. DOMENICO: So Mr. Rogers has made all
 24 his objections and incorporated them. We have, if I'm
 25 not mistaken, a slightly different issue to dis -- one

141

1 of the same issues about changes made after review and
 2 comment but one new one; is that correct?
 3 MR. DUNN: We do. Let me -- let me back
 4 up for one second. I think, since we are starting
 5 No. 95 now, that we would renew and incorporate the
 6 objections raised previously in No. 94 with regard to
 7 the requirement that -- that both proponents be here,
 8 and I would note, for the record, that as we start No.
 9 95, neither proponent is here.
 10 And I only make that distinction because I
 11 would think it a possibility that you could have a
 12 court at some future time say as long as one of the
 13 proponents was there, you're okay, but having neither
 14 there is not okay. I don't think that distinction is
 15 supportable by the -- the statute, but just in case
 16 that's made, I want to note that for the record.
 17 And, of course, on behalf of Objector Don
 18 Childers, we'd note the same objection with regard to
 19 the -- the whereas clauses, as well.
 20 And as you know, in the motion we raised
 21 the issue, again, that changes were made after the
 22 review and comment hearing. The language "at no
 23 interest" was included. We've discussed that, and --
 24 and I'll assume the board will vote the same this time.
 25 The other one is unique to No. 95, and

142

1 that is that in -- in new paragraph 4 of the measure,
 2 the capitalization of the state bank, it originally
 3 said that the capitalization of the bank "shall"
 4 include all tax and other revenues and funds of the
 5 state and was changed to "may" and as we were getting
 6 started here, and I'll note for the record that the
 7 proponent did raise that a few moments ago before he
 8 left and cited to something in the review and comment
 9 hearing that he felt that was being responsive to, and
 10 I've tried to figure out what that is and I haven't
 11 been able to, so I don't know if anybody wrote that
 12 down.
 13 MR. DOMENICO: Paragraph 6.
 14 MR. DUNN: Well, that's what I thought he
 15 said, and paragraph 6 only relates to whether or not
 16 the employees are subject to the state personnel
 17 system, and I'm reading it quickly, but I don't think
 18 it covers anything other than that.
 19 And I do not see how changing the
 20 permissive or mandatory nature of capitalization of the
 21 bank by the state is responsive to a paragraph
 22 discussing whether or not employees are part of the
 23 state personnel system; and giving the proponent the
 24 benefit of the doubt, I tried to figure out if it
 25 was -- if he meant another paragraph, and I was not

143

1 able to do that.
 2 Certainly paragraph 2 discusses
 3 capitalization, but it's not relevant to this issue,
 4 and I cannot find another paragraph that -- that deals
 5 with that, so I'm not sure how it was responsive. I
 6 don't recall -- again, I have watched the -- we
 7 videotaped it, and I've watched it numerous times to
 8 check these arguments, and I did not see anything in
 9 there that talked about the mandatory permissive nature
 10 of capitalization by the state.
 11 MR. DOMENICO: How about paragraph 4? Or
 12 question 4 or whatever you want to call it?
 13 MR. DUNN: Again, I think that has to do
 14 with the protection of public deposits in terms of
 15 likely the -- the Public Deposit Protection Act, but if
 16 that were the case, I'm not sure if he was trying to --
 17 if you -- if you wanted to insure public protection and
 18 the measure said "may" be capitalized and you changed
 19 it to "shall," I don't know, maybe that would apply;
 20 but this goes the other direction. It makes the
 21 capitalization permissive, not mandatory.
 22 MR. DOMENICO: All right. But question
 23 No. 4 was since the proposed initiative leaves in place
 24 Colorado's existing public deposit protection system,
 25 do the proponents intend to require all state revenues

144

1 be deposited in the state bank? Couldn't they have
 2 responded by saying, Well, let's just say it may
 3 include all the state revenue and then we avoid that?
 4 MR. DUNN: But -- unless I don't
 5 understand the measure, the section has to do with just
 6 simply the capitalization of the bank, not whether
 7 state funds have to be deposited in the bank.
 8 MR. DOMENICO: The prior part -- the
 9 section before the alteration said the capital --
 10 capitalization of the bank shall include all tax and
 11 other revenues of the state. The question was do you
 12 intend to require that all state revenues be deposited
 13 in the state bank. Altering the language to say no,
 14 that the capitalization may -- doesn't have to but may
 15 include all state revenues seems directly responsive to
 16 that question.
 17 MR. DUNN: One second.
 18 MS. STAIERT: Or even the question 3,
 19 where it says the proposed initiative calls for the
 20 state bank to be capitalized by the state treasury.
 21 MR. DOMENICO: Yeah, currently it's a
 22 combination of 3 and 4 --
 23 MS. STAIERT: Current practice -- yeah,
 24 current practice in Colorado requires the appropriation
 25 of the entire state treasury.

145

1 MR. DUNN: Well there's a -- there's a
 2 difference between deposits and capitalization.
 3 MS. STAIERT: Right.
 4 MR. DUNN: You would require all the
 5 assets -- all the assets of the state or all the cash
 6 of the state to be deposited in the bank but not
 7 require the -- the bank to be capitalized.
 8 MS. STAIERT: Yeah, but he's just -- I
 9 think when you take the two together, he's saying you
 10 may do this, you may choose to have some of your money
 11 somewhere else.
 12 MR. DOMENICO: Right, and if you were --
 13 if you were writing the memo and you read Section 4 and
 14 it says the capitalization shall include all tax and
 15 other revenues and funds, you say, Do you really mean
 16 that every penny the state brings in has to go into the
 17 bank? And that's why you write that question and then
 18 they write section 4 to not have such a substantive
 19 requirement.
 20 MR. DUNN: But again, I think the
 21 question of whether all state assets have to be
 22 deposited in the bank, all state funds have to be
 23 deposited in the bank is a totally different subject
 24 than how the bank is capitalized. In other words, how
 25 it's protected.

146

1 MR. DOMENICO: The capitalization is the
 2 assets that the bank has to have or the bank does have.
 3 MR. DUNN: To protect deposits.
 4 MR. DOMENICO: Well, I mean, sort of its
 5 capitalization are the assets of the bank, and before,
 6 it said it had to include all the revenues and funds of
 7 the state. Someone asked them, Do you really mean that
 8 all the funds and revenues have to go in there? And
 9 they said no, let's just say "May." I mean, the
 10 substantive change, I agree with you, may not be
 11 exactly what is a good idea or what they intended, but
 12 it -- it seems pretty clearly a response to that sort
 13 of a question, especially following 3, where they sort
 14 of -- the questions kind of seemed to be aimed at
 15 pointing out that as it was written, this kind of was
 16 more mandatory than they might have intended, so
 17 anyway.
 18 MR. DUNN: I think No. 3 has to do with
 19 the surplus funds of the state, and as the memo says,
 20 current practice in Colorado requires -- requires the
 21 appropriation of the entire state treasury to pay the
 22 expenses of operating the state government. So the
 23 question is how would surplus funds be available in the
 24 bank for lending, et cetera if there -- if there are
 25 no excess funds to be deposited for lending purposes?

147

1 I'm not sure what that has to do with whether the bank
 2 is capitalized with state assets or not. Again,
 3 capitalization being different than deposits.
 4 And then I -- again, I said -- I think
 5 No. 4 has to do with, you know, whether or not, just as
 6 a general matter -- see, and I think it's actually --
 7 that question is addressing the last part of paragraph
 8 4 where it says "specifically allocated funds and other
 9 assets of the state normally held by financial
 10 institutions shall be deposited and held by the bank."
 11 Those questions are related to that line. Do you
 12 really mean that all the al -- specific allocated funds
 13 and other assets of the state shall be deposited and
 14 held by the bank?
 15 MR. GELENDER: Let me ask a question of
 16 the difference between deposits and capitalization, and
 17 part of my ignorance of banking, but are -- can
 18 capitalization, the monies put in the bank for
 19 capitalization then be used or, I mean, do they just
 20 sit there? Is this a reserve we're talking about?
 21 MR. DUNN: I'll let Mr. Childears
 22 answer -- answer that.
 23 MR. CHILDEARS: Don Childears again. It
 24 basically is the safety cushion for the bank. It is
 25 the net assets after you subtract deposits. Deposits

148

1 are assets to businesses and individuals. To a bank,
 2 they're a liability. We owe that money to the
 3 depositor; in this case, to the public entity.
 4 So deposits are debt to the bank. Capital
 5 is the net assets that are left after you subtract
 6 deposits and other debt from total assets. They're, if
 7 you will, at opposite ends of the financial spectrum.
 8 MR. GELENDER: Okay. Then reading this,
 9 it seems to me that the proponents don't necessarily
 10 understand that distinction any better than I did
 11 before you explained it to me.
 12 It says the capitalization of the bank
 13 would include all tax and other revenues and funds of
 14 the state. I mean, it seems like an absurdity, because
 15 that's -- the only money this bank has, right, is state
 16 money?
 17 MR. DOMENICO: Right, and that's what
 18 Question 3 is kind of trying to point out. If your
 19 capitalization has to include all the money, how can
 20 you lend it out or operate the government, right?
 21 MR. GELENDER: Right. So that's a good
 22 point. "May."
 23 MR. DOMENICO: Or they may have been
 24 thinking like the initial capitalization, how do you
 25 start it up. I don't know. But I -- I mean, it seems

149

1 pretty clearly to have been in response to 3 and 4 or
 2 3 -- or one or the other, at least.
 3 MR. DUNN: If only we had the proponents
 4 here.
 5 MR. DOMENICO: I'm not sure that would
 6 help us all that much. So, let's see, so we already
 7 dealt with II(a). Now we've discussed II(b).
 8 MS. STAIERT: So you want to make a motion
 9 on II?
 10 MR. DOMENICO: So I -- we've already dealt
 11 with all of Mr. Rogers' issues.
 12 MS. STAIERT: Right.
 13 MR. DOMENICO: Yeah, so what's that mean?
 14 MS. STAIERT: I don't know. What does
 15 that mean?
 16 MR. DOMENICO: So then I will move that we
 17 deny the motion for the -- the motion for rehearing on
 18 point 2 relating to changes allegedly made after review
 19 and comment.
 20 MS. STAIERT: Second. All those in favor?
 21 Aye.
 22 MR. GELENDER: Aye.
 23 MR. DOMENICO: Aye.
 24 MR. DUNN: Looking at the single subject
 25 challenges, I think there are several that are

150

1 duplicative of No. 94 and I won't repeat those, but
 2 will incorporate them here with regard to No. 95.
 3 I think, Madam Chair, you raised the issue
 4 earlier about what's in No. III(b), which I think is --
 5 is a little bit different than what was in 94, so I
 6 want to make sure we articulate that, that the measure
 7 now -- or this measure will supersede TABOR to the
 8 extent it allows the state to retain excess revenue
 9 that would otherwise be in violation of -- of TABOR if
 10 the bank operates and does make revenue that exceeds
 11 the TABOR limitations, and that would apply -- that's a
 12 little bit different than the political subdivision
 13 argument because there you could say, Well, that's -- I
 14 think the argument Mr. Domenico made was that's a
 15 natural effect, perhaps, of -- of what would happen
 16 with a municipal bank, to finally use the phrase I've
 17 trying to use, been wanting to use the whole time.
 18 But here you have the state revenue, one
 19 state bank, and it could then operate to exceed TABOR's
 20 prohibition on the state having a revenue cap. That's
 21 not just a cap for some entities and not others or
 22 those who have an established bank; this is a mandatory
 23 bank, and through the bank now the state can exceed
 24 TABOR's revenue limitations.
 25 MR. DOMENICO: You know, this is a

151

1 slightly different version of the arguments we had on
 2 the last one, but I'm not sure substantively it's
 3 different in the sense that I can -- I guess I don't
 4 quite see if the -- if the bank somehow is itself just
 5 making so much money that it goes -- that it puts the
 6 state over the TABOR revenue limits, the bank's
 7 revenue -- I guess my point is the bank's revenue seems
 8 very unlikely itself, setting aside the fact that the
 9 bank seems likely to be an enterprise, to violate the
 10 TABOR requirements.
 11 Now, if the bank's revenues plus tax
 12 revenue and other revenues of the state combined
 13 somehow go over the TABOR revenue limit, then it's
 14 not -- then I -- then I could see how this issue could
 15 arise, but there it sort of seems to me that -- that
 16 the -- the bank's revenue could still be -- there's not
 17 necessarily a conflict. The way to resolve that
 18 problem would be to limit the state's non-bank revenue
 19 under TABOR while the bank stays within its limits, I
 20 think. At least that's the way I -- I think I got
 21 through this basic issue last time.
 22 MR. DUNN: If I -- if I hear that right,
 23 Mr. Domenico, then you're saying that the -- there
 24 would be a separate analysis for the bank's revenue
 25 cap --

152

1 MR. DOMENICO: Well, I mean, I --
 2 MR. DUNN: -- and whether it exceeds that
 3 versus the rest of state revenues?
 4 MR. DOMENICO: Well, I think your arg -- I
 5 guess my question is, is your argument that -- that
 6 there should not be, that there -- that -- I mean, I
 7 guess is your point that if you're going to be putting
 8 all the state revenue into the bank and this provision
 9 says the revenue of the bank shall not be limited, then
 10 there can be any limit on the revenue of the state
 11 since the bank's revenue is the state's revenue?
 12 Because if that's your argument, that's the same thing
 13 we just talked about about the taxes, and I don't agree
 14 with it.
 15 But the better argument or the argument
 16 that seems possible would be that if somehow you had
 17 regular state revenue and then you have a bank
 18 operating off to the side and the state is itself
 19 bumping up against the revenue limit and you're
 20 bringing in income from the bank that would -- would
 21 otherwise put you over the top, then it might trigger a
 22 slightly different analysis.
 23 But the idea that this somehow just
 24 exempts the state from TABOR revenue limits because the
 25 revenue of the bank can't be limited and the state's

153

1 revenue turns into the bank's revenue is -- I worked
 2 through that in my head last time and it seems to me
 3 it's backwards because the state's revenue can be
 4 limited and then the state's revenue, to the extent it
 5 goes into the bank, would already have been limited by
 6 TABOR before you get to that. So I don't know if
 7 anybody else --
 8 MS. STAIERT: But then if the bank does
 9 loans at 10 percent and it goes over, then it's not
 10 subject to TABOR and I don't see how the bank could be
 11 an enterprise because it's going to get more than
 12 10 percent of its money from tax, right? It's not a
 13 fee system bank.
 14 MR. DOMENICO: Well --
 15 MS. STAIERT: How is it going to be an
 16 enterprise?
 17 MR. DOMENICO: Well, first, I mean --
 18 MS. STAIERT: I mean, enterprises are
 19 generally based on fees.
 20 MR. DOMENICO: The operating -- the first
 21 year, obviously, there's money, but once you're sort of
 22 in an operating system -- I don't know.
 23 MS. STAIERT: Yeah.
 24 MR. DOMENICO: But, I mean, setting aside
 25 the enterprise issue --

154

1 MS. STAIERT: Right, but . . .
 2 MR. DOMENICO: -- the revenue limits would
 3 still seem to apply to the state to me.
 4 MR. DUNN: But that, I think, that would
 5 require a separate calculation for the bank and the
 6 state, and I don't recall any situation where a part of
 7 a governmental entity was counted separate from the
 8 rest of the entity for purposes of calculating TABOR
 9 revenue limits. So, you know, it won't surprise you
 10 that I say this, but I actually think it's true that --
 11 the point I'm trying to make is your second argument,
 12 that if the bank's revenue pushes the state over the
 13 TABOR limit, then argument one of this measure, TABOR
 14 does not apply.
 15 MR. DOMENICO: Right. And -- and I think
 16 that is the better argument, but it still seems to me
 17 that the way to deal with that would be to -- the way
 18 you could apply both TABOR and this measure would be to
 19 say that the -- the state's revenue has to be at that
 20 level and the bank's is separate. I mean, the
 21 revenue -- the revenue the bank brings in through its
 22 lending activities, et cetera, and investing, to the
 23 extent it should do that, would be smaller than the
 24 state's budget.
 25 MR. GELENDER: Well, if I may, it seems to

155

1 me what happened is that the bank's revenue would -- I
 2 mean, if we say that it can't be limited means they get
 3 to keep it all, so the bank, say, keeps all its
 4 revenue, which counts against the state TABOR cap and
 5 the state refunds it in the next year to the general
 6 fund before it gives money to the bank or because, you
 7 know, just because it's -- because the bank's not
 8 limited -- I mean, I don't know that to deposit the
 9 state's money in the bank -- I mean, it's still the
 10 state's money. I don't know the benefit if it becomes
 11 a bank asset. At any rate, I mean, it seems to me that
 12 that's how it would work, assuming that it's not
 13 somehow an enterprise, which seems likely.
 14 MR. DOMENICO: But --
 15 MR. GELENDER: That's, I think, how I
 16 would interpret it.
 17 MR. DOMENICO: So are we done --
 18 MS. STAIERT: You want to vote?
 19 MR. DOMENICO: -- with the discussion? So
 20 let's see. So we've incorporated our comments on all
 21 the rest of these that are similar to 94, so I will,
 22 then, move that we deny the motion for rehearing on
 23 point 3 about the single subject requirement.
 24 MR. GELENDER: Second.
 25 MS. STAIERT: All those in favor?

156

1 MR. DOMENICO: Aye.
 2 MR. GELENDER: Aye.
 3 MS. STAIERT: Opposed? No.
 4 So it passes 2 to 1, and we're left with
 5 title?
 6 MR. DUNN: Is it -- I'm sorry. There
 7 was -- was that Mr. Gelender who voted no?
 8 MS. STAIERT: I voted no.
 9 MR. DUNN: Oh, you voted no? And was
 10 that -- could you help me understand for the record,
 11 was that based on -- on the revenue limitations
 12 argument?
 13 MS. STAIERT: The TABOR, yes.
 14 MR. DUNN: Thank you.
 15 I guess, then, we're turning to the title.
 16 Again, we'd argue that "full faith and credit" is a
 17 catchphrase, that the measure needs to reflect that the
 18 state is obligating its general treasuries to cover any
 19 losses. It might be easier to have 94 up there to
 20 compare, but I don't know if that's possible.
 21 MS. STAIERT: It is. We've done it
 22 before.
 23 MR. DOMENICO: Well, you could just
 24 change -- I mean, for "full faith and credit," you can
 25 just change that. This one is even easier to change, I

157

1 think. Just change "full faith and credit" to "assets"
 2 on line 4.
 3 MR. WARD: You said "all of the assets"
 4 last time, I think.
 5 MR. DOMENICO: I think we did.
 6 MR. DUNN: I would suggest, in the single
 7 subject clause, that it needs to say "establishment of
 8 a bank owned and operated by the state of Colorado."
 9 MR. DOMENICO: That's not a bad idea.
 10 Mr. Hobbs would have objected.
 11 MS. STAIERT: Yeah, he didn't like "and."
 12 MR. DOMENICO: He didn't like conjunctions
 13 in a single subject, but I'm not quite -- I never was
 14 convinced that was a problem.
 15 Yeah, that's a little bit simpler than my
 16 suggestion which was going to be to add the -- to add
 17 that concept on the end of line 2 now. It would say
 18 "establishing and authorizing the state to operate a
 19 bank," and I think you could get rid of "state owned"
 20 since it's --
 21 MS. STAIERT: Up above?
 22 MR. DOMENICO: So it would be
 23 "establishing and authorizing the state to operate a
 24 bank," but I don't know -- I think Mr. Dunn's
 25 suggestion might be slightly better, if we're okay with

158

1 the conjunction.
 2 MS. STAIERT: That's fine with me. I
 3 don't think owning it and operating it make two
 4 subjects, so . . .
 5 MR. GELENDER: I don't.
 6 MR. DOMENICO: All right. So the other
 7 sort of major change we made on 94 was clearly stating
 8 that the subdivisions could put all their revenue in
 9 there.
 10 MS. STAIERT: In this one, do they have
 11 to?
 12 MR. GELENDER: Yes. I believe.
 13 MR. DUNN: Okay. Before we get too far
 14 down into the measure, I think one of the most
 15 important features of the measure that needs to be
 16 reflected early on is that this bank is established
 17 only for the purpose of accepting state deposits as
 18 opposed to individual and commercial deposits.
 19 MS. STAIERT: Right.
 20 MR. DUNN: I'd have to look at how the
 21 proponents phrased that, but --
 22 MR. DOMENICO: Well, we have that in there
 23 on line -- I think it's starting there on line 7,
 24 prohibiting the bank from accepting deposits
 25 from any --

159

1 MR. DUNN: That's right. Yeah,
 2 and that's -- one sec. Yeah, I wrote notes on that.
 3 That, I think, is a central feature that should be up
 4 front. I think voters need to know that this is not a
 5 bank that they can go put their paycheck in and get a
 6 car loan for.
 7 MS. STAIERT: I don't have a problem with
 8 that.
 9 MR. DOMENICO: So where does this happen?
 10 MS. STAIERT: 7.
 11 MR. DOMENICO: If it were me, what I would
 12 do is take the authorizing language on line 8 and
 13 the -- not all that.
 14 MR. GELENDER: Just "to practice."
 15 MR. DOMENICO: Just "to practice" is on
 16 line 9 and put that either before or after the "full
 17 faith and credit line" that we just changed and then
 18 probably -- right after that, putting the -- the
 19 clause -- I think the clause Mr. Dunn was just talking
 20 about, which now starts at the end of line 8, makes
 21 more -- it doesn't really make sense -- or it makes
 22 more sense after the discussion of the tax and revenue
 23 funds of the state, so I would put that after what you
 24 just added on line 6.
 25 MR. DUNN: So I would suggest that that

160

1 should be after the initial clause "establishing a bank
 2 authorized to lend money for various specified
 3 purposes" and then prohibiting the bank from accepting
 4 deposits from any individual or private entity.
 5 MR. DOMENICO: So backing the debts --
 6 would you -- you would move that down somewhere?
 7 MR. GELENDER: Probably after the -- the
 8 capitalization clause, maybe?
 9 MR. DOMENICO: Yeah, you could move that
 10 to the -- after what we just added in.
 11 MR. DUNN: I would suggest that both of
 12 those clauses would go in front of the capitalization
 13 clause, so I would move "authorizes the bank to be
 14 capitalized with all tax and other revenues and funds
 15 of the state," et cetera, after the next two.
 16 MS. STAIERT: Would you switch those two?
 17 MR. DUNN: Well, I would move it -- I
 18 would take that clause and move it down after the next
 19 two, so after the -- after all that red lining, on
 20 line 7.
 21 MR. DOMENICO: Yeah. I mean, those all
 22 seem to be sort of intertwined and very important to
 23 figure out what -- what can and can't go into the bank,
 24 so which one goes first and second and third, I don't
 25 know.

161

1 MR. DUNN: Well, I'm trying to think of --
 2 think of it from the perspective of the voter and which
 3 elements they would consider as most important.
 4 MS. STAIERT: Let me read it. "An
 5 amendment to the Colorado Constitution concerning the
 6 establishment of a bank owned and operated by the State
 7 of Colorado, and, in connection therewith, establishing
 8 a bank authorized to lend money for various specified
 9 purposes; prohibiting the bank from accepting deposits
 10 from any individual or private entity; backing the
 11 debts and obligations of the bank by" -- take out
 12 "the" -- "by all of the assets of the State of
 13 Colorado; authorizing the bank to be capitalized with
 14 all tax and other revenues and funds of the state
 15 subject to sound banking practices; specifying
 16 requirements for oversight, governance and management
 17 of the bank; specifying that the revenue, income and
 18 expenditures of the bank shall not be limited or
 19 restricted except for financial and public policy
 20 considerations; and authorizing the drafting of rules
 21 and regulations of the bank subject to approval by the
 22 advisory board of the bank, the board of directors of
 23 the bank, the Colorado general assembly and the
 24 governor."
 25 Can you show us how it would look?

162

1 MR. DUNN: And I won't -- I won't repeat
 2 some of the points we made on 94, but we'll renew those
 3 here with regard to this -- the measure needs to
 4 reflect the risks being taken on by voters for bank
 5 failure, et cetera.
 6 MS. STAIERT: Okay.
 7 MR. GELENDER: The only thing I would say
 8 is if we want to save a few words, instead of saying
 9 "all of the assets of the State of Colorado," do we
 10 want to say "all the state assets"?
 11 MS. STAIERT: Oh. What do you think?
 12 MR. WARD: All the state assets?
 13 MR. DUNN: Line 5.
 14 MR. GELENDER: I think we can do similarly
 15 on the next clause. It's "all state tax and other
 16 revenues and funds," maybe -- and get rid of the "of
 17 the state."
 18 MR. DUNN: I would ask that I think you
 19 should strike "subject to sound banking practices."
 20 I'm not sure -- I'm not sure what that means in the
 21 measure itself, let alone in the title, but I think
 22 arguably it could be a catchphrase.
 23 MR. GELENDER: What if it just says
 24 authorizing, not requiring? I mean, I think that the
 25 impression they don't necessarily have to have

163

1 everything, in front of line 5.
 2 MS. STAIERT: Okay. Take it out.
 3 MR. GELENDER: I guess on line 7, just
 4 want to -- 'cause I did the same thing with the state,
 5 if we just want to say "specifying that bank revenue,
 6 income and expenditures" and get the "the" out of "the
 7 bank" out.
 8 MS. STAIERT: Okay. I'm going to read it
 9 one last time.
 10 "An amendment to the Colorado Constitution
 11 concerning the establishment of a bank owned and
 12 operated by the State of Colorado, and, in connection
 13 therewith, establishing a bank authorized to lend money
 14 for various specified purposes; prohibiting the bank
 15 from accepting deposits from any individual or private
 16 entity; backing the debts and obligations of the bank
 17 by all state assets; authorizing the bank to be
 18 capitalized with all state tax and other revenues and
 19 funds; specifying requirements for the oversight,
 20 governance and management of the bank; specifying that
 21 bank revenue, income, and expenditures shall not be
 22 limited or restricted except for financial and public
 23 policy considerations; and authorizing the drafting of
 24 rules and regulations of the bank subject to approval
 25 by the advisory board of the bank, the board of

164

1 directors of the bank, the Colorado general" --
 2 "general assembly and the governor."
 3 You want to make a motion?
 4 MR. GELENDER: Sure. I move we deny the
 5 motion for rehearing and adopt the staff draft as it
 6 appears on -- as amended as it appears on the screen.
 7 MS. STAIERT: Second.
 8 All those in favor?
 9 MR. DOMENICO: Aye.
 10 MR. GELENDER: Aye.
 11 MS. STAIERT: Aye.
 12 All right. That's unanimous, and the
 13 changes reflected in the ballot title will also be
 14 changed in the questions, and it is 6:47 and we are
 15 adjourned.
 16 WHEREUPON, the within proceedings were
 17 concluded at the approximate hour of 6:47 p.m. on the
 18 26th day of April, 2012.
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 25

REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
 CITY AND COUNTY OF DENVER)

I, LORI A. MARTIN, Registered Merit Reporter, Certified Realtime Reporter, and Notary Public, State of Colorado, do hereby certify that these proceedings were taken in machine shorthand by me at the time and place aforesaid and were thereafter reduced to typewritten form; that the foregoing is a true transcript of the proceedings had.

I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 9th day of May, 2012.

My commission expires June 2, 2012.

- Reading and Signing was requested.
- Reading and Signing was waived.
- Reading and Signing is not required.