

SUPREME COURT, STATE OF COLORADO  
2 East 14th Avenue, Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO  
C.R.S. § 1-40-107(2)

Petitioners:  
Earl Staelin and David Runco, Proponents

v.

Respondents:  
Title Board:  
Jason Gelender, Troy Bratton, and David Blake

v.

Respondents:  
Don Childears, Objector  
Barbara M.A. Walker, Objector

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Attorney for the Petitioners:

Earl H. Staelin  
Attorney at Law  
1873 S. Bellaire St., Suite 1401 Denver CO  
80222720-457-7057  
Fax 303-753-3747 Email: [estaelin@comcast.net](mailto:estaelin@comcast.net)

Supreme Court Case Number:

2016SA148

**REPLY BRIEF OF PETITIONERS  
EARL STAELIN AND DAVID RUNCO**

## 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 reply brief complies with C.A.R. 28(g) because it contains 2,084 words.

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

For the party raising the issue:

\_\_\_ (Not Applicable to Reply Brief) The brief contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.\_\_\_\_\_, p.\_\_\_\_\_), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

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

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

/s/ Earl H. Staelin  
Attorney for Proponents

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## SUMMARY OF ARGUMENT

Respondent Objectors and the Title Board all exaggerate the significance of the revision regarding marijuana deposits, ignore the fact that acceptance of marijuana deposits was optional in the original proposal as in the second, and ignore relevant statements made on the point by Proponents at the Title Board rehearing. They fail to show how the bank in the revised initiative would have any less or different authority to decide whether or not to accept deposits from the marijuana industry than in the original version. The revision provided clarification and not a substantial change of substance. The cases cited by Respondents are clearly distinguishable from the case at bar.

## PRESERVATION OF ISSUES AND STANDARD OF REVIEW

Proponents also preserved the issue regarding deposits from marijuana businesses in their written response filed at the rehearing of the Title Board.

## ARGUMENT

- A. Respondents fail to show how the changes made to the initiative after the Review and Comment hearing were substantial or that they did not help clarify the procedure for determining whether the bank would accept deposits of marijuana businesses.

At the rehearing of the Title Board on April 28, 2016 Mr. Staelin made the following statement when asked to state Proponents' response to Objectors' assertion that the revised proposal contained a substantial revision:

(7:14 – 8:24) Mr. Staelin: Yes, I made the point--there really is not a difference here. *The measure (paragraph 3(d)) does not require the board to take deposits of marijuana businesses. It leaves that open, it's a complex issue. There are other efforts underway to do that. The bank would still have to get approval we, believe, from federal authorities if that were done.* It's just one of many things that the bank would be doing. And I think it's very proper to reserve that for later determination when the board would be---with the advice of the advisory board that is to be set up, its management, and with review by the General Assembly, would decide, among other things, who may be a depositor at the bank. And the word is "substantial"; this is not a substantial change. I think it's more appropriate administratively, and it certainly does not make it a second subject. (parenthetical matter added)(emphasis added)

Thus, under the initial proposal, whether the bank will take marijuana deposits is to be decided by the bank through the action of its management and board, with advice from its advisory board. In the revised proposal, approval is also required by the General Assembly, a provision that was added in direct response to Questions 14(a) and (d) from the legislative staff.

The revised measure clarifies that that decision will be incorporated in the rules and regulations. As stated, efforts have already been taken by the General Assembly to solve the deposit problem of marijuana businesses by authorizing credit unions to take such deposits. Moreover, federal approval is required, meaning that the ultimate solution is not in the hands of Colorado authorities, although federal action by the Treasury Department has already been taken to approve such deposits, and a lawsuit is pending in U.S. District Court in Colorado to challenge the refusal of the Federal Reserve System to authorize acceptance of such deposits despite the action of the U.S. Treasury Department.<sup>1</sup> In addition, federal legislation as well as a proposed amendment to the financial services appropriation bill have been introduced by Senator Jeff Markley of Oregon to solve the problem.<sup>2</sup> The fact that 23 states have now legalized marijuana for medical or others purposes makes the solution of this problem urgent. For all these reasons,

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<sup>1</sup> “Banking on the Marijuana Industry? One senator has moved to make it easier for banks to work with businesses that legally sell pot”, *U.S. News & World Report*, by Brian MacIver, November 25, 2015 (Exhibit A attached)

<http://www.usnews.com/news/articles/2015/11/25/banking-on-the-marijuana-industry>

<sup>2</sup> “Between Pot and a Hard Place: Fed Rejects Colorado Marijuana Bank”, NBC News, by *Associated Press*, October 22, 2015 (Exhibit B attached)

<http://www.nbcnews.com/storyline/legal-pot/between-pot-hard-place-fed-rejects-colorado-marijuana-bank-n449536>

the possibility that the state owned bank would be needed or capable of providing a timely solution to the problem appears remote, and it might have been misleading and have provided unreasonable expectations to marijuana businesses and the public to leave it in subsection 3(d) unchanged, as opposed to moving it to 6(b) where it is appropriately de-emphasized to recognize that it is a remote possibility.

Mr. Blake also asked the following question:

(8:25) Mr. Blake: What's your response to Mr. Dunn's argument that if it's not, I want to quote, since the Proponents stated at the Review and Comment hearing that marijuana was the idea. Was the idea for the provision? Was the idea for initiative 127? Was the—goes on to say the provision was written because the marijuana industry in Colorado needs a lawful place to deposit its money, so if that was the purpose and it was struck, Mr. Dunn is arguing that then, that's another subject. So what's your response to that?

(9:14) Mr. Staelin: It wasn't the idea of the measure as a whole. That one provision talks about a lawful business that does not have banking, and the answer to the question was, we did have in mind marijuana businesses. The reason for that is that one major purpose of a bank is to provide a place for safekeeping of money, and there is a problem right now, with the marijuana businesses that they have money without any really safe place to store it, which creates problems of safety, and potential crime, and other related issues, and we think because the banking situation does not adequately provide for that, *that should not be ruled off base for the bank. There are other ways that could be solved, and I've heard there are ways it's already being solved<sup>3</sup>, so in some ways it's just a possibility, maybe even*

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<sup>3</sup> Proponents' counsel has heard that some marijuana businesses contract with management companies who make bank deposits of their money



*remote, that it would be done, certainly not obligatory.* (emphasis added)

Mr. Blake then asked the following questions and received these answers:

(10:28) Mr. Blake: I guess the question is, why did you strike it? If staff drafting didn't ask you to, and it was in there originally and it had a clear purpose, why did you strike it?

(10:41) Mr. Staelin: One reason was, I assumed they'd raise the argument that we're trying to appeal to the marijuana industry to get it passed, or that it's a second subject, and I think it unduly highlights that particular issue. So we think it's one which is better deferred to the board, with full review and a chance for the General Assembly to review it, like all of the other regulations of the bank.

(11:10) Mr. Blake: If you did it to avoid an argument in opposition, doesn't that make it a substantive provision?

(11:20) Mr. Staelin: I don't think so. If the (original) provision places undue emphasis on one relatively minor part of the whole banking, public banking proposal, I don't think it (the change) is substantial. As I said, it's an optional provision. There's no requirement. There's no requirement that it consider that (i.e. taking deposits of marijuana businesses in the original proposal). ...  
(parenthetical matter added)

To summarize, the substance of the original proposal and the revised proposal regarding deposits both make it optional whether the bank will take deposits of marijuana businesses. After the hearing before the legislative staff but before filing the revised proposal with the Secretary of State, Proponents realized that the likelihood of the bank being able to resolve the banking problem of marijuana businesses due to its predominantly federal nature and the likelihood that it would be resolved before the bank could become involved were remote, and that therefore

it was appropriate to revise the proposal to clarify the procedure for deciding whether to accept deposits from the marijuana industry. The revised proposal clarifies the mechanism for how that decision will be made, and adds review by the General Assembly of the decision, which was in direct response to questions 14(a) and (d) by the legislative staff. In conclusion, the revision regarding marijuana deposits was neither substantial nor substantive, helped to clarify the procedure for deciding whether to accept such deposits, and does not make it a second subject.

B. The cases cited by Objectors are clearly distinguishable from the present case.

*In In re Proposed Initiated Constitutional Amendment Concerning Ltd. Gaming in the Town of Idaho Springs*, 830 P.2d 963 (Colo.1992) the proponents consistently represented to the legislative staff that gaming was proposed for only one city, Idaho Springs, but the final proposal authorized gaming in a number of cities. This court characterized the effects of a “substantial” change such as that in *Limited Gaming* as being to create “an entirely different proposal from the one previously reviewed by the legislative offices” (830 P.2d at 967-968). In no way can it be said that the revision in initiative #127 made it “an entirely different proposal” from the original version regarding deposits. Instead, it is difficult to

identify any practical difference between the effects of the original and revised versions regarding deposits from the marijuana industry.

Objector Walker's Opening Brief cites the case *In Re: The Matter of Title, Ballot Title and Submission Clause, and Summary Adopted May 16, 1990, by the Board and Pertaining to the Proposed Initiative Under the Designation "Tax Reform"*, 797 P.2d 1283 (Colo. 1990). In that case the revised "May Initiative" removed "many provisions" that were in the "April Initiative" that was reviewed and commented upon by the legislative staff. The removal of "many provisions" is entirely different from the present case where the decision of whether to allow marijuana businesses to make deposits was moved from one section to a different section which clarified that the determination whether to accept such deposits would come under the broader authority of the bank to decide "who may be a depositor", but which had the same practical effect.

Respondents claim that the public, including the marijuana industry, would not understand the change made in the revised proposal because it is "hidden". As explained above, the revised proposal merely provides a more accurate reflection of the remote possibility of the bank taking such deposits and the procedure required in order to make that decision.

Respondents also claim that subsection 3(d) is a “central” feature or “core” feature of the bank. Proponents submit that whether 3(d) is a central feature is not relevant, but only whether the revised version involves a substantial change. In any event section 3(d) is not a central feature because it merely offers the possibility that the bank may help seek a solution to the marijuana’s industry’s banking problem in the event it is not resolved by other efforts in the meantime. While the amount of deposits of marijuana businesses might be substantial, e.g. in millions of dollars at one time, that would likely be a tiny fraction of the deposits of the bank consisting of all state deposits, which would be in the billions of dollars. Further, by creating an option for the bank to decide to accept such deposits, however remote the possibility, the bank would be fulfilling some of its purposes---to promote public safety and the general welfare (subsection 3(a)). According to the initiative, the bank will not commence operations until January 1, 2018 (subsection 6(a)), and after that would need time to hire a president and key employees, appoint an advisory board, draft and approve rules and regulations, and submit them to the General Assembly, all of which might reasonably require another six to twelve months, or up to 2½ years from the present. With all the effort put into resolving the marijuana deposit problem in Colorado and at the

federal level in the meantime, one would think that the problem will be solved by then, making the possibility of a state-owned bank role in the solution very remote.

In order to “liberally construe” statutes governing initiatives such as C.R.S. §1-40-105(2) to “allow the greatest possible exercise of this valuable right”, we submit that the revision concerning marijuana deposits must be determined to be not “substantial”. *City of Glendale v. Buchanan*, 578 P. 2d 221, 224 (Colo. 1978).

### CONCLUSION

For the foregoing reasons, Proponents request that the Court reverse the action of the Title Board granting the motion for rehearing of Objector Childears and remand the case for further action by the Title Board.

Dated: May 31, 2016

Respectfully submitted,

/s Earl H. Staelin

Earl H. Staelin

Attorney at Law

1873 S. Bellaire St. Suite 1401

Denver, CO 80222

Attorney for Proponents

Earl Staelin and David Runco

## CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2016, the Petitioners' REPLY BRIEF was filed with the Court and served upon counsel below via email by consent to counsel at their addresses listed below:

/s Earl H. Staelin

W. Eric Kuhn  
Senior Assistant Attorney General  
Office of the Attorney General  
1300 Broadway, 10th Floor  
Denver, CO 80203  
[eric.kuhn@coag.gov](mailto:eric.kuhn@coag.gov)  
Attorneys for the Title Board

Jason R. Dunn and David Meschke  
Brownstein Hyatt Farber Schreck LLP  
410 17th Street, #2200  
Denver, Colorado 80202  
[jdunn@bhfs.com](mailto:jdunn@bhfs.com)  
Attorneys for Don Childears, Objector

Deanne R. Stodden  
Coane, Payton, and Payne, LLC  
999 18<sup>th</sup> Street, Suite S1500  
Denver, CO 80202  
[dstodden@cp2law.com](mailto:dstodden@cp2law.com)  
Attorneys for Barbara M.A. Walters, Objector

# US News & World Report

<http://www.usnews.com/news/articles/2015/11/25/banking-on-the-marijuana-industry> DATE FILED: May 31, 2016 11:11 PM

## Banking on the Marijuana Industry?

**One senator has moved to make it easier for banks to work with businesses that legally sell pot**

By [Brian MacIver](#) | Contributor Nov. 25, 2015, at 1:46 p.m.



Customers shop inside The Grass Station recreational marijuana store in Denver, Colo., on Sept. 16, 2015. Brennan Linsley/AP

It is legal to sell marijuana in 23 states. But pot businesses can't deposit their money in banks because of federal banking laws. While the dilemma has been a back-burner issue in Congress for several years, a solution may be in the works.

A provision in the upcoming financial services spending bill would prevent the federal government from spending money on penalizing financial institutions that accept legal marijuana businesses as clients. That would greatly reduce the ability of federal agencies' to prosecute the banks.

Increased access to banking would, in turn, decrease the currently cash-only businesses' risk of robbery by allowing customers to pay with debit and credit cards, reduce the likelihood that the business could be used as a money-laundering front and solve the nightmare of trying to pay taxes with cash.

"Forcing businessmen and businesswomen who are operating legally under Oregon state law to shuttle around gym bags full of cash is an invitation to crime and malfeasance," said Sen. Jeff Merkley, D-Ore. "It's time to let banks serve these legal businesses without fearing devastating reprisals from the federal government."

Merkley, whose state has legalized the sale of recreational and medical marijuana, proposed a bill that would grant immunity from federal prosecution to financial institutions that have pot shops as clients. However, the bill has been stuck in the Senate Banking, Housing and Urban Affairs committee since July.

Committee Chairman Richard Shelby, R-Ala., confirmed Tuesday that he has no plans to bring the bill up for mark-up in his committee.

So Merkley came up with a workaround: using the financial services appropriations bill as a means to achieve the goal of allowing banks to serve marijuana dispensaries. Spending bills are generally considered "must-pass" legislation.

Shelby voted against the amendment being included in the current financial services appropriations bill.

Twenty-three states and the District of Columbia have legalized cannabis in one way or another, while the federal government regulates banks and credit unions. Because marijuana is still classified as a schedule 1 narcotic, financial institutions are subject to prosecution on money laundering charges for accepting clients that deal in marijuana, legal or not.

Deputy Attorney General James Cole issued a memo in August 2013 to reassure banks and credit unions about the low priority the Justice Department places on legal marijuana dispensaries, saying that as long as marijuana businesses and financial institutions do not violate a few principles, like not selling to minors, they would not be a target for prosecution.



But according to Robert Rowe, vice president and associate chief counsel for the American Bankers Association's Center for Regulatory Compliance, the memo didn't reassure banks sufficiently.

"It's very challenging for a bank [to have a cannabis business as a client]," Rowe said. "In conversation with bankers, the only way that they could begin to comply with [the guidance] would be to have an embedded employee at one of these businesses."

In addition to jeopardizing their charters should they be prosecuted for accepting a marijuana business as a client, financial institutions also risk their reputations when taking them on, according to Rowe.

He said that bankers in places like Colorado, where the referendum for legalized marijuana passed at about 55 percent to 45 percent, are "concerned about that minority that did not vote in favor of the referendum who might look at [the banks] branded as 'marijuana banks' and take their business elsewhere."

Without access to banking, legal cannabis dispensaries are often forced to go cash-only. This not only makes them a public safety issue, but is also a problem for state financial agencies that now have to prepare regional and local offices for the increased cash circulation.

"We are currently analyzing how to improve our handling of cash," said Joy Krawczyk, a spokeswoman for the Oregon Department of Revenue. While dispensaries have already begun selling recreational cannabis, the state is only implementing its sales tax in January 2016 to allow time for offices to make the necessary changes.

"We have made some construction changes around buildings," Krawczyk said. "Our security teams, facilities and processing center staff have all been coordinating to figure out how to best receive the large amounts of cash we are anticipating."

She added that Oregon is trying to make filing for state taxes and payments as easy as possible for those business owners because "if you make it hard for people to... comply, they won't do it."

Even if a financial institution is willing to take a marijuana dispensary's business, the process can be complicated. Aaron Varney, a director at Dockside Cannabis dispensaries in Seattle, said that strict regulation is the big issue for dispensaries that manage to get bank accounts.

"We get quite a bit of red tape or structural challenges," Varney said in a phone interview. "The bank account is a hundred times more expensive. Regulatory compliance is complicated. But I get it in one sense: they have to get a staff member to oversee all these complicated accounts."

Unlike a bar or liquor store, if a bank accepts a marijuana business as a client, the bank becomes responsible for ensuring that the dispensary complies with federal and state regulations, the ABA's Rowe said.

"If there's a problem [with a liquor business], and we often hear about sale of liquor to minors, the state officials that are tagged with enforcing that will step into play. It slips on the marijuana side," he said.

The spending bill provision, while a step in the right direction, is probably not enough to shake all doubts from bankers' minds, said Rowe.

"[The provision] looks like it would apply to most agencies. But my hesitation is that there is always an enterprising attorney," he said.

The best situation for bankers, according to Rowe, would be congressional action that would legalize marijuana nationally or some sort of legislation, like Merkley's, giving safe harbor to financial institutions.

Federal legalization seems a long way off with the GOP controlling both the House and Senate, however.

"The Senate is gridlocked and there is virtually no path for small bills like this to make it out of committee," said a Senate staffer. "There is also a general attitude of not wanting to pass any bill with legalizing marijuana."

## **Between Pot and a Hard Place: Fed Rejects Colorado Marijuana Bank**

October 22, 2015

by Associated Press

DENVER -- Colorado's attempt to create a bank to service its marijuana industry has suffered another setback by the federal government and could be facing an impossible dilemma.

The Federal Reserve — the guardian of the U.S. banking system — said in a court filing Wednesday that it doesn't intend to accept a penny connected to the sale of pot because the drug remains illegal under federal law.

The stance appears to mark a shift in the position of the federal government. Last year, the U.S. Treasury Department issued rules for how banks can accept pot money.

"We're frustrated," said Andrew Freedman, director of marijuana coordination for Colorado Gov. John Hickenlooper. "We tried to do the most with the building blocks of instructions they sent us, set up the most rigorous solution. And we still are left with confusion."



File photo of a bag of marijuana being prepared for sale next to a money jar at BotanaCare in Northglenn, Colorado. RICK WILKING / Reuters File

The filing came in a legal battle between the Federal Reserve and the would-be Fourth Corner Credit Union, which was set up last year to serve Colorado's \$700 million-a-year marijuana industry.

The credit union can't open without clearance from the Federal Reserve, which said in its filing that "transporting or transmitting funds known to have derived from the distribution of marijuana is illegal."

Colorado chartered the Fourth Corner Credit Union after the Treasury Department issued its guidance last year on marijuana banking. Fourth Corner was designed to give the industry in Colorado a safe place to bank while paying steep fees to account for all the hoops set up by the Treasury Department.

The credit union then needed permission from the Federal Reserve to access the national banking system and perform electronic transactions. No dice.

The credit union now wants a federal judge to step in and order the Federal Reserve to change its mind.

"It's a phenomenal question about executive action," said Peter Conti-Brown, a lawyer and banking historian at the University of Pennsylvania who is following the case.

On one hand, the Federal Reserve is standing in the way of the stated goal of the Treasury Department to "enhance the availability of financial services for, and the financial transparency of, marijuana-related businesses." But by allowing pot industry money to mingle with funds from other national commerce, the Federal Reserve would be removing one of the final barriers to marijuana acceptance.

The federal government could hardly claim to consider weed illegal if its own banking system allows marijuana proceeds in the national banking system.

The Federal Reserve said in the latest filing that bankers won't be led away in handcuffs for taking marijuana money, but they don't have the right to put that money in the Federal Reserve system.

By pushing for approval from the Fed, it was "as if Colorado enacted a scheme to allow trade in endangered species or trade with North Korea," the filing says.

The mixed signals have left Colorado's marijuana industry in a bind. Many shops still operate in cash, unable to accept credit cards or make other electronic transactions.

"We're still a Schedule I narcotic at the federal level," said Tyler Henson of the Colorado Cannabis Chamber of Commerce, which represents pot growers and retailers. "We can provide every Band-Aid imaginable at the state level, but until the federal government acts on this, we're stuck."

Deirdra A. O'Gorman, CEO of the still-unopened credit union, said she's more optimistic. A Federal Reserve account does not mean it is legitimizing an illegal industry, she said.

"We'll be able to figure this out sooner rather than later," O'Gorman said.

But Conti-Brown, the banking expert, is doubtful.

"I don't think the lawsuit is going to go anywhere," he said.

The presiding judge in the case, U.S. District Judge R. Brooke Jackson in Denver, has given no indication when he'll decide whether to hear the complaint filed by Fourth Corner.