

<p>Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, CO 80202</p>	<p style="text-align: center;">FILED IN THE SUPREME COURT</p> <p style="text-align: center;">MAY 15 2012</p> <p style="text-align: center;">OF THE STATE OF COLORADO Christopher T. Ryan, Clerk</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 #94 and #95</p> <p>Petitioners: Barbara M.A. Walker and Don Childears</p> <p>v.</p> <p>Respondents: Earl Staelin and Robert Bows</p> <p>and</p> <p>Title Board: Suzanne Staiert, Dan Domenico, and Jason Gelender</p>	
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<p>OPENING BRIEF OF PETITIONER DON CHILDEARS</p>	

CERTIFICATE OF COMPLIANCE

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

Specifically, the undersigned certifies that:

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

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- It contains 9,419 words.
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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.

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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.



Michael D. Hoke

TABLE OF CONTENTS

	Page
Statement of Issues Presented for Review.....	1
Statement of the Case	2
A. Nature of the Case.....	2
B. Nature of the Measures, Course of Proceedings, and Disposition Before the Title Board	2
1. Initiative #94 would permit political subdivisions to establish banks.....	2
2. Initiative #95 would require the state to establish a bank.....	4
3. Review and Comment Hearing.....	4
4. Procedural History Before the Title Board and Statement of Facts.....	5
Summary of Argument	7
Argument	9
A. The Title Board lacked jurisdiction to set titles for the Initiatives because both proponents were not at all relevant meetings of the title board.....	9
1. Standard of Review	9
2. Sections 1-40-106(4)(a) & (d) apply to hearings on motions for rehearing	10
(a) The plain text of section 1-40- 106(4)(a) & (d) require both Proponents to be at every Title Board meeting, including rehearings	10
(b) The legislative history of HB 1072 and the purposes behind that bill demonstrate an intent to require attendance at rehearings	14

TABLE OF CONTENTS
(continued)

	Page
3. The Title Board recognized that section 1-40-106(4)(a) requires attendance of both proponents, but exercised jurisdiction anyway	16
4. Because one of the proponents was absent from the rehearing, the Title Board lacked jurisdiction to set a title	19
B. The Title Board lacked jurisdiction to set titles because the measures contain impermissible prefatory language.....	20
1. Standard of Review	20
2. The Colorado Constitution and statutes expressly prohibit prefatory material.....	21
3. The Board ignored its own doubts about its jurisdiction to set a title where it did not understand whether the prefatory material constituted part of the measure to be reflected in the title	21
4. The presence of “whereas” clauses above the “be it enacted” clauses violates both the Constitution and statute and denies the Title Board jurisdiction to set titles	26
C. The Proponents made substantial changes to the measures after review and comment hearings that were not in direct response to comments or questions from legislative staff	27
1. Standard of Review	27
2. Proponents changed both Initiatives to allow lending “at no interest.”	28

TABLE OF CONTENTS
(continued)

	Page
3. Proponents changed the limitations on the powers and authority of banks in Initiative #94	30
4. The Title Board improperly placed the burden on Petitioner to show that the legislative staff had not commented on the changes, and refused to allow him to meet that burden	31
5. The Title Board erroneously shifted the burden to the Petitioner to prove that changes made to measures are responsive to comments from legislative staff	33
D. The Initiatives each contain multiple separate subjects having no necessary or proper connection.....	35
1. Standard of Review	35
2. The titles must be stricken because each Initiative addresses multiple separate subjects that are not dependent upon each other	36
(a) Initiative #94.....	36
(b) Initiative #95.....	38
E. In the event the Board had jurisdiction, the titles must still be revised to reflect the substance of the measures accurately	40
1. Standard of Review	40
2. The titles do not correctly or fairly express the true intent and meaning of the measures	41
(a) Initiative #94.....	41
(b) Initiative #95.....	42
Conclusion	43

TABLE OF AUTHORITIES

CASES

<i>Colorado State Bd. of Med. Examiners v. Saddoris</i> , 825 P.2d 39 (Colo. 1992)	12
<i>Davidson v. Sandstrom</i> , 83 P.3d 648 (Colo. 2004)	3, 29
<i>In re Ballot Title 1997–98 No. 10</i> , 943 P.2d 897 (Colo. 1997)	40
<i>In re Ballot Title 1997–98 No. 109</i> , 962 P.2d 252 (Colo. 1998)	20
<i>In re Ballot Title 1999–2000 # 256</i> , 12 P.3d 246 (Colo. 2000)	28
<i>In re Ballot Title 1999–2000 No. 104</i> , 987 P.2d 249 (Colo. 1999)	35
<i>In re Ballot Title 1999–2000 No. 258(A)</i> , 4 P.3d 1094 (Colo. 2000)	40
<i>In re Ballot Title 1999–2000 No. 29</i> , 972 P.2d 257 (Colo. 1999)	35, 40
<i>In re Ballot Title 2007–2008, #17</i> , 172 P.3d 871 (Colo. 2007)	9, 35
<i>In re Ballot Title for a Petition on Campaign & Political Fin.</i> , 877 P.2d 311 (Colo. 1994)	21
<i>Matter of Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to Constitution of State of Colo. Adding Subsection (10) to Sec. 20 of Art. X (Amend Tabor 25)</i> , 900 P.2d 121 (Colo. 1995)	35

STATUTES

C.R.S. § 11-10.5-103(2)	41
C.R.S. § 1-40-105	1, 28, 33
C.R.S. § 1-40-106	1, 5, 10, 12, 13, 19, 26
C.R.S. § 1-40-107	2
C.R.S. §§ 11-10.5-101 through 112	36, 41
C.R.S. §§ 11-47-101 through -120	36
C.R.S., Title 11	41
U.S.C., Title 12, Chapter 2	41

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 351 (abridged 6th ed. 1991)	11
Colo. Const., Article V, § 1(8)	1
Colo. Const., Article X, § 20(4)(b)	37
Colo. Const., Article X, § 22	3

Colo. Const., Article X, § 23	4
MERRIAM-WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 391 (1989).....	11

Don Childears (“Petitioner”), registered elector of the State of Colorado, through his undersigned counsel, respectfully submits the following Opening Brief in support of his Petition for Review of Final Action of the Title Setting Board Concerning Proposed Initiatives 2011–2012 Nos. 94 & 95 (the “Initiatives”).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. A new Colorado law requires that each proponent of a ballot initiative be present at any Title Board meeting considering their measure. One of the proponents was absent from the rehearing on Initiative #94, and both proponents were absent from rehearing on #95. Did the Title Board lack jurisdiction to set a title for the Initiatives under section 1-40-106(4)(a)?
2. Each Initiative contained a full page of language above the “be it enacted” clause. Did the Title Board lack jurisdiction because the measures failed to comply with article V, section 1(8) of the Colorado Constitution and section 1-40-105(4)?
3. The proponents made changes to the underlying measures after the Review and Comment hearing that were substantive and not in direct response to questions or comments posed at that hearing. Did the Title Board err in determining that it had jurisdiction to review the Initiatives and set titles?

4. The Initiatives each contain multiple separate subjects that bear no necessary or proper connection to each other. Did the Title Board err in approving the Initiatives under Colorado's single-subject requirement?
5. Did the Title Board err in setting ballot titles for the Initiatives that fail to disclose major provisions of the measures and are otherwise vague and misleading?

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This original proceeding is brought pursuant to section 1-40-107(2), seeking review of the actions of the Ballot Title Setting Board regarding proposed Initiatives #94 and #95. Petitioner is a registered elector who timely submitted a Motion for Rehearing before the Title Board pursuant to section 1-40-107(1). In addition, Petitioner timely filed his Petition for Review, together with certified copies of the required documents, within five days from the date of the hearing on the Motion for Rehearing pursuant to section 1-40-107(2).

B. NATURE OF THE MEASURES, COURSE OF PROCEEDINGS, AND DISPOSITION BEFORE THE TITLE BOARD

1. Initiative #94 would permit political subdivisions to establish banks.

Although it is somewhat unclear from the actual language of the measure, the Proponents of Initiative #94 indicate that it will add a new section 22 to article

X of the Constitution to authorize any county, municipality or political subdivision of the state to establish a bank and engage in banking. As noted by legislative staff, “political subdivision” would include special districts.¹ Remarkably, it would also include *judicial* districts.²

Such banks would be authorized to lend money “to promote development and enterprise in the state or any other purpose authorized by the laws governing the subdivision.” The banks would have the same powers and authority as other banks chartered by the state of Colorado, except as expanded or limited by the General Assembly, and revenue, income and assets of the banks could not be limited under any circumstances.

The Initiative also proposes rules for the governance of such banks as well capitalization requirements. The initiative would permit such banks to self-insure their deposits by foregoing FDIC insurance and backing them with the subdivision’s “full faith and credit.” Finally, the measure authorizes the General Assembly to provide regulatory “guidelines” for such banks.

¹ See Exhibit 1 (April 18 Transcript (“4/18/12 Tr. pt. 1”)) at 24:5–6 & 24:11 (Proponent Bows confirms that the measure is not restricted to cities or counties).

² See *Davidson v. Sandstrom*, 83 P.3d 648, 656 (Colo. 2004) (“We hold that by its plain meaning . . . , ‘any other political subdivision’ encompasses judicial districts.”).

2. Initiative #95 would require the state to establish a bank.

Initiative #95 proposes to add a new section 23 to article X of the Constitution that would create a state-owned bank authorized to lend money:

to promote development, commerce, industry, and agriculture in the state and to promote home ownership, maintenance and construction of needed infrastructure, education, public health and safety, and other purposes for the general welfare of the citizens of the state of Colorado.

The bank would have all of the powers and authority of other private banks chartered in the state of Colorado, except that it would be prohibited from taking deposits from private parties or corporations. Debts and obligations of the bank would be backed by the “full faith and credit” of the state. The revenue and income of the bank could not be limited except upon “sound financial and public policy considerations.” The Initiative further provides for governance of the bank, and requires that bank management draft rules and regulations to govern the bank. It also allows that the bank’s capitalization “may include all tax and other revenues and funds of the state, subject to sound banking practices” and requires that all funds normally held in financial institutions be deposited and held in the bank.

3. Review and Comment Hearing

The initial Review and Comment hearing for the Initiatives was held on April 6, 2012. Following that hearing, the proponents made a variety of changes to

the Initiatives and submitted revised measures to the secretary of state without further review and comment from legislative staff.

4. Procedural History Before the Title Board and Statement of Facts

The Title Board conducted its initial public hearing and set the titles for the Initiatives on April 18, 2012.³

Petitioner and one other objector subsequently filed timely Motions for Rehearing. During the rehearing on Initiative #94, Proponent Staelin was initially in attendance, but Proponent Bows was not.⁴ Proponent Staelin then left the rehearing before a new title was set for Initiative #94, and before consideration of Initiative #95.⁵

At the rehearing, counsel for Petitioner challenged the jurisdiction of the Board to set a title in absence of both Proponents, as required by section 1-40-106(4). The Board rejected that argument on a 2–1 vote.⁶

Petitioner also challenged the Board’s jurisdiction on the basis that the measures each contain extensive prefatory material before the “be it enacted”

³ Exhibit 2 (April 18 Transcript (“4/18/12 Tr. pt. 2”)) at 38:7–13.

⁴ Exhibit 3 (April 26, 2012 Transcript (“4/26/12 Tr.”)) at 2 (indicating attendance of only one Proponent Representative, Mr. Staelin) & 5:20–22.

⁵ See Ex. 3, 4/26/12 Tr., at 131:18.

⁶ Ex. 3, 4/26/12 Tr., at 16:18–17:1 (Mr. Gelender voting against).

clauses in violation of constitutional and statutory requirements. A vote to approve the motion for rehearing on Initiative #94 for lack of jurisdiction failed on a 1–2 vote,⁷ and by a 2–1 vote, the Board exercised jurisdiction and set titles for Initiative #95 as well.⁸

Finally, the Board also rejected Petitioner’s challenge to the Board’s jurisdiction on the ground that Proponents had made substantial changes to both measures after review and comment that were not directly responsive to comments from legislative staff. Once again, the Board voted 2–1 to deny the motions for rehearing in that respect.⁹

The Board then finalized the language for the title, ballot title and submission clause for Initiative #94 and voted to deny the motions for rehearing.¹⁰

The Board also voted 2–1 that Initiative #95 satisfied the single-subject requirement; Ms. Staiert opposed the motion on the basis that the initiative would separately supersede TABOR.¹¹ The Board then finalized the language for the

⁷ Ex. 3, 4/26/12 Tr., at 55:4–13 & 57:9–16 (Mr. Gelender voting in favor).

⁸ Ex. 3, 4/26/12 Tr., at 140:7–21 (Mr. Gelender voting against).

⁹ Ex. 3, 4/26/12 Tr., at 82:20–83:3 (Ms. Staiert voting against).

¹⁰ Ex. 3, 4/26/12 Tr., at 137:13–20.

¹¹ Ex. 3, 4/26/12 Tr., at 155:21–156:13.

title, ballot title and submission clause for Initiative #95 and voted to deny the motions for rehearing.¹²

SUMMARY OF ARGUMENT

The titles must be stricken because the Title Board lacked jurisdiction to set titles for the measures. *First*, section 1-40-106(4) requires attendance of *both* proponents at every Title Board meeting at which a measure is considered, but Proponent Bows was entirely absent from the April 26 rehearing, and Proponent Staelin left before the Board set a title for either measure. Because section 1-40-106(4) divests the Board of jurisdiction to set titles in the absence of both proponents, and because the Board set titles on both measures at the April 26 rehearing in the absence of both proponents, the Board's action must be reversed.

Second, the extensive prefatory material attached to each measure before the "be it enacted" clauses violates article V, section 1(8) of the Colorado Constitution and section 1-40-105(4), which require measures to begin with a "be it enacted" clause and to contain no title or other information that could provide a designation by which voters should express their choices. These requirements are particularly important here, where the Board (and, arguably, Proponent Staelin himself)

¹² Ex. 3, 4/26/12 Tr., at 164:4–11.

expressed significant confusion as to whether the voluminous prefatory material constituted part of the measures at all.

Third, Proponents made substantial changes to the measures that were not directly responsive to comments from legislative staff. Proponents themselves were unable to identify comments to which their changes were responsive, in part because they were not present during part of the relevant discussion. The Title Board improperly shifted the burden to Petitioner to prove that changes were not responsive, and, in doing so, refused to consider proffered evidence in favor of hearsay that could not be contested at the rehearing. Any one of these issues is reversible error.

Fourth, both measures violate the single-subject requirement. The ostensible primary purpose of Initiative #94 is to authorize political subdivisions of the state to establish banks. But Proponents agreed that part of the intent is to make more revenue available to the state by exempting bank revenues from TABOR. And the measure would change several other disparate substantive areas of the law. Similarly, Initiative #95 would establish a state-owned bank, but would also provide an exception to TABOR's restrictions on state revenues, eliminate protections currently provided for state funds under the Public Deposit Protection Act, and would allow the state to pledge its credit for private enterprise.

Finally, even if the Title Board somehow had jurisdiction to set a title for either measure, the titles it set are misleading and must be redrafted. Neither title reflects accurately the powers and authority the banks would have or the significant effects the measures would have on current protections afforded public funds held in private institutions. Moreover, the title for Initiative #95 materially misstates the one limitation the measure would place on the bank's powers and authority. The titles must therefore be stricken and remanded to the Title Board for resetting.

ARGUMENT

A. THE TITLE BOARD LACKED JURISDICTION TO SET TITLES FOR THE INITIATIVES BECAUSE BOTH PROPONENTS WERE NOT AT ALL RELEVANT MEETINGS OF THE TITLE BOARD.

1. Standard of Review

The interpretation of section 1-40-106(4) is an issue of first impression for this Court.¹³ In other situations, however, where the jurisdiction of the Title Board is challenged, the Court reviews the jurisdictional issue *de novo*.¹⁴

¹³ This issue has been raised in another recently filed case regarding Initiatives #67, #68 & #69. The Petitioner here respectfully asks the Court to take judicial notice of the arguments made therein on this jurisdictional question and of the *amicus* brief filed in support of petitioners in Case No. 12SA117.

¹⁴ See, e.g., *In re Ballot Title 2007–2008, #17*, 172 P.3d 871, 876 (Colo. 2007) (reversing Title Board's exercise of jurisdiction without deference to Board findings on single-subject issue).

This issue was raised with respect to both Initiatives during the April 26 rehearing, during which the Title Board voted 2–1 to exercise jurisdiction despite the absence of the proponents.¹⁵

2. Sections 1-40-106(4)(a) & (d) apply to hearings on motions for rehearing.

(a) The plain text of section 1-40-106(4)(a) & (d) require both Proponents to be at every Title Board meeting, including rehearsings.

Section 1-40-106(4) is the result of legislation (HB 11-1072) adopted by the General Assembly in 2011 in an effort to improve the initiative and title-setting process. Among these changes, the Title Board now loses jurisdiction to set a title if either of the proponents are absent from any meeting at which their measure is considered. Section 1-40-106(4)(a) is unambiguous:

each designated representative of the proponents *shall* appear at *any* title board *meeting* at which the designated representative's ballot issue is considered.¹⁶

Four key words in section 1-40-106(4)(a) make it a mandatory and jurisdictional requirement that both proponents attend every meeting of the Title Board on their initiative. First, rather than describing the requirement as to who must attend the Title Board meetings as “a representative,” “one representative,” or

¹⁵ Ex. 3, 4/26/12 Tr., at 16:18–17:1 (Mr. Gelender voting against).

¹⁶ C.R.S § 1-40-106(4)(a) (emphasis added).

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 inclusiveness¹⁷

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.”¹⁸

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”¹⁹ Thus, section 1-40-106(4) applies to 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

¹⁷ BLACK’S LAW DICTIONARY 351 (abridged 6th ed. 1991).

¹⁸ MERRIAM-WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 391 (1989).

¹⁹ MERRIAM-WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 93 (1989).

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 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.²⁰

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.²¹

²⁰ 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.”).

²¹ C.R.S § 1-40-106(4)(d) (emphasis added).

Thus, the 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 are made after the 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 the 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.

Nor is the attendance requirement particularly burdensome. There are typically only one or two Title Board meetings at which a measure is considered. And if a proponent cannot attend one of those meetings, section 1-40-106(4)(d) allows the Title Board to consider the measure “at its next meeting.” Alternatively, under guidelines promulgated by the Secretary of State, proponents may designate a new representative to take over his or her role as a proponent and to attend the meeting.²²

²² See Designated Representatives’ Responsibilities, COLO. SEC’Y OF STATE, <http://www.sos.state.co.us/pubs/elections/Initiatives/designatedRep.html> (last visited May 15, 2012) (noting that “[e]ach designated representative must appear at

(b) The legislative history of HB 1072 and the purposes behind that bill demonstrate an intent to require attendance at rehearings.

House Bill 11-1072 (“HB 1072”)²³ was the brain-child of a diverse group of more than twenty-seven leading community and business organizations in Colorado.²⁴ Their stated goal was to improve the initiative process by requiring greater transparency, accountability, and clarity in the title-setting and signature-gathering process.

Having both of the proponents at any rehearing was intended by the legislature and serves a logical purpose toward achieving the stated goals of the legislation. In fact, attendance at the rehearing may be even more important than at the initial hearing. It is now common practice that objectors to a proposed measure skip the initial Title Board hearing and object only through written motion for rehearing and oral argument at that subsequent meeting. As such, the rehearing has in reality become the “real” hearing on a measure and is often the only point at which a detailed discussion regarding the meaning and effect of a measure occurs.

any Title Board meeting during which the designated representatives’ proposed initiative is to be heard” and providing mechanism for substituting designated representatives).

²³ Exhibit 6.

²⁴ See *Amicus Curiae* Brief for Colorado Concern *et al.*, *In re Ballot Title 2011–2012 #67, #68 & #69*, Case No. 2012SA117, submitted May 14, 2012.

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.

While the legislative hearings on HB 1072 did not focus specifically on the attendance requirement (arguably because the language was simply 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...”²⁵ Despite these protests, no one in the room—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

²⁵ See Exhibit 7 (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).

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.

It did not take long for the legislature's concerns to become reality: at the rehearing on Initiative #95, the absence of both proponents became problematic when the Title Board was left to speculate as to whether changes Proponents made to the measure 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.²⁶

3. The Title Board recognized that section 1-40-106(4)(a) requires attendance of both proponents, but exercised jurisdiction anyway.

At the rehearing, counsel for Petitioner questioned the Board's jurisdiction to proceed without both Proponents present, arguing that section 1-40-106(4)(a)

²⁶ Ex. 3, 4/26/12 Tr., at 141:25–149:4.

applied and precluded the Title Board from proceeding with the rehearing on the Initiatives.²⁷

Solicitor General Domenico stated his belief that counsel for Petitioner made “a perfectly reasonable argument about the interpretation of the requirements of that statute.”²⁸ Mr. Gelender agreed, saying that he had “no doubt whatsoever that the general assembly intended to make both proponents show up at any title board meeting and the language is very clear.”²⁹ Mr. Gelender also responded to comments that perhaps section 1-40-106(a)(4) was no longer applicable after the title was set at the initial hearing by stating that in amending a previously set title, the Board would be “setting another title or a different title,” and thus the statute remained applicable.³⁰

Nevertheless, Mr. Domenico questioned what purpose might be served in enforcing section 1-40-106(4)(a).³¹ Counsel for Petitioner noted that the statute was clearly intended to ensure that the proponents of a measure would be available to answer questions and to inform the Board and the electorate about the nature

²⁷ Ex. 3, 4/26/12 Tr., at 5:6–6:11.

²⁸ Ex. 3, 4/26/12 Tr., at 13:21–23.

²⁹ Ex. 3, 4/26/12 Tr., at 15:19–23.

³⁰ Ex. 3, 4/26/12 Tr., at 15:2–6.

³¹ Ex. 3, 4/26/12 Tr., at 6:19–7:1.

and meaning of their measure.³² Ms. Staiert expressed concern that, in her view, the statute provides no remedy to enforce this provision once the Title Board has already set a title at the first hearing on the measure, as did Mr. Domenico.³³

Likewise, Mr. Domenico suggested that rehearings do not fall within the scope of section 1-40-106(4) because the Title Board does not “set” a title on rehearing, but only grants or denies motions for rehearing and may “amend” the title that has “already been set.”³⁴

The Title Board rejected the jurisdictional argument on a 2–1 vote.³⁵

Apparently needing to catch a plane, Proponent Staelin then left the rehearing before the discussion of Initiative #94 had been completed, before any substantive discussion on #95, and before a title had been set on either measure.³⁶ Ironically, later discussion on Initiative #95 focused on whether a certain change to the measure was responsive to comments from legislative staff, but no Proponent was present to provide answers.³⁷

³² Ex. 3, 4/26/12 Tr., at 7:11–19.

³³ Ex. 3, 4/26/12 Tr., at 7:20–22 & 8:13–15.

³⁴ Ex. 3, 4/26/12 Tr., at 8:20–9:2.

³⁵ Ex. 3, 4/26/12 Tr., at 16:18–17:1 (Mr. Gelender voting against).

³⁶ Ex. 3, 4/26/12 Tr., at 131:18.

³⁷ See Ex. 3, 4/26/12 Tr., at 141:25–149:23.

4. Because one of the proponents was absent from the rehearing, the Title Board lacked jurisdiction to set a title.

Both Initiatives were “considered” at the April 26 rehearing. Section 1-40-106(4)(a) therefore required the attendance of each Proponent. Because Mr. Bows did not attend any of that proceeding, and because Mr. Staelin attended only part, section 1-40-106(4)(d) prohibited the Title Board from setting a title on either measure.

Nonetheless, despite comments by at least two board members that the statutory language seemed unambiguously to require dual attendance at the rehearing, two members of the Title Board questioned whether section 1-40-106(4) would divest the Board of jurisdiction where they had already set titles at a previous hearing.

Aside from the doubtful proposition that a title is “set” if it the measure is still being “considered” at later Title Board meetings, the question is misdirected: at the April 26 rehearing, the Board did not merely deny motions for rehearing, but it expressly made wholesale changes to the title as originally set at the first hearing and “set” new titles for both Initiatives. Mr. Gelender moved “to deny the motion for rehearing and *set* the title” on Initiative #94.³⁸ On Initiative #95, the Board

³⁸ Ex. 3, 4/26/12 Tr., at 137:13–15 (emphasis added).

voted to “adopt” a new title as rewritten.³⁹ The Board’s previous actions on the Initiatives are irrelevant—in absence of both Proponents, the Board lacked jurisdiction to set and adopt the titles at the April 26 hearing and was required, at a minimum, to postpone consideration of the Initiatives until the next Title Board meeting. Because the Title Board acted when it lacked jurisdiction to do so, it must be reversed and the measures must be returned to the board for reconsideration at its next meeting.

B. THE TITLE BOARD LACKED JURISDICTION TO SET TITLES BECAUSE THE MEASURES CONTAIN IMPERMISSIBLE PREFATORY LANGUAGE.

1. Standard of Review

Jurisdictional issues are matters of law that the Court reviews *de novo*. Failure to conform to formal and procedural requirements for submission of measures divests the Title Board of jurisdiction.⁴⁰

The Title Board’s jurisdiction was challenged on this basis at the April 26 rehearing, but the Board rejected it on a 2–1 vote despite significant reservations by at least one of those voting to continue the hearing.⁴¹

³⁹ Ex. 3, 4/26/12 Tr., at 164:4–11.

⁴⁰ *In re Ballot Title 1997–98 No. 109*, 962 P.2d 252 (Colo. 1998) (affirming Title Board’s refusal to set title where proponents failed to submit correct drafts of original, amended and final initiative).

2. The Colorado Constitution and statutes expressly prohibit prefatory material.

Article V, section 1(8), of the Colorado Constitution requires that “[t]he style of all laws adopted by the people through the initiative shall be, ‘Be it Enacted by the People of the State of Colorado.’” Section 1-40-105(4) requires proponents to submit to the secretary of state, among other things, “an original final draft which gives the final language for printing . . . 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.” Failure to comply with section 1-40-105(4) eliminates the Title Board’s jurisdiction to set a title.⁴²

3. The Board ignored its own doubts about its jurisdiction to set a title where it did not understand whether the prefatory material constituted part of the measure to be reflected in the title.

The Board lacked jurisdiction to set a title because the extensive prefatory material before the “be it enacted” clause violated constitutional and statutory requirements for measures. The Board itself was gravely concerned about the

⁴¹ Ex. 3, 4/26/12 Tr., at 55:4–13 & 57:9–16 (Mr. Gelender voting in favor of granting petition) & 140:7–21 (Mr. Gelender voting against exercising jurisdiction).

⁴² See *In re Ballot Title for a Petition on Campaign & Political Fin.*, 877 P.2d 311, 316 (Colo. 1994) (petitioner bears burden of showing procedural noncompliance with § 1-40-105(4), which would destroy Board’s jurisdiction).

issue, but ultimately decided that the remedy lay with the Secretary of State, or some other party.

During the April 18 hearing on Initiative #94, Solicitor General Domenico questioned, *sua sponte*, whether the Board had jurisdiction to set a title because the Initiative begins with a panoply of statements and information that preceded the “be it enacted” clause. Addressing these “whereas” clauses, Mr. Domenico stated: “I’m just confused about whether I understand what we’re doing here well enough to have jurisdiction to set a title”⁴³

Proponent Bows stated that the “whereas” clauses were included in the measure for the purpose of educating individuals who might sign the petition.⁴⁴ Mr. Domenico then repeatedly likened the “whereas” clauses to advertising added to the measure.⁴⁵ In response to the claim that the “whereas” clauses would not be added to the Constitution, but would be contained in the measure for purposes of collecting signatures, Mr. Domenico stated, “I don’t think that’s appropriate, frankly. The people are being asked to vote on a change to the constitution, and

⁴³ Ex. 1, 4/18/12 Tr. pt. 1, at 4:2–4; *see also id.* at 4:18–19 (“That’s sort of my question: What are all these whereas clauses then?”).

⁴⁴ Ex. 1, 4/18/12 Tr. pt. 1, at 6:9–12.

⁴⁵ Ex. 1, 4/18/12 Tr. pt. 1, at 8:25–9:3, 9:19–22 & 10:18–19.

either they're being asked to vote on this [additional language] or they're not."⁴⁶

Later, Mr. Domenico noted that permitting measures to have such prefatory language that is not part of the amendment being sought could significantly change the initiative process:

It seems to me this would change sort of fundamentally how people propose amendments, if you're just allowed to include essentially your arguments for it in the measure in what you present to us and present to signature gatherers⁴⁷

He also expressed concern that there might be no mechanism for the language to be removed from the petition or from the measure itself after the title was set:

I'm just confused, if [the prefatory material is] going to go away, when it will disappear from what this process is and by what mechanism it disappears from the process and what would prevent people from attaching a beautiful advertisement or—I mean, this was obviously not done with this intent, but if this is what—if we're just going to ignore everything before when they say "be it enacted," but we're still going to set titles and allow people to include it somewhere, I'm just confused about what will happen to that language and how it affects the title.⁴⁸

⁴⁶ Ex. 1, 4/18/12 Tr. pt. 1, at 12:9–12.

⁴⁷ Ex. 1, 4/18/12 Tr. pt. 1, at 14:10–15.

⁴⁸ Ex. 1, 4/18/12 Tr. pt. 1, at 27:17–28:3.

Despite Mr. Domenico's concerns about the "whereas" clauses, the Title Board proceeded to set a title for the Initiative.⁴⁹ Similar concerns were expressed for Initiative #95 but the Board likewise elected to continue.⁵⁰

At the rehearing, the Board engaged in another lengthy discussion on this issue, and again expressed significant concern over whether the clauses constituted part of the measure for purposes of setting a title. During the rehearing, Mr. Knaizer, counsel to the Title Board, specifically advised the Board:

[I]f the board determines that because of, for example, the placement of the "Be it Enacted" clause, that it's—it's not sufficiently clear to the board what the meaning of the measure is and what is included, then the board, under Supreme Court precedent, should not set a title.⁵¹

Shortly thereafter, both Mr. Domenico and Ms. Staiert stated that it was unclear to them whether the title should reflect the content of the "whereas" clauses:

[MR. DOMENICO:] I do think it's problematic, even though these are sort of non-substantive, if we really aren't sure what's going to go on the ballot, that we can set a title

...

[MS. STAIERT:] [I]t sounds like, from Mr. Knaizer, that he has previously advised whatever comes out of the title

⁴⁹ Ex. 1, 4/18/12 Tr. pt. 1, at 36:17–25.

⁵⁰ Ex. 2, 4/18/12 Tr. pt. 2, at 3:7–8.

⁵¹ Ex. 3, 4/26/12 Tr., at 48:21–42:1.

board is what you print on the petition, which means that all these whereas clauses go on the petition and then the petition is adopted, that's what's going to go in the constitution. So all these whereas clauses are going to go in the constitution.

I don't know. It makes it unclear to me what I'm trying to set. Should I—should my—should my title start, “An Amendment to the Colorado Constitution to talk about the Bank of North Dakota and, in connection therewith, establish a similar bank in Colorado?” Is that really what I'm doing or am I doing something else?⁵²

Even Proponent Staelin was unable to confirm whether the prefatory material was part of the measure:

MR. DOMENICO: But are they part of the initiative or the measure . . . ?

MR. STAELIN: I guess I haven't seen a clear answer to that.⁵³

Nevertheless, a vote to approve the motion for rehearing on Initiative #94 for lack of jurisdiction and strike the title failed on a 1–2 vote.⁵⁴ Later, by a 2–1 vote, the Board decided to exercise jurisdiction and set titles for Initiative #95 as well.⁵⁵

⁵² Ex. 3, 4/26/12 Tr., at 50:24–51:3 & 51:16–52:4.

⁵³ Ex. 3, 4/26/12 Tr., at 35:5–9.

⁵⁴ Ex. 3, 4/26/12 Tr., at 55:4–13 & 57:9–16 (Mr. Gelender voting in favor).

⁵⁵ Ex. 3, 4/26/12 Tr., at 140:7–21 (Mr. Gelender voting against).

4. The presence of “whereas” clauses above the “be it enacted” clauses violates both the Constitution and statute and denies the Title Board jurisdiction to set titles.

The inclusion in the measure of extensive language before the “be it enacted” clause violates both the Constitution and statute, and is sufficient basis for reversing the Title Board. Article V, section 1(8), contemplates that initiatives will *begin* with a “be it enacted” clause. A reading of this provision as anything other than a substantive mandate that no language shall appear prior to this clause would render the provision superfluous. Similarly, the requirement in section 1-40-105(4) that the final initiative petition be submitted “without any title, submission clause, or ballot title” expressly precludes the kind of introductory material used here that could be construed as a title or summary of the measure or as the designation by which voters shall express their choice. Together, these two provisions require that an initiative omit any prefatory language and present *only* the desired amendment to the statutes or constitution.

This requirement is more than simply a technical nuance. Indeed, if prefatory material were permitted, it could not be reflected in the title, but would nevertheless be required to appear on petitions for signatures. Section 1-40-106 is clear that titles are to be set only for a “proposed law or constitutional amendment” and that titles “shall correctly and fairly express the true intent and meaning” of the

proposed law or amendment *only*. But section 1-40-105(4) requires that the final submitted initiative petition be the “final language for printing,” so that if “whereas” clauses or other prefatory material were permitted, the material *must* be printed on the petitions to be circulated for signatures. As noted by Mr. Domenico during the April 18 hearing, this would fundamentally change the initiative process—there would be nothing to prevent petitions from containing advertisements, propaganda, images, or other persuasive materials to sway electors to sign the petitions.

Because both Initiatives here contained substantial language before the “be it enacted” clauses, they violate article V, section 1(8), of the Colorado Constitution and section 1-40-105(4). The Title Board therefore lacked jurisdiction to set titles, and the Title Board should be reversed with instructions to strike the titles.

C. THE PROPONENTS MADE SUBSTANTIAL CHANGES TO THE MEASURES AFTER REVIEW AND COMMENT HEARINGS THAT WERE NOT IN DIRECT RESPONSE TO COMMENTS OR QUESTIONS FROM LEGISLATIVE STAFF.

1. Standard of Review

Ballot measures must be submitted to the directors of the legislative council and the office of legislative legal services for review and comment. Proponents may not thereafter make any substantial amendment to the measure, “other than an amendment in direct response to the comments of the directors of the legislative

council and the office of legislative legal services,” without resubmitting the amended measure for additional review and comment.⁵⁶

“The requirement that the original draft be submitted to the legislative council and office of legislative legal services . . . allows the public to understand the implications of a proposed initiative at an early stage in the process.”⁵⁷ For this reason, if substantial changes are made without the benefit of review and comment, the Title Board lacks jurisdiction to set titles.

This objection was raised in the Motion for Rehearing and at the April 26 rehearing with respect to both Initiatives.⁵⁸

2. Proponents changed both Initiatives to allow lending “at no interest.”

Following the initial Review and Comment hearing on April 6, 2012, the proponents made a variety of changes to the Initiatives, several of which were not in response to any questions or comments made by legislative staff.

First, Proponents added the phrase “or at no interest” to the new paragraph (1) of each measure. This changed the requirement in the original drafts that if a bank elects to loan money, it must do so “at interest.” Under the amended

⁵⁶ C.R.S. § 1-40-105(2).

⁵⁷ *In re Ballot Title 1999-2000 # 256*, 12 P.3d 246, 251 (Colo. 2000).

⁵⁸ Mot. for Rehearing on Initiative #94 at 1 § II; Mot. for Rehearing on Initiative #95 at 1 § II; Ex. 3, 4/26/12 Tr., at 57:21–60:4 & 141:20–142:12.

versions, a bank would still have the discretion to loan money, but now would also have the option of doing so at no interest. From a public policy standpoint, this is a significant change.

Perhaps acknowledging that these changes were not discussed at the review and comment hearing, Proponent Staelin argued that “interest” could nonetheless include rates so low as to be effectively indistinguishable from zero, so that the change is not substantial.⁵⁹ Such a position cannot be squared with the plain meaning of the measures’ language, and “[c]ourts should not engage in a narrow or technical construction” of initiatives.⁶⁰ At any rate, under the that rationale, both the original “at interest” and the subsequent “or at no interest” language are entirely superfluous. For a court to give meaning to the terms in the measure, there must be a meaningful difference between lending “at interest” or “at no interest,” and if so, the change is substantial.

This change was not discussed in the review and comment memorandum or at the April 6 hearing, and is therefore impermissible.⁶¹

⁵⁹ Ex. 3, 4/26/12 Tr., at 162:2–13.

⁶⁰ *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004).

⁶¹ See Exhibit 4 (Memorandum dated April 3, 2012 from Legislative Counsel Staff and Office of Legislative Legal Services regarding Initiative #94); Exhibit 5 (Memorandum dated April 3, 2012 from Legislative Counsel Staff and Office of Legislative Legal Services regarding Initiative #95).

3. Proponents changed the limitations on the powers and authority of banks in Initiative #94.

Second, the Proponents changed the limitations on the powers and authority of banks, replacing “except as limited by the legally established purposes of the government of the political subdivision” to “except as expanded or limited by the General Assembly.” In making this revision, Proponents made two separate changes: (1) they shifted the limiting authority from the political subdivision (through its legally established purposes) to the General Assembly, and (2) they authorized the General Assembly to expand a political subdivision’s authority and powers. Mr. Domenico noted that it was “clearly a substantive change.”⁶²

Proponents were unable to explain why they made this change.⁶³ Not surprisingly, they were likewise unable to identify any comment from legislative staff that prompted the change. The Title Board speculated that it may have been in response to substantive comment #9 from the legislative staff, which questioned whether the Proponents intended for there to be any regulatory oversight for the banks. But that comment could not have prompted the changes. First, the Proponents made entirely different changes in response to comment #9, adding a new paragraph 5 titled “Regulatory Oversight.” Given an entire separate section

⁶² Ex. 3, 4/26/12 Tr., at 68:10–11.

⁶³ Ex. 3, 4/26/12 Tr., at 67:10–23.

devoted to regulatory oversight, it is difficult to believe that the Proponents would also have felt it necessary to change the language in paragraph 1 as well. Second, the changes to paragraph 1 now permit the General Assembly to *expand* the powers and authority of banks, which would not constitute “regulatory oversight” under ordinary meaning of the term. At any rate, the Proponents’ own inability to identify any comment from the legislative staff that prompted the change is dispositive—the title should be stricken and the measure should be returned to legislative staff for additional review and comment.

4. The Title Board improperly placed the burden on Petitioner to show that the legislative staff had not commented on the changes, and refused to allow him to meet that burden.

At the April 26 rehearing, counsel for Petitioner challenged the Title Board’s jurisdiction to set a title based on the changes made after review and comment. In response, Mr. Gelender asked counsel for Petitioner whether he had attended the review and comment hearing or whether he was simply relying on the memorandum from legislative staff in arguing that changes were not responsive to comments from staff; counsel responded that he had attended the hearing, and had also reviewed a video recording of the hearing roughly a dozen times, and could find nothing that would indicate the changes were responsive to questions or

comment.⁶⁴ Proponent Staelin, who also attended the April 6 hearing, was unable to identify any comments to which the challenged changes were responsive.⁶⁵

Later, counsel for Petitioner went so far as to offer the Board a video recording of the April 6 review and comment hearing,⁶⁶ but the Board declined the offer.

Nevertheless, Mr. Gelender stated that prior to the Title Board meeting, he engaged in a private conversation with the staff attorney who had conducted the April 6 hearing, and inquired whether that person deemed the changes responsive.⁶⁷ And although he admitted that he had not reviewed any recording of the review and comment hearing himself, he would defer to the opinion of that attorney that the changes were responsive. Compounding the problem, Mr.

Domenico then explicitly deferred to Mr. Gelender's decision, stating:

I, too, have not listened to the video or anything like that, so we're in a little bit of a tough spot, but if Mr. Gelender's convinced that both of these changes were triggered by the discussions, I think at this stage we should accept that and deny the motion for a rehearing on that basis as not having carried their burden of convincing us⁶⁸

⁶⁴ Ex. 3, 4/26/12 Tr., at 60:8–14.

⁶⁵ Ex. 3, 4/26/12 Tr., at 67:10–23.

⁶⁶ Ex. 3, 4/26/12 Tr., at 77:6–24.

⁶⁷ See Ex. 3, 4/26/12 Tr., at 60:15–62:17 & 69:3–9.

⁶⁸ Ex. 3, 4/26/12 Tr., at 69:3–9.

5. The Title Board erroneously shifted the burden to the Petitioner to prove that changes made to measures are responsive to comments from legislative staff.

It is axiomatic that Colorado's title-setting process prohibits an initiative proponent from making substantive changes to a measure after the review and comment hearing.⁶⁹ However, such changes may be made if they are "in direct response to the comments of the directors of the legislative council and the office of legislative legal services"⁷⁰ The issue is *jurisdictional*, and the Title Board lacks jurisdiction in such cases even if no objector raises the issue. The Board must satisfy itself that any changes made are responsive to comments from legislative staff. The burden of proving that substantive changes were responsive to questions or comments therefore falls squarely on the measure's proponents.

Strict adherence to this requirement places proponents at little risk as they alone are in the best position to determine both whether changes to a measure are substantial and also whether the changes were made in direct response to comments from the legislative staff. Only proponents are required to attend the review and comment hearing. It is therefore entirely appropriate that proponents

⁶⁹ C.R.S. § 1-40-105(2).

⁷⁰ *Id.*

bear the burden of demonstrating that changes made were directly responsive to staff comments.

Here, the Title Board erroneously placed the burden on the objectors to demonstrate that changes were not responsive to comments. In doing so, Mr. Domenico acknowledged that placing the burden on petitioners places them in an “awkward position” and requires them to “prove a negative”⁷¹

But the Board went even further: not only did it improperly shift the burden, it also declined to evaluate the testimony presented at the hearing, dismissing an offer from Petitioner to make the video of the review and comment hearing available to them, and, as noted above, deferred to claims supposedly made outside the hearing by a member of the legislative staff to one board member.

Given the Board’s refusal to review the video recording and deference to unconfirmable hearsay, there was simply no way Petitioner could prove the changes were not directly responsive to staff comments. The Board erred in shifting the burden to Petitioner and relying on extrinsic evidence, and further erred in denying him an opportunity to meet that burden once shifted. The Board’s action should therefore be reversed.

⁷¹ Ex. 3, 4/26/12 Tr., at 80:22–81:2.

D. THE INITIATIVES EACH CONTAIN MULTIPLE SEPARATE SUBJECTS HAVING NO NECESSARY OR PROPER CONNECTION.

1. Standard of Review

This Court's review of a measure for compliance with the single-subject requirement of article V, section 1(5.5) of the Colorado Constitution is *de novo*.⁷² A "proposal that has at least two distinct and separate purposes which are not dependent upon or connected with each other violates the foregoing single-subject requirement."⁷³ The Court "must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated."⁷⁴ In doing so, the Court applies "the general rules of statutory construction and accord[s] the language of the measure its plain meaning."⁷⁵

⁷² See, e.g., *In re Ballot Title 2007–2008, #17*, 172 P.3d 871, 876 (Colo. 2007) (reversing Title Board's exercise of jurisdiction without deference to Board findings on single-subject issue).

⁷³ *In re Ballot Title 1999–2000 No. 104*, 987 P.2d 249, 253 (Colo. 1999); see also *Matter of Title, Ballot Title & Submission Clause, & Summary with Regard to a Proposed Petition for an Amendment to Constitution of State of Colo. Adding Subsection (10) to Sec. 20 of Art. X (Amend Tabor 25)*, 900 P.2d 121, 125 (Colo. 1995) (tax credit unconnected to procedures for adopting future initiatives and therefore constitutes an additional subject).

⁷⁴ *In re Ballot Title 1999–2000 No. 29*, 972 P.2d 257, 260 (Colo. 1999) (quoting *In re Ballot Title 1997–1998 # 30*, 959 P.2d 822, 825 (Colo. 1998)).

⁷⁵ *In re Ballot Title 2007–2008, #17*, 172 P.3d at 874.

Petitioner raised objections to both Initiatives as containing multiple subjects both in the Motions for Rehearing and at the April 26 rehearing.⁷⁶

2. The titles must be stricken because each Initiative addresses multiple separate subjects that are not dependent upon each other.

(a) Initiative #94

While the primary purpose of Initiative #94 is to authorize political subdivisions of the state to establish and operate banks, several other unrelated subjects are impermissibly woven into the measure. Indeed, the legislative staff identified seven separate purposes behind the measure, including “[t]o make statements and findings about the Bank of North Dakota.”⁷⁷ And Petitioner also highlighted three additional purposes: (1) to amend Article X of the Colorado Constitution to allow subdivisions to engage in multi-year fiscal obligations (2) to void the Public Deposit Protection Act, which establishes protections for public funds deposited in private institutions,⁷⁸ and (3) to amend the prohibition in Article XI of the Colorado Constitution, which currently categorically prohibits certain political subdivisions from pledging their credit in any amount for any reason. None of these additional purposes is dependent upon or necessarily connected with

⁷⁶ Mot. for Rehearing on Initiative #94 at 2 § III; Mot. for Rehearing on Initiative #95 at 2 § III; Ex. 3, 4/26/12 Tr., at 83:5–103:22 & 149:24–150:24.

⁷⁷ Ex. 4 at 1–2.

⁷⁸ C.R.S. §§ 11-10.5-101 through -112 and §§ 11-47-101 through -120.

the measure's primary purpose. As a result, the Title Board lacked jurisdiction to set a title.

As noted by the Board, nothing in Initiative #94 prohibits the banks from accepting deposits from individuals, corporations, or other non-governmental entities. Nor does the measure prohibit the subdivision from *lending to itself*. Establishment of a bank that accepts deposits from others would allow a subdivision to borrow against those deposits and to retain any earnings generated from those deposits, both in circumvention of TABOR restrictions. It would also implicitly amend TABOR by allowing subdivisions to engage in multi-year fiscal obligations.⁷⁹ And public funds deposited in the banks would not be subject to the protections currently afforded such funds under the Public Deposit Protection Act. Such a sweeping reform in the fiscal restrictions imposed on political subdivisions is so substantial that it constitutes a separate subject and should be addressed directly in a separate initiative.

Nor are such changes necessarily connected to or dependent upon the authorization of political subdivisions to establish banks. Either could easily occur without the other. Nothing would prevent Proponents from proposing a measure that would allow subdivisions to establish banks that are still subject to TABOR

⁷⁹ Colo. Const., art. X, § 20(4)(b).

restrictions or the Public Deposit Protection Act. Proponents could also submit a measure that limits the Act's or TABOR's applicability to subdivisions without authorizing them to establish banks.

Similarly, allowing subdivisions to pledge their credit to secure deposits would fundamentally change the subdivision's fiscal risk. Under Initiative #94, a subdivision could be *required* to bankrupt itself to honor depository debts. This, too, is such a substantial change to current law that it constitutes a separate subject.

(b) Initiative #95

Several unrelated subjects are addressed by Initiative #95 in addition to its primary purpose to require the establishment of a state-owned bank. Legislative staff identified seven separate purposes,⁸⁰ but did not exhaust the list. The Title Board established at least three additional purposes: (1) to "make much more revenue available for state purposes and restore our healthy economy,"⁸¹ (2) to exempt state revenues from TABOR, which Proponents explicitly endorsed,⁸² and (3) as highlighted by Mr. Domenico and confirmed by Proponents, to "fill a perceived need for certain types of lending that [don't] exist."⁸³ In addition, the

⁸⁰ See Ex. 5 at 2.

⁸¹ Ex. 2, 4/18/12 Tr. pt. 2, at 11:24–12:1.

⁸² Ex. 2, 4/18/12 Tr. pt. 2, at 11:12–12:7 & 12:25–13:6.

⁸³ Ex. 2, 4/18/12 Tr. pt. 2, at 35:1–3 & 35:11–12.

measure is also intended to (4) essentially void the Public Deposit Protection Act as to state funds, because all state assets normally held by financial institutions would be required to be deposited and held in the bank without protections provided by the Act;⁸⁴ (5) supersede TABOR to allow the state to retain excess revenue that would otherwise be in violation of the TABOR revenue limitations; and (6) void the prohibition in Article XI of the Colorado Constitution against the state pledging public funds for private business.

Mr. Domenico questioned the Proponents on whether the Initiative was intended to have any interaction with other constitutional provisions such as TABOR. Proponent Staelin confirmed that the measure was intended to supersede TABOR's restrictions on state revenues, stating that one of the purposes of the measure was to "make much more revenue available for state purposes and restore our healthy economy."⁸⁵ Ms. Staiert asked the Proponents once again to confirm their intent to exempt state revenues from TABOR, which they did, and Mr. Gelender noted that as a result the measure might not satisfy the single-subject requirement.⁸⁶

⁸⁴ See Ex. 5 at 3 ¶ 4.

⁸⁵ Ex. 2, 4/18/12 Tr. pt. 2, at 11:12–12:7.

⁸⁶ Ex. 2, 4/18/12 Tr. pt. 2, at 12:25–13:6.

Just as with the separate purposes of Initiative #94, these additional purposes are not dependent upon or necessarily connected to the primary purpose of the measure. As noted above, the Public Deposit Protection Act by its terms would not apply to funds held in the bank. And the Proponents' professed intent to exempt state revenues from TABOR is particularly troubling. TABOR would be circumvented in precisely the same fashion as under Initiative #94 with respect to state revenues. And the state would be permitted to pledge its credit to insure obligations to virtually any non-governmental individual or entity. Just as with Initiative #94, these purposes are so substantial as to constitute separate subjects requiring separate ballot initiatives. Accordingly, the Title Board lacked jurisdiction to set a title for Initiative #95.

E. IN THE EVENT THE BOARD HAD JURISDICTION, THE TITLES MUST STILL BE REVISED TO REFLECT THE SUBSTANCE OF THE MEASURES ACCURATELY.

1. Standard of Review

“The titles must be sufficiently clear and brief for the voters to understand the principal features of what is being proposed; a material omission can create misleading titles.”⁸⁷ A title must be rejected if it is “misleading, inaccurate, or fails to reflect the central features of the proposed initiative.”⁸⁸ Similarly, a title must be

⁸⁷ *In re Ballot Title 1999–2000 No. 258(A)*, 4 P.3d 1094, 1098 (Colo. 2000).

⁸⁸ *In re Ballot Title 1997–98 No. 10*, 943 P.2d 897, 901 (Colo. 1997).

rejected if it “reinforces voter confusion about the effect of a ‘yes’ or ‘no’ vote” on the initiative.⁸⁹

Petitioner raised issues with the titles during the April 26 rehearing.⁹⁰

2. The titles do not correctly or fairly express the true intent and meaning of the measures.

(a) Initiative #94

The title for Initiative #94 fails to reflect several key aspects of the measure. For example, the title does not indicate that funds held in the banks would not be subject to the protections normally afforded public funds under the Public Deposit Protection Act.⁹¹ That Act by its terms applies *only* to banks chartered under title 11 of the Colorado Revised Statutes or under chapter 2 of title 12 of the United States Code.⁹² And nothing in the measure would require that funds be afforded similar protections. The removal of these key protections currently afforded public funds is a “central feature” of the measure, and must therefore be reflected in the title.

The title is also misleading in that it fails entirely to reflect that the bank’s power and authority may be expanded or limited by the General Assembly.

⁸⁹ *In re Ballot Title 1999–2000 No. 29*, 972 P.2d 257, 268 (Colo. 1999).

⁹⁰ *See, e.g.*, Ex. 3, 4/26/12 Tr., at 124:6–20, 128: 20–129:13 & 158:13–18.

⁹¹ C.R.S. §§ 11-10.5-101, *et. seq.*

⁹² C.R.S. § 11-10.5-103(2) (defining “bank”).

Instead, it merely states that the banks would have “the same power and authority of other banks.” And the title does not specify what “other banks” provide the default powers and authority for the banks of political subdivisions. The title also fails to reflect that even under such default powers and authority a bank may have substantial powers beyond those traditionally associated with accepting deposits and lending activity, such as the power to invest in real estate and to manage 401(k) and IRA assets. The title gives no indication to average voters of the true powers and authority that such banks might have, but merely reinforces voter confusion on the matter, and therefore must be remanded to the Title Board for revision.

(b) Initiative #95

The title for Initiative #95 suffers from many of the same defects that plague the title for Initiative #94. For example, the title for Initiative #95 similarly fails to indicate that funds held in the banks would not be subject to the protections normally afforded public funds under the Public Deposit Protection Act. Nor does it reflect that a bank may have substantial powers beyond those traditionally associated with accepting deposits and lending activity, such as to invest in real estate and to manage 401(k) and IRA assets. The title should therefore be rejected for the same reasons mentioned above.

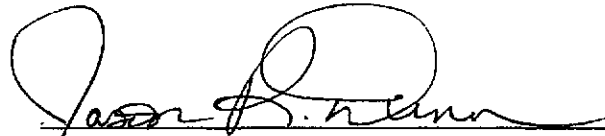
But the title for Initiative #95 omits additional features that renders the title materially misleading: while it lists certain limited powers and authority of the bank, it utterly fails to mention that the bank would “have all the powers and authority of other banks chartered by the state of Colorado” other than the authority to take deposits of individual citizens, corporations, and other private legal entities. And in describing the limitation on acceptance of deposits, the title lists only “deposits from any individual or private entity” but fails to mention that the bank could not except deposits from *public* corporations, which is clearly prohibited by the measure. Because the title does not accurately reflect these key provisions of the measure, it must be rejected.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests, pursuant to section 1-40-107(2), that the actions of the Title Board with respect to the Initiatives be reversed and the matter be remanded to the Title Board with instructions to strike the titles and return the initiative to its proponents or, to the extent permissible, to correct its errors at a future meeting of the Title Board.

Respectfully submitted this 15th day of May, 2012.

BROWNSTEIN HYATT FARBER SCHRECK LLP

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

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2012, a true and correct copy of this

OPENING BRIEF OF PETITIONER DON CHILDEARS was delivered via overnight

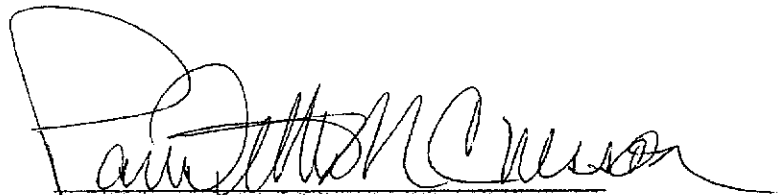
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BEFORE THE INITIATIVE TITLE SETTING REVIEW BOARD

STATE OF COLORADO

DEPARTMENT OF STATE

April 18, 2012

INITIATIVE 94:
ESTABLISHMENT OF BANKS OWNED BY POLITICAL SUBDIVISIONS

The initiative came on for hearing at 1700 Broadway, 3rd Floor Aspen Conference Room, Denver, Colorado 80290, on April 18, 2012, at 6:16 p.m. before Tiffany D. Goulding, Registered Professional Reporter and Notary Public within Colorado.

3

P R O C E E D I N G S

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3 MS. STAIERT: We are reconvening. It is

4 now 6:15 and we are on item 94, which is establishment

5 of banks owned by political subdivisions. If the

6 proponents could come forward and identify themselves.

7 MR. BOSE: My name is Robert Bose.

8 MR. STAELIN: My name is Earl Staelin.

9 MS. STAIERT: Thank you. Does anyone on

10 the board have questions for the proponents?

11 MR. GELENDER: Not on single subject.

12 MS. STAIERT: Would proponents like to

13 make any statement about the single subject?

14 MR. BOSE: No, other than we did find a

15 couple things that we would like to change slightly.

16 MS. STAIERT: But as to the single

17 subject, you have no other comment?

18 MR. BOSE: No.

19 MS. STAIERT: Anyone in the audience who

20 would like to speak on the issue of single subject?

21 All right. Then I would make a motion that this is a

22 single subject and that we move to setting the title.

23 MR. GELENDER: Second.

24 MR. DOMENICO: I guess I'm not sure where

25 my question is appropriately placed, but my copy at

2

1 Title Setting Review Panel:

2

3 Suzanne Staiert, Deputy Secretary of State

4

5 Daniel D. Domenico, Solicitor General

6

7 Jason Geleader, Senior Attorney

8

9 Proponent Representatives:

10 Robert Bose

11 Earl H. Staelin, Esq.

12

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1 least discusses North Dakota. And I've got a Bank of

2 North Dakota here, and I'm just confused about whether

3 I understand what we're doing here well enough to have

4 jurisdiction to set a title or whether that's one of

5 these typos that the proponent was going to suggest

6 that that's a typo or just my own.

7 MR. STAELIN: There's a number of whereas

8 clauses where that language occurs referring to the

9 Bank of North Dakota, and this proposal -- both

10 proposals 94 and 95 are modeled on the experience of

11 the Bank of North Dakota and its structure and legal

12 setting. The language "be it enacted" comes after

13 that, and the only change to the constitution is the

14 language that comes after the "be it enacted." So

15 none of the references to the Bank of North Dakota

16 become part of -- or plan to become part of the

17 Colorado constitution.

18 MR. DOMENICO: That's sort of my

19 question. What are all these whereas clauses then?

20 Typically what we're asking people to vote on is

21 adding, subtracting, altering things in the

22 constitution, and often they include whereas clauses

23 or at least sort of introductory language. We had a

24 pretty good example of that earlier with the amendment

25 to the statute of limitations, sort of some

5

1 legislative intent, if you will, language. And so
 2 that's what I'm confused about. What do you expect us
 3 actually to be putting in the constitution?
 4 MR. STAELIN: Well, subject to some
 5 amendments, the language that is in the proposal
 6 following the language "be it enacted."
 7 MR. DOMENICO: So what starts on the
 8 second page of what I've got as the final would be the
 9 new -- a new section of the constitution?
 10 MR. STAELIN: Correct.
 11 MR. DOMENICO: Then this first page about
 12 North Dakota is --
 13 MS. STAIERT: Is just for reference.
 14 MR. DOMENICO: -- for me? Is this going
 15 to be -- I'm just -- is this something that's going to
 16 be in the measure? I mean, I'm partly confused.
 17 Normally we have sort of new provisions that are in
 18 all caps, but this is all new, right? There's no
 19 changes to existing --
 20 MR. STAELIN: No.
 21 MR. DOMENICO: -- existing provisions.
 22 So everything is --
 23 MR. BOSE: Other than the references to
 24 provisions that might conflict with this.
 25 MR. DOMENICO: Okay. So there's a

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1 reference to that, but there's not -- you're not
 2 actually going in and striking out anything that
 3 exists, right?
 4 MR. STAELIN: Correct. We had considered
 5 and didn't really reject the idea of having something
 6 that would actually be part of it, but our long
 7 introductory section is too long for that and not
 8 really appropriate.
 9 MR. BOSE: It was designed really for
 10 educational purposes. So you go out, you need people
 11 to sign a petition, you know they may or may not
 12 understand this banking model. Even though public
 13 banking has a long history in the United States with
 14 all the colonies at various times during U.S. history
 15 when the government itself issued the currency here
 16 and there, and so folks didn't understand it. We're
 17 prepared to jettison this. We discussed this with the
 18 legislative council and they said that it was just the
 19 pieces after the "be it enacted" that were part of the
 20 amendment for the constitution.
 21 MR. DOMENICO: The problem we have is we
 22 are sort of in a take-it-or-leave-it position. The
 23 time for kind of editing it is passed. So I just
 24 don't know what I'm going to ask.
 25 MR. BOSE: I'm not sure what you mean the

7

1 time for editing is passed. Everything I've seen here
 2 today --
 3 MR. DOMENICO: That's the title and the
 4 submission clause. We're talking about the actual
 5 amendment that would become part of the constitution.
 6 I don't know what to do with this first page of what I
 7 have.
 8 MS. STAIERT: Of the whereases?
 9 MR. DOMENICO: Right. I mean, setting
 10 aside the North Dakota part.
 11 MS. STAIERT: I mean, I don't have a
 12 problem with them. They're just whereas legislative
 13 history statements.
 14 MR. GELENDER: My understanding is that
 15 past practice with these things is I think for
 16 purposes of title setting that they're essentially
 17 ignored because they don't have a substantive effect.
 18 They're just declarations and they don't actually
 19 amend the constitution. It's not -- I believe it's
 20 not entirely clear to me whether or not this part of
 21 it would appear in the blue book as context for the
 22 amendment.
 23 I think that's -- anyways, I sort of
 24 understand what Mr. Domenico's difficulty with this
 25 sort of language is. It might be something that's

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1 worthy of statutory clarification at some point, is
 2 what we should do with stuff like this, but I think
 3 that given the general principle of giving sort of
 4 significant latitude to the initiative process, sort
 5 of protecting the people's right to the initiative,
 6 that our best tactic since this doesn't have -- these
 7 whereas clauses don't have legal effect and aren't
 8 getting added anywhere --
 9 MR. DOMENICO: That's what -- I don't
 10 agree that they're not getting added anywhere. This
 11 is what would go in the constitution.
 12 MS. STAIERT: See, I don't think so. I
 13 think what goes in the constitution is "now
 14 therefore."
 15 MR. DOMENICO: Then what are they doing?
 16 That's what I don't understand, what do they do. If
 17 it's everything in, for example, number whichever was
 18 the provision of the -- I mean, this is not just for
 19 my education, right? This is meant to be sort of what
 20 would go out to the people. So if you compare it to
 21 the statute of limitations, 91, right, it's not that
 22 that doesn't -- the sort of aspirational legislative
 23 history language, that still becomes part of the
 24 constitution, or in that case the statute. And it's
 25 just that it may not have an effect. And so I don't

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1 think it's our practice to allow people to go
 2 adding advertising to the measure with the idea that
 3 it becomes -- it just goes away at some point.
 4 MS. STAIERT: See, this is their
 5 declaration of intent. That's their Section 1. In 77
 6 it's just -- well, not 77.
 7 MR. GELENDER: I think in 91 that's not
 8 located anywhere in the statutes either. It's a
 9 nonstatutory declaration. So I don't know how we
 10 treat that.
 11 MR. DOMENICO: I don't agree with that at
 12 all. That becomes part of the statute, as I read it.
 13 MR. GELENDER: No, it doesn't.
 14 MR. DOMENICO: No. I disagree with that.
 15 That is not -- I mean, that becomes a declaration. I
 16 don't think that's just information.
 17 MR. GELENDER: Where is it going to be
 18 put?
 19 MR. DOMENICO: I don't know, but, I mean,
 20 it's not our practice -- my understanding is it's not
 21 our practice to simply allow people to in the measure
 22 include kind of their advertising campaign.
 23 MS. STAIERT: They can put whatever they
 24 want in the measure.
 25 MR. DOMENICO: Right. That's part of the

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1 measure. And so I don't agree that that's just sort
 2 of interesting background information for whoever
 3 happens to look at what we have. I mean, that is --
 4 MR. GELENDER: The point is in 91,
 5 without any location here, it's my belief that
 6 Section 1 of Initiative 91, if that's enacted, it's
 7 not going to go anywhere in the Colorado Revised
 8 Statutes.
 9 MR. DOMENICO: I don't agree.
 10 MR. GELENDER: When the general assembly
 11 drafts bills, we sometimes do a legislative
 12 declaration like this without a statutory number and
 13 it appears in the session laws, but not in the
 14 Colorado Revised Statutes.
 15 MR. DOMENICO: So it appears in the
 16 session laws but not in the statutes.
 17 MR. GELENDER: That's correct.
 18 MR. DOMENICO: So it's just advertising.
 19 So where would it appear?
 20 MR. GELENDER: And in this case it's
 21 difficult here because there is no -- there are no
 22 session laws for initiatives. So presumably, it would
 23 be advertising.
 24 MS. STAIERT: It would appear in the
 25 history of the initiative. And the purpose would be

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1 if a court were at some point to declare that certain
 2 provisions were not -- were unclear, they would go
 3 back and look at the legislative history, and that's
 4 where the intent in the clauses would come in.
 5 MR. DOMENICO: But nobody goes and looks
 6 at the --
 7 MS. STAIERT: Well, but they do, but
 8 that's what it's for.
 9 MR. GELENDER: Let's take another tact.
 10 I guess given your position, what suggestion do you
 11 have on how we resolve it? Is your goal -- not goal,
 12 but do you think therefore we just have to consider
 13 whether it's a single subject based on whether this is
 14 so different from the rest of the measure that it's a
 15 different subject?
 16 MR. DOMENICO: No. I want to know what
 17 the constitution is going to look like after a vote on
 18 this and --
 19 MR. GELENDER: And it's my belief that
 20 it's going to look like what's after the "be it
 21 enacted" after starting on the second page.
 22 MS. STAIERT: That's my belief.
 23 MR. BOSE: Which is the legislative
 24 council's position as well.
 25 MR. DOMENICO: So then what are we going

12

1 to be giving people? This whole first page is a typo.
 2 Is this going to go in the initiative so the people
 3 who are going to be handing out --
 4 MS. STAIERT: The people who are
 5 collecting the signatures will have this declaration
 6 of why they did what they did. Then there will be a
 7 question attached to it.
 8 MR. DOMENICO: Yeah. See, I find that --
 9 I don't think that's appropriate, frankly. The people
 10 are being asked to vote on a change to the
 11 constitution, and either they're being asked to vote
 12 on this or they're not. And so if I vote for this, am
 13 I supposed to understand what this means or is it
 14 irrelevant to me? That's where I'm --
 15 MS. STAIERT: It becomes relevant if a
 16 court someday says that the terms are not clear and
 17 goes back and looks at the legislative agenda. Then
 18 it could have some relevance.
 19 MR. DOMENICO: So you think we just
 20 ignore this page that we're going to allow people to
 21 be handing out, that it's irrelevant to our duty.
 22 That strikes me as remarkable, frankly, that we're
 23 going to be ignoring a page of legally relevant,
 24 potentially, information that has --
 25 MR. GELENDER: I don't know that I'd say

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1 I'm set in that position. I guess what I'm looking
 2 for is what the alternative course of action should
 3 be.
 4 MS. STAIERT: Do you want to withdraw
 5 this page?
 6 MR. DOMENICO: I don't think they can
 7 withdraw the page.
 8 MS. STAIERT: It's not substantive.
 9 MR. DOMENICO: I think it is. The
 10 constitution would look different with it than without
 11 it. It's not a typo. I don't think you can just come
 12 in and withdraw a page of information in front of the
 13 title board.
 14 MS. STAIERT: Do you want to hold it over
 15 and talk to --
 16 MR. STAELIN: We don't think it's part of
 17 the constitution.
 18 MR. DOMENICO: Right. If they're right
 19 and if you're right that this is just sort of
 20 interesting information, then it doesn't matter. If
 21 I'm right, that we shouldn't be allowing any kind of
 22 attachment of advertising to measures, then we need to
 23 deal with it. I don't think it's -- I mean, either
 24 it's relevant or it's irrelevant.
 25 MR. BOSE: As a citizen initiator here,

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1 I'm subject to the advice that I get during the
 2 process. And the advice that I got -- that we got
 3 from the legislative council was that that portion
 4 that precedes the "be it enacted" is not part of the
 5 proposed constitutional amendment and that we could
 6 include this. So we're not just arguing this on the
 7 basis of just this is our feeling, but simply the
 8 advice we've gotten as part of this process.
 9 MR. DOMENICO: I agree with that. I just
 10 don't know what to do with this. **It seems to me this**
 11 **would change sort of fundamentally how people propose**
 12 **amendments, if you're just allowed to include**
 13 **essentially your arguments for it in the measure in**
 14 **what you present to us and present to signature**
 15 **gatherers, but then --**
 16 MR. BOSE: Just as the legislature does.
 17 MR. DOMENICO: The legislature is a very
 18 different process. They vote on it right there.
 19 There's not an additional step. But, I mean, so if
 20 you think we just ignore the first page and move on,
 21 I'm happy to do that. It strikes me as an odd thing
 22 to have done.
 23 MR. GELENDER: It seems to me -- and
 24 maybe I'm wrong about this, but the potential courses
 25 of action would seem to be -- and I'm assuming that we

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1 think at least that without this we'd probably have a
 2 single subject if we don't count this. I don't want
 3 to assume too quickly; but assuming that's the case,
 4 it seems to me that we could go to setting titles
 5 without this. We can consider this as part of it and
 6 whether we have a single subject including this at
 7 least somewhat unrelated stuff with it or potentially
 8 if we have the authority, we're back tomorrow for
 9 rehearings, we can lay over, consult, think about it,
 10 and try again. And I don't know what our procedures
 11 are for sort of reconsideration if we wanted to set it
 12 aside now and think about it tomorrow as well.
 13 MR. DOMENICO: I'm comfortable proceeding
 14 as you suggested because I think it's still a single
 15 subject even with it. I just think it might affect
 16 how I would write the title.
 17 MR. GELENDER: Okay.
 18 MR. BOSE: So this would come down to
 19 the -- since the title is based on the proposed
 20 amendment and you have this prefatory -- this is
 21 like -- having written a home loan charter, this is
 22 like a prefatory synopsis in the sense that, you know,
 23 the title and the single subject have to do with what
 24 would be enacted, not the prefatory comments. That's
 25 just my argument.

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1 MR. DOMENICO: No. I agree with that. I
 2 just am not entirely sure about what exactly would be
 3 enacted. So that's sort of where I am.
 4 MR. GELENDER: Okay.
 5 MS. STAIERT: We've still got to vote on
 6 the single subject.
 7 MR. GELENDER: Motion for single subject.
 8 I made that motion, right? Aye for me.
 9 MS. STAIERT: Aye.
 10 MR. DOMENICO: Aye.
 11 MS. STAIERT: So we'll proceed to the
 12 title.
 13 MR. GELENDER: Is our preliminary step at
 14 this point to sort of make a motion as to whether the
 15 various whereas clauses are sufficiently central to be
 16 considered for inclusion of the title?
 17 MS. STAIERT: Well, if you want to put
 18 some of the clauses in the title.
 19 MR. GELENDER: I don't, but I can make
 20 the motion if we need to think about it.
 21 MR. DOMENICO: I don't think that they
 22 would need to be in the title necessarily. I do have
 23 a question whether -- are we just going to -- is this
 24 going to discuss North Dakota or is it going to
 25 discuss Colorado or the numbers? I mean, is it really

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1 just a page for us? If it's going to say North
 2 Dakota, is it a typo of the sort that can be fixed?
 3 I'm just unclear kind of what everybody thinks this is
 4 doing here in front of us.
 5 MS. STAIERT: I don't think it can be
 6 fixed because it's all related to things that are
 7 happening in North Dakota, and Colorado doesn't have a
 8 bank. I mean, maybe it's curable when they put the
 9 petition together and somebody wants to say this isn't
 10 appropriate material for a petition. You know, I
 11 don't know the answer to that question, what goes in a
 12 petition and what doesn't; but these clauses can't be,
 13 quote, fixed because they really do have to do with
 14 North Dakota. And what they're trying to do is say to
 15 people who are signing the petitions, Look, it's okay,
 16 it's happened in North Dakota, and look what it did
 17 for the people of North Dakota, so we should have the
 18 same thing here in Colorado. I mean, that's
 19 essentially what --
 20 MR. DOMENICO: Okay. I see what you're
 21 saying.
 22 MS. STAIERT: -- they're doing, right?
 23 MR. BOSE: It could have been more
 24 complicated. We could have said the colonies did this
 25 as well, but we picked the one that's happening right

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1 now within the United States.
 2 MS. STAIERT: That's why they picked it.
 3 That's the platform they're going to sell it on. Now,
 4 whether or not that's going to be appropriate for
 5 petition circulation, I don't know; but I don't think
 6 it's going to go into the constitution. But if you
 7 want to put something in about a bank like North
 8 Dakota...
 9 MR. DOMENICO: I guess I'm just confused
 10 about what we're voting on still, I guess.
 11 MS. STAIERT: I think we're voting on
 12 everything after the "now therefore," so page 2.
 13 MR. DOMENICO: I've been wasting my time
 14 a lot of the time the last six years of actually
 15 paying attention to introductory clauses.
 16 MR. GELENDER: I guess one of the things
 17 I would say then is earlier today we set a title for a
 18 measure that had an introductory section and I believe
 19 did not make any reference to those declarations which
 20 don't directly change or affect the law in that title.
 21 I'm not sure -- I don't see anything in here that
 22 affects any right of any person or in any way has what
 23 we call general applicability and future effect where
 24 it would qualify as being the law.
 25 MR. DOMENICO: I agree with you. I agree

19

1 with you. In that sense it is the same as the
 2 whatever it was, 91.
 3 MR. GELENDER: So for purposes of a
 4 title, I don't know what relevance the whereas clauses
 5 have.
 6 MR. DOMENICO: Well, I feel uncomfortable
 7 setting a title when I don't know what it is I'm
 8 asking people to vote on. Now, it may be that
 9 everything here would sort of disappear at some point
 10 in the future, and so that's fine. That strikes me as
 11 interesting. And so, I mean, I agree with you that
 12 these provisions, I don't think we need to include
 13 them as material terms for the reason you stated. But
 14 I didn't think that the reason we ignored the
 15 introductory language on 91 was because it was just
 16 introductory language. I thought we ignored it
 17 because it didn't make any -- we ignored it in setting
 18 the title because it didn't make any substantive
 19 change, and so not that it was just going to disappear
 20 after today. So that's my only concern.
 21 MR. GELENDER: Well, I think while I
 22 understand your philosophical point, I think the same
 23 logic applies where even if I'm wrong and this goes
 24 into the -- and counsel staff is wrong and this goes
 25 into the constitution, I don't think it makes a

20

1 substantive change.
 2 MR. DOMENICO: I agree with that. I
 3 don't disagree.
 4 MS. STAIERT: All right. Staff draft is
 5 up. Do the proponents have any comment on the staff
 6 draft?
 7 MR. BOSE: A comment on what?
 8 MS. STAIERT: The staff draft.
 9 MR. BOSE: Yes. We do have a couple
 10 suggestions. And there will be parallels to this in
 11 95 as well. Our first suggestion is that on line 1 to
 12 delete "concerning the" and change "authority" to
 13 authorizing and then delete "of." So it would read,
 14 "An amendment to the Colorado constitution authorizing
 15 political subdivisions in the state," et cetera, just
 16 in the interest of direct language writing.
 17 MS. STAIERT: That's generally just a
 18 term of art that we use when we're going to then do
 19 "in connection therewith." It's the way the
 20 legislature drafts, so we draft like they draft. Do
 21 you have anything else?
 22 MR. STAELIN: Yeah. Our thought on that
 23 was that it's a little confusing to people. This is a
 24 new idea. When it says, "Concerning the authority of
 25 political subdivisions," the implication might be that

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1 they already have that authority and what it does is
 2 to authorize them, and I think it's better to say that
 3 clearly.
 4 MS. STAIERT: It might be, but until the
 5 legislature drafts that way, we don't draft that way.
 6 MR. BOSE: Because the legislature and
 7 the -- a lot of folks in the legislature are lawyers.
 8 A lot of people reading this aren't. So we were just
 9 trying to make it clear.
 10 MS. STAIERT: I appreciate that. We had
 11 a plain language in the legislature this year.
 12 MR. BOSE: If that's the normal
 13 constraint, that's what it is.
 14 MR. STAELIN: One of our thoughts about
 15 that was a reference to the Declaration of
 16 Independence and what if they had instead titled it
 17 the Declaration Concerning the Rights and
 18 Responsibilities of Colonies to the Crown. It made
 19 more sense to call it a Declaration of Independence.
 20 MS. STAIERT: Do you have any other
 21 comments?
 22 MR. STAELIN: If it's possible to do that
 23 consistent with the plain language, I think that would
 24 be preferred.
 25 MR. BOSE: One other comment, and that is

22

1 in line 2 after the words "to engage in banking," we
 2 were interested in inserting language from the actual
 3 proposed amendment. Under No. 1, "Authorization of
 4 political subdivisions to establish banks," there's a
 5 phrase beginning on line 3 of that paragraph running
 6 to line 4 that says, "To promote development and
 7 enterprise in the state and to promote any purpose
 8 authorized by the laws governing such subdivisions."
 9 We were thinking that it would be appropriate to give
 10 folks an indication of the purposes there. And so we
 11 were interested in --
 12 MS. STAIERT: That was No. 3?
 13 MR. BOSE: I'm sorry. I'm not sure of
 14 the question.
 15 MS. STAIERT: Where were you reading
 16 from?
 17 MR. BOSE: Okay. On line 2 after where
 18 it says, "To engage in banking," we were suggesting to
 19 promote development and enterprise in the state -- I'm
 20 sorry. I think we cut this off.
 21 MS. STAIERT: It probably really doesn't
 22 matter because to promote development and enterprise
 23 in the state and to promote any purpose authorized by
 24 the law, I mean, I'll let the others chime in here;
 25 but that's going to be kind of promotional language,

23

1 catch-praise-type language. It's typically not going
 2 to make it into a question.
 3 MR. BOSE: Okay. Because in 95 it says,
 4 "To promote the general welfare of the citizens." So
 5 we're just wondering where do you draw the line at?
 6 MS. STAIERT: Right. That line might get
 7 drawn in 95.
 8 MR. BOSE: Okay. That's fine. It was
 9 just a question that came up to us.
 10 MS. STAIERT: That's fine. It was
 11 certainly one of my notes in 95, that kind of
 12 language. Do you have any other comments?
 13 MR. STAELIN: Well, on the purpose, if we
 14 don't get specific, I still like the idea of having
 15 the general language in there "within the purposes for
 16 which the political subdivision is authorized." I
 17 don't think that's promotional language. It makes it
 18 clear.
 19 MS. STAIERT: So what purposes would
 20 those be?
 21 MR. STAELIN: For each political
 22 subdivision it's going to be different. What that
 23 means is that whatever that political subdivision's
 24 purposes are, the bank may be used to fulfill those
 25 purposes.

24

1 MS. STAIERT: So, for instance, a
 2 political subdivision that builds roads and has a
 3 police station?
 4 MR. BOSE: Yeah, although some of them
 5 don't. It wouldn't necessarily be limited to cities
 6 or counties, but there is language in the first
 7 section of the proposed amendment where it says, "To
 8 promote any purpose authorized by the laws governing
 9 such political subdivisions." So because we're
 10 dealing with such a various body, various -- you know,
 11 because it could be not only cities and counties, but
 12 it could include --
 13 MS. STAIERT: But the bank isn't just for
 14 the political subdivision. The bank is for anybody,
 15 isn't it?
 16 MR. STAELIN: Each subdivision would
 17 establish its own bank.
 18 MS. STAIERT: Right. But anybody could
 19 go to that bank that lived in the subdivision, or the
 20 bank is just for the government?
 21 MR. STAELIN: It's for the government and
 22 if the political subdivision were to -- your title
 23 includes that the authorities in that political
 24 subdivision can establish what that bank can do. It
 25 might or it might not.

25

1 MR. DOMENICO: But the language you were
 2 just suggesting about "to promote the purpose
 3 authorized," do I take it that's meant to sort of
 4 limit the ability of a government entity to sort of --
 5 it can't just establish a bank to try to make a bunch
 6 of money or to try to do something. It's got to be
 7 tied to some preexisting purpose of the government
 8 subdivision?
 9 MR. STAELIN: Yes.
 10 MR. BOSE: Right. Which in its most
 11 general sense is to promote the general welfare, et
 12 cetera, and then some political subdivisions have more
 13 specific ones. We actually within here mention to
 14 promote development and enterprise. In 95 we state a
 15 whole bunch more purposes, but you're right, it is to
 16 go -- it is to define it as the purposes of the
 17 political subdivision, the bank would serve those
 18 purposes.
 19 MS. STAIERT: All right. Any comments
 20 from anybody out in the audience regarding this
 21 proposal? Come on up. If you could just identify
 22 yourself.
 23 MR. DUNN: Jason Dunn with Brownstein
 24 Hyatt Farber Schreck. I wasn't planning on
 25 testifying, but I couldn't help myself. I want to

26

1 circle back to the issue of the whereas clauses. The
 2 discussion seemed to be on the question of whether
 3 that met the single-subject requirement. I think that
 4 misses the point. The point is whether the title
 5 board has the jurisdiction to set a title in this
 6 matter. I think, Mr. Gelender, you made the right --
 7 you asked the right question. You said I don't know
 8 whether this is in the constitution or not. If that's
 9 unclear in your mind or if that's unclear with the
 10 title board, then you don't have jurisdiction to set a
 11 title because you don't understand the measure. And
 12 at the review and comment hearing, the proponent -- or
 13 the legislative staff said in the comment memo that it
 14 was unclear whether that was part of the -- intended
 15 to be part of the constitution or not.
 16 As I recall -- and this is just from my
 17 recollection at the time -- the proponents, based on
 18 what they said today, I think said it was not intended
 19 to be, but yet the amended version and the final
 20 version that was sent up here to the secretary of
 21 state's office had edits to the whereas clauses and
 22 they provided a redline version to the whereas
 23 clauses. And then they talked about just now that the
 24 measure -- that the whereas clauses will be used as
 25 part of the signature-gathering process to educate

27

1 voters about the measure as they're deciding whether
 2 to sign the petition or not. And presumably it would
 3 be included in the blue book.
 4 So I think Mr. Domenico is exactly right.
 5 It's completely unclear as to whether this winds up in
 6 the constitution, whether it's part of the petition,
 7 whether it's part of the blue book, and it's not a
 8 question of whether it's actually a single subject.
 9 It's a question of whether the measure was written in
 10 such a way that you have jurisdiction to write a
 11 title. So I think Mr. Gelender said it exactly right.
 12 He doesn't know whether it's in the measure or not,
 13 and if that's the case, then you can't write a title.
 14 So we object on that ground. Thank you.
 15 MR. DOMENICO: Well, I mean, that's sort
 16 of -- obviously since he said I was exactly right, I
 17 agree with him. But, I mean, I'm just confused, if
 18 it's going to go away, when it will disappear from
 19 what this process is and by what mechanism it
 20 disappears from the process and what would prevent
 21 people from attaching a beautiful advertisement or --
 22 I mean, this was obviously not done with this intent,
 23 but if this is what -- if we're just going to ignore
 24 everything before when they say "be it enacted," but
 25 we're still going to set titles and allow people to

28

1 include it somewhere, I'm just confused about what
 2 will happen to that language and how it affects the
 3 title. So that's going back.
 4 I think for today I'm comfortable
 5 proceeding with our sort of obligation to interpret
 6 these provisions liberally in favor of the right of
 7 initiative. But if there's a rehearing, I'm still
 8 willing to reconsider that I understand what's going
 9 on here well enough to set a title. So we can move on
 10 from that, though, for today because for purposes of
 11 today I think it's worth going through the process.
 12 MS. STAIERT: Comments from the board on
 13 the draft?
 14 MR. GELENDER: I do have comments on the
 15 draft. There's a few things I think are a little bit
 16 inaccurate, but first I'm going to start with the
 17 single subject. I want to ask the proponents whether
 18 this measure -- it talks about the engaging in
 19 banking. To me that term is a little bit confusing
 20 because I think of engaging in banking, too, that I
 21 engage in banking when I go take money out of my
 22 checking account. And certainly, political
 23 subdivisions right now have the authority to have
 24 accounts and put their funds on deposits in banks and
 25 things. And I guess what I'd like to know is whether

29

1 the proponents have any issue whether this actually
 2 substantively does any more than authorizes political
 3 subdivisions to establish banks, which is what I
 4 prefer as a single subject.
 5 MR. BOSE: That's a good question that
 6 you've raised. It reminds me of an issue addressed by
 7 William Jennings Bryan when he was proposing that the
 8 government needed to, you know, establish its own bank
 9 and the banks -- the position of the banks was that
 10 the government ought to get out of the banking
 11 business. And Bryan's retort was that the banks ought
 12 to get out of the business of governance. And it's a
 13 fuzzy area because there's an overlap here that deals
 14 with certain sovereign issues. I would propose that
 15 the issue of the creation of money and credit is a
 16 sovereign issue. It's covered in Article I, Section 8
 17 of the United States constitution and that it falls in
 18 the same category as roads, armies, post offices, and
 19 such. This is a longstanding debate in this country
 20 and elsewhere. So it's a little fuzzy. And we tried
 21 to just define this in such a way that we weren't
 22 overly limiting it because of the, you know, history
 23 of these terms.
 24 MR. STAELIN: I would add to that,
 25 granted, some people might use the term "engage in

30

1 banking" to mean deposits, but I think in the context
 2 of the rest of the provision it's clear that it means
 3 acting as a bank. And the actual language from 94
 4 includes not only that language, "engage in banking";
 5 but right after that is "or establish a bank," which I
 6 think makes it clear.
 7 MR. GELENDER: Let me put this a
 8 different way. If this measure passes, what could a
 9 political subdivision now be empowered to do in terms
 10 of banking without establishing its own bank that it
 11 can't do now?
 12 MR. BOSE: Could you say that one more
 13 time?
 14 MR. STAELIN: I don't know of anything.
 15 MR. GELENDER: If this measure passes,
 16 what kind of banking could a public -- could a
 17 political subdivision engage in that it is not able to
 18 engage in now without establishing its own bank?
 19 MR. STAELIN: I think establish a bank is
 20 synonymous with engage in banking. Personally I would
 21 prefer that language "engage in banking" didn't appear
 22 because I think it doesn't really add anything, but it
 23 is another way to express the same idea.
 24 MR. BOSE: I would take a little
 25 different tact on that, because once you establish a

31

1 bank then you engage in banking. The establishment of
 2 a bank is really kind of a founding of an institution,
 3 but it doesn't -- so it's like a static moment in time
 4 and the banking is the verb form. And so we've
 5 covered the noun and the verb form here so that once
 6 established the political subdivision can go forward
 7 and do whatever it was allowed according to the
 8 parameters of a political subdivision running a bank.
 9 MR. STAELIN: I stand corrected, because
 10 I agree with that. I think it might be better to have
 11 the two terms reversed, "establish a bank" and "engage
 12 in banking." I don't know if that's permissible at
 13 this point.
 14 MR. BOSE: They're both in. I don't
 15 think we can change it.
 16 MR. GELENDER: I don't have anything
 17 else.
 18 MR. DOMENICO: I think I don't care for
 19 the language as it is and would lean towards, if
 20 you're going to choose one, authorizing subdivisions
 21 to establish a bank is preferable, although I don't
 22 disagree that it is important that they can continue
 23 to operate the bank after they establish it. The most
 24 important thing is that they can now become -- run
 25 their own banks, and so I would lean in your direction

32

1 on that.
 2 MS. STAIERT: Let's put in that establish
 3 language.
 4 MR. GELENDER: I think one thing that's
 5 just slightly inaccurate in the title is where it
 6 says, "Insuring deposits by the full faith and
 7 credit." I believe the measure authorizes
 8 subdivisions to do that, but it doesn't make it
 9 mandatory or automatic. So something like allowing
 10 political subdivisions to self-insure deposits with
 11 their full faith and credit is more accurate.
 12 MR. STAELIN: I like that.
 13 MR. DOMENICO: I think that's a good
 14 change. I think the rest of it's pretty good. I
 15 might want to revisit a little bit the first couple of
 16 lines when we're ready to do that.
 17 MR. GELENDER: The other question is do
 18 we need to make any reference to that they get the
 19 same authority and powers as other banks or -- you
 20 know, the capitalization also, again, is I don't
 21 believe requirements. I think it's authorization. It
 22 says, "May be capitalized by the same means available
 23 and subject to the same minimums." Well, I guess
 24 "subject to the same minimums" would be a requirement.
 25 So I'm wrong with that. Then it says they can use any

33

1 different funds. Maybe that's too technical and we
 2 just don't need anything more, but I wanted to raise
 3 it.
 4 MR. DOMENICO: I think kind of the
 5 general statement up there is pretty good as it is.
 6 MS. STAIERT: I do, too. I think to the
 7 average voter they would understand.
 8 MR. GELENDER: Then the only other thing
 9 is maybe on line 3 and regulatory structure, I think
 10 the governance kind of covers that. I don't know that
 11 their internal manager is exactly a regulatory
 12 structure and I think that the ability of the state to
 13 regulate is covered down below.
 14 MS. STAIERT: You had some stuff on that?
 15 MR. DOMENICO: Yes. We've sort of now
 16 gone halfway between the traditional "concerning and
 17 in connection therewith" language and the modern
 18 radical just using the verbs and verb forms. So I
 19 sort of think we need to choose one or the other.
 20 Either use the old language "concerning" and then put
 21 in there the noun of the subject or just say an
 22 amendment and here's what it does. So that's kind of
 23 my big picture.
 24 MS. STAIERT: I like the "concerning and
 25 in connection therewith."

34

1 MR. GELENDER: I might even say
 2 concerning authorization for. It's a little more
 3 active.
 4 MS. STAIERT: That's fine.
 5 MR. GELENDER: Then the other thing on
 6 line 2, I think, since it's political subdivision,
 7 make it plural for banks and take out the "a" in bank.
 8 MR. DOMENICO: Then the only other
 9 suggestion I had was whether we wanted to include the
 10 language or some language in addition to just to
 11 establish and operate or something like that, to
 12 establish and operate banks to address the concern
 13 about engage in banking. Now, certain members of this
 14 board in the past have been concerned about including
 15 a conjunction in the statement of the single subject,
 16 which I've always found not to be a problem. If
 17 anybody is concerned about it, I don't know that we
 18 need it in there; but I would probably include it. To
 19 establish and operate, I think, captures -- it does
 20 seem conceivable to me that you could authorize the
 21 establishment of a bank by a government entity, but
 22 they have to have some other group operate it. So
 23 that seems worth mentioning.
 24 MS. STAIERT: You want to collapse it and
 25 I'll read it. So it reads, "This is an amendment to

35

1 the Colorado constitution concerning authorization for
 2 political subdivisions to establish and operate banks,
 3 and in connection therewith, specifying requirements
 4 for the governance of such banks, including
 5 capitalization requirements, allowing political
 6 subdivisions to self-insure deposits with their full
 7 faith and credit, and authorizing the Colorado General
 8 Assembly to provide regulatory guidelines for the
 9 oversight of these public banks by the Colorado
 10 Banking Board and the Colorado Commissioner of
 11 Financial Services." Anything else?
 12 MR. GELENDER: Technically the Colorado
 13 Banking Board is the Colorado State Banking Board. I
 14 don't know if we should track the measure to its real
 15 name.
 16 MR. DOMENICO: You could also -- if
 17 you're going to make a change there, my suggestion
 18 would be to remove all those Colorados, since it is
 19 after all the Colorado constitution we're amending
 20 here, and you could then say authorizing the general
 21 assembly, providing oversight by the state banking
 22 board and the state board, even just banking board,
 23 state banking board, and commissioner of financial
 24 services.
 25 MS. STAIERT: Okay.

36

1 MR. STAELIN: That, of course, makes a
 2 lot of sense, but I wonder if the average voter would
 3 get that. They might see banking board and think is
 4 that federal, state, what is that?
 5 MR. DOMENICO: I think we added state in.
 6 I think it's preferable with state. I don't think we
 7 need to specify which state. No. I was confused
 8 about North Dakota and Colorado. Most voters will
 9 probably get it.
 10 MR. STAELIN: Would you want to add state
 11 commissioner of financial?
 12 MR. DOMENICO: I don't feel strongly
 13 about it. I think it's probably clear enough.
 14 MR. BOSE: I think in terms of wording,
 15 the state at the head --
 16 MR. DOMENICO: Seems to modify.
 17 MS. STAIERT: All right. Then I'll make
 18 a motion that we adopt the staff draft as amended.
 19 MR. GELENDER: Second.
 20 MS. STAIERT: All those in favor?
 21 MR. GELENDER: Aye.
 22 MS. STAIERT: Aye.
 23 MR. DOMENICO: Aye.
 24 MS. STAIERT: The question will reflect
 25 the changes made in the staff draft.

1 WHEREUPON, the within proceedings were
 2 concluded at the approximate hour of 7:10 p.m. on the
 3 18th day of April, 2012.

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REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
 COUNTY OF ARAPAHOE)

I, TIFFANY D. GOULDING, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that the within proceedings were taken in machine shorthand by me at the time and place aforesaid and was 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 20th day of April, 2012.

My commission expires October 19, 2014.

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

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BEFORE THE INITIATIVE TITLE SETTING REVIEW BOARD

STATE OF COLORADO

DEPARTMENT OF STATE

April 18, 2012

INITIATIVE 95:
ESTABLISH A STATE-OWNED BANK

The initiative came on for hearing at 1700 Broadway, 3rd Floor Aspen Conference Room, Denver, Colorado 80290, on April 18, 2012, at 7:10 p.m. before Tiffany D. Goulding, Registered Professional Reporter and Notary Public within Colorado.

3

P R O C E E D I N G S

MS. STAIERT: It is now 7:10. And we are on item 95, which is establishing a state-owned bank. Do you think you could take that language and put it underneath so we can look at what we just did? Starting with the issue of the single subject, does anyone on the panel have any questions -- well, let me ask the proponents to introduce themselves again. If you could introduce yourself again.

MR. BOSE: Yes. My name is Robert Bose.

MR. STAELIN: Earl Staelin.

MS. STAIERT: And anyone on the board have any questions regarding this single-subject measure? Anyone in the audience wish to speak on the single subject of this measure?

~~MR. DOMENICO: We have the same issue~~
~~obviously.~~ It's not necessary to go over it again.

MS. STAIERT: I'll move that this be declared a single subject and that we move on to setting a title. All those in favor say aye.

MR. GELENDER: Aye.

MR. DOMENICO: Aye.

MS. STAIERT: Aye. We have the staff draft up with the draft we just did underneath in red.

2

Title Setting Review Panel:

Suzanne Staiert, Deputy Secretary of State

Daniel D. Domenico, Solicitor General

Jason Gelender, Senior Attorney

Proponent Representatives:

Robert Bose

Earl H. Staelin, Esq.

4

I don't know which one we want to work from. Does anyone have any questions for the proponents? How about anyone in the audience who wishes to speak to the substance of this initiative?

MR. DOMENICO: I guess I do have one question. These are -- you intend to promote both of these? They're not mutually -- you're not going to choose one or the other. You plan to push both of them, but they're also sort of standalone; if one fails and one passes, that's okay. All right.

MR. BOSE: Absolutely.

MR. DOMENICO: I don't know whether starting with our amended draft or the staff draft is easier.

MR. GELENDER: I think the staff draft is probably easier in this case. There's enough difference there.

MS. STAIERT: So should we change "the establishment" to "concerning authorization"?

MR. DOMENICO: I wouldn't. I think this actually establishes the bank, whereas the other one authorized the establishment.

MS. STAIERT: I would like to strike the "to promote the general welfare of the citizens" language.

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1 MR. DOMENICO: I agree with that.
 2 MR. GELENDER: In the interest of
 3 brevity, I'd also suggest strike the "owned by the
 4 State of Colorado" and just put "state owned" before
 5 bank on line 1.
 6 MR. BOSE: Could we discuss that?
 7 MR. GELENDER: Sure.
 8 MS. STAIERT: Go ahead.
 9 MR. BOSE: Well, brevity, I agree with
 10 you, it does make it more brief. I think there's a
 11 different feeling to the two phrases. And I think
 12 that citizens reading that and I know my own emotional
 13 reaction to state-owned bank versus a bank for the
 14 State of Colorado is slightly different. I know -- I
 15 don't think we're just splitting hairs here, but I
 16 think it has certain political implications in terms
 17 of how people take certain verbiages, left and right,
 18 and all of this kind of stuff. So I have some
 19 concerns there for that last edit, even though in
 20 terms of brevity I do agree with you.
 21 MS. STAIERT: You want to remove it?
 22 Make a motion.
 23 MR. GELENDER: Sure. I don't think the
 24 difference rises to the level of really prejudicing
 25 anyone against the measure. So I would move to keep

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1 the change.
 2 MS. STAIERT: I'll second it.
 3 MR. DOMENICO: I'd probably leave it as
 4 it was, but they're both sort of within our authority.
 5 I mean, it only saves about two words, so it doesn't
 6 strike me as necessary.
 7 MS. STAIERT: You want to withdraw it or
 8 you want to go forward?
 9 MR. DOMENICO: You've got a motion with a
 10 second.
 11 MR. GELENDER: You know, I can withdraw
 12 it. I think the point is not strong enough, to the
 13 extent the proponents care about it and honestly I
 14 really don't.
 15 MS. STAIERT: Then we'll take it and move
 16 it back.
 17 MR. GELENDER: I do have one further
 18 thought on the single subject here. And it's
 19 because -- let me double-check something really
 20 quick -- it's specifically in here and I think it's
 21 the kind of thing that the people of the -- a lot of
 22 the people of the state would really care about when
 23 voting on this. I think I would add after "owned by
 24 the State of Colorado" backed by the full faith and
 25 credit of the state.

7

1 MS. STAIERT: You want that in the
 2 subject line or down below "in connection therewith"?
 3 MR. GELENDER: No. Right after as part
 4 of the single subject. The reason being is one of the
 5 things we have in our constitution currently are
 6 prohibitions on general obligation debt and stuff. I
 7 think that's such a substantial change, particularly
 8 given the way the economic crisis has gone the last
 9 years and how much people talk about it and get
 10 interested in issues of public debt and things, that
 11 it's worthy of being included in the single subject.
 12 MS. STAIERT: Can you show us what that
 13 would look like?
 14 MR. BOSE: This would now be in there
 15 twice.
 16 MR. GELENDER: Well, we'd take it out
 17 later.
 18 MR. BOSE: I see what you're saying.
 19 MR. DOMENICO: That strikes me as an odd
 20 use of the statement of the single subject. I guess I
 21 don't have a problem with it really. And it is
 22 certainly very important. It just runs contrary to
 23 sort of my effort to keep the statement of the subject
 24 sort of as the statement of the subject in our effort
 25 to describe the measure's effects as the remainder.

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1 But it is certainly an important factor and would have
 2 important implications one way or the other.
 3 MS. STAIERT: A comment?
 4 MR. BOSE: Yeah. It is interesting.
 5 There's a subtle difference here using that phrase up
 6 there or later backing the debts and obligations of
 7 the bank. And I'm wondering, along with the last
 8 comment, if that isn't a little off subject there
 9 because later in the bill there's a discussion of
 10 where the reserves come from and how those can be
 11 looked at. And so there are some good questions
 12 involved in what is backed by the full faith and
 13 credit and what is based on reserves and
 14 capitalization. So by putting this phrasing at the
 15 top rather than having to do with the debts and
 16 obligations, it changes perhaps the meaning or intent
 17 slightly. It gets complicated, I think, in terms of
 18 financing and law. Just a thought.
 19 MR. GELENDER: Well, I guess given the
 20 discussion, I think I'll move that change.
 21 MR. DOMENICO: Let me just make my
 22 suggestion. I would suggest not making that change
 23 there, but moving the language about backing the debts
 24 and obligations to the beginning of the trailer, the
 25 effective part of the title, whatever you want to call

9

1 it, and emphasizing it that way would be my
 2 preference, because there are other things that seem
 3 to me to be very important about this. I mean,
 4 Section 4 itself strikes me as potentially very -- at
 5 least as important as the full faith and credit
 6 backing. That all the tax and other revenues and
 7 funds of the state are going to go into this bank is
 8 to me a big deal and sort of in some ways overlaps at
 9 least with backing it with all that revenue. So if
 10 we're going to start saying, man, this is really
 11 important, it has to go in the subject statement, I'm
 12 not sure I would stop with what we have there.

13 MS. STAIERT: Yeah, I think I would agree
 14 with that. I think the taking of the revenues and
 15 funds out of private banks to the private banks would
 16 be the biggest issue.

17 MR. GELENDER: It's a safe thing to say
 18 motion fails for lack of a second.

19 MS. STAIERT: Yeah.

20 MR. DOMENICO: Fair enough.

21 MS. STAIERT: But I don't mind putting
 22 that back up first. Can you move it?

23 MR. DOMENICO: So one thing, if we're
 24 going to get -- if this is sort of technically in the
 25 single subject and then in connection therewith, what

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1 we don't do in the -- and maybe we don't need to, but
 2 with this language we never actually say that it
 3 establishes a bank. We say it's concerning the
 4 establishment of a bank and then we say sort of other
 5 aspects of it. And I just wonder if we sort of need
 6 to say that.

7 MS. STAIERT: We should just take out
 8 concerning and then just an amendment to the Colorado
 9 constitution establishing a bank owned by the state
 10 and in connection therewith.

11 MR. DOMENICO: That's exactly where we
 12 just were on the last one about sort of mixing our --
 13 I mean, when sort of -- the subject to me is separate
 14 from sort of how you go about addressing the subject.
 15 And I think we have adopted titles that just go
 16 straight into -- because they're sort of so tied
 17 together, really they only do one thing and you can
 18 just say here's what it does and that is also the
 19 subject of it. To me, concerning the establishment of
 20 a bank owned by the state and then saying and in
 21 connection therewith, establishing a bank owned by --
 22 establishing a state-owned bank authorized to lend
 23 money, et cetera, is kind of a necessary requirement
 24 of this format. If you're going to go the other
 25 direction, I think then you take out the "in

11

1 connection therewith" language and just go straight
 2 through, here's what it does. That's a little bit
 3 hard, I think, to do in these five-, six-clause
 4 titles.

5 MS. STAIERT: Let's go back to concerning
 6 the establishment of a bank and then just say and
 7 establishing -- and in connection therewith
 8 establishing the bank, backing the debts and
 9 obligations.

10 MR. DOMENICO: I also have a question
 11 about sort of the last part of Section 1 for the
 12 proponents. Do you intend for this -- where it talks
 13 about the revenue and income shall not be limited, nor
 14 shall expenditures and management be restricted and
 15 that it supersedes conflicting state constitutional,
 16 et cetera, et cetera, do you view that as having any
 17 interaction with TABOR, for example, and limitations
 18 on revenue and that sort of thing?

19 MR. STAELIN: Yes.

20 MR. DOMENICO: So what do you view as the
 21 impact it would have?

22 MR. STAELIN: Well, TABOR would possibly
 23 restrict the revenue. It would possibly restrict
 24 expenditures. And that would defeat the purpose to
 25 make much more revenue available for state purposes

12

1 and restore our healthy economy.

2 MR. DOMENICO: Part of the purpose of
 3 this is, in fact, then to increase state revenue, not
 4 just by being sort of an effect of running a really
 5 small bank, but by getting out from TABOR's
 6 limitations.

7 MR. STAELIN: Not just state revenue, but
 8 by having a bank that partners with private banks to
 9 increase revenue in the state as a whole through
 10 private business. North Dakota has had no bank
 11 closings in years, whereas Colorado's bank closures
 12 are five times the national average. This has a
 13 general benefit that goes way beyond just making more
 14 money available to the state government, but to all
 15 private business in the state, including banking.

16 MR. BOSE: Just one more clarification,
 17 too. Then those revenues for the state, just looking
 18 at the North Dakota model generally, are applied in
 19 two different ways, one to the general fund, and two,
 20 for the loan portfolio. So you get the multiplier
 21 effect, economically speaking, that Earl was referring
 22 to, plus an amelioration of taxation saying North
 23 Dakota is considering that at this time, or at least a
 24 supplement to the general fund.

25 MS. STAIERT: And are you anticipating

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1 that the revenues would be subject to TABOR.
 2 MR. BOSE: Yes. Correct.
 3 MS. STAIERT: That requires an entirely
 4 different set of language.
 5 MR. GELENDER: It would also require
 6 reconsideration of whether we have a single subject.
 7 MS. STAIERT: Well, where's the fiscal
 8 note?
 9 MR. GELENDER: Well, that's true.
 10 There's no -- we don't know how much money this thing
 11 would make, what it would do. It's not a TABOR
 12 question, per se.
 13 MS. STAIERT: No. It's a TABOR problem
 14 if there's revenue that is generated beyond the cap.
 15 MR. GELENDER: It's all contingent.
 16 MS. STAIERT: Right.
 17 MR. DOMENICO: Yeah. It's not a
 18 Section 4, I don't think. I mean, it's not a TABOR
 19 Section 4 issue, is it, like requiring a vote?
 20 MS. STAIERT: Not until --
 21 MR. DOMENICO: A separate vote, right?
 22 It's not a tax. It's a revenue, right?
 23 MS. STAIERT: It does require a separate
 24 vote because they're saying if we go over, all those
 25 funds would be kept in the general.

14

1 MR. DOMENICO: Right.
 2 MR. BOSE: Can I ask a question? I'm a
 3 little confused by this because we're not saying if or
 4 anything. In the state constitution there are
 5 different articles that conflict with each other.
 6 That just happens all the time. So this just seems
 7 like standard language for allowing sections of the
 8 constitution to stand on their own. And I don't see
 9 where TABOR would supersede this.
 10 MS. STAIERT: It doesn't supersede it;
 11 but if you make revenue above and beyond the cap, then
 12 revenue goes back to the people unless you ask the
 13 voters for permission to keep the revenue in this
 14 question and have it not subject to TABOR.
 15 MR. BOSE: But then aren't you saying
 16 that if this were voted in and you had two different
 17 provisions in the constitution, one this and the other
 18 TABOR, you're saying that TABOR would apply.
 19 MS. STAIERT: Yes.
 20 MR. BOSE: You're saying that the wording
 21 here isn't sufficient enough to make that any
 22 different?
 23 MS. STAIERT: Correct.
 24 MR. BOSE: What is it that you're saying
 25 isn't in here that could, in fact, allow this

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1 amendment to supersede TABOR?
 2 MR. GELENDER: Well, I think the first
 3 thing would be it says, "Supersede conflicting state
 4 constitutional provisions," et cetera. There's
 5 nothing in here that I can see that explicitly
 6 conflicts with TABOR. It doesn't say in here the bank
 7 can keep all revenue even if it puts the state over
 8 its TABOR limit. It doesn't say that the bank can
 9 assume the debt without going and getting voter
 10 approval. I can't say I know whether or not one of
 11 these things would ever qualify for enterprise status,
 12 given what this bank -- given that it's going to get
 13 as much money as it is, I would tend to think not.
 14 MR. BOSE: I'm a little confused. It
 15 does say here, "The revenue and income of such a bank
 16 shall not be limited, nor shall expenditures and
 17 management of its revenue, income, and assets be
 18 restricted, except upon sound financial and public
 19 policy considerations."
 20 MR. DOMENICO: I think I agree with that.
 21 I think this does sort of -- I mean, either it
 22 conflicts with -- either it runs up against TABOR or
 23 it doesn't. If it runs up against TABOR, I think it's
 24 pretty clear that its intent is that this supersedes
 25 TABOR. If it doesn't run up against TABOR, then TABOR

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1 is not a problem.
 2 MS. STAIERT: I think to supersede TABOR
 3 you have to ask really specific language in your
 4 question.
 5 MR. STAELIN: I missed the last part of
 6 that.
 7 MR. DOMENICO: There are certain things
 8 that you have to ask specifically in TABOR if you're
 9 trying to use TABOR. I don't think -- I guess I'm not
 10 clear. If you're trying to raise taxes, increase
 11 taxes, you are required to use certain language. If
 12 you -- I guess the point is for you this is not in
 13 effect now, so we have to try to write a title that
 14 complies with TABOR, which is in effect now. Even
 15 though this would, were it to pass, supersede TABOR,
 16 it's not in effect now. So the requirements of TABOR,
 17 to the extent they apply, apply to how we write this
 18 title.
 19 I'm not entirely sure what the language
 20 would have to be. It's not a tax increase that
 21 Section 4 with the explicit sort of fill-in-the-blank
 22 dollar amount applies to. And I can't remember
 23 exactly if there's similar sort of required language
 24 to deal with a Section 7 revenue limit or whatever
 25 other limit. So I guess I might need a little more

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1 information on that, but ordinarily you can get
 2 yourself out of an existing constitutional limit by
 3 doing this sort of language. The question is whether
 4 there's an obligation on us or the secretary of state
 5 imposed by TABOR before we put something on the ballot
 6 that might have that effect of using certain language.
 7 I don't know that there is.
 8 MR. GELENDER: The way I see it, there's
 9 no TABOR question here. TABOR is very specific about
 10 what it requires special language for, and none of
 11 those things, you know, are tax policy changes on the
 12 tax revenue. There doesn't appear to be a tax policy
 13 change here. We're not directly incurring any kind of
 14 debt. There's no tax rate increase. There's no new
 15 tax. There's nothing to specifically indicate
 16 anything you can put a number on in terms of revenue
 17 generation. So I don't see any issue with that, like
 18 we have to comply with some existing TABOR
 19 requirement. To me this is actually -- I've heard the
 20 words a lot today, and now I'll use them, the coiling
 21 of the folds deal, where does this somehow have some
 22 effect that would down the road somehow negate an
 23 element of TABOR that the people would really need to
 24 know about and that might be a second subject.
 25 MR. DOMENICO: Yeah. That's what I was

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1 trying to get at and was a little bit -- I'm not sure
 2 I understood the answer well enough of is the intent
 3 here that, well, because the capitalization, the
 4 revenue and income of the bank include all tax and
 5 other revenues of the state, if you were to bump up --
 6 and then you've got this provision. Does this mean,
 7 for example, that the revenue and income of the
 8 bank -- say that the legislature and whoever the
 9 directors of the bank or however you wanted to do it
 10 said, You know, hey, our revenue and income includes
 11 income tax revenue, we just don't have enough of that
 12 these days, let's increase the income tax or graduate
 13 it or that would be a better way to run the bank,
 14 would that supersede TABOR's requirement of a vote to
 15 make that sort of a change?
 16 MR. BOSE: I would say there's nothing in
 17 here that gives the bank the authority to increase
 18 taxes. There are a lot of -- I agree with you there
 19 are a lot of subtle constitutional issues here,
 20 especially when you have the state, say, doing
 21 business as a bank and the difference between the
 22 state and the bank and whether it's the state doing
 23 something or the bank. That has been raised in
 24 different areas, but --
 25 MR. DOMENICO: Sure. I guess the way you

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1 would get there, as I read this, is so, okay, the
 2 bank's income includes all tax revenue. Then
 3 Section 1 says the revenue and income shall
 4 essentially only be limited upon sound financial and
 5 public policy considerations. So if some
 6 constitutional provision is limiting that income,
 7 could somebody argue that therefore that
 8 constitutional provision has been superseded by the
 9 last sentence of Section 1. I hear you saying no,
 10 that that part of it wouldn't change, but, I mean,
 11 what if just setting aside -- I think I understood the
 12 argument that this bank will help generate more
 13 revenue, it will bring in its own income as a bank;
 14 but it also includes all the tax revenue and other
 15 state revenue that currently TABOR applies to.
 16 So say set aside the sort of commercial
 17 income that might be generated. Say that someday the
 18 economy recovers and the state is bringing in all
 19 sorts of additional income through traditional means
 20 that makes part of the assets of the bank, right. If
 21 those bump up against the existing revenue limits in
 22 TABOR, just the money from income tax, et cetera, and
 23 you bump up against the limits that are in TABOR now
 24 and you haven't seen this kind of extra income, would
 25 this mean the state could keep that money or would

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1 that have to be refunded and you're only talking about
 2 keeping the kind of bank specific additional income?
 3 MR. STAELIN: I think this language "the
 4 revenue and income of such a bank shall not be
 5 limited, nor shall expenditures in management of its
 6 revenue, income, and assets be restricted except upon
 7 sound financial and public policy considerations," I
 8 think that means that the answer is this doesn't, that
 9 this is not going to restrict the income. The way
 10 that the taxes might be affected would be that if the
 11 managers of the bank and the legislature decided that
 12 we have enough revenue here we could make a tax cut,
 13 we could enact a tax cut. And that has actually
 14 happened in North Dakota. And one of the great
 15 benefits of this whole proposal is that it actually
 16 accomplishes the purposes of TABOR in a way that
 17 restores a healthy economy and makes TABOR completely
 18 unnecessary.
 19 MR. DOMENICO: I'd like to think that
 20 that would be the result, but what if instead of
 21 giving us a tax cut they say, Hey, let's keep all this
 22 extra money? Would they be allowed to do that?
 23 MS. STAIERT: I'm not sure we can answer
 24 the question. I mean, I completely disagree with what
 25 the proponents are saying their interpretation is

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1 because I think under this scenario this bank can't
 2 loan money because that's against a public policy
 3 consideration, which is TABOR. This bank can't keep
 4 money over the cap because that would violate a public
 5 policy consideration, which would be TABOR. And since
 6 we can't change the language of what's in here, I
 7 mean, it just sets up a very litigious section. And,
 8 you know, that's really not for the board.
 9 MR. DOMENICO: That seems pretty clear to
 10 me that if this were enacted it would be allowed to
 11 lend money.
 12 MS. STAIERT: I don't think so, because I
 13 think TABOR says you can't pledge money without a
 14 vote.
 15 MR. DOMENICO: But this would supersede
 16 TABOR if this were enacted.
 17 MS. STAIERT: It doesn't say that. It
 18 says you can do all these things upon sound financial
 19 and public policy considerations. Somebody is going
 20 to come in and say the public policy consideration is
 21 TABOR.
 22 MR. DOMENICO: I like TABOR usually as
 23 much as anybody; but I don't think that would be a
 24 winning argument, given this is later in time, it's
 25 more specific, specifically says it supersedes

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1 anything conflicting. I am questioning, though, how
 2 the income -- I think I'm getting sort of two
 3 different answers from the proponents is part of the
 4 problem.
 5 MR. BOSE: I'd like to clarify a couple
 6 things. The state, according to TABOR, is restricted
 7 in terms of taxes and such. And those restrictions,
 8 in my mind, having written part of this, would still
 9 apply. Those taxes that were raised would be
 10 deposited in the bank. The bank doesn't have the
 11 authority to raise taxes. It does -- it is given the
 12 authority to lend money, et cetera. And I agree with
 13 Mr. Domenico where you say that because of the
 14 provisions in here that these other issues in terms of
 15 revenue and income, that it would be allowed to do
 16 these as sound financial and public policy
 17 considerations.
 18 MR. DOMENICO: The only reason I am
 19 concerned about this, I think, is because of
 20 Section 4, which makes essentially all the assets, all
 21 the cash assets of the state at least, the assets of
 22 the bank. And that's where I get a little concerned
 23 that essentially you've turned the banks -- the state
 24 for purposes of its tax and other revenues and funds,
 25 in the words of Section 4, into the bank and vice

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1 versa. And so maybe, though, the way to look at that
 2 is TABOR applies to Section 4. TABOR limits the tax
 3 and other revenues the state can get and then it's
 4 only the Section 4 money -- there's kind of the TABOR
 5 filter that defines the universe of Section 4 and then
 6 that's what kind of goes into Section 1. Is that the
 7 right way to think about it?
 8 MR. BOSE: I agree with you that TABOR
 9 does serve as a filter and that once that money goes
 10 into the bank, those funds are still restricted, you
 11 know, in terms of being pledged to the budget or other
 12 CAFR, C-A-F-R, funds. So they're still restricted
 13 that way, other than the ones that are unassigned or
 14 not being used. And so that was the intent. But I
 15 agree with your interpretation about the filter.
 16 MR. DOMENICO: The bank can sort of --
 17 the banks will hold as revenues all the state's tax
 18 and other income. It will give out money. How will
 19 money come out of the bank? In two ways. Well, one
 20 way is clear, lending out to people for these
 21 specified purposes. How exactly does the state get
 22 money for everything else it does?
 23 MR. BOSE: Well, in one sense it's very
 24 similar to what's set up now. The state just deposits
 25 a lot of its money into private banks. It pays

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1 certain fees for the administration of those funds.
 2 They're segregated in certain ways. But the return on
 3 investment, so to speak, of those funds and the
 4 interest that it gets and such are really secondary
 5 because the funds first are leveraged by those private
 6 banks for their own investment purposes, sometimes at
 7 odds with the interests of the state.
 8 So in this case the state would be able
 9 to leverage those funds in the same way that a bank
 10 does, but it would be in the public interest and for
 11 the purposes of the state. So that's why when you --
 12 it's sometimes confused in terms of comparing apples
 13 to oranges, the return on investment of a state that
 14 deposits its funds in private banks which at best
 15 might get up to 3 1/2 percent versus North Dakota's
 16 return at 19 percent or sometimes more.
 17 MR. DOMENICO: So Section 4 really -- the
 18 basic point of Section 4 is just you're taking all the
 19 money that's in these other accounts, wherever they
 20 are, and putting them in the bank and that's kind of
 21 all -- then everything else just operates the same.
 22 MR. BOSE: Yes. And those accounts --
 23 some of those accounts are untouchable in the same way
 24 that they are now.
 25 MR. DOMENICO: Right. Of course. Okay.

25

1 I think I'm getting a little bit better handle on it
 2 and I'm a little less concerned than I was ten minutes
 3 ago. So it seems to me then that Section 4 simply
 4 says deposit -- the state is going to deposit all of
 5 its cash essentially in this bank. Section 1 then is
 6 not supposed to be read that it kind of changes much
 7 other than -- Section 1 is really about the operation
 8 of the bank itself and not kind of anything beyond it,
 9 even though the bank will be operating with all of the
 10 state's cash. And so it strikes me then that actually
 11 TABOR limitations on revenue and expenditures are not
 12 meant to be altered by this, that the state still will
 13 be limited by TABOR's income and revenue to the extent
 14 the bank is operating and generating its own income.

15 MR. BOSE: Okay. I'd like to clarify
 16 that, because I don't agree 100 percent. The first
 17 part of what you said earlier is that TABOR acts as a
 18 filter for the taxes that the state collects and how
 19 much tax they collect. ~~Once they put them into the~~
 20 ~~bank and the bank leverages those funds through~~
 21 ~~partnerships with community banks, independent banks,~~
 22 ~~et cetera, and has an income on that, TABOR would not~~
 23 ~~apply to that income.~~ So it's a two-way -- there's
 24 two different levels here, you know. What the state
 25 can do in terms of taxation and raising and how much

26

1 it can get still applies outside of the purveyance of
 2 the bank. Once it comes into the bank, it's not
 3 restricted. And it's not tax money. I mean, the bank
 4 is not earning money through taxes.

5 MS. STAIERT: The bank is basically an
 6 enterprise.

7 MR. DOMENICO: It's an enterprise, right.
 8 For TABOR purposes, it's essentially an enterprise,
 9 which I guess it sort of is.

10 MR. GELENDER: It qualifies.

11 MS. STAIERT: Yeah.

12 MR. DOMENICO: Better than a lot -- I
 13 should be quiet. That part of it I'm a little bit
 14 concerned about how to make that clear. I asked
 15 before so if there is none of this additional kind of
 16 bank-related revenue and the state goes over, and I've
 17 resolved my concern about that. The converse is what
 18 if the state revenue comes up to the limit and now
 19 you're saying if the bank generates a bunch of excess
 20 revenue, it can keep it, do whatever it wishes with
 21 that. And I just wonder if we need to explain that in
 22 the title.

23 MS. STAIERT: No.

24 MR. GELENDER: I think I'm not sure -- I
 25 may have been the one who somewhat started us down

27

1 this whole path. I think I'm not too concerned
 2 because I can't put my finger on a tangible, concrete
 3 I know -- you know, we're sort of speculating about
 4 possible effects all down the road and things, but I
 5 don't know that I can put my finger on something
 6 concrete and say, This is going to change how TABOR
 7 operates. For example, with the last point, you know,
 8 courts will harmonize. Even if the bank keeps its
 9 earnings, all the money is sort of fungible. They can
 10 say, you can't spend the bank's money, but by the way,
 11 state, you're going to refund more stuff before it
 12 ever gets to the bank.

13 MR. DOMENICO: That's sort of my
 14 question. It's not clear to me whether that would be
 15 the effect if you sort of had -- if you ran into that
 16 situation or if it would be that sort of ax to grind.

17 MR. GELENDER: I think that without that
 18 clarity that we really -- it just becomes speculation
 19 for anything we could do with the title, and we're
 20 probably best off just talking about what's clear in
 21 the measure.

22 MR. DOMENICO: Right. Well, the one
 23 thing you can do is say stating that the revenue and
 24 income of such bank shall not be limited or
 25 expenditures restricted.

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1 MR. GELENDER: Right.

2 MR. DOMENICO: We know that it does
 3 indeed specify that. What that means requires some
 4 foresight that we probably don't have. So that's sort
 5 of my question, whether we sort of add that kind of --
 6 whether that adds anything to anybody else's.

7 MR. GELENDER: I think so.

8 MR. DOMENICO: The other thing I thought
 9 about adding is something about what it's authorized
 10 to lend for and what it's not allowed to do, but maybe
 11 we should think about adding kind of that provision
 12 first. I don't know where the right place to put it
 13 is; but it might be just sort of after bank on line 5
 14 right there, just specifying that the revenue and
 15 income of a bank shall not be limited, nor shall
 16 expenditures be restricted. Then I don't know if you
 17 need to add the language of "except upon sound
 18 financial." I don't know that you need to add that.

19 MS. STAIERT: Yeah.

20 MR. STAELIN: I would prefer that in
 21 there. It sounds too much like a blank check.

22 MR. GELENDER: Make it a series, so the
 23 revenue, income, and expenditures of the bank shall
 24 not be limited.

25 MS. STAIERT: Yeah.

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1 MR. DOMENICO: Then the question is
 2 whether to add this sort of except upon or except for
 3 financial and public policy considerations.
 4 MR. GELENDER: Yeah, I think so.
 5 MR. DOMENICO: So I think that's what I
 6 would say, "except for financial and public policy
 7 considerations." Sound is in the measure, but I get a
 8 little nervous using that kind of language.
 9 Adjectives I try to avoid in these when I can.
 10 MR. GELENDER: I think on the requiring
 11 on line 6, we actually need to just have allowing or
 12 authorized allowing, because it says, "May include the
 13 tax and revenues and funds of the state."
 14 MS. STAIERT: How about authorizing?
 15 MR. BOSE: I think that was a wise choice
 16 of words, because four says, "Capitalization of the
 17 bank may include."
 18 MR. GELENDER: I'm looking at line 5
 19 where it says, "Governance." I think there's a little
 20 more to it than that because it talks a little bit
 21 about the management as well and then the oversight.
 22 So I just -- yeah. I think I might say specify
 23 requirements for the oversight, governance, and
 24 management of the bank.
 25 MS. STAIERT: You want to accept it, see

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1 what it looks like?
 2 MR. DOMENICO: I've got a couple
 3 suggestions, or one I think that I want to discuss,
 4 and that is I agreed with sort of taking out the
 5 language of promoting development, et cetera, but I do
 6 wonder if we need to say, wherever it went,
 7 establishing a state-owned bank authorized to lend
 8 money for various specified purposes and then -- I
 9 mean, because as I understand it, the bank -- and I
 10 have to think it through. I probably don't understand
 11 banks, but do banks really -- do they typically do
 12 anything other than lend and invest money? I mean, so
 13 this doesn't -- I guess my question is sort of whether
 14 this language is limiting what the bank can do, this
 15 sort of sentence about what it's authorized to lend
 16 money for, or is it expanding what it can do?
 17 MR. BOSE: I'd love to address that
 18 because in number one there's a long list of things
 19 here. And, you know, in addition to, as we mentioned,
 20 a partnering or participating in loans with private
 21 banks throughout the state and developing programs in
 22 areas where other banks may forego those particular
 23 products, if you look at North Dakota over the years
 24 when they've had major issues such as droughts,
 25 floods, blight, something like that, the state bank

31

1 has stepped in, renegotiated mortgages on farms and
 2 houses and stuff like that. So it has affected the
 3 social fabric of the state of North Dakota
 4 significantly. And this isn't just true in North
 5 Dakota, but everywhere that public banks have occurred
 6 all around the world. Canada and Australia had them
 7 up just past world War II, et cetera. So there are
 8 other possibilities in there in the public interest
 9 that a private bank doesn't fall within the scope of
 10 what most private banks do.
 11 MR. DOMENICO: And so does that
 12 language -- I mean, we don't want to get into trying
 13 to pick and choose among the listed purposes. This is
 14 kind of the best I can do for that. My other question
 15 was so the other thing it's authorized, given power is
 16 the authority of all other banks chartered by the
 17 state. What is the effect of that language that kind
 18 of comes next in Section 1? It's sort of in the
 19 middle of Subsection 1.
 20 MR. BOSE: Okay. This was -- there was a
 21 slight difference here between what we wrote and the
 22 Bank of North Dakota. Originally the Bank of North
 23 Dakota did take -- did do retail banking and take
 24 deposits from private citizens and such. And there's
 25 been questions raised in other states, because 17

32

1 states since 2010 have considered legislation either
 2 to study or authorize it, about competition with
 3 private banks. So we elected in this measure, not in
 4 the previous measure but in 95, to put that
 5 restriction in to, you know, specifically address
 6 those concerns in terms of competition, because if you
 7 look at the partnering and participatory aspect of the
 8 bank, it actually -- as Earl mentioned earlier, you
 9 know, North Dakota hasn't had any bank failures in ten
 10 years. It has the highest number of community and
 11 independent banks per capita of any place in the
 12 United States, that type of thing. So actually, the
 13 North Dakota Bankers Association endorses the Bank of
 14 North Dakota. So it actually boosts the private
 15 sector as well as the public sector.
 16 MR. DOMENICO: So I guess so the
 17 exception in that sentence, "Except that the bank will
 18 not take deposits of individual citizens," et cetera,
 19 that clearly does something. The part of that
 20 sentence that comes before, "The bank shall have all
 21 the powers and authority of other banks chartered by
 22 the State of Colorado," to me that means it can invest
 23 money, it can do things other than just -- the
 24 sentence that comes before that is authorizing it to
 25 make loans, and that's all the sentence before it

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1 talks about, is making loans for various purposes.
 2 Then the first part of that says you can do everything
 3 any other state-chartered bank can do, except take
 4 deposits from individuals. So all the money sort of
 5 has to be the state's money, right, effectively or
 6 money generated by the bank. Okay. So now I
 7 understand. I wonder if we need to say anything in
 8 the title --
 9 MS. STAIERT: I think we do.
 10 MR. DOMENICO: -- about that.
 11 MS. STAIERT: Otherwise, people think
 12 they can use the bank, too.
 13 MR. DOMENICO: Yeah, they might. I don't
 14 know if we need to include anything about the first
 15 part of that sentence about authorizing it to do
 16 anything any other bank can do. That's sort of true,
 17 and I understand why it's in the measure. Whether it
 18 needs to go in the title, it seems not necessary.
 19 MR. GELENDER: I don't think it's
 20 necessary. I would still sort of ask whether we're
 21 sure that the "authorized to lend money for various
 22 specified purposes" is necessary only because I don't
 23 know that "various specified purposes" really adds
 24 information. And it's a bank, so I don't think anyone
 25 would think it couldn't lend money.

34

1 MS. STAIERT: Yeah, but it lends money
 2 for public -- I don't think it lends money for a car.
 3 MR. GELENDER: You know, if you actually
 4 look at the language "promote development, commerce,
 5 industry, and agriculture... home ownership,
 6 maintenance and construction of needed infrastructure,
 7 education, public health and safety, and other
 8 purposes for the general welfare," especially when you
 9 say that general welfare --
 10 MS. STAIERT: Yeah, it could be anything.
 11 MR. GELENDER: And then commerce and
 12 industry, I don't know that there's much limitation
 13 there, really.
 14 MS. STAIERT: I'm fine with taking that
 15 out.
 16 MR. DOMENICO: I would prefer to keep it
 17 in. I think it may be that it doesn't serve any
 18 purpose, but that to me is an effort on our part to
 19 interpret the measure and figure out what effect it
 20 would have.
 21 MR. GELENDER: I suppose it tells people
 22 to go look for specified purposes.
 23 MR. DOMENICO: And the bank -- I mean,
 24 that's kind of the main reason for doing this, I take
 25 it, maybe we'll make a bunch of money running our own

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1 bank; but it strikes me that the real purpose here is
 2 to sort of fill a perceived need for certain types of
 3 lending that doesn't exist. And to me, I think if the
 4 bank sort of went off into some bizarre started
 5 running hedge funds and stuff, you might point to this
 6 language and say, Now, wait a minute, I think you've
 7 gotten a little bit beyond it. So for us to sort of
 8 say, Oh, that's meaningless language is, I think -- I
 9 would rather at least suggest that there's something
 10 in there.
 11 MR. STAELIN: We agree with that
 12 position.
 13 MR. BOSE: If you look at the governance
 14 the way we framed this, similar to North Dakota, of
 15 course, North Dakota didn't have any investments in
 16 derivatives and such. In fact, they've taken a more
 17 conservative policy than the private banks in doing
 18 that.
 19 MS. STAIERT: I think that the language
 20 about deposits could go probably shall not be limited
 21 or restricted except for financial and public policy
 22 considerations and further restricted from accepting
 23 or something like that.
 24 MR. DOMENICO: Yeah. That's a good place
 25 to put it, but it might be easier to just add a little

36

1 clause that says, "Prohibiting the bank from taking
 2 deposits of individual citizens."
 3 MR. GELENDER: We have it, right, with
 4 private entity. Just add any individual or private
 5 entity.
 6 MR. DOMENICO: Oh, yeah. It's down
 7 there. But I think it might be better where the chair
 8 was suggesting, which is essentially one clause up
 9 after considerations, because there you're sort of
 10 talking about --
 11 MS. STAIERT: Public policy
 12 considerations and then just prohibiting.
 13 MR. STAELIN: Isn't an entity something
 14 other than a person? So you might want both words
 15 there, person or entity.
 16 MR. DOMENICO: Usually actually person is
 17 defined as including an entity in most places.
 18 MS. STAIERT: Any person or private
 19 entity.
 20 MR. DOMENICO: If you're going to do
 21 that, I'd suggest an individual.
 22 MS. STAIERT: Okay. Would you accept
 23 them all again. It's been a while since we've read
 24 anything. Let me read what we have: "This is an
 25 amendment to the Colorado constitution concerning the

37

1 establishment of a bank owned by the State of
 2 Colorado, and in connection therewith, establishing a
 3 state-owned bank authorized to lend money for various
 4 specified purposes, backing the debts and obligations
 5 of the bank by the full faith and credit of the State
 6 of Colorado; specifying requirements for the
 7 oversight, governance, and management of the bank;
 8 specifying that the revenue, income, and expenditures
 9 of the bank shall not be limited or restricted except
 10 for financial and public policy considerations,
 11 prohibiting the bank from accepting deposits from any
 12 individual or private entity, authorizing the bank to
 13 be capitalized with all tax and other revenue and
 14 funds of the state subject to sound banking practices,
 15 and authorizing the drafting of rules and regulations
 16 of the bank subject to the approval by the advisory
 17 board of the bank, the board of directors of the bank,
 18 the Colorado General Assembly, and the governor." We
 19 say sound policy twice. I guess not. We say,
 20 "Financial and public policy" and then later we say,
 21 "Subject to sound banking practices."
 22 MR. STAELIN: I like the word "sound" in
 23 there because financial doesn't really tell you
 24 anything.
 25 MS. STAIERT: I meant in terms of

38

1 shortening it, but that's fine.
 2 MR. BOSE: There's a long history on the
 3 word "sound" and the phrase "sound money."
 4 MS. STAIERT: As long as that's not a
 5 catch phrase, I don't want to know about it. All
 6 right. Anyone have anything else? Is there a motion?
 7 MR. GLENDEN: Sure. I move that we
 8 adopt the staff draft as amended for Initiative 95.
 9 MR. DOMENIC: Second.
 10 MS. STAIERT: It has been moved and
 11 seconded. Is there a vote? Aye.
 12 MR. GLENDEN: Aye.
 13 MR. DOMENIC: Aye.
 14 MS. STAIERT: It is 8:10. And this
 15 concludes today's agenda pursuant to Section
 16 1-40-1071. Any person presenting an initiative,
 17 petition, or any registered electorate who is not
 18 satisfied with the decision of the title board with
 19 respect to whether a petition contains more than a
 20 single subject or who is not satisfied with the titles
 21 and submission clause provided by the title board and
 22 who claims they are unfair or they do not fairly
 23 express the true meaning and intent of the proposed
 24 state law or constitutional amendment may file a
 25 motion for a rehearing with the secretary of state

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1 within seven days after this motion is made or the
 2 titles and submission clause are set. Because this is
 3 the title board's last April meeting, any motion for
 4 rehearing will be heard within 48 hours of the
 5 expiration of the seven-day period. We are adjourned.
 6 WHEREUPON, the within proceedings were
 7 concluded at the approximate hour of 8:11 p.m. on the
 8 18th day of April, 2012.
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REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
 COUNTY OF ARAPAHOE)

I, TIFFANY D. GOULDING, Registered Professional Reporter and Notary Public, State of Colorado, do hereby certify that the within proceedings were taken in machine shorthand by me at the time and place aforesaid and was 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 20th day of April, 2012.

My commission expires October 19, 2014.

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

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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.

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P R O C E E D I N G S

MS. STAIERT: All right. We're back on
the record of the title setting board. The next item
up is No. 94, Establishment of Banks Owned by Political
Subdivision. This item is scheduled for a rehearing,
and the time is now 2:46. And if the petitioner could
come forward. Or petitioners. And just to the podium.
We'll have some questions. First I'm going to read it
into the record.

This is "An amendment to the Colorado
Constitution concerning authorization for political
subdivisions to establish and operate banks, and, in
connection therewith, specifying requirements for the
governance of such banks, including capitalization
requirements; allowing the political subdivisions to
self-insure deposits with their full faith and credit;
and authorizing the general assembly to provide
regulatory guidelines for the oversight of these public
banks by the state banking board and the commissioner
of financial services."

Does the proponent have anything he would
like to say based on what's been filed in the petition?

MR. STAELIN: 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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Title Setting Review Panel:
Suzanne Staiert, Deputy Secretary of State
Jason Gelender, Office of Legislative Legal
Services

Dan Domenico, Solicitor General

Maurice Knaizer, Assistant Attorney General

Proponent Representative:
Earl H. Staelin, Esq.

For the Objector Don Childears, Colorado Banking
Association and Colorado Mortgage Lending Association:

JASON R. DUNN, ESQ.
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, Suite 2200
Denver, Colorado 80202

THOMAS M. ROGERS III, ESQ.
NATHANIEL SCOTT BARKER, ESQ.
Rothgerber Johnson & Lyons, LLP
1200 17th Street, Suite 3000
Denver, Colorado 80202

Also Present: Steve Ward
Andrea Gyger

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then a motion was filed later, yesterday afternoon,
that spelled out, I think, more what the reasons are.
They seem to be based on exactly the same basis, so --

MS. STAIERT: Okay. All right. Thank
you. If the petitioner could come forward and identify
themselves. You can go ahead and have a seat. Thanks.

MR. DUNN: Good afternoon, my name is
Jason Dunn. I'm with Brownstein, Hyatt, Farber,
Schreck, and I am here on behalf of Objector Don
Childears and also the Colorado Banking Association and
the Colorado Mortgage Lending Association.

Before I begin, I have to say it feels a
little bizarre to be here without Mr. Hobbs sitting in
that chair. I think over the last ten years I've done
this, either on this side of the podium or in
Mr. Domenico's chair or as Mr. Hobbs' attorney while in
the Attorney General's office, I had a chance to work
with him, and he was a great public servant and I was
honored to work with him, and I'm sure he's not
listening today, but if he were, I would thank him for
his service on the title board, so I just wanted to
make that comment.

MS. STAIERT: Thank you.

MR. DUNN: Let me start with a
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 10-105(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 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 that's the key
21 word in the provision, but the original meeting is not here.

22 And it also says, in the provision,
23 that -- that they shall appear at any title board
24 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 MR. 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

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1 rehearing, we haven't set a date, 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 rehearings is specific to rehearings, the
 11 other one being more general, that rehearings 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 rehearings.

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.

13

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 locks 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. STABERT: 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

24

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

25

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 whereas clauses 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 whereases
 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, could 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. STAELIN: 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 1 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:** Okay. So that motion failed. So we still
 16 haven't done anything.
 17 **MR. DUNN:** So, in other words, it's a
 18 normal title board.
 19 **MR. DOMENICO:** That's right.
 20 **MR. DUNN:** Well, let me continue with some
 21 of the jurisdictional issues, then. There were two
 22 substantive changes made to the measure after the
 23 review and comment hearing that were not discussed.
 24 Actually, I should say at least three.
 25

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 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: I say. 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 does not 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 "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 discussion.

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. STAEELIN: 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. STAEELIN: 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. STAEELIN: Could I ask a question
 13 about --

14 MR. DOMENICO: Yeah.

15 MR. STAEELIN: 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

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 a little bit of a tough
5 spot, but if Mr. Geleader'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 notion 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

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. Geleader, 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

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

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: Old 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 log council, but we have it
 12 available online. We use iStock, which I've now
 13 become familiar with 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 in 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 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	<p>1 then supersede that or conflict with it.</p> <p>2 MR. STAELIN: I have a response.</p> <p>3 MS. STAIERT: Uh-huh.</p> <p>4 MR. STAELIN: In lending money, the state</p> <p>5 would not be taking on debt. It's lending money. The</p> <p>6 party undertaking the debt would be the party at the</p> <p>7 other end. In North Dakota, as -- we envisioned here</p> <p>8 actually, the -- the subdivision banks would ordinarily</p> <p>9 be entering into correspondent-type relationships with</p> <p>10 community banks to lend money. That would be done</p> <p>11 through the bank, through the community banks.</p> <p>12 And also there is no requirement that in</p> <p>13 amending the constitution -- because we have a</p> <p>14 superseding clause, there's no requirement that we</p> <p>15 spell out every provision of the constitution that</p> <p>16 might be in conflict with it. That's more the nature</p> <p>17 of cleanup that can be done later, but we make it clear</p> <p>18 the single issue is to authorize political subdivisions</p> <p>19 to establish their own banks and generally what</p> <p>20 those -- what the guidelines for -- for doing that will</p> <p>21 be.</p> <p>22 MR. GELENDER: I have a question or two</p> <p>23 for the proponent briefly.</p> <p>24 MS. STAIERT: That's you. You.</p> <p>25 MR. STAELIN: Oh, okay. I'm sorry. I was</p>	87	<p>1 Mr. Childears runs the Colorado Banking Association,</p> <p>2 that typically a bank is funded 80 percent by borrowed</p> <p>3 funds. Banks routinely borrow money for their purposes</p> <p>4 and for presumably lending at higher rates. So I don't</p> <p>5 think a bank can operate without -- without engaging in</p> <p>6 multi- -- in multiyear debt.</p> <p>7 MR. STAELIN: The political subdivisions</p> <p>8 have a power that the banks don't have and that is they</p> <p>9 can levy taxes and assess fees. The basis for the</p> <p>10 funding, the capitalization of the bank is the tax</p> <p>11 money and fees that come in, and all of that becomes</p> <p>12 available, then, to lend out. There's no need to</p> <p>13 borrow.</p> <p>14 MR. DUNN: Jason Dunn again. I would -- I</p> <p>15 would direct the title board back to the language we</p> <p>16 discussed a moment ago where it says the bank has</p> <p>17 the -- all the powers -- let me make sure I get the</p> <p>18 right language. "Any such bank shall have the same</p> <p>19 powers and authority as other banks chartered by the</p> <p>20 State of Colorado." Banks have the authority to incur</p> <p>21 debt, multiyear debt, for purposes of the operation of</p> <p>22 the bank.</p> <p>23 MS. STAIERT: Mr. Dunn, when you say</p> <p>24 superseding TABOR to allow the state to retain excess</p> <p>25 revenue, where is that in the proposal? Where does it</p>
86	<p>1 thinking the proponent of the motion.</p> <p>2 MR. GELENDER: I'm sorry. So is -- in</p> <p>3 your view, is TABOR a conflicting state constitutional</p> <p>4 amendment that would be superseded by this or would --</p> <p>5 for example, if one these banks, and assuming it didn't</p> <p>6 qualify for enterprise status, was going to take on</p> <p>7 a -- was going to incur a multiple fiscal year</p> <p>8 obligation, that they would not need a vote of the</p> <p>9 people? Would they or would they not need a TABOR</p> <p>10 vote?</p> <p>11 MR. STAELIN: I don't think so. I don't</p> <p>12 think it conflicts with TABOR. This -- this isn't</p> <p>13 authorizing the bank to borrow money. So . . .</p> <p>14 MR. GELENDER: So if it -- if the bank</p> <p>15 chose to, your assumption is that would be subject to</p> <p>16 TABOR requirements?</p> <p>17 MR. STAELIN: If the bank chose to --</p> <p>18 MS. STAIERT: Borrow.</p> <p>19 MR. GELENDER: To incur multiple -- to</p> <p>20 borrow, to issue bonds or something like that.</p> <p>21 MR. STAELIN: I believe so.</p> <p>22 MR. GELENDER: Thank you.</p> <p>23 MR. DUNN: Jason Dunn again.</p> <p>24 I was just speaking with Mr. Childears,</p> <p>25 the -- the objector on this. He indicated to me, and</p>	88	<p>1 say that they can keep the revenue?</p> <p>2 MR. DUNN: I'm sorry?</p> <p>3 MS. STAIERT: Well, in your memorandum,</p> <p>4 you state that one of the violations of the single</p> <p>5 subject is that it -- it supersedes TABOR and that it</p> <p>6 allows -- am I on the right one?</p> <p>7 MR. DUNN: Are you on 95?</p> <p>8 MS. STAIERT: I may not have the right</p> <p>9 one. Yeah, I'm on 95. Or 94.</p> <p>10 MR. DUNN: Unfortunately we're not to 95</p> <p>11 yet.</p> <p>12 MR. DOMENICO: Well, what -- what -- I</p> <p>13 mean, what difference does it make? Why is it --</p> <p>14 that's not a separate subject, right? I mean, running</p> <p>15 a bank -- if running a bank means that certain other</p> <p>16 provisions can't be applied to you, then that doesn't</p> <p>17 seem to be a -- maybe it's a separate -- a second</p> <p>18 implication, a fact. I don't even know if I would call</p> <p>19 it a purpose, but the -- the question is whether it's a</p> <p>20 separate unrelated subject, and to me, it -- it's not.</p> <p>21 MR. DUNN: Well, what's, I think, a</p> <p>22 separate subject is not whether so much the bank has</p> <p>23 the authority, it's that the political subdivision has</p> <p>24 the authority now to generate revenue through multiyear</p> <p>25 debt, that the stated purpose of the bank is to promote</p>

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 -- give, 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	<p>1 administration, the dollar. It says right on it, full 2 faith and credit</p> <p>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.</p> <p>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.</p> <p>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</p>	115	<p>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.</p>
114	<p>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."</p> <p>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.</p> <p>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.</p>	116	<p>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?</p>

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. STAEELIN: 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. STAEELIN: 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. STAEELIN: -- 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	<p>1 put my money in a bank, if the bank screws up and</p> <p>2 spends -- and loans my money out to people building all</p> <p>3 these subdivisions that no one lives in and then my</p> <p>4 bank fails and they can't pay me back, that's what FDIC</p> <p>5 insurance is for.</p> <p>6 This is -- there aren't -- the -- the</p> <p>7 money in here is basically tax money, and it sort of</p> <p>8 seems not surprising, if I'm going to say -- if I'm</p> <p>9 authorizing a bank to hold all of my subdivision's</p> <p>10 assets, that if the bank fails because it lends it out</p> <p>11 to people it shouldn't have loaned the money to or</p> <p>12 that -- that it just, for whatever reason, couldn't pay</p> <p>13 it back, that then my subdivision won't have that money</p> <p>14 anymore.</p> <p>15 I mean, I guess that's my confusion is --</p> <p>16 is the -- if the -- if the bank screws up, it seems not</p> <p>17 surprising that your subdivision is going to have</p> <p>18 trouble and -- and it seems very different than if the</p> <p>19 bank is going to be insuring other people's deposits.</p> <p>20 MR. CHILDEARS: I think that's the very</p> <p>21 point we're trying to make, that those deposits of the</p> <p>22 local government would not have any protection, they</p> <p>23 would not have any insurance or collateral to back</p> <p>24 them, and so they basically go uninsured, and that's</p> <p>25 such a key concept that we believe it ought to be in</p>	123	<p>1 that is inherent in that. I think that you're</p> <p>2 basically going with self-insurance or uninsured</p> <p>3 deposits.</p> <p>4 MR. DUNN: Is it -- my client may correct</p> <p>5 me if I'm wrong. Is the way to describe it to say</p> <p>6 allowing political subdivisions to insure deposits only</p> <p>7 with the assets of the subdivision?</p> <p>8 MS. STAIERT: Oh, they could go get an</p> <p>9 insurance policy, somebody to underwrite it, I suppose.</p> <p>10 Maybe they can get their intergovernmental risk people</p> <p>11 to underwrite their banks, I don't know, you know,</p> <p>12 but --</p> <p>13 MR. DUNN: I don't know if that's possible</p> <p>14 or not.</p> <p>15 MS. STAIERT: Yeah, I mean, I don't know.</p> <p>16 They offer insurance for other things, maybe they'd</p> <p>17 offer for that. But I think the point is that that</p> <p>18 really is what self-insurance is. I mean, I guess we</p> <p>19 could have a debate about whether that really means no</p> <p>20 insurance, and I guess it really does mean no</p> <p>21 insurance, but for most people, they understand that to</p> <p>22 self-insure means you pledge your own credit.</p> <p>23 MR. DOMENICO: Maybe, to me, the important</p> <p>24 point that the title doesn't really reflect is that</p> <p>25 these -- these banks can hold all those -- all the</p>
122	<p>1 the title.</p> <p>2 MR. DOMENICO: Yeah, and I guess I'm just</p> <p>3 saying that sort of seems inherent to me in running --</p> <p>4 if you're putting all your money into your own bank, as</p> <p>5 opposed to if this were authorizing them to deposit it</p> <p>6 in private banks and exempting them from insurance,</p> <p>7 that what we have there kind of -- is sufficient to say</p> <p>8 what the measure does, and to the extent that exposes</p> <p>9 these municipalities to really bad risks, which it very</p> <p>10 well might, then that strikes me as a matter for the</p> <p>11 public debate.</p> <p>12 MS. STAIERT: And I don't see it a lot</p> <p>13 differently than municipalities deciding not to take</p> <p>14 out insurance for claims and deciding to self-insure.</p> <p>15 That's what they're self-insuring with is their assets.</p> <p>16 If they get an \$8 million lawsuit and they lose it,</p> <p>17 then that was a bad policy decision, you know. They</p> <p>18 didn't have insurance. I mean, it's sort of the same</p> <p>19 thing. If they loan out \$8 million to a developer and</p> <p>20 they go bankrupt, then you're right, there is no</p> <p>21 insurance, but that is basically what's known as</p> <p>22 self-insuring.</p> <p>23 MR. CHILDEARS: Correct, but you're not</p> <p>24 asking voters to make a decision on a provision where I</p> <p>25 don't believe self-insurance truly reflects the risk</p>	124	<p>1 money of the subdivision.</p> <p>2 MS. STAIERT: Right.</p> <p>3 MR. DOMENICO: To me, this could be we're</p> <p>4 just going to set up our own little community bank and</p> <p>5 take deposits and money --</p> <p>6 MR. DUNN: Well, I was going to say one of</p> <p>7 the things I think needs to be reflected in the title,</p> <p>8 and I was going to bring this up in '95, but I did not</p> <p>9 realize until the proponent said it a moment ago that</p> <p>10 it was part of this measure as well, is that</p> <p>11 individuals and private entities cannot deposit funds</p> <p>12 in this bank. I think most voters who read this, when</p> <p>13 they think establish and operate banks, it means, oh,</p> <p>14 great, I have a -- a government bank that I can go put</p> <p>15 my money in and probably get either higher a interest</p> <p>16 rate or borrow money at a cheaper rate from like a</p> <p>17 credit union or even at lower rates and that that ought</p> <p>18 to be reflected in the title because I think people</p> <p>19 will assume that they could -- they would -- could</p> <p>20 avail themselves of -- of these types of banks.</p> <p>21 MS. STAIERT: Or maybe in connection</p> <p>22 therewith, allowing only the subdivisions to deposit or</p> <p>23 some language like that, allowing deposits from only</p> <p>24 the subdivision of the bank.</p> <p>25 MR. DOMENICO: Yeah, I guess I'm not</p>

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 Childears, 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 could 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. Geleender 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.
 19 * * * * *
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 22
 23
 24
 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.

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

April 3, 2012

TO: Earl Staelin and Robert Bows

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #94, concerning the establishment of banks owned by political subdivisions

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. To make statements and findings about the Bank of North Dakota;
2. To allow municipalities, counties, home rule municipalities, home rule counties, cities and counties, and other political subdivisions to establish a bank;
3. To specify the membership for the board of directors for a bank established by each type of political subdivision;

4. To specify that banks created under the proposed initiative may lend money at interest to promote development and enterprise in the state, and to promote any purpose authorized by the laws governing the political subdivision creating the bank;
5. To specify that banks created under the proposed initiative have the same powers and authority of other banks chartered by the state except as limited by the legally established purposes of the government of the political subdivision;
6. To specify that revenue, income, and assets of these banks are not limited, and expenditures and management of the banks' revenue, income, and assets are not restricted, except upon sound financial and public policy considerations; and
7. To specify that the provisions of the proposed initiative are self-executing and severable and supersede any conflicting state constitutional, state statutory, charter, or other state or local provisions.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

WHEREAS Paragraphs

1. 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.)
2. If the proponents intend the "WHEREAS" paragraphs to be a part of the initiative, carefully check to ensure that spelling, grammatical, punctuation, and typographical errors are corrected.

Enacting Clause

Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it Enacted by the People of the State of Colorado". To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative directly above the text to be added to the Colorado constitution.

Section Number/Amending Clause

1. Section numbers being added to the constitution are typically numbered in sequence. Currently, the last section number under article X of the constitution is section 21. Therefore, the proponents should add the new section of the proposed initiative as section 22 rather than section 23.
2. It is standard drafting practice to include an amending clause telling the reader what is being added to or amended in the Colorado constitution. Instead of using the phrase "THEREFORE, be it enacted as Article X, Section 23 of the Colorado Constitution:", use "In the constitution of the state of Colorado, add section 22 to article X as follows:".

Format/Organization of Initiative

1. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headings.
2. The provisions of the proposed initiative should appear in the following order: The enacting clause, followed by the amending clause indicating what change is being made to the Colorado constitution, followed by the text of the initiative.

Numbering of Constitution/Headnotes

1. Constitutional provisions are usually divided into component parts using the following structure: Subsection, for example, "(1)"; followed by paragraphs, for example, "(a)"; followed by subparagraphs, for example, "(I)"; ending with sub-subparagraphs, for example, "(A)". The proponents may want to consider breaking up the text of the proposed initiative into separate subsections, etc.
2. Each section in the Colorado constitution has a headnote. Headnotes should briefly describe the contents of the section, should follow the constitutional section number, should be in bold-faced type, should be in mixed-case letters, and should end with a period.
3. It is standard drafting practice for the first line of the constitutional text or the first line of a subsection to immediately follow the headnote on the same line instead of the first subsection appearing on a separate line from the headnote.
4. In addition, sometimes internal headnotes are used for reader-friendly purposes, similar to the headings in the current initiative. Internal headnotes should follow the subsection number or paragraph letter, as appropriate, should be bold-faced type, and should end with a period.

For example:

Section 22. Banks owned by political subdivisions - board of directors - capitalization. (1) Purpose and findings. (a) SINCE 1919, THE PEOPLE OF NORTH

DAKOTA HAVE OWNED AND BENEFITED FROM . . .

(b) THE BANK OF NORTH DAKOTA IS LIMITED IN ITS SCOPE . . .

(2) **Political subdivision banks established.** (a) ANY COUNTY, MUNICIPALITY, OR POLITICAL SUBDIVISION OF THE STATE MAY ENGAGE . . .

(3) **Governance of banks established by municipalities.** IN THE EVENT A STATUTORY MUNICIPALITY . . .

(4) **Governance of banks established by counties.** IN THE EVENT A STATUTORY COUNTY . . .

(5) **Governance of banks established by home rule municipalities.** IN THE EVENT A HOME RULE MUNICIPALITY . . .

Small Caps/Capitalization

1. It is standard drafting practice to use SMALL CAPITAL LETTERS (rather than ALL CAPS) to show the language being added to the Colorado constitution.
2. Note that although the text of the proposed initiative should be in small capital letters, a large capital letter should be used to indicate capitalization where appropriate. The following should be large capitalized:
 - a. The first letter of the first word of each sentence;
 - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
 - c. The first letter of proper names.
3. It is standard drafting practice to capitalize only proper names, such as the names of states. Therefore, it is unnecessary to capitalize words such as "people", "bank", "federal reserve system", "state", "mayor", "municipal attorney", etc.

Commas

1. The preferred method for separating a series in a list is to include a comma after the second to last item in the series. For example, "apples, oranges and pears" should be "apples, oranges, and pears".
2. In the first paragraph after the "THEREFORE" clause, with regard to the fourth sentence ("The revenue, income, and assets of such a bank shall not be limited, nor shall expenditures and management of its revenue, income, and assets be restricted except upon sound financial and public policy considerations."): If the proponents mean that the revenue, income, and assets of the bank shall not be limited **except upon sound financial and public policy considerations**, nor that expenditures and management of its revenue, income, and assets be restricted **except upon sound financial and public policy considerations**, the proponents should place a comma before the "except" phrase. In other words, if the proponents intend that the "except" phrase applies only to the phrase that begins "nor", then leave the sentence written as is.

Active Voice/Verb Tense/Authority Verbs

Prior to the 2012 legislative session, the Office of Legislative Legal Services revised its drafting guidelines pertaining to verb tense, active voice, and authority verbs (e.g., shall, shall not, may). These guidelines emphasize writing in active voice, writing in the present tense (rather than future tense), and using authority verbs only to mandate, prohibit, permit, or impose conditions on a person or entity. Accordingly, the proponents may want to consider implementing the guidelines in the proposed initiative. Following are a few examples:

- a. Instead of writing "Any such bank shall have the same", write "Any such bank has the same".
- b. Instead of "assets of such a bank shall not be limited", "assets of such a bank are not limited".
- c. Instead of "shall consist of", "consists of".

Miscellaneous

1. It is standard drafting practice to use the word "that" instead of "which" when indicating a restrictive clause, meaning the word, clause, or phrase following the word "that" is necessary to the meaning of the sentence and is not simply additional or descriptive information. If "which" is used, it is preceded by a comma.
2. Except for dates, express numbers in words; for example, in the fourth WHEREAS clause, "\$325 million" should be written as "three hundred twenty-five million dollars" and in the sixth WHEREAS clause, "\$500 million" should be written as "five hundred million dollars" and "30%" should be written as "thirty percent".
3. In the last sentence of the paragraph following the "THEREFORE" clause, the proponents may want to add "state" before the word "charter".
4. "And/or" is ambiguous. Use the word "or" to connect two or more phrases, events, conditions, etc. when only one or more, but not all, need occur. Instead of using "and/or" in the last paragraph of the proposed initiative, use "or".
5. In the last paragraph of the proposed initiative, toward the end of the first sentence, insert the word "or" before the word "chartered".
6. You may wish to consider adding a definitions section to define certain terms such as "political subdivision", "bank", "financial institution", etc.

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to

have a single subject. What is the single subject of the proposed initiative?

2. What will be the effective date of the proposed initiative?
3. What sources did the proponents rely on for the factual statements in the "whereas" clauses of the proposed initiative? Several of the factual assertions appear to be inaccurate. For example, the Bank of North Dakota does not "administer bank charters and audits"; and the Bank of North Dakota is not prohibited by either the North Dakota Constitution or North Dakota statutes from competing with other financial institutions in the private sector. See www.banknd.nd.gov
4. The proposed initiative would authorize any "political subdivision" of the state to engage in or establish a bank. Some political subdivisions of the state, for example, special districts, are very small entities with few assets and little revenue. Do the proponents intend for these types of entities to be allowed to form banks?
5. Colorado law currently provides a system for the protection of deposits of public moneys in financial institutions. Eligible public depositories must meet minimum requirements of Colorado law and have a designation as a public depository from the Colorado banking board and the commissioner of financial services in order to receive deposits of public moneys. See §§ 11-10.5-101 through 11-10.5-112 and 11-47-101 through 11-47-120, C.R.S. Regarding this system:
 - a. What do the proponents intend with respect to Colorado's existing regulatory structure for public depositories if the proposed initiative is enacted by the people?
 - b. Can the system continue to exist in its current form, or would it be necessary for the General Assembly to change the system to account for governments depositing public money in their own banks?
6. The proposed initiative calls for a political subdivision bank to be capitalized in the same manner as a private bank including with public money of the subdivision. Current practice of these subdivisions generally requires the appropriation of the entire treasury of the subdivision to pay the expenses of its operation. How would surplus funds be available in the bank for lending for promoting development and enterprise in the state and to promote any purposes authorized by the laws governing the political subdivision?
7. Current Colorado law requires all financial institutions operating in the state to have federal deposit insurance coverage. This underpins Colorado's public deposit protection system, which requires collateralization of public deposits in addition to federal deposit insurance coverage to avoid losses in the event of insolvency of a financial institution. The Bank of North Dakota is not a member of the Federal Deposit Insurance Corporation (FDIC). The state of North Dakota guarantees the deposits in the Bank of North Dakota by the full faith and credit of the state of North Dakota. With respect to the protection of deposits in banks created by local governments under the proposed initiative:

- a. Do the proponents intend for banks created by Colorado local governments to be members of the FDIC?
- b. If not, how, if at all, will local governments back up deposits in the banks they create?
- c. The Bank of North Dakota predates the FDIC and has never chosen or been required to join the FDIC. Do the proponents know whether Colorado or federal financial institution regulators will allow the creation and operation of a bank that is not a member of the FDIC?
- d. If the proponents intend for the full faith and credit of the state of Colorado or the political subdivision creating the bank to back up deposits in the bank, would the requirements of the Taxpayer's Bill of Rights (TABOR), Article X, § 20 of the Colorado constitution be an obstacle to this because the state and other units of government that are not enterprises do not have the ability to levy taxes without voter approval? Would a separate ballot initiative be required to amend or repeal TABOR to make this work?
8. Banking in the United States has generally, with certain exceptions for the operation of the First and Second Banks of the United States early in our history, the Federal Reserve System, and limited efforts by certain states to create their own banks in the early 19th Century, been conducted as a private business activity. Even when the Bank of North Dakota was created, the state of North Dakota acknowledged it was creating an entity that would be conducting a private activity. See www.banknd.nd.gov; G. Edward Griffin, *The Creature from Jekyll Island* (1998). In fact, at the same election where North Dakota voters approved creation of the bank, they also approved North Dakota entering into the grain storage/elevator business. The Colorado constitution contains a variety of provisions that prohibit Colorado and its local governments from operating or participating in private businesses. For example, Article XI of the Colorado constitution generally prohibits the state and local governments from lending or pledging their credit and owning private businesses. Article XI allows local governments to contract debt only after voter approval. Likewise, Article X prohibits the state and local governments from contracting multi-year debt without voter approval. Banks are essentially debtors to their creditor depositors. With respect to these issues:
- a. Would the proponents consider amending Article XI of the Colorado constitution to conform with the authority granted in the proposed initiative to local governments to create and operate banks?
- b. Would the proponents consider amending Article X as necessary to permit the creation of multiple fiscal year obligations by banks created by local governments under this proposed initiative?
9. The Bank of North Dakota has no formal regulatory oversight of its activities other than informational audits provided to the North Dakota Financial Services Commissioner. Do the proponents intend for there to be any regulatory oversight over banks created under the

proposed initiative?

10. The proposed initiative would allow all political subdivisions in Colorado to create and operate a bank. Given that according to the Colorado Department of Local Affairs (See www.dola.colorado.gov) there are over 3,000 active subdivisions that would be eligible to form a bank in Colorado under the proposed initiative is it the proponents intent that:
 - a. The large number of potential government-backed banks would compete with each other for potential depositors?
 - b. The large number of government-backed banks would eventually form some type of alternative to the current private sector banking/financial services industry in Colorado?
 - c. The large number of potential banks that could emerge could affect the safety and soundness of public and private deposits in nongovernmental banks?

11. In the provisions of the proposed initiative dealing with governance of banks created by statutory municipalities and counties, there is reference to the municipal auditor and the county auditor serving on the board of directors. In Colorado, statutory cities and counties do not have official positions of municipal auditor and county auditor, nor is there a "chief county commissioner". Would the proponents consider changing these terms to require another appropriate city official and county official to serve on the board of directors of a bank created by either type of entity?

STATE OF COLORADO

Colorado General Assembly

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MEMORANDUM

April 3, 2012

TO: Earl Staelin and Robert Bows

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2011-2012 #95, concerning the establishment of a state-owned bank

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

This initiative was submitted with proposed initiative 2011-2012 #94. The comments and questions raised in this memorandum will not include comments and questions that were addressed in the memoranda for proposed initiative 2011-2012 #94, except as necessary to fully understand the issues raised by proposed initiative 2011-2012 #95. Comments and questions addressed in the other memorandum may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum. Only new comments and questions are included in this memorandum.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. To make statements and findings about the Bank of North Dakota;
2. To require the state of Colorado to establish and operate a bank;
3. To specify the membership, appointment, and duties of a board of directors, an advisory board, and a president for the state bank;
4. To authorize the bank to lend money at interest to promote development, commerce, industry, and agriculture in the state, to promote home ownership, maintenance and construction of needed infrastructure, education, public health, safety, and other purposes for the general welfare;
5. To specify that the bank has all the powers and authority of other banks chartered by the state of Colorado, except taking deposits of individual citizens, corporations, and other legal entities;
6. To specify that the revenue and income of the bank are not limited and its expenditures and management of its revenue, income, and assets are not restricted except upon sound financial and public policy considerations; and
7. To specify that the provisions of the proposed initiative are self-executing and severable and supersede conflicting state constitutional, state statutory, charter, or other state or local provisions.

Technical Comments

The technical comments and questions set forth in the review and comment memorandum on proposed initiative 2011-2012 #94 are applicable to proposed initiative 2011-2012 #95 and, as such, will not be repeated. However, the following new technical comments and questions have arisen:

1. In the first paragraph after the "THEREFORE" clause, with regard to the second sentence "The bank is authorized to lend money at interest to promote development, commerce, industry, and agriculture in the state, to promote home ownership, maintenance and construction of needed infrastructure, education, public health, safety, and other purposes for the general welfare of its citizens.": [emphasis added]
 - a. If it is the proponents' intent that the bank is authorized to lend money at interest to promote development, commerce, etc., and to promote home ownership, maintenance and construction of needed infrastructure, etc., then the comma before the second "to promote" should be changed to an "and";

- b. The proponents may want to add the word "public" before the word "safety".
2. In the first paragraph after the "THEREFORE" clause, with regard to the third sentence, the comma before the "except that" phrase should be a semicolon.
3. In the second paragraph after the "THEREFORE" clause, with regard to the first sentence, consider changing "should represent" to "that represent".
4. In the third paragraph following the "THEREFORE" clause, "Board of the Bank" should refer to the "board of directors of the bank" for the proper name of the entity.

Substantive Comments and Questions

The substantive comments and questions set forth in the review and comment memorandum on proposed initiative 2011-2012 #94 are applicable to proposed initiative 2011-2012 #95 and, as such, will not be repeated, and are incorporated by reference into this memorandum. In addition, the following new substantive comments and questions have arisen:

1. The "whereas" clauses of the proposed initiative refer repeatedly to the Bank of North Dakota. However, the proposed initiative would prohibit the state bank created in Colorado from receiving deposits from individual citizens, corporations, and other legal entities. Do the proponents realize that this is contrary to the practices of the Bank of North Dakota, which does receive deposits from individuals and businesses? See www.banknd.nd.gov
2. The proposed initiative authorizes capitalization of the state bank from tax and other revenues and funds of the state not otherwise specifically allocated. What do the proponents intend by the terms "not otherwise specifically allocated"? The practice in Colorado has been to establish numerous specific funds for various forms of state revenue, for example, the division of registrations cash fund. Tax and fee revenue flows directly into many of these "cash" funds. Could the term "not otherwise specifically allocated" be construed to prevent money that currently flows into "cash" funds of the state from being deposited in the bank?
3. The proposed initiative calls for the state bank to be capitalized with the state treasury. Current practice in Colorado requires the appropriation of the entire state treasury to pay the expenses of operating state government. How would surplus funds be available in the bank for lending for economic development, commerce, industry, and agriculture, home ownership, maintenance and construction of needed infrastructure, education, public health, safety, and other purposes for the general welfare of the citizens?
4. Since the proposed initiative leaves in place Colorado's existing public deposit protection system, do the proponents intend to require all state revenue to be deposited in the state bank, or would the state continue to be able to use eligible public depositories? If so, who would decide what public money to deposit into the state bank and what to deposit into other eligible public depositories?

5. In the section of the proposed initiative dealing with governance of the state bank, the proposed initiative specifies no terms of office for the members of the board of directors who are not state officials. The same is true of the advisory board. The proponents should consider changes to the language to specify the terms of office of these persons. Also, what do the proponents intend for the length of the terms?
6. The language of the proposed initiative says that the management of the bank will be hired according to the standards of the state civil service system. Do the proponents intend for employees of the bank to be state employees and part of the state personnel system? If so, will the bank's employees be entitled to the same rights as other state employees with respect to hiring and other terms and conditions of employment? If the proponents intend for the bank's employees to be subject to control by the bank's board of directors and management, the proponents should make appropriate changes to the wording of the proposed initiative to reflect this.
7. The proposed initiative calls for the top five officials of the bank to draft rules and regulations for the bank. The rules would be subject to approval of the advisory board, the board of the bank, the General Assembly, and the Governor. Do the proponents intend for the General Assembly to approve these rules in a bill or a resolution? What would happen if the General Assembly refused to approve the rules? What if the Governor vetoed the legislation approving the rules, and the General Assembly failed to override the Governor's veto? Do the proponents intend that the bank would be able to begin to function notwithstanding what the General Assembly and the Governor were to do with respect to the rules and regulations? If so, the proponents should clarify this in the proposed initiative.
8. The proposed initiative is silent with respect to regulation of the state bank. The Bank of North Dakota is not regulated directly by financial regulators in the state of North Dakota or by federal bank officials. Do the proponents also intend that the state bank in Colorado not be regulated as other financial services providers?
9. The proposed initiative is silent as to whether the state bank would become a member of the Federal Deposit Insurance Corporation (FDIC) or whether deposits would be backed by the full faith and credit of the state of Colorado. Deposits in the Bank of North Dakota are backed by the full faith and credit of the state of North Dakota, with no federal deposit insurance. What is the proponents intent with respect to the protection of deposits in the state bank? Would the bank become a member of the FDIC? Would the bank be able to operate without FDIC insurance? The proponents should make changes to the wording to indicate whether debts and obligations of the bank would or would not be backed by the full faith and credit of the state of Colorado.
10. If the proponents intend for the full faith and credit of the state of Colorado to back up deposits in the bank, would the requirements of the Taxpayer's Bill of Rights (TABOR), Article X, § 20 of the Colorado constitution, be an obstacle to this because the state cannot levy taxes without voter approval? Would a separate ballot initiative be required to amend or repeal TABOR to make this work?

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.

(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

Filed brief contains a CD with an audio recording that we are unable to upload to our website.