SUPREME COURT OF COLORADO 101 W. Colfax Avenue, Suite 800 Denver Colorado 80203 ORIGINAL PROCEEDING UNDER C.R.S. § 1-40-107(2) Appeal from the Ballot Title Board Petitioners: Barbara M.A. Walker and Don Childears v. Respondents: Earl Staelin and Robert Bows and Title Board: Suzanne Staiert, Dan Domenico, and Jason Gelander	FILED IN THE SUPREME COURT MAY 31 2012 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk COURT USE ONLY
Attorneys for Proponents: Earl H. Staelin #30283 Onsager, Staelin, & Guyerson, LLC 1873 S. Bellaire Street, Suite 1401 Denver, CO 80222 303-512-1123 FAX 303-512-1129 E-mail: estaelin@comcast.net	Supreme Court Case No: 2012SA130
PROPONENTS' ANSWER BRIEF TO BARBARA M.A. WALKER	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

X The brief complies with C.A. R. 28(g) because it does not exceed 18 pages.

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

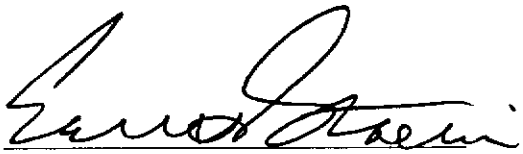
For the party raising the issue:

_____ 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:

X It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

X I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



Earl H. Staelin

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STATEMENT CONCERNING ISSUES PRESENTED FOR REVIEW

Proponents Earl Staelin and Robert Bows agree generally with the statement of the two issues raised by Petitioner Barbara M.A. Walker ("Walker"). However, Proponents do not agree with the contention in Issue 2 that the recitals preceding the enactment clause are "extraneous" or "argumentative", but rather that they contain relevant facts founded in current banking experience in North Dakota that explain and support the purposes for enacting the measures. While some question the extent to which the Bank of North Dakota as opposed to oil is the reason for North Dakota's prosperity, Alaska and Montana have as much oil, but high unemployment and budget deficits. (Childears Exhibit 3, 118/24 – 119/5), and North Dakota is prospering in many ways in addition to oil (Initiatives, "whereas" clauses).

STATEMENT OF THE CASE

Proponents agree with the Statement of the Case as presented by Walker, except that Proponents submitted their proposal to the Colorado Legislative Council on March 23, 2012, not April 3, 2012. April 3rd is the date the Colorado Legislative Council and Office of Legislative Legal Services issued their Memorandum on the two initiatives.

Proponents were aware of a plan to introduce legislation in 2012 to establish a state-owned bank in Colorado. However, Proponents learned in about mid-February that the legislation would not be introduced due to strong opposition from a national interest group. Due to the seriousness of Colorado's financial condition, Proponents prepared initiatives #94 and #95 on relatively short notice and filed them within the deadline on March 23, 2012 so that voters might be able to consider such measures this year.

SUMMARY OF ARGUMENT

(1) The absence of one of the Proponents from the rehearing before the Board was not sufficient to deprive the board of jurisdiction to set the titles under C.R.S. § 1-40-106(4)(a) and (d). Objectors' motion for rehearing and the notice of rehearing occurred less than one day before the rehearing while Proponent Bows was en route to Philadelphia, making literal compliance with the rule extremely impractical. Proponents complied to the best of their ability, including requesting that Mr. Bows participate by telephone, which was denied, and failing that, Mr. Bows orally appointed Mr. Staelin as his representative for the rehearing. Proponents submit that Constitutional due process under the 5th and 14th Amendments to the U.S. Constitution and Article II, Section 25, of the Colorado Constitution requires that the rule in C.R.S. § 1-40-106 governing the presence of

both Proponents at all meetings of the Board should be read to incorporate a "good cause" exception, and to require a showing of prejudice.

(2) The recitals preceding the enactment clause did not deprive the Board of jurisdiction to set the titles under Colo. Const. art. V, §1(8), or C.R.S. § 1-40-105(4). Such clauses explaining the purposes of the measure through concrete example are not prohibited by the Colorado Constitution, art. V, § 1(8) nor by C.R.S. § 1-40-105(4).

ARGUMENT

A. The Title Board had jurisdiction to set a title under C.R.S. §1-40-106(4)(a) and (d) even though one of the proponents was absent from the April 26, 2012 hearing of the Title Board when Initiative #94 was discussed and even though both proponents were absent from the portion of the April 26, 2012 hearing when Initiative #95 was discussed.

1. **Standard of Review.** Proponents do not agree that C.R.S. § 1-40-107(1) requires a *de novo* review by this Court of a question of law as to whether the Board had jurisdiction to set titles. This Court has long held that the court should "allow the greatest possible exercise of this valuable right" City of Glendale v. Buchanan, 578 P. 2d 221, 224 (Colo. 1978) and should "engage in all legitimate presumptions in favor of the propriety of the Board's actions" In re Ballot Title (Petitions), 907 P.2d 586, 590 (Colo. 1995). Proponents agree that Walker preserved this issue.

2. Both proponents were present for the initial public hearing on April 18, 2012 when the Board set the titles. C.R.S. §1-40-106(4)(d) provides that the Board shall not "set title" unless both proponents are present. As Mr. Domenico commented on April 26, the Board had already set the title on April 18, 2012 and the Board would only be amending the title. (Childears Exhibit 3, 2/20 – 3/2).

Mr. Bows was absent from the April 26, 2012 rehearing because he was en route to Pennsylvania when Walker and Childears filed their requests for rehearing and when notice of rehearing was given to Mr. Staelin late in the afternoon of April 25, 2012. Mr. Bows was attending the conference of the Public Banking Institute (PBI) of which he is a board member and it would have been extremely inconvenient for him to return for the rehearing. Mr. Staelin was authorized to serve as Mr. Bows' representative for the rehearing. (Walker Exhibit K, 12/24 – 13/17).

The rehearing on April 26, 2012 started at 2:46 p.m. (Childears Exhibit 3, 4-26-12, p. 1). Just before a break taken at 5:18 p.m. Mr. Staelin mentioned to the Board that he had originally scheduled a flight for 7:05 a.m. on April 26th, but (when notified of the rehearing) rescheduled for 7:33 p.m. that day, thinking he'd have time after the hearing to make his flight (Childears Exhibit 3, 4-26-12, 108/20-25) Mr. Staelin recalls that he left at close to 6:00 p.m., or as late as

possible to still allow him to make his flight to attend the conference in Philadelphia.

After the break, Mr. Domenico proposed that to the extent the same objections and issues are raised in #95 that everyone:

> incorporate what's already been said and ruled upon, and then to the extent that helps with the fact that now we've begun the rehearing already on 94 and 95, in case the proponent feels the need to leave, I think he's been here for both hearings" (Childears Exhibit 3, 4-26-12, 110/5-14)

Ms. Staiert responded: "Okay, All right."

The Board had concluded most of its discussion of Initiative #94 when Mr. Staelin left. He requested permission of the Board to leave early, and requested that all of his comments and all of the board's comments concerning Initiative 94 be applied to Initiative 95, to which the Board agreed (Childears Exhibit 3, 131/5-9, 18). Objectors made no objection to this request. Shortly thereafter, the board voted unanimously to deny the motion for rehearing and to amend the title to #94 as it then appeared on the screen. (Exhibit 3, 4-26-12, 137/13-20).

The Board then considered the Title for #95. The arguments raised by objectors to #95 were essentially the same as their objections to #94. The Board made similar amendments to #95 to those made to #94, mostly for style and clarity, without significant changes to the substance of the title. The Board then

unanimously denied the motion for rehearing and adopted the staff draft of #95 as it then appeared on the screen as the ballot title, with the "changes reflected in the ballot title" to be "changed in the questions", and then adjourned at 6:47 p.m. (Childears Exhibit 3, 4-26-12, 164/4-18).

Walker has failed to show any prejudice from the non-appearance of Mr. Bows at the rehearing, or from the absence of Mr. Staelin for part of the rehearing, or how the outcome of the hearing might have been different had they both been present throughout. The most significant change made in the ballot title of both initiatives was to incorporate the request of Objector's representative to change the backing of the debts and obligations of the bank from "full faith and credit" to "all the assets" of the state or political subdivision. Under these circumstances, the Board's unanimous decision to set title is not clearly erroneous, and should not be disturbed. Proponents submit that a rigid adherence to the rule would violate the rights of Proponents under the due process clauses of the Colorado Constitution, Article 2, §25 and the Fifth and Fourteenth Amendments to the U.S. Constitution, absent a "good cause" exception applied in the circumstances, or allowing Mr. Bows to appear by telephone. As the Court held in Sears, Roebuck & Co. v. Baca, 682 P.2d 11, at 19 (Colo. 1984):

> Under the circumstances, due process "require[d]" that the Department "promulgate rules and regulations to guide hearing officers in their decisions" concerning probationary licenses.
> ...
> Due process, we have stated, is a flexible standard calling for such procedural protections as the particular situation demands.

At the rehearing Ms. Walker's attorney, Mr. Rogers cited In re Petitions on Campaign and Political Finance, 877 P. 2d 311 (Colo. 1994), arguing that if a title is defective it deprives the title board of jurisdiction to set title (Childears Exhibit 3, 20/19 – 21/7). The Court in that case also said at p. 313:

> Thus we indulge all legitimate presumptions in favor of the propriety of the Board's action, and only in clear cases will we invalidate the title, ballot title and submission clause, or summary prepared by the Board.

Proponents submit that if the Court indulges all legitimate presumptions in favor of the Board's action on this issue, Objectors have failed to make a clear case for invalidating such action and the denial of Objectors' motions should be affirmed.

B. The Title Board properly set titles for the Initiatives under Article V, § 1(8) of the Colorado Constitution and C.R.S. § 1-40-105(4) even though both Initiatives contained "whereas" clauses above the "Be it enacted" clause.

1. **Standard of Review**. Proponents do not agree that whether the Board properly set a title should be heard *de novo* by the Supreme Court. Most ballot title cases hold that "great deference" and "every presumption" must be granted to the Title Board in setting title, and that only in "clear cases" will the Board be overruled. These standards are inconsistent with *de novo* consideration of the issue.

Proponents at hearing made clear their intent that the proposed measures began with the "Be it Enacted" clause which followed the "whereas" clauses. Colo. Const. art. V, § 1(8) states as follows: "The style of all laws adopted by the people through the initiative shall be, 'Be it Enacted by the People of the State of Colorado'."

Nothing in Article V §1(8) prohibits the use of such recitals or "whereas" clauses before the enactment clause.

C.R.S. § 1-40-105(4) provides:

> (4) After the conference provided in subsections (1) and (2) of this section, a copy of the original typewritten draft submitted to the directors of the legislative council and the office of legislative legal services, a copy of the amended draft with changes highlighted or otherwise indicated, if any amendments were made following the last conference conducted pursuant to subsections (1) and (2) of this section, and an original final draft which gives the final language for printing shall be submitted to the secretary of state without any title, submission clause, or ballot title providing the designation by which

the voters shall express their choice for or against the proposed law or constitutional amendment.

Again, nothing in the above language prohibits the use of "whereas" clauses before the enacting clause. The original final draft of the measures submitted to the secretary of state did not contain any "title, submission clause, or ballot title providing the designation by which the voters shall express their choice" and thus did not contravene C.R.S. § 1-40-105(4).

Finally, the April 3, 2012 Memorandum to Proponents from the Colorado Legislative Council and Office of Legislative Legal Services ("Council") states as follows:

> With regard to the "WHEREAS" paragraphs at the beginning of the proposed initiative, it is unclear whether they are part of the proposed initiative itself and are to be added to the Colorado constitution if the proposed initiative is enacted or are simply extra explanatory material. If the proponents intend the paragraphs to be added to the Colorado constitution as part of the initiative, you should add the paragraphs as a subsection to the new section 22, article X of the constitution. (See the example under "**Numbering of Constitution/Headnotes**" for adding the paragraphs as a "purpose and findings" subsection.)
>
> If the proponents intend the "WHEREAS" paragraphs to be a part of the initiative, carefully check to ensure that spelling, grammatical, and typographical errors are corrected.

(Exhibit A, p. 2 under "Technical Comments")

The above advice provided by the Council also does not prohibit the "whereas" clauses, which if not part of the enactment would be considered "extra explanatory material".

The Title Board also had approved Initiative #91 at the hearing on April 18, 2012 that contained "whereas" clauses in a similar fashion (Childears Exhibit 3, 35/8-13).

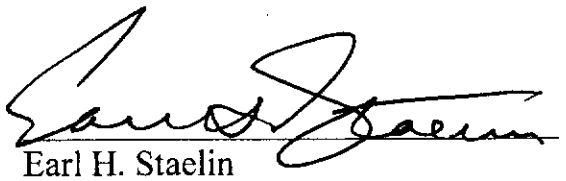
Therefore, under C.R.S. § 1-40-105(4) the Title Board had jurisdiction to set the titles, and under established case law the Court should "allow the greatest possible exercise of this valuable right" City of Glendale v. Buchanan, 578 P. 2d 221, 224 (Colo. 1978) and to "engage in all legitimate presumptions in favor of the propriety of the Board's actions" In re Ballot Title (Petitions), 907 P.2d 586, 590 (Colo. 1995). Accordingly, the Court should deny Objector's petition on this issue.

CONCLUSION

Proponents respectfully request that pursuant to C.R.S. § 1-40-107(2) the court affirm the Title Board's denial of the Motions for Rehearing and find that the Title Board had jurisdiction to hear these measures and set titles for the Initiatives.

Dated: May 30, 2012

Respectfully submitted,



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Certificate of Service

I hereby certify that on May 30, 2012, a true and correct copy of the foregoing ANSWER BRIEF OF PROPONENTS TO BARBARA M.A. WALKER was served via overnight delivery service or hand delivery to the following:

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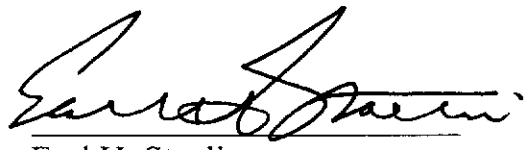

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