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Original Proceeding Pursuant to § 1-40-107(2), C.R.S. (2011) Appeal from the Ballot Title Board	▪ COURT USE ONLY ▪
In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2011-2012 #94 and #95 **Petitioners:** Barbara M. A. Walker and Don Childears; **v.** **Respondents:** Proponents Earl Staelin and Robert Bows; and Suzanne Staiert, Dan Domenico, and Jason Gelander, in their capacities as members of the Colorado Title Setting Board.	Supreme Court Case No.: 2012SA130 (consolidated with 2012SA131 & 2012SA132)
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OPENING BRIEF OF PETITIONER BARBARA M. A. WALKER

CERTIFICATE OF COMPLIANCE

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

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

Choose one:

☐ It contains _____ words.

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☒ For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

☐ For the party responding to the issue:

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

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

Nathaniel S. Barker
Attorney for Petitioner Barbara M. A. Walker

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2. Under Colorado constitutional and statutory provisions concerning the procedural requirements for a valid proposed initiative, does the Ballot Title Board have jurisdiction to consider an initiative's title when proponents submit their proposed initiative with extraneous, argumentative recitals that appear above the constitutionally mandated enacting clause and that are not intended to be enacted into law?

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Respondents Earl Staelin and Robert Bows (collectively, "Proponents") submitted Proposed Ballot Initiatives #94 ("Initiative 94") and #95 ("Initiative 95") (collectively, "Initiatives") to Colorado Legislative Council for statutorily mandated review on April 3, 2012, the last possible day for submission of an initiative intended for inclusion on the 2012 General Election Ballot. On April 6, 2012, Legislative Council and the Office of Legislative Legal Services held a

review and comment hearing at which Proponents addressed numerous technical and substantive questions and comments. *See generally* Legis. Council Memo. re: Init. 94, Apr. 3, 2012 (attached as Exhibit A); Legis. Council Memo. re: Init. 95, Apr. 3, 2012 (attached as Exhibit B). Later that same day, only minutes before the deadline to file a proposed initiative for potential placement on the 2012 General Election Ballot, Proponents submitted the Initiatives to the Secretary of State for title setting. *See* 2011-2012 #94 – Final (attached as Exhibit C); 2011-2012 #95 – Final (attached as Exhibit D).

Subsequently, on April 18, 2012, the Ballot Title Board (the "Board") convened a hearing and set titles for both Initiatives. Ms. Walker, a registered Colorado elector, filed a timely Motion for Rehearing as to each Initiative. *See generally* Mot. for Reh'g on Init. 94, Apr. 25, 2012 (attached as Exhibit E); Mot. for Reh'g on Init. 95, Apr. 25, 2012 (attached as Exhibit F). Both motions were denied, except to the extent that the Board made changes to the Initiatives' titles. *See* Init. 94 Tit. as Designated and Fixed by the Bd., Apr. 26, 2012 (attached as Exhibit G) at 1; Init. 95 Tit. as Designated and Fixed by the Bd., Apr. 26, 2012 (attached as Exhibit H) at 2. Ms. Walker timely petitioned this Court for review of the Board's decision to exercise jurisdiction and set the Initiatives' titles. *See* Pet. for Rev. of Final Action of Tit. Setting Bd. Concerning Proposed Init. 2011-2012

No. 94, May 1, 2012; Pet. for Rev. of Final Action of Tit. Setting Bd. Concerning Proposed Init. 2011-2012 No. 95, May 1, 2012.

II. STATEMENT OF FACTS

When Proponents submitted the Initiatives to Legislative Council for review and comment, each Initiative included a series of ten recitals, each beginning with the word, "WHEREAS" (the "Recitals"). *See* 2011-2012 #94 – Original (attached as Exhibit I); 2011-2012 #95 – Original (attached as Exhibit J). In its review and comment memoranda, Legislative Council not only asked Proponents whether they intended the Recitals to be included in the Colorado constitution if the Initiatives were enacted, but also instructed Proponents regarding the proper form that any submission to the Secretary of State must follow. *See* Exh. A at 2-5; Exh. B at 2-3.

Specifically, Proponents were told that if they intended to include the Recitals as part of the Colorado constitution, Proponents should include them as a "subsection to the new section . . . of the constitution." *See* Exh. A at 2; Exh. B at 2 (incorporating technical comments regarding Initiative 94). Additionally, Legislative Council told Proponents that, in order to comply with the Colorado constitution, the enacting clause must appear directly above any text that will be added to the constitution. *Id.* Finally, Proponents were instructed regarding the proper form of amending clause that should appear between the Recitals and the

intended language to be added to the Colorado constitution. *See* Exh. A at 3.

Proponents later clearly admitted that their intent is that the Recitals will not be enacted into law and will not appear in the Colorado constitution if either Initiative is adopted by Colorado voters. *See* Tr. of Tit. Bd. Reh'g Re: Initiatives 94 and 95, Apr. 26, 2012 (attached as Exhibit K) at 55:14-18; 56:3-4 (statement of Mr. Staelin). Despite the Legislative Council's instructions and Proponents' intent, Proponents submitted the Initiatives in a non-compliant form. Each Initiative opens with a caption and nine Recitals, followed by the constitutionally required enacting clause, and finally followed by the text which Proponents intend to be enacted. *See generally* Exh. C; Exh. D. Thus, despite Legislative Council's instructions, Proponents included the Recitals in their final submission even though they do not intend for the Recitals to be enacted into law. *See* Exh. K at 55:14-56:1 (statement of Mr. Staelin).

Additionally, although Colorado statutes require each and every proponent to attend any Board meeting at which their proposed initiative will be considered, one Proponent was absent from the April 26, 2012 Board Rehearing on the Initiatives. *Id.* at 12:24-13:8. Mr. Bows's absence troubled the Board, but because the Board could not identify the proper remedy, it moved forward with the rehearings, including amending each Initiative's title. *See* Exh. G; Exh. H.

SUMMARY OF THE ARGUMENT

The Board does not have jurisdiction to consider or set the title for any initiative when the proponents do not each appear at a Board meeting at which the proposed initiative is considered. C.R.S. § 1-40-106(4)(a), (d). Because Mr. Bows did not attend the April 26, 2012 rehearings, the Board improperly exercised jurisdiction in proceeding with the rehearings and amending the Initiatives' titles.

Additionally, the Board does not have jurisdiction to set the title for any initiative that does not comply with constitutional and statutory formatting requirements. Colo. Const. art. V, § 1(2), (8); C.R.S. § 1-40-105(4). Because the Initiatives include extraneous, argumentative Recitals above the enacting clause that are not intended to be enacted into law, Proponents failed to follow those formatting requirements, and the Board improperly exercised jurisdiction in setting the title for both Initiatives.

STANDARD OF REVIEW

Whether the Title Board has jurisdiction to set an initiative's title is a question of law that this Court reviews *de novo*. *See, e.g., In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 #219*, 999 P.2d 819, 820-22 (Colo. 2000) (implicitly construing *de novo* C.R.S. § 1-40-107(1), which grants Board jurisdiction over motions for rehearing). Ms. Walker preserved both issues

presented for review by: 1) incorporating Mr. Childears's argument regarding the jurisdictional effect of Mr. Bows's absence from the Title Board rehearings, Exh. K at 17:14-18 (statement of Ms. Walker's counsel); and 2) arguing in her Motions for Rehearing and at the rehearings that Proponents submitted both Initiatives in an improper form, *see* Exh. E at 1; Exh. F at 1; Exh. K at 17:19-22:7 (statement of Ms. Walker's counsel).

ARGUMENT

I. THE BOARD IMPROPERLY EXERCISED JURISDICTION IN SETTING THE INITIATIVES' TITLES BECAUSE ONE OF THE PROPONENTS WAS ABSENT FROM THE REHEARING ON THE INITIATIVES.

Colorado law unequivocally requires that proponents of an initiative must designate two representatives to represent the proponents' interests and receive notice regarding the initiative, C.R.S. § 1-40-104, and that both designated representatives must "appear at any title board meeting at which the . . . ballot issue is considered," *id.* § 1-40-106(4)(a). Additionally, each designated representative must affirm that he or she is familiar with the requirements of Title 1, Article 40 governing initiatives, including the attendance requirement. *Id.* § 1-40-106(4)(b). The Board is deprived of jurisdiction to set the title of any initiative if either of the proponents "fails to appear at a title board meeting. . . .", and the Board may consider the issue at its next meeting, presumably when both proponents are

present. *Id.* § 1-40-106(4)(d).

Here, because Mr. Bows, one of each Initative's designated representatives, undisputedly did not appear at the April 26, 2012 rehearings on either Initiative, the Board improperly exercised jurisdiction to consider them. Exh. K at 12:24-13:8 (statement of Mr. Staelin). When the failure of both Proponents to appear was brought to the Board's attention, the Board—unsure of the proper remedy—nevertheless proceeded to hear Ms. Walker's and Mr. Childears's objections to the Initiatives, and even made changes to the title it had already set for each Initiative. *See* Exh. G; Exh. H.

In determining it had jurisdiction to proceed with the rehearing on the Initiatives, the Board specifically ignored clear statutory language that unequivocally requires proponents to attend all Board meetings at which their measure is considered. § 1-40-106(4)(a). Indeed, the Board is explicitly deprived of jurisdiction to consider any measure when either of its designated representatives are absent, regardless of how this Court reads the attendance requirement. *Id.* § 1-40-106(4)(d). Despite the Board's concerns, the proper remedy when any proponent is absent from a title board meeting is that consideration of the initiative is continued until the next meeting. *Id.* The clear language of section 1-40-106(4)(d) provides the remedy for failure of proponents

to appear at any "title board meeting," without exclusion. *Id.*

Proponents may argue that section 1-40-106(4)(d) applies only to meetings at which a title is actually set, and thus an alternative remedy for failure to attend is required. That is simply not the case. But even if it is, both proponents are required to attend a rehearing on their measure by the plain language of section 1-40-106(4)(a). The attendance requirement is the same under both 1-40-106(4)(a) and (4)(d), and therefore the remedy must also be the same.

Here, the Board set each Initiative's title at the original April 18, 2012 hearing, at which both Proponents appeared. Thus, Proponents could claim, they satisfied the attendance requirement such that it would be improper for the Board to continue the April 26, 2012 rehearing to the next scheduled Board meeting because section 1-40-106(4)(d) does not apply when a title has already been set.

This argument misses the mark for two reasons. First, the Board actually amended each Initiative's title at the April 26, 2012 rehearings. *See* Exh. G; Exh. H. Thus, although the titles had been previously drafted, they were not finally set until the rehearings. Refusing to apply *any* remedy to Proponents' failure each to attend the rehearings runs afoul of the attendance requirement, which is clearly articulated in section 1-40-106(4)(a).

Second, because this argument ignores that section 1-40-106(4)(a) requires

each Proponent's attendance at the rehearing, objectors are left without a remedy only if this Court does not apply section 1-40-106(4)(d) to rehearings subsequent to title setting. The law clearly requires that, "[e]ach designated representative . . . shall appear at any title board meeting at which the . . . ballot issue is considered." § 1-40-106(a). This requirement applies to *all* Board meetings, not just those at which a title is set. The Board's broad discretion does not encompass ignoring this validly enacted procedural requirements. Mr. Bows was absent from the April 26, 2012 rehearing in clear violation of section 1-40-106(a), and the Board could not proceed with any business related to the Initiatives in his absence.

Taken as a whole, the initiative statutes clearly deprive the Board of jurisdiction to proceed when proponents fail to appear at a Board rehearing. § 1-40-106(4)(a), (d). The proper procedure is to continue the rehearing until the Board's next meeting, at which proponents must appear. *Id.* § 1-40-106(4)(d). Until the motion for rehearing is resolved at a Board meeting attended by each proponent, proponents cannot move forward with the initiative process, including submitting their petition form to the Secretary of State or collecting signatures. *Id.* § 1-40-107(4). This is the only proper reading of the entire initiative scheme, as it upholds the clear language of the appearance requirement, *id.* § 1-40-106(4)(a), (d), while also protecting objectors' right to be heard, *id.* § 1-40-107(1), regardless

of whether section 1-40-106(4)(a) or section 1-40-106(4)(d), or both, apply to this case.

Therefore, the Board improperly exercised jurisdiction to consider Ms. Walker's Motions for Rehearing when one of the Proponents was undisputedly absent from the rehearings.

II. THE BOARD IMPROPERLY EXERCISED JURISDICTION IN SETTING THE INITIATIVES' TITLES BECAUSE PROPONENTS DID NOT SUBMIT THE INITIATIVES IN THE CONSTITUTIONALLY MANDATED FORM.

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'." Colo. Const. art. V, § 1(8). Additionally, every initiative petition submitted to the Secretary of State "shall include the full text of the measure. . . ." Colo. Const. art. V, § 1(2).

Here, because of errors made by Proponents, the Initiatives cannot comply with both constitutional requirements. The enacting clause must precede the text of any ballot measure. *See* Colo. Const. art. V, § 1(8). Here, the Recitals precede the enacting clause, and thus cannot be included on petitions or the ballot without violating section 1(8). On the other hand, the "full text" of a measure must appear on petitions for the measure. *See* Colo. Const. art. V, § 1(2). However, because the full text here does not comply with section 1(8), it may not appear on petitions.

By misplacing the enacting clause and including extraneous Recitals in the final text of the Initiatives submitted to the Secretary of State pursuant to C.R.S. 1-40-105(4), Proponents have doomed their own measures.

Thus, Proponents did not meet the procedural requirements of section 1(2), section 1(8), or section 1-40-105(4) when they submitted language that they do not intend to be enacted into law above the enacting clause. Indeed, the Board admitted that it did not know how to classify the nine Recitals that appear above the enacting clause in each Initiative; whether those clauses would appear on ballot petitions; or whether and when those clauses would be dropped from the Initiative, as Proponents intend. *See* Exh. K at 26:17-27:5 (statement of Board Member Domenico). Nevertheless, the Board proceeded to consider the Initiatives and revise the titles. *See* Exh. G; Exh. H.[1]

Instead, the Board should have recognized the constitutional requirements, and that the Board does not have jurisdiction to consider the Initiatives based on these procedural shortcomings. *See in re Petition on Campaign and Political*

[1] Notably, this Court should presume that the Secretary of State, "properly determined the sufficiency of the filing of a petition." *In re Petition on Campaign and Political Finance*, 877 P.2d 311, 315 (Colo. 1994). Thus, although Ms. Walker carries the burden of proving procedural *non*-compliance, the Board is deprived of jurisdiction to consider the Initiatives so long as Ms. Walker can identify a procedural defect in the submissions. *See id.* at 316 (noting that petitioner did not show any defect that would destroy Board's jurisdiction).

Finance, 877 P.2d at 315-16 (implying that Board may not consider initiatives that fail to comply with procedural filing requirements). The Board erred, therefore, in considering the Initiatives in their current form.

Proponents' failure to comply with these requirements cannot be excused. Proponents acknowledged by affidavit pursuant to section 1-40-106(4)(b) that they were aware of the legal requirements surrounding initiatives. Further, the Legislative Council told Proponents what were the correct procedural requirements, including proper placement of the enacting clause, as well as the preferred placement of the amending clause following the Recitals. Exh. A at 2-3. Had Proponents followed those instructions, as clearly laid out in at the review and comment memoranda, the Initiatives would comply with the constitutionally mandated procedural requirements. Proponents chose, instead, to submit non-conforming Initiatives. *See generally* Exh. C; Exh. D.

Proponents will likely argue that rejecting the Initiatives on these grounds will violate the requirement that this Court liberally construe initiative statutes to "allow the greatest possible exercise of this valuable right." *City of Glendale v. Buchanan*, 578 P.2d 221, 224 (Colo. 1978). Here, requiring Proponents to resubmit the Initiatives in proper form to the Secretary of State would prevent the Initiatives from appearing on the 2012 General Election Ballot. *See* C.R.S. § 1-40-

106(1) ("[T]he last meeting [of the Board] shall be held no later than the third Wednesday in April in the year in which the measure is to be voted on."). However, this outcome is irrelevant to this Court's analysis. Proponents themselves chose to submit the Initiatives without sufficient time to cure any defects and still include the Initiatives on this year's ballot. It is Proponents' failure to comply with constitutional requirements that prevents the Initiatives from appearing on this year's ballot. Nothing, however, precludes Proponents from resubmitting properly formatted initiatives for inclusion on a future ballot.

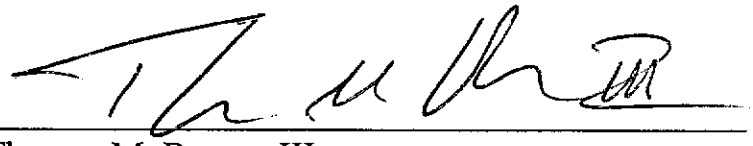
Thus, the Board improperly exercised jurisdiction in setting the Initiatives' titles when the Initiatives were submitted in an impermissible format.

CONCLUSION

For these reasons, the Board improperly exercised jurisdiction in setting the Initiatives' titles. Proponents failed to comply with statutorily mandated attendance at the April 26, 2012 Rehearing on the Initiatives, and they failed to comply with constitutionally mandated requirements for submitting the Initiatives to the Secretary of State. Because of these failures, Ms. Walker respectfully requests that this Court: 1) hold that the Board does not have jurisdiction to set the Initiative's title until such time as Proponents cure these jurisdictional defects; and 2) remand the Initiatives to the Board for further action consistent with this Court's holding.

DATED: May 15, 2012

ROTHGERBER JOHNSON & LYONS LLP



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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2012, a true and correct copy of the foregoing **OPENING BRIEF OF PETITIONER BARBARA M. A. WALKER** was served via FedEx overnight or hand delivery to the following:

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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 subdvisions - 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?

RECEIVED
APR 0 6 2012 S.WARD 2:54 P.M.
ELECTIONS/LICENSING
SECRETARY OF STATE

Proposed Constitutional Amendment for the State of Colorado
To Authorize the Establishment of Banks Owned by Political Subdivisions of the State
To Be Numbered as Article X, Section 22

WHEREAS, since 1919 the People of North Dakota have owned and benefited from the successful operation of the Bank of North Dakota, the specific purpose of which has been to provide an in-state repository for the holding, management and distribution of the fees and taxes collected from the operation of the government of North Dakota; and-

WHEREAS, the Bank of North Dakota is limited in its scope and purpose to make funds available for state, city, and county government operations, to benefit the People and communities of North Dakota, and to provide correspondent banking services for chartered members; and

WHEREAS, the People of North Dakota have significantly benefited from the Bank of North Dakota which has paid the state treasurer more than three hundred twenty-five million dollars ($325,000,000) from bank profits over the past ten years; and

WHEREAS, the Bank of North Dakota is attributed with being the cause for the North Dakota economy topping the list of state economies year after year, and with being the only State that has had a continuous budget surplus since before the financial crisis of 2008; and while the rest of America has been enduring a recession, the state of North Dakota has enjoyed the largest budget surplus in its history; and

WHEREAS, the Bank of North Dakota is attributed with being the cause why in 2011 the People of North Dakota saw almost five hundred million dollars ($500,000,000) returned to them in income and property tax cuts and will enjoy a thirty percent (30%) decrease in tax liability when combining 2009-2011 tax cuts; and

WHEREAS, the Bank of North Dakota is attributed with being the cause why North Dakota has the lowest foreclosure rate, the lowest credit card default rate, and the lowest unemployment rate (3.3%) of any State in the nation; and

WHEREAS, banks in the state of Colorado are failing at a rate five times greater than banks in other parts of the United States; and-

WHEREAS, small businesses in the state of Colorado have experienced great difficulties in obtaining necessary capital as a result of the recession that began in 2008 and which result from the monetary policies of the national banking system under the control of the Federal Reserve System; and

WHEREAS, most or all of the above advantages of a State-Owned Bank can also be realized by a city, county, or other political subdivision of the state of Colorado by establishing its own bank modeled on the State Bank of North Dakota;

, Be it Enacted by the People of the state of Colorado:

In the constitution of the state of Colorado, add section 22 to article X as follows:

(1) **Authorization of Political Subdivisions to Establish Banks.** Any county, municipality, or political subdivision of the state may engage in banking or establish a bank, and may lend money at interest or at no interest to promote development and enterprise in the state and to promote any purpose authorized by the laws governing such political subdivision. Any such bank shall have the same powers and authority of other banks chartered by the State of Colorado, as well as the power and authority to deposit public revenues and funds in its own bank, except as expanded or limited by the General Assembly, . 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. All provisions of this section are self-executing and severable and supersede any conflicting state constitutional, state statutory, state chartered, or other state or local provisions.

(2) **Governance of Banks.**

(a) **Governance of Banks Established by Statutory Municipalities**: In the event a statutory municipality of the state establishes a bank, its board of directors shall consist of the mayor, the municipal attorney, and the chief financial officer of the municipality. The capitalization of such bank may include all revenues, funds, and other assets of the municipality that would normally be deposited or held in a financial institution or designated as collateral by a financial institution.

(b) **Governance of Banks Established by Statutory Counties:** In the event a statutory county of the state establishes a bank, its board of directors shall consist of acounty commissioner designated by the county commission,, the district attorney, and the chief financial officer of the county. The capitalization of such bank may include all revenues, funds, and other assets of the county that would normally be deposited or held in a financial institution or designated as collateral by a financial institution.

(c) **Governance of Banks Established by Home Rule Municipalities**: In the event a home rule municipality establishes a bank, its board of directors shall consist of at least three elected officials, to consist of the chief executive officer of said municipality (the mayor or equivalent) and two others to be determined by the enabling legislation.

(d) **Governance of Banks Established by Home Rule Counties:** In the event a home rule county establishes a bank, its board of directors shall consist of at least three elected officials, to be determined by the enabling legislation.

(e) **Governance of Banks Established by Political Subdivisions other than Cities and/or Counties:** In the event a political subdivision that is not a municipality or county establishes a bank, its board of directors shall consist of at least three elected officials, to be determined by the enabling legislation.

(f) **Governance of Banks Established by Political Subdivisions that are both a City and a County:** In the event a political subdivision that is both a city and a county establishes a bank, its board of directors shall consist of at least three elected officials, to be determined by the enabling legislation.

(3) **Capitalization of Banks Established by Any Political Subdivision:** Banks established

by statutory municipalities, statutory counties, home rule municipalities, home rule counties, political subdivisions of the state other than cities or counties, and political subdivisions that are both a city and a county may be capitalized by the same means available to, and subject to the same minimums prescribed for banks that are privately owned, owned by publicly held corporations, or chartered by this state or the United States. Such means may include bonds, tax revenues, funds, and other assets of the political subdivision that may be so designated for this purpose. Political subdivisions not meeting minimum capitalization requirements may deposit their revenues and funds in banks established by other political subdivisions of the state of Colorado and/or a bank established by the state of Colorado.

(4) **Insured Deposits of Banks Established by Any Political Subdivision:** Banks established by statutory municipalities, statutory counties, home rule manicipalities, home rule counties, political subdivisions of the state other than cities or counties, and political subdivisions that are both a city and a county may forego FDIC insurance and self-insure their deposits, the debts and obligations of such banks being backed by the full faith and credit of the political subdivision.

(5) **Regulatory Oversight:** The General Assembly may provide guidelines enforced by the Colorado Banking Board and the Colorado Commissioner of Financial Services for the oversight of banks established by statutory municipalities, statutory counties, home rule municipalities, home rule counties, political subdivisions of the state other than cities or counties, and political subdivisions that are both a city and a county, including auditing requirements.