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SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
In the Matter of The Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #127 (Establishment of State-Owned Bank) **Petitioners:** EARL STAELIN AND DAVID RUNCO, v. **Respondents:** BARBARA M.A. WALKER AND DON CHILDEARS, and **Title Board:** JASON GELENDER, TROY BRATTON, DAVID BLAKE.	▲ **COURT USE ONLY** ▲
Attorneys for Respondent Barbara M.A. Walker: Deanne R. Stodden, #33214 COAN, PAYTON & PAYNE, LLC 999 18TH Street, Suite S1500 Denver, CO 80202 Telephone: 303.861-8888 Email: dstodden@cp2law.com	Case No.: 2016SA148

OPENING BRIEF OF RESPONDENT 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:

This brief complies with C.A.R. 28(g). It contains 3,603 words.

This brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

In response to each issue raised, the appellee must provide under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant'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/ Deanne R. Stodden

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Respondent, Barbara M.A. Walker, a registered elector of the State of Colorado, through her undersigned counsel, respectfully submits this Opening Brief.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Title Board erred in finding that it lacked jurisdiction to set a title for Proposed Ballot Initiative 2015-16 #127, concerning the Establishment of a State-owned Bank ("Initiative 127" or the "Initiative") because the Initiative as filed with the Secretary of State on April 8, 2016, contained substantial amendments from the Initiative that was discussed at the Legislative Staff Review and Comment Hearing on April 6, 2016 ("Review and Comment Hearing"), that were not in direct response to questions or comments by the Legislative Council Staff, contrary to Article V, Section 1 (5) of the Colorado Constitution and C.R.S. Section 1-40-105 (2)?

STATEMENT OF THE CASE

Petitioners Earl Staelin and David Runco (hereafter "Proponents") seek to circulate Initiative #127 to obtain the required number of signatures to place the measure on the ballot. On April 6, 2016, a Review and Comment Hearing was held before representatives of the Offices of Legislative Council and Legislative Legal Services ("Legislative Offices"). Thereafter, on April 8, 2016, the Proponents

submitted an amended version of the Initiative to the Secretary of State for the purpose of submission to the Title Board, which did not contain Subsection (3) (d). *Record, Ex. 2, p. 2.* In addition, the amended version of the Initiative contained the addition of Subsection (6) (b). *Id. at p. 4.*

A Title Board hearing was held on April 20, 2016, to establish the Initiative's single subject and set a title. *Record, Ex. 4, p. 6.* On April 26, 2016, Don Childears ("Childears") timely filed a Motion for Rehearing and on April 27, 2016, Barbara M.A. Walker ("Walker") timely filed a Motion for Rehearing, both alleging that the Board did not have jurisdiction to set a title, the title was misleading, did not fairly and correctly express the true meaning of Initiative #127, and would lead to voter confusion. *Record, Ex. 4, pp. 1-5 and 7-11.*

The Rehearing was held on April 28, 2016, at which time the Title Board granted the Motion for Rehearing, finding that Initiative #127 contained substantial amendments after the Review and Comment Hearing that were not made in direct response to a Legislative Office question, contrary to C.R.S. § 1-40-105(2). *Record, Ex. 4, p. 6.*

SUMMARY OF THE ARGUMENT

The Title Board correctly determined that it did not have jurisdiction to set a title for Initiative #127 and granted the Motion for Rehearing due to the fact that the Initiative contained substantial amendments after the Review and Comment Hearing. The Proponents' election to strike the language in Subsection (3) (d) alluding to the State-Owned Bank accepting deposits from the marijuana industry, and to add the language in Subsection (6) (b) after the Review and Comment Hearing were both substantial amendments to the Initiative that were not in direct response to a question or comment from the Legislative Offices. As a result, the Title Board's decision should be affirmed.

ARGUMENT

I. Standard of Review.

Whether the Title Board properly refused to exercise its jurisdiction to set a title is a question of law subject to *de novo* review by this Court. *See In Re: Title, Ballot and Submission Clause, and Summary for 1999-2000 No. 219*, 999 P.2d 819, 820-22 (Colo. 2000). In reviewing a challenge to the Title Board's decision, the reviewing court "employ[s] all legitimate presumptions in favor of the propriety of

the [Title] Board's actions." *In re Title, Ballot, Title and Submission Clause for 2009-2010 No. 45*, 234 P.3d 642, 645 (Colo. 2010).

This issue was properly preserved. The Title Board found that Initiative #127 contains a single subject and set a title at its hearing on April 20, 2016. *Record, Ex. 4, p. 6.* Respondents Childears and Walker moved for rehearing, and such Rehearing was held on April 28, 2016. At the Rehearing, counsel for Childears and Walker argued that the Initiative contained a substantial amendment that was not made in direct response to a Legislative Staff question. The Title Board granted the Motion and denied setting a title. *Id.* Petitioners then timely filed their petition for review in this Court.

II. The Removal of Subsection (3) (d) is a Substantial Amendment to the Initiative Not Made in Direct Response to a Question or Comment from the Legislative Staff in violation of C.R.S. § 1-40-105 (2).

Prior to the Review and Comment Hearing on Initiative #127, Subsection (3) (d) of the Initiative stated: "*The Bank may accept the deposits of any business lawfully operating under the Constitution and laws of the State of Colorado but which does not have a bank or financial institution in the State of Colorado in which it may lawfully deposit its moneys*." *Record, Ex. 2, p. 2.* In preparation for the

Review and Comment Hearing, the Legislative Offices provided a series of technical comments and substantive comments and questions dated April 4, 2016. *Exhibit A, p. 4.* In Question #5, the Legislative Staff asked whether Subsection (3) (d) was written with the marijuana industry in mind. The question reads:

> Subsection (3) (d) of the proposed initiative states that the state bank may accept deposits of any business lawfully operating under the constitution and laws of Colorado but which does not have a bank or financial institution in the state which may lawfully accept deposit of its moneys. Do the proponents intend for this language to permit the state bank to accept deposits from the marijuana industry in Colorado?

Id. In response to Question #5, at the Review and Comment Hearing, the Proponent stated that "[marijuana] was the idea" and stated that the provision was written because the marijuana industry in Colorado needs a "lawful place to deposit [its] money."[1] The Proponent went on to state that accepting deposits from the marijuana industry is "very consistent with the purpose of the bank." *Id.* The Legislative Offices accepted this answer and no additional questions on this topic were asked. Neither the Legislative Offices nor the Proponents discussed removing Subsection

[1] Audio for the Review and Comment Hearing can be found on the General Assembly's website at http://www.leg.state.co.us/clics/cslFrontPages.nsf/Audio. Open page by clicking on "Other Committees," "Review and Comment Hearings," and the link for "Initiative 2015-2016 #127 Review and Comment Hearing." The audio for question 5 begins at 18:18 of the recording.

(3) (d). However, after the Review and Comment Hearing and prior to submitting the Initiative to the Secretary of State, the Proponents removed Subsection (3) (d) from the Initiative.

The removal of Subsection (3) (d) substantially changes the Initiative and was clearly not made to promote non-technical language or in direct response to a question from the Legislative Offices. At the Rehearing on April 28, 2016, the Proponent stated that the language was removed because he thought it would help the Proponents to avoid an objection. Particularly, in response to the question from the Title Board "Why did you strike it?" the Proponent stated that the Proponents assumed "they would want to raise the argument that we are trying to appeal to the marijuana industry to get it passed or it's a second subject and it unduly highlights that particular issue."[2] The Proponent's own statement indicates that the change was not made to clarify the language or to reduce the use of technical terms, but rather that the language was removed in order to avoid an objection and potentially garner support for the Initiative by concealing the intent of the Initiative. It is axiomatic

[2] Audio for the Rehearing can be found on the Secretary of State's website at http://www.sos.state.co.us/pubs/info_center/audioArchives.html. Open page by clicking on "April 28, 2016", "Part 4" which started at 13:32. The response to the question "Why did you strike it?" starts at approximately 10:43 of the recording.

that removing or adding language for the specific purpose of avoiding an objection or garnering support for an initiative is substantive in nature.

In addition to being a substantive change, the removal of Subsection (3) (d) was also not made in direct response to questions or comments by the Legislative Offices. The Legislative Offices asked a question that was answered - if the intent of Subsection (3) (d) was to permit the bank to accept deposits from the marijuana industry. At no point during the Review and Comment Hearing did the Proponents or the Legislative Offices discuss striking Subsection (3) (d). Asking a simple yes or no question does not open to door to completely deleting a provision that, according to the Proponents' own statement, was of central concern in drafting the Initiative.

III. The Addition of Subsection (6) (b) is a Substantial Amendment to the Initiative Not Made in Direct Response to A Question or Comment from the Legislative Staff in violation of C.R.S. § 1-40-105 (2).

At the Rehearing, the Proponents argued that the removal of Subsection (3) (d) was not a substantial amendment to the Initiative because the Proponents "moved" the language and added Subsection (6) (b).[3] *See Exhibit B, Response of*

[3] Rehearing audio at 21:00.

Proponents to Motion For Rehearing at p. 2. Subsection (6) (b) adds significant language regarding rules and regulations for the bank and does not address the issue removed from Subsection (3) (d) - that the bank would accept deposits from the marijuana industry. Subsection 6 (b) of the Initiative provides:

> The Rules and Regulations shall cover, but not be limited to, the following issues: protection of public deposits, adequacy of capitalization, lending criteria, security for loans, accounting standards applicable to the bank, criteria for investments, who may be a depositor at the bank, policies for management of loans, the issue as to whether and to what extent, based upon differences between the bank and private banks, the administration and enforcement of such rules and regulations governing the bank should remain under the authority of the banking board or under the management of the board of the bank, - whether and under what conditions the bank may extend the full faith and credit of the bank to obligations that it assumes, whether the bank may guarantee the loans of other banks, and other issues relevant to the establishment and operation of the bank so as to ensure its financial soundness and its ethical management to serve the public interest of the citizens of Colorado.

Record, Ex. 2, p. 4.

Not only is the addition of Subsection (6) (b) a substantial amendment to the Initiative, it is also not simply Subsection (3) (d) in a different location within the Initiative. While Subsection (3) (d) is only three lines, Subsection (6) (b) is twelve lines. *Id. at p. 2 and p. 4.* The addition of Subsection (6) (b), in and of itself, is a substantial change that would have required the Proponents to resubmit the Initiative

to the Legislative Offices for review and comment prior to being submitted to the Secretary of State.

Further, the addition of Subsection (6) (b) was not an amendment made in direct response to a question or comment from the Legislative Offices. At the Rehearing and in their written Response to the Motion for Rehearing, the Proponents argue that Subsection (6) (b) was added in direct response to Question #14 from the Legislative Offices. *See Exhibit B, at p. 2.* Question #14 from the Legislative Staff (which contains several sub-questions) attempts to clarify the role the general assembly would have in the rules and regulations of the bank and if the State or citizens of Colorado would have any enforcement rights for the rules and regulations. Thus, the addition of Subsection (6) (b) is clearly not in response to Question #14.

IV. The Title Board Lacks Jurisdiction to Set a Title for Initiative #127.

C.R.S. § 1-40-105(2) provides that "[a]fter the review and comment meeting but before submission to the Secretary of State for title setting, the proponents may amend the petition in response to some or all of the comments of the directors of the legislative council and the office of legislative legal services, or their designees. *If any substantial amendment is made to the petition, other than an amendment in*

direct response to the comments of the directors of the legislative council and the office of legislative legal services, the amended petition must be resubmitted to the directors for comment in accordance with subsection (1) of this section prior to submittal to the Secretary of State as provided in subsection (4) of this section." (Emphasis added.) Thus, according to the clear language of C.R.S. § 1-40-105 (2), after the Proponents deleted Subsection 3 (d) and added Subsection (6) (b) to Initiative #127, the Initiative should have been resubmitted to the Legislative Offices for review and comment prior to being submitted to the Secretary of State.

The Court addressed this issue in *In Re: The Matter of Proposed Initiative for an Amendment to Article XVI, Section 6, Colorado Constitution, Entitled "W.A.T.E.R.*", 875 P.2d 861, 867 (Colo. 1994), when it stated that "[d]uring the public meeting to be held by the directors upon submission of a proposed initiative, the directors are to present comments to the proponents of the petition concerning the format or contents of the petition, and are to suggest editorial changes, where appropriate, to promote the use of plain, nontechnical language...The purpose of the public meeting is to inform the proponents and the public of the potential impact of the initiative." *(Internal citations omitted.)*

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), the proponents of the initiative submitted two different versions of the initiative (the "April Initiative" and the "May Initiative" and argued that since the language in the May Initiative was taken from the April Initiative, and the legislative offices had an opportunity to examine the provisions of the April Initiative, there was no need for review and comments on the May Initiative. Many provisions that were contained in the April Initiative were removed from the May Initiative. *Id at 1287.* This Court disagreed with the proponents, finding that "[i]t is contrary to the plain language of Article V, Section 1(5). The constitution requires the legislative offices to present their comments at a public meeting and expressly states that '[s]uch meeting shall be held prior to the fixing of a ballot title.' Here, there was no such public meeting prior to setting the ballot title for the May initiative." *Id.*

The Court went on to say that the proponents' argument "misperceives the purpose of the comment and review process. While it is true that the comments and review are intended in part to assist the proponents in drafting their initiative, there is an overriding public purpose served by the presentation of comments and review in a public meeting." *Id.* Initiative #127 was substantially changed after the Review and Comment Hearing and thus, the public was deprived of the opportunity to comment on the Initiative after Subsection (3) (d) was removed. Contrary to Article

V, Section 1 (5) of the Colorado Constitution and C.R.S. § 1-40-105 (2), there was no opportunity for public analysis.

The factual background concerning Initiative #127 is also similar to the scenario in *In re Proposed Initiated Constitutional Amend. Concerning Limited Gaming in the Town of Idaho Springs,* 830 P.2d 963 (Colo. 1992), wherein substantial amendments were made to the initiative after the review and comment hearing. The Court in *Limited Gaming* stated that the purpose of the public meeting with the legislative offices is to "encourage linguistic refinement of drafts of proposed initiatives." The Court in *Limited Gaming* found that "the adoption of language in a subsequent draft of a proposal that substantially alters the **intent and meaning of central features** of the initial proposal presents a different situation. The public's right to understand the contents of an initiative in advance of its circulation would be completely eradicated if the intent and meaning of the central features of a proposal submitted to the Board for the purpose of fixing a title thereto is substantially different from the intent and meaning of the central features of an earlier version thereof that was submitted to the legislative offices." *Id.* at 968 (Emphasis added).

Similar to *Tax Reform* and *Limited Gaming*, the Proponents of Initiative #127 made substantial amendments to the Initiative after the Review and Comment

Hearing that were not in direct response to questions or comments from the Legislative Offices. These amendments to the Initiative altered the intent and meaning of the central features of the Initiative. Because the Proponents did not resubmit the measure to the Legislative Offices for review and public comment as required under both Article V, Section 1 (5) of the Colorado Constitution and C.R.S. § 1-40-105 (2), the Title Board is without jurisdiction to set the title, ballot title and submission clause, and summary for Initiative #127.

CONCLUSION

For the reasons given above, the Court should affirm the Title Board's April 28, 2016, action regarding Initiative 2015-2016 #127.

Respectfully submitted this 23rd day of May 2016.

COAN, PAYTON & PAYNE, LLC

/s/ Deanne R. Stodden

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, a true and correct copy of the foregoing **OPENING BRIEF OF RESPONDENT BARBARA M.A. WALKER** was filed and served via the Colorado ICCES system to the following:

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In accordance with C.A.R. 30(f), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.

EXHIBIT A

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MEMORANDUM

TO: Earl Staelin and David Runco

FROM: Legislative Council Staff and Office of Legislative Legal Services

DATE: April 4, 2016

SUBJECT: Proposed initiative measure 2015-2016 #127, 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 directors of 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.

Earlier versions of this proposed initiative, proposed initiatives 2011-2012 #94 and #95, 2013-2014 #7, and 2013-2014 #104, were the subject of memoranda dated April 3, 2012, March 15, 2013, and March 25, 2014, which were discussed at public meetings on April 6, 2012, March 19, 2013, and March 27, 2014, respectively. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative.

However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

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

1. To establish a state-owned bank in the state of Colorado;
2. To state the purpose of the state-owned bank;
3. To establish the state-owned bank as an enterprise under section 20 of article X of the state constitution;
4. To make the effective date of the proposed initiative January 1, 2017;
5. To make legislative declarations with respect to the reasons for creating a state bank and the benefits of a state bank;
6. With respect to the operation of a state bank, to define the terms "sound banking practices," "sound financial and public policy considerations," and "state personnel system;"
7. To allow the state-owned bank to accept deposits of any business lawfully operating under the constitution and laws of the state of Colorado, but which does not have a bank or financial institution in the state of Colorado in which the business may lawfully deposit money;
8. To establish an elected board of directors of the state-owned bank;
9. To establish an appointed advisory board to give input to the board of directors on the direction of the state-owned bank;
10. To provide for the appointment of a president of the bank by the board of directors and for the hiring of management and employees of the bank according to the standards of the state personnel system;
11. To charge the top operating officials of the bank with the task of drafting rules and regulations of the bank with advice from the advisory board and approval of the board of directors;
12. To require the general assembly to appropriate funds within three months after the effective date of the proposed initiative to enable the bank to purchase or

lease land, physical structures, and furnishings for the bank to begin operations;

13. To capitalize the bank with revenues and funds of the state that would otherwise be deposited in private financial institutions, other funds as permitted by sound banking practices, and funds generated by revenue bonds issued by the bank; and

14. To require that state funds held by private banks prior to the establishment of the state bank be transferred to the state bank within ten working days from when the board of directors declares that the bank is ready to receive the transfer of funds, which transfer must begin no later than two years from the effective date of the proposed initiative.

Substantive Comments and Questions

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

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?

2. What sources did the proponents rely on for the factual statements in subsection (1) of the proposed initiative?

3. In paragraph (c) of subsection (2), what is the definition of "public interest"?

4. Subsection (1) of the proposed initiative declares that the state bank will operate as a "tabor enterprise."

    a. Subsection (8) of the proposed initiative allows the capitalization of the bank to include "any proceeds from taxes and other revenues and funds of the state." Is it your intent that these funds would satisfy the requirements of section 20 of article X of the state constitution (also known as the "Taxpayer's Bill of Rights" or "TABOR") that the state bank would receive under ten percent of its annual revenue from the state government?

    b. Subsection (8) also requires all funds and other assets of the state held by private financial institutions to be transferred to the state bank. How would it be ensured that those funds are under the required ten percent of annual revenue limit of TABOR? Who would make this determination? What would happen if these transfers exceeded the ten percent annual revenue limit of TABOR?

c. Is it possible that the state bank would not actually ever satisfy the requirements to be an enterprise under TABOR? If so, would the proponents consider amending TABOR to create an exception for the state bank?

5. Subsection (3) (d) of the proposed initiative states that the state bank may accept deposits of any business lawfully operating under the constitution and laws of Colorado but which does not have a bank or financial institution in the state which may lawfully accept deposit of its moneys. Do the proponents intend for this language to permit the state bank to accept deposits from the marijuana industry in Colorado?

6. Colorado law currently provides a system for the protection of deposits of public money 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 money. See sections 11-10.5-101 through 11-10.5-112 and 11-47-101 through 11-47-120, Colorado Revised Statutes. 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? Would the state-owned bank created by the proposed measure have to follow the laws protecting public deposits?

   b. Can the state's system of banking regulation continue to exist in its current form, or would it be necessary for the general assembly to change the system to account for the operation of a bank owned by the state?

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. With respect to the protection of deposits in the state-owned bank created under the proposed initiative:

   a. How will the "full faith and credit of the state of Colorado" back up deposits in the state-owned bank? Should there be a limit on how much money is available to cover losses on any given account? For example, the FDIC currently limits coverage to $250,000 per account.

   b. 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 state-owned bank that is not a member of the FDIC?

8. Will the requirements of TABOR be an obstacle to the full faith and credit of the state of Colorado backing the deposits of the state-owned bank because the state is not an enterprise and does not have the ability to levy taxes without voter approval? Do the proponents intend for paragraph (f) of subsection (3) of the proposed initiative, which states that all the provisions of the proposed initiative are self-executing and severable and supersede conflicting state constitutional, state statutory, state chartered, or other state or local provisions to resolve any conflicts with TABOR?

9. 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: A Second Look at the Federal Reserve* (Amer. Media, 3rd edition, May 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 of the state to own and operate a bank, as granted in the proposed initiative?

    b. Would the proponents consider amending article X as necessary to permit the creation of multiple fiscal year obligations by the state-owned bank created under this proposed initiative?

10. 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 the state-owned bank created under the proposed initiative?

11. Subsection (3) states that the bank may lend money "at interest or at no interest."

    a. Do you intend to place any limits on the interest rate that the bank may charge? If so, would the limits vary depending on who the recipient of the loan is? And by what standard, if any, would the limits be set? For example, would the existing state usury laws apply?

    b. Do you intend to place any limits on who may receive a loan from the bank?

12. Subsection (4) does not state that candidates for the board of directors are nonpartisan, or that political parties may not endorse candidates for these positions. Do you intend to allow these elections to be partisan?

13. Under subsection (5) (a), what constitutes "advisory input" from the board of advisors? How do the proponents intend the board of advisors to work in conjunction with the board of directors? What level of control or authority would the advisors hold over the directors and the operations or management of the bank?

14. Subsection (6) states that the rules and regulations of the bank are to be drafted by the managers of the bank and approved by its board of directors, "subject to consideration of recommendations by the advisory board."

    a. Is it your intent that the general assembly have no say in the rules and regulations of the bank? If so, how does this procedure differ from the operation of banks that "are operated principally in the interests of their shareholders," as stated in subsection (2) (a)?

    b. If the board (or 4 of the 7 members of the board, constituting a controlling group) were to act in a way that violated the principles stated in this proposed initiative, how do you anticipate the situation should be addressed? Do you wish to give citizens standing to enforce those principles through a private lawsuit in court? Would the general assembly have the authority to establish a recall procedure or other means of relief legislatively?

    c. Would the adoption of rules be subject to the "State Administrative Procedure Act," article 4 of title 24, Colorado Revised Statutes?

    d. Do the proponents intend for the general assembly to have any control or veto power over these rules? If not, how would you address the contention that the delegation of authority to this small group of individuals, in derogation of the general assembly's plenary authority over taxing, spending, and appropriations under article V of the Col-

orado constitution, conflicts with article V or with the due process principles discussed in *Cottrell v. Denver*, 636 P.2d 703, 709 (Colo. 1981)?

15. Under subsection (8), regarding capitalization of the state bank:

    a. Who determines the amount of "taxes and other revenues and funds of the state" that are needed to capitalize the state bank?

    b. Section 33 of article V of the Colorado constitution specifies that "No moneys in the state treasury shall be disbursed therefrom except upon appropriations made by law ...." Do the proponents intend that the general assembly would appropriate state money to capitalize the state bank?

    c. What "other funds" are "collected currently for the state" by other banks, and how are they "collected"? Do you intend for the state bank to take over the "collection" of these funds, and if so, when?

    d. Regarding the second sentence, which begins "All specifically allocated funds ...," do the proponents believe that it is feasible for all assets of the state that are held by or invested by private financial institutions to be transferred to the state bank within ten working days after "the bank is ready to receive the transfer of funds"? If so, how?

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.

The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

X-X-XXXX. Headnote. (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph

(2) Subsection

(3) Subsection

Bullet points, as used in Section 1 of the proposed initiative, should be replaced with the appropriate subdivision markers.

1. It is standard drafting practice when referencing statutory sections to include the word "section" before the number. For example, "section 24-35-204.5, [C.R.S.]".

   In Section 22 (1) (c) of the proposed initiative, the text refers to "this amendment" when it should refer to "this section."

   Also in (1) (c), publicly owned should not be hyphenated.

2. It is standard drafting practice to use SMALL CAPITAL LETTERS (rather than ALL CAPS) to show the language being added to and stricken type, which appears as stricken type, to show language being removed from the Colorado constitution or the Colorado Revised Statutes. However, normal capitalization rules still apply. In the proposed initiative, proper nouns, such as "U.S." and "Germany" should be capitalized. The first word of every new sentence should be capitalized. Additionally, the beginning of each numbered or lettered subdivision should begin with a capital letter, even if the text is a continuation from a sentence that began in a previous, larger subdivision (an example of this is the bullet-pointed list in (1) (a) of Section 22. Words that are common nouns are not capitalized; for example, the headnote in (3) of Section 22 currently appears "**Establishment of State-owned Bank**" but should read "**Establishment of state-owned bank**."

3. The headnote at the beginning of the proposed initiative is currently "**State-owned bank. Statement of intent.**" Because the statement of intent only applies to (1), it should appear after, not before the (1) designation. In other words, the headnote should appear: "**State-owned bank.** (1) **Statement of intent.**"

4. When referencing other sections of the Colorado Constitution or Colorado Revised Statutes, the common convention is to start by naming the smallest subsection first and working up to the largest. For example, a citation in (3) of Section 22 appears as: "...AS DEFINED IN COLORADO CONSTITUTION, ART. 10,

§20 (A) (2)." It should appear: "...AS DEFINED IN SECTION 20 (2) (d) OF ARTICLE 10 OF THE COLORADO CONSTITUTION."

5. Section (3) (b) of the proposed initiative contains "and/or". It is unnecessary to include this term. Simply use the word "or", which includes the meaning of the word "and" in statutory language.

6. In (3) (c) of the proposed initiative, specify the paragraph referred to by stating, "PURSUANT TO THIS PARAGRAPH (c)."

7. In (3) (d) of the proposed initiative, specify the constitution referred to by stating "UNDER THE COLORADO CONSTITUTION."

8. The section following (3) (d) is listed as (3) (f). It should be (3) (e) in order to continue the sequence.

9. The headnote after (4) contains two punctuation errors. First, a dash should separate headnote entries. Second, headnotes end with periods. The headnote should appear: "**Governance of state bank – elected officials.**"

10. The best way to refer to members of Congress in (4) (a) is with the term "Congressional members."

11. The word "moneys" should be replaced with "money."

12. The effective date at the end of the proposed initiative should read: "This section is effective January 1, 2017."

Proposed Constitutional Amendment for the State of Colorado

To Establish a Publicly-Owned State Bank
To be Numbered as Article X, Section 22

Be it Enacted by the People of the State of Colorado:

SECTION 1. In the constitution of the state of Colorado, **add** section 22 to Article X as follows:

Section 22. State-owned bank. Statement of intent. (1)(a) THE STATE OF COLORADO DESIRES TO ESTABLISH A STATE-OWNED BANK AS A TABOR ENTERPRISE, IN ORDER TO STRENGTHEN ITS ECONOMY BY:

- KEEPING THE STATE'S DEPOSITS LOCAL IN ITS OWN STATE-OWNED BANK, WORKING FOR THE LOCAL ECONOMY;
- ELIMINATING INTEREST AND FEE EXPENSES ASSOCIATED WITH THE USE OF OUT-OF-STATE BANKS;
- PROVIDING AN ADDITIONAL SOURCE OF INCOME FOR THE STATE. ;
- PROTECTING COLORADO'S ECONOMY FROM THE SYSTEMIC RISKS OF BANKS THAT ARE TOO BIG TO FAIL, OF THE SORT THAT CAUSED THE 2008 GREAT RECESSION; AND
- PROTECTING THE STATE'S OWN DEPOSITS AND INVESTMENTS FROM CONFISCATION IN A "BAIL-IN" AS AUTHORIZED BY THE DODD-FRANK ACT OF 2010.

(b) TRUE AND SUSTAINABLE PROSPERITYCOMES IN LARGE PART FROM THE CREATION AND MANAGEMENT OF MONEY AND CREDIT IN THE PUBLIC INTEREST. THIS HAS BEEN REPEATEDLY DEMONSTRATED GLOBALLY AND HISTORICALLY, BEGINNING WITH THE PUBLIC CREDIT SYSTEMS OF MANY OF THE ORIGINAL THIRTEEN COLONIES OF THE UNITED STATES. TODAY IN THE U.S. WE HAVE THE MODEL OF THE BANK OF NORTH DAKOTA, WHICH PROTECTED THE STATE'S ECONOMY FROM RECESSION IN 2008-2009. GLOBALLY, HIGHLY SUCCESSFUL PUBLIC BANKING MODELS ARE FOUND IN GERMANY, SOUTH KOREA, JAPAN, COSTA RICA, AND MANY OTHER COUNTRIES; AND IN THE PAST, IN CANADA, FRANCE, AND AUSTRALIA, AMONG OTHERS.

(c) THE SOLE PURPOSE OF THIS AMENDMENT IS TO ESTABLISH A PUBLICLY-OWNED STATE BANK AS A TABOR ENTERPRISE THAT EFFECTIVELY PROMOTES THE GENERAL WELFARE OF THE CITIZENS OF THE STATE OF COLORADO, AS DEFINED IN SUBSECTION (4) OF THIS SECTION.

(2) **Definitions.** AS USED IN THIS SECTION:

(a) "SOUND BANKING PRACTICES" MEANS PRACTICES GENERALLY FOLLOWED BY PUBLIC NON-PROFIT BANKS, SUCH AS THE BANK OF NORTH DAKOTA, THAT ARE OPERATED IN THE PUBLIC INTEREST, AS OPPOSED TO THE FREQUENTLY QUESTIONABLE OR UNLAWFUL PRACTICES OF MAJOR PRIVATE FOR-PROFIT BANKS, WHICH ARE OPERATED PRINCIPALLY IN THE INTERESTS OF THEIR SHAREHOLDERS, WHICH OFTEN CONFLICT WITH THE PUBLIC INTEREST, AND THEREBY CREATE UNREASONABLE RISKS FOR THE ECONOMY OF THE UNITED STATES AND THE STATE OF COLORADO. FOR EXAMPLE, SOUND BANKING PRACTICES INCLUDE, BUT ARE NOT LIMITED TO, THE AVOIDANCE OF INVESTMENTS IN SPECULATIVE INSTRUMENTS SUCH AS DERIVATIVES, CREDIT DEFAULT SWAPS, INTEREST RATE SWAPS, COMMODITIES FUTURES, AND MORTGAGE BACKED SECURITIES.

(b) "SOUND FINANCIAL AND PUBLIC POLICY CONSIDERATIONS" MEANS CONSIDERATIONS FOCUSED ON THE PUBLIC INTEREST, SUCH AS THOSE ENUMERATED IN SUBSECTION (3), PARTICULARLY THOSE OF THE CITIZENS OF THE STATE OF COLORADO.

(c) "STATE PERSONNEL SYSTEM" REFERS TO THE SYSTEM ESTABLISHED UNDER SECTION 13 OF ARTICLE XII OF THE COLORADO CONSTITUTION.

(3) **Establishment of State-owned Bank.** (a) THE STATE OF COLORADO HEREBY ESTABLISHES A BANK TO BE OWNED BY THE STATE OF COLORADO AND OPERATED AS AN ENTERPRISE AS DEFINED IN COLORADO CONSTITUTION, ART. 10, §20 (A)(2). THE BANK IS AUTHORIZED TO LEND MONEY AT INTEREST OR AT NO INTEREST; TO PROMOTE SUSTAINABLE DEVELOPMENT, COMMERCE, INDUSTRY, AND AGRICULTURE IN THE STATE; TO PROMOTE HOME OWNERSHIP, MAINTENANCE AND CONSTRUCTION OF NEEDED INFRASTRUCTURE, EDUCATION, PUBLIC HEALTH AND SAFETY; AND OTHER PURPOSES THAT SUPPORT THE GENERAL WELFARE OF THE CITIZENS OF THE STATE OF COLORADO. THE BANK SHALL HAVE ALL THE POWERS AND AUTHORITY OF OTHER BANKS CHARTERED BY THE STATE OF COLORADO.

(b) THE BANK SHALL BE AUTHORIZED TO ISSUE REVENUE BONDS IN ORDER TO PROVIDE CAPITALIZATION AND/OR TO SUPPORT ANY OF ITS FACILITIES OR OPERATIONS.

(c) THE BANK SHALL CONSTITUTE AN ENTERPRISE FOR PURPOSES OF SECTION 20 OF ARTICLE X OF THE COLORADO CONSTITUTION SO LONG AS IT RETAINS THE AUTHORITY TO ISSUE REVENUE BONDS AND EACH YEAR RECEIVES LESS THAN TEN PERCENT OF ITS TOTAL REVENUES IN GRANTS FROM ALL COLORADO STATE AND LOCAL GOVERNMENTS COMBINED. SO LONG AS IT CONSTITUTES AN ENTERPRISE PURSUANT TO THIS PARAGRAPH THE BANK SHALL NOT BE SUBJECT TO ANY PROVISIONS OF SECTION 20 OF ARTICLE X OF THE STATE CONSTITUTION.

(d) THE BANK MAY ACCEPT THE DEPOSITS OF ANY BUSINESS LAWFULLY OPERATING UNDER THE CONSTITUTION AND LAWS OF THE STATE OF COLORADO BUT WHICH DOES NOT HAVE A BANK OR FINANCIAL INSTITUTION IN THE STATE OF COLORADO IN WHICH IT MAY LAWFULLY DEPOSIT ITS MONEYS.

(f) ALL PROVISIONS OF THIS SECTION 22 ARE SELF-EXECUTING AND SEVERABLE AND SUPERSEDE CONFLICTING STATE CONSTITUTIONAL, STATE STATUTORY, STATE CHARTERED, OR OTHER STATE OR LOCAL PROVISIONS.

(4) **Governance of state bank: elected officials:** THE BOARD OF DIRECTORS OF THE BANK CONSISTS OF SEVEN MEMBERS WHO SHALL BE ELECTED AS FOLLOWS:

(a) THE SEVEN BOARD MEMBERS SHALL EACH REPRESENT A DISTRICT WHOSE BOUNDARIES SHALL BE THE SAME AS THE SEVEN CONGRESSIONAL DISTRICTS FROM WHICH COLORADO'S SEVEN CONGRESSPERSONS ARE ELECTED. IF THE NUMBER OF REPRESENTATIVES FROM COLORADO SHOULD CHANGE TO AN EVEN NUMBER IN THE FUTURE, THE NUMBER OF DISTRICTS FROM WHICH MEMBERS WILL BE ELECTED FROM WILL CHANGE ACCORDINGLY, AND THE GOVERNOR WILL APPOINT ONE ADDITIONAL BOARD MEMBER MAKING UP THE NEW ODD TOTAL NUMBER. BEFORE NEW ELECTIONS ARE HELD USING NEW DISTRICT BOUNDARIES, BOARD MEMBERS WILL FINISH OUT THE REMAINING TWO YEARS OF THEIR FOUR YEAR TERM, BUT THE OTHER BOARD MEMBERS WILL BE REPLACED BY ELECTIONS FROM THE NEW DISTRICTS.

(b) THE INITIAL ELECTION SHALL BE HELD ON THE FIRST TUESDAY IN NOVEMBER, 2017 IN CONJUNCTION WITH THE GENERAL ELECTION, AND INCLUDE CANDIDATES FOR ALL SEVEN DISTRICTS, THREE OF WHOM SHALL BE ELECTED FOR AN INITIAL TERM OF TWO YEARS AND FOUR OF WHOM SHALL BE ELECTED FOR A TERM OF FOUR YEARS. THEREAFTER, THE TERM OF EACH MEMBER SHALL BE FOR FOUR YEARS. EACH ELECTION HELD AFTER THE INITIAL ELECTION SHALL ALSO BE HELD ON THE FIRST TUESDAY IN NOVEMBER IN ODD-NUMBERED YEARS IN CONJUNCTION WITH THE GENERAL ELECTION.

(c) A CANDIDATE MUST BE A CITIZEN OF THE STATE OF COLORADO FOR AT LEAST FOUR YEARS BEFORE HE OR SHE CAN DECLARE THEIR CANDIDACY AND MUST BE A RESIDENT OF THEIR DISTRICT FOR TWO YEARS PRIOR TO THE DEADLINE FOR CANDIDATE REGISTRATION.

(d) TO BE INCLUDED ON THE BALLOT, CANDIDATES MUST REGISTER WITH THE SECRETARY OF STATE'S OFFICE, WHICH SHALL PROVIDE AN AUTOMATED ONLINE PROCESS THAT INCLUDES THE OPPORTUNITY FOR EACH CANDIDATE TO LIST THEIR QUALIFICATIONS AND REASONS WHY THEY WANT TO SERVE.

(e) IN THE EVENT THAT NO CANDIDATE WITHIN A DISTRICT RECEIVES A MAJORITY OF VOTES FROM THAT DISTRICT, THE SECRETARY OF STATE SHALL SET A RUN-OFF ELECTION BETWEEN THE TWO CANDIDATES RECEIVING THE MOST VOTES. THE RUN-OFF ELECTION MUST BE HELD WITHIN THIRTY DAYS AFTER THE RESULT OF THE INITIAL ELECTION IS CERTIFIED.

(f) THE GENERAL ASSEMBLY SHALL APPROPRIATE FUNDS AS NECESSARY TO CONDUCT THE ELECTIONS PROVIDED FOR IN THIS SUBSECTION. FUNDS APPROPRIATED FOR THE ELECTION SHALL NOT BE DEEMED TO BE PART OF THE REVENUE OF THE BANK. THE SECRETARY OF STATE SHALL SET AND CONDUCT ALL ELECTIONS FOR THE BOARD OF DIRECTORS OF THE BANK IN ACCORDANCE WITH THIS SUBSECTION 4.

(g) THE BANK SHALL COMMENCE OPERATIONS JANUARY 1, 2018.

(5) **Governance of State Bank: Management, employees, and advisors:** (a) THE BOARD OF DIRECTORS SHALL RECEIVE ADVISORY INPUT ON THE GENERAL DIRECTION OF THE BANK FROM A NINE-MEMBER BOARD OF ADVISORS WHOSE MEMBERS REPRESENT A BROAD CROSS-SECTION OF THE STATE INCLUDING BUSINESS AND INDUSTRY, FARMING, FINANCE, EDUCATION, AND LABOR. OF THE NINE, AT LEAST TWO MUST BE OFFICERS OF BANKS WHOSE MAJORITY OF STOCK IS OWNED BY COLORADO RESIDENTS. AT LEAST ONE DIRECTOR MUST BE AN OFFICER OF A STATE-CHARTERED OR FEDERALLY CHARTERED FINANCIAL INSTITUTION. THE GOVERNOR SHALL APPOINT A CHAIRMAN, VICE CHAIRMAN, AND SECRETARY FROM THE ADVISORY BOARD OF DIRECTORS. . THE GOVERNOR SHALL APPOINT THE BOARD MEMBERS FOR STAGGERED TERMS OF FOUR YEARS EACH, EXCEPT FOR THE INITIAL APPOINTMENT WHICH SHALL PROVIDE FOUR-YEAR TERMS FOR FIVE MEMBERS AND TWO-YEAR TERMS FOR FOUR MEMBERS, SUBJECT TO CONFIRMATION BY A MAJORITY OF THE SENATE OF THE GENERAL ASSEMBLY OF THE STATE OF COLORADO. VARIOUS GROUPS WITHIN EACH AREA OF INTEREST MAY NOMINATE MEMBERS OF THE BOARD OF ADVISORS IN A MANNER TO BE DETERMINED BY THE GENERAL ASSEMBLY.

(b) THE BOARD OF DIRECTORS SHALL ALSO RECEIVE REGULAR FINANCIAL REPORTS, NO LESS THAN ONCE A MONTH, FROM THE MANAGEMENT OF THE BANK. THE FINANCES OF THE BANK SHALL BE AUDITED ANNUALLY BY AN INDEPENDENT ACCOUNTING FIRM FREE FROM ANY CONFLICTS OF INTEREST WITH THE BANK OR STATE. THE BOARD SHALL MAKE ALL REPORTS AND THE AUDIT PUBLIC WHEN IT RECEIVES THEM. THE BOARD SHALL CHANGE AUDITORS AT LEAST EVERY THREE YEARS.

(c) EXCEPT FOR THE PRESIDENT OF THE BANK, WHO SHALL BE APPOINTED BY THE BOARD OF DIRECTORS AND SERVE AT THEIR PLEASURE, THE MANAGEMENT AND EMPLOYEES OF THE BANK SHALL BE HIRED BY THE PRESIDENT ACCORDING TO THE STANDARDS OF THE STATE PERSONNEL SYSTEM. THE PRESIDENT SHALL ENDEAVOR TO HIRE THE BEST QUALIFIED PERSONS FROM AMONG THE CANDIDATES APPROVED BY THE STATE PERSONNEL SYSTEM AND THE BANK SHALL COMPENSATE THEM ACCORDINGLY BY SALARY. THE TITLES AND DUTIES OF THE REMAINING TOP FIVE OFFICIALS SHALL BE DETERMINED BY THE BOARD OF DIRECTORS. NO EMPLOYEE OF THE BANK SHALL RECEIVE COMPENSATION IN THE FORM OF COMMISSIONS, FEES, OR BONUSES, EXCEPT THAT THE BOARD MAY ESTABLISH A SYSTEM FOR AWARDING MODEST BONUSES FOR OUTSTANDING PERFORMANCE OF AN EMPLOYEE'S DUTIES IN SERVICE OF THE

BANK'S MISSION. THE PRESIDENT OF THE BANK MUST HAVE SUBSTANTIAL EXPERIENCE IN BANKING. THE MANAGEMENT OF THE BANK SHALL BE RESPONSIBLE FOR THE DAY-TO-DAY OPERATIONS OF THE BANK, WHICH SHALL FOLLOW THE GENERAL OBJECTIVES SET FORTH IN THIS SECTION AND, SUBSEQUENTLY, BY THE BOARD OF DIRECTORS.

(6) **Rules and Regulations of State Bank.** FOLLOWING THE COMMENCEMENT OF OPERATIONS ON JANUARY 1, 2018, THE INITIAL MANAGEMENT OF THE BANK, CONSISTING OF THE TOP FIVE OPERATING OFFICIALS OF THE BANK, INCLUDING THE PRESIDENT APPOINTED BY THE BOARD OF DIRECTORS AND THOSE HIRED BY THE PRESIDENT UNDER THE PROTOCOLS OF THE STATE PERSONNEL SYSTEM, SHALL BE CHARGED WITH DRAFTING THE RULES AND REGULATIONS OF THE BANK, SUBJECT TO CONSIDERATION OF RECOMMENDATIONS BY THE ADVISORY BOARD AND APPROVAL OF THE BOARD OF DIRECTORS OF THE BANK.

(7) **Initial Operation of Bank.** WITHIN THREE MONTHS AFTER THE EFFECTIVE DATE OF THIS SECTION 22 OF ARTICLE X, THE GENERAL ASSEMBLY SHALL APPROPRIATE FUNDS TO ENABLE THE BANK TO PURCHASE OR LEASE LAND, PHYSICAL STRUCTURES, AND FURNISHINGS SUFFICIENT FOR THE BANK TO BEGIN LENDING OPERATIONS. AFTER THE BOARD OF DIRECTORS IS ELECTED, A PRESIDENT IS HIRED, AND ADVISORY BOARD IS SELECTED, THE PRESIDENT OF THE BANK, AFTER CONSULTATION WITH THE ADVISORY BOARD, AND WITH THE APPROVAL OF THE BOARD OF DIRECTORS, SHALL PURCHASE OR LEASE THE LAND, PHYSICAL STRUCTURES, AND FURNISHINGS NECESSARY TO ENABLE THE BANK TO CONDUCT ITS BUSINESS. THE BANK SHALL ESTABLISH ITS OFFICES WITHIN THE STATE OF COLORADO.

(8) **Capitalization of State Bank.** THE CAPITALIZATION OF THE BANK MAY INCLUDE ANY PROCEEDS FROM TAXES AND OTHER REVENUES AND FUNDS OF THE STATE, INCLUDING OTHER FUNDS SUCH AS MAY BE COLLECTED CURRENTLY FOR THE STATE BY OTHER BANKS, THAT ARE NOT OTHERWISE OBLIGATED, OTHER DEPOSITS IN ADDITION TO THOSE FROM THE STATE AS PERMITTED BY SOUND BANKING PRACTICES, AND FUNDS GENERATED BY REVENUE BONDS ISSUED BY THE BANK. ALL SPECIFICALLY ALLOCATED FUNDS AND OTHER ASSETS OF THE STATE NORMALLY HELD BY FINANCIAL INSTITUTIONS SHALL BE DEPOSITED AND HELD BY THE STATE BANK, INCLUDING MONEYS HELD BY OTHER BANKS FOR THE STATE OF COLORADO PRIOR TO THE ESTABLISHMENT OF THE BANK, WHICH SHALL BE TRANSFERRED TO THE BANK WITHIN TEN WORKING DAYS AFTER THE BOARD OF DIRECTORS DECLARES THAT THE BANK IS READY TO RECEIVE THE TRANSFER OF FUNDS. THE TRANSFER OF FUNDS SHALL COMMENCE NO LATER THAN TWO YEARS FROM THE EFFECTIVE DATE OF THIS SECTION 22 OF ARTICLE X. THE BOARD OF DIRECTORS, UPON RECEIVING THE ADVICE AND RECOMMENDATIONS FROM THE MANAGEMENT OF THE BANK, SHALL DETERMINE THE MEANS FOR ADDITIONAL CAPITALIZATION AS REQUIRED TO MEET THE OBJECTIVES OF THE BANK AS SET FORTH IN THIS SECTION.

(9) **Effective date.** THE EFFECTIVE DATE OF THIS SECTION SHALL BE JANUARY 1, 2017.

EARL H. STAELIN

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March 23, 2016

Via Email: lcs.ga@state.co.us

Mike Mauer, Director
Colorado Legislative Council
200 E Colfax Ave
Denver, CO, 80203 USA

Re: Initiative: Proposed Constitutional Amendment to Establish State-Owned Bank

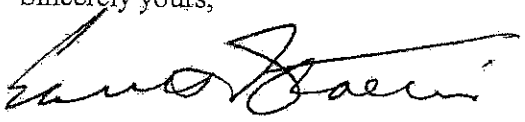
Dear Mr. Mauer:

Attached is a proposed Initiative for an Amendment to the Colorado Constitution Article X, as new Section 22 to establish a state-owned bank as a TABOR enterprise. The amendment would displace any present provisions of the Constitution or other laws of the state to the contrary.

The amendments are being submitted by myself, for whom the above address and contact information may be used (my cell phone is 303-229-2834), and David Runco, who is at 327 N. Grant St., Denver, CO 80203, cell 720-236-7988; david.runco@gmail.com.

We look forward to receiving your feedback and assistance on this proposal. Thank you for your prompt and careful consideration.

Sincerely yours,



Earl H. Staelin

cc: David Runco

EXHIBIT B

COLORADO TITLE SETTING BOARD

DATE FILED: May 23, 2016 5:00 PM

IN THE MATTER OF THE TITLE AND BALLOT TITLE AND SUBMISSION CLAUSE FOR INITIATIVE 2015-2016 #127

RESPONSE OF PROPONENTS TO MOTION FOR REHEARING

On behalf of Proponents Earl Staelin and David Runco, the undersigned counsel hereby submits this Response of Proponents to the Motion for Rehearing for Initiative 2015-2016 #127 filed by Don Childears, and in order make the Response easier to follow first sets forth respectively, the points in the Motion, immediately followed by the Proponents' Response, as follows:

I. THE TITLE BOARD LACKS JURISDICTION BECAUSE THE PROPONENTS MADE SUBSTANTIVE CHANGES THAT WERE NOT RESPONSIVE TO THE REVIEW AND COMMENT HEARING.

For the Review and Comment Hearing on Initiative #98, the Legislative Council Staff provided a series of substantive comments and questions. In Question 5, the staff asked for clarification as to whether a subsection of the measure was written with the marijuana industry in mind. The question reads:

> Subsection (3)(d) of the proposed initiative states that the state bank may accept deposits of any business lawfully operating under the constitution and laws of Colorado but which does not have a bank or financial institution in the state which may lawfully accept deposit of its moneys. Do the proponents intend for this language to permit the state bank to accept deposits form the marijuana industry in Colorado?

In response, the Proponent stated at the Review and Comment Hearing that "[marijuana] was the idea" and that the provision was written because the marijuana industry in Colorado needs a "lawful place to deposit [its] money."[1] The staff accepted this answer and no person asked any follow-up questions; it received the clarification it needed. At no point during the hearing did the Proponent or the staff discuss removing that subsection. Thus, the measure as proposed had a significant feature of providing banking services to a major industry in Colorado

[1] Audio for the Review and Comment Hearing can be found on the Colorado General Assembly's website at http://www.leg.state.co.us/clics/cslFrontPages.nsf/Audio?OpenPage by clicking on "Other Committees," "Review & Comment Hearings," and the link for "Initiative 2015-2016 #127 Review and Comment Hearing." The audio for question 5 begins at 18:18 of the recording.

that generates millions of dollars in revenue every year, and that to date has no ability to lawfully bank in this State.

Nonetheless, the Proponent removed that subsection in its Amended Draft for Initiative #98. While section 1-40-105(2) permits proponents of initiatives to amend the petition in response to some or all of the staff's comments, the subsection permits a "substantial amendment" only in "direct response" to staff comments. If the amendment is not in direct response, then the amended petition must be resubmitted for comment. *Id.*

Proponent's removal of the subsection was, at best, an *indirect* response to the staff's question. More likely, it was made strategically and independent of the staff's question. Because nobody at the hearing commented on removing that subsection or questioned its inclusion—the comments related only to its *meaning*—that subsection's removal was not made in "*direct response*" to the staff's comments. Thus, the amended petition should have been resubmitted for a new review and comment. Because it was not, the Title Board lacks jurisdiction under section 1-40-105(2) to set title to this measure as amended.

PROPONENTS' RESPONSE TO PART I RE POSSIBLE ACCEPTANCE OF MARIJUANA DEPOSITS.

Section 3(d) does not require the bank to take deposits of a lawful business that has no lawful place to bank in Colorado, i.e. certain lawful businesses unable to obtain banking services, i.e. certain business related to marijuana. Rather, the provision states that the bank may accept such deposits. While section 3(d) with that express language was removed, language having the exact same legal effect has been added to section 6(b). Section 6(b) which was a direct response to the Legislative Council's Question 14. It provides that the board of directors, with advice of the Advisory Board, and subject to the approval of the General Assembly, may, among other things, decide "who may be a depositor at the bank". This section gives the bank the exact same authority to accept deposits from presently unserved marijuana businesses as was contained in the original section 3(d). It places that authority in a more logical place, that is, under the board's general responsibility to establish the rules and regulations of the bank as set out in section 6(b).

C.R.S. § 1-40-105(2) provides in relevant part as follows:

> (2) After the public meeting but before submission to the secretary of state for title setting, the proponents may amend the petition in response to some or all of the comments of the directors of the legislative council and the office of legislative legal services, or their designees. If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the

directors of the legislative council and the office of legislative legal services, the amended petition shall be resubmitted to the directors for comment in accordance with subsection (1) of this section prior to submittal to the secretary of state as provided in subsection (4) of this section.

Section 1-40-105(2) only requires resubmission to the directors if a "substantial" amendment has been made. This placement of the authority in the board to accept deposits of marijuana businesses in section 6(c) instead of in section 3(d), is in direct response to Question 14 and in any event does not constitute any change in the authority of the board, much less a "substantial" amendment.

II. THE TITLE BOARD LACKS JURISDICTION BECAUSE THE MEASURE IS SO VAGUE THAT CANNOT BE UNDERSTOOD.

1. The measure purports to establish a state-owned bank, but does not grant the state any of the traditional benefits of ownership, including the right to control or govern the bank, the right to dividends or residual profits, and the ability to sell or transfer its assets. In short, it is not a "state-owned" bank.

PROPONENTS' RESPONSE: The measure gives the bank "all the powers and authority of other banks chartered by the state of Colorado. It is hardly necessary or useful to spell out all of these powers and authority. The objection has no merit.

2. The measure states that its purpose is to promote public health, safety, and other purposes for the general welfare of Colorado citizens but does not provide with any detail how this purpose will be fulfilled.

PROPONENTS' RESPONSE: The measures states in section 3 that the bank is authorized to lend money, and to promote various services that are in the public interest. Obviously, the intended means to do this is through making loans, even though it is not spelled out as clearly as it might have been.

3. The measure states that the bank will be a TABOR enterprise, but it is unclear how, under any circumstance, the bank will function as an enterprise by receiving less than 10% of its revenue from the State.

PROPONENTS' RESPONSE: The measure clearly provides the means for the bank to function as a TABOR enterprise without the necessity of receiving 10% or more of its funds from the government, as explained by Proponents at the hearing before the Legislative Council. These include: the fact that all deposits of the state in other banks and all tax and other revenues of the state will be deposited in the state

owned bank, a portion of which may be used as capital reserves. The bank expects that based upon typical bank financing principles the income from loans based upon those capital reserves, which may be up to 10 times the amount of capital reserves, will provide sufficient income for the bank that it will never require 10% or more of its revenue to come from the government. In fact, the Bank of North Dakota, upon which this bank is modeled, has averaged over 20% return on equity per year over the past 12 years and not only does not depend upon any income from government, but currently contributes about $100 million per year to state government from its profits (it had $130.7 net earnings in 2015). In addition, in section 3(c) the initiative authorizes the bank to issue revenue bonds which may provide capitalization or to meet other purposes of the bank without relying upon any funds from government.

4. The measure states that the governor shall appoint the members of the Board of Advisors. The measure also states that at least some of those board members are "subject to confirmation by a majority of the Senate." However, as a result of the measure's unclear phrasing, it is ambiguous whether senate confirmation applies to all appointed board members, board members from the governor's initial appointment of board members, or only the four board members with two-year terms from the governor's initial appointment of board members.

PROPONENTS' RESPONSE: Section 5 of the Initiative is clear in providing that the Governor appoints all members of the Advisory Board, including the chairman, vice chairman, and secretary, although the gender neutral terms "chair" and "vice chair" would have been preferred.

5. The measure states that the initial management of the bank will draft the bank's rules and regulations, which includes "whether or under what conditions the bank may extend the full faith and credit of the bank," but fails to provide any specifics as to what is meant by extending "full faith and credit."

PROPONENTS' RESPONSE: The term "full faith and credit" does not need to be defined in the Initiative because it has a widely accepted meaning.

6. The measure discusses capitalization but fails to define what it means by "other funds" not "otherwise obligated," and does not specify who or what determines the desired level of capital for the bank.

PROPONENTS' RESPONSE: The term "otherwise obligated" would mean that the funds are owed to another entity. This could be further defined by the rules and regulations of the bank. Section 6(b) provides that the rules and regulations shall cover the issue of "adequacy of capitalization". Section 5(d) provides that "the

management of the bank shall be responsible for the day-to-day operations of the bank, which shall follow the general objectives set forth in this section and, subsequently, by the board of directors." This would include the rules and regulations government capitalization, as approved by the General Assembly.

7. The measure states that the bank shall be audited by an independent accounting firm free from any conflicts of interest with the bank or the State. However, it is doubtful whether any accounting firm could be independent because the State, through the Department of Regulatory Agencies' State Board of Accountancy, regulates all Certified Public Accountants ("CPAs") doing business in the state, including out-of-state CPAs.

PROPONENTS' RESPONSE: Obviously, the fact all accounting firms doing business in the state are regulated by the state, where all accounting firms are equally affected, and where the conflict is very indirect, is not what is intended by the subsection. The section should be construed to only apply to direct conflicts of interest involving a particular accounting firm with the bank or the state. The board is directly elected by the people of the state, and all financial reports, including monthly reports are made public. A sound rule of legislative construction is to interpret provisions so as to give them effect rather than to render them meaningless as the Opponent would argue for here. The Bank of North Dakota upon which this bank is modeled is in the same situation regarding the regulation of its accountants and despite that has had a sterling record of sound operation and financial reporting for many years. The board of the bank can always clarify this rule in its establishment of rules and regulations for the bank.

8. The measure contains an incomprehensible cross-reference. Section (1)(c) sets forth the "sole purpose" of the measure and contains a supposed cross-reference to a definition in subsection (3), but is unclear whether the definition is for the "general welfare of the citizens of the state of Colorado," the "sole purpose of this amendment," or something else. Regardless, subsection (3) contains explanations, not definitions.

PROPONENTS' RESPONSE: This criticism is also without merit. The word "defined" means to "describe" and in fact the word "describe" is one of its preferred if not most preferred synonyms. Subsection 3 clearly describes in detail what is meant by the words "effectively serves the public interest and promotes the general welfare of the citizens of the state of Colorado" by describing its function of lending money for a variety of specific purposes that serve the public interest and other purposes that "support the general welfare" of the citizens of Colorado.

III. INITIATIVE #127 IMPERMISSIBLY CONTAINS MULTIPLE SEPARATE AND DISTINCT SUBJECTS IN VIOLATION OF THE SINGLE-SUBJECT REQUIREMENT.

The stated purpose of the measure is the establishment of "a publicly owned state bank as an enterprise exempt from the requirements of the Taxpayer's Bill of Rights . . . ." But the measure actually contains multiple separate subjects including at least the following:

1. Establishing a state bank;

2. Providing a mechanism to raise revenues to promote the general welfare;

3. Superseding and impliedly repealing the Public Deposit Protection Act, C.R.S. §§ 11-10.5-101, *et seq.* The Act's purpose is to serve Colorado taxpayers by "ensur[ing] the preservation and protection of all public funds held on deposit by a bank" and "the expedited repayment of such funds in the event of default and subsequent liquidation of a bank which holds such deposits." This purpose is not "necessarily or properly connected" to Initiative #127's purposes, which include keeping the state's deposits local and eliminating interest and fee expenses pertaining to the use of out-of-state banks.

PROPONENTS' RESPONSE: The single subject of the Initiative is to establish a state owned bank. Like any bank it provides a variety of benefits to its owners, in this case to the state and citizens of the state rather than to private shareholders. In fact, if it had been formed to serve private interests rather than the public interest it would not be legal. Indeed, it might be questioned whether the present system is legal whereby the taxpayers' money is deposited in major private banks that use that money for their own benefit by leveraging it to lend money and invest in questionable products such as derivatives the put that money and even the U.S. economy at risk. The stated purpose of the measure is to lend money in the public interest, not to raise revenue. The fact that the bank produces a side benefit that it increases public revenue without raising taxes does not make it a second subject. Likewise, the fact that the bank has the potential to protect the state from recession, as the Bank of North Dakota did for North Dakota in 2008, does not mean that such potential constitutes a second subject.

The Initiative does not supersede or impliedly repeal the Public Deposit Protection Act. Sections 6(a) and 6(b) of the Initiative require the board of directors, with the advice of the Advisory Board and with approval of the General Assembly, to draft rules and regulations that include among other things: "protection of public deposits." This responsibility and review is appropriate because the Public Deposit Protection Act is directed at private banks that hold public deposits, not public banks that hold their own deposits, a quite different situation. It clearly does not involve a second subject.

THE TITLE AS DRAFT IS MISLEADING AS DOES NOT FAIRLY AND CORRECTLY EXPRESS THE TRUE MEANING OF THE MEASURE BECAUSE IT CONTAINS IMPERMISSIBLE CATCH-PHRASES AND FAILS TO DESCRIBE IMPORTANT ASPECTS OF THE MEASURE.

1. The phrase "publicly owned state bank" in the title is an impermissible catchphrase that is likely to elicit public support for the measure without the public understanding that the State would not enjoy any of the traditional benefits of ownership. Neither the state nor the general public would have any say in the governance of the bank except through election of the board of directors, neither the state nor the general public would necessarily be entitled to any dividends from the bank, and no transfers to the general fund would be required under the measure.

PROPONENTS' RESPONSE: This argument is also totally without merit. The phrase "publicly owned state bank" is an accurate description of the measure and is hardly a catch phrase. If people are wary of depositing their money in private banks, that is the fault of the private banks and their past conduct. The board of directors of the bank, the advisory board, the officers of the bank, the Governor, and the General Assembly, all of whom have a role in the governance of the bank, are all agents of the state, so it makes no sense to say that the state has no say in the governance of the bank. Further, the general public does not have a direct say in the governance of virtually any government department or agency. However, the bank, as shown in the Initiative, has several layers of public input and control, through public elections of the board of directors, the appointment of a nine member advisory board with banking experience and ties to Colorado banks, and review of rules and regulations by the General Assembly. In addition, the financial affairs of the bank are completely transparent, available to the public, and regularly audited by certified public auditors. The title is not required to include all of these details but it does cover the main points and therefore is adequate.

2. The phrase "lend money for public purposes" in the title is an impermissible catch-phrase that is likely to elicit public support for the measure without the public understanding that the loans need not promote any public purpose at all.

PROPONENTS' RESPONSE:

3. The title fails to indicate that the state bank would have all of the powers and authority of state-chartered banks, including the receipt of private deposits and the power to foreclose on loans in default, as well as substantial powers beyond those traditionally associated with

accepting deposits and lending activity, such as the power to invest in real estate and to manage 401k, IRA, and trust assets.

PROPONENTS' RESPONSE: The law does not require that the title include all of the details of the Initiative or for the Initiative itself to define every power and obligation of the bank. Section 6(a) and 6(b) provide the procedure for the adoption of the rules and regulations of the bank, including defining who may be a depositor, and what kinds of investments the bank may engage in, subject to approval by the General Assembly. The power to foreclose upon loans in default is customary for any bank and certainly does not need to be separately disclosed in the title.

4. The title fails to reflect that the bank would be authorized to issue interest-free or subsidized loans.

PROPONENTS RESPONSE: As stated before, it is not necessary to disclose every provision of the measure. Any bank can issue interest free loans. Because the bank is designed to serve the public interest, the authorization to issue loans interest-free is entirely consistent with the public interest and should not be deemed subsidization. Such loans may serve the public interest by pulling the recipients out of poverty into productive enterprise that returns tax money to the state and political subdivisions, reduces reliance upon welfare, reduces poverty and crime, and resources devoted to crime, and promotes services such as clean energy that avoid "externalized costs" that the public must pay for connected with sources of energy that may cause damage to health or the environment.

5. The title fails to reflect that state revenues and funds would become capital of the bank and would no longer be available to meet the needs of the state.

PROPONENTS' RESPONSE: Only a minority portion of state revenues and funds would become capital of the bank, a decision that must be made by the management of the bank, consistent with "sound financial and public policy considerations." This is true also of the major banks that hold all of the state's deposits at the present time and in the past. The change would not make any practical difference to the citizens of Colorado except that the state would now avoid the substantial fees that private banks now charge the state for handling its funds, not infrequently in ways that are against the public interest.

6. The title fails to reflect that the bank would be entirely self-regulated with no governmental oversight beyond the General Assembly's approval of the proposed rules and regulations.

PROPONENTS' RESPONSE: This is another frivolous objection. The title specifically mentions that the bank will be governed by a seven member publicly

elected board of directors, with advisory input from a nine-member advisory board appointed by the governor. These boards are agencies of the government and thus do constitute government oversight of the bank. The title mentions that the bank's finances will be independently audited annually. It is not necessary to mention every safeguard of the public's interest in the title. While not necessary, if desired the title could also mention that, as provided in sections 6(a) and 6(b) the board of directors, with input of the advisory board, will enact rules and regulations for the bank, subject to approval by the General Assembly, and that as provided in section 5(c) the finances of the bank will be reported to the board at least monthly and made public.

7. The title fails to reflect that the bank would be authorized to issue debt without any limitation as to the amount of debt to be issued.

PROPONENTS' RESPONSE: This objection is also without merit. In section 3(b) the authorization to issue revenue bonds is limited to either the purpose of capitalization for the bank or "to support any of its facilities or operations". By definition, the obligation to repay revenue bonds is restricted to revenue, and is not a general obligation. The authorization of the bank to establish rules and regulations as described in sections 6(a) and 6(b) covers the issue of:

> "whether and under what conditions the bank may extend the full faith and credit of the bank to obligations that it assumes, whether the bank may guarantee the loans of other banks and any other issues relevant to the establishment and operation of the Bank so as to ensure its financial soundness and its ethical management to serve the public interest of the citizens of Colorado." (emphasis added)

While it is not essential to include mention of such authorization and restriction in the title, if the title board prefers, proponents would not object to the inclusion of a brief statement concerning the rules and regulations, the procedure by which they are adopted, and that they must "ensure its (the bank's) financial soundness and ethical management."

8. The title fails to fully represent "capitalization" of the bank as stated in the measure.

PROPONENTS' RESPONSE: Like the operation of privately owned banks who hold the state's deposits now, section 8 of the initiative authorizes the bank to use a portion of its deposits to capitalize the bank. Section 8 also authorizes the board of directors with the advice and recommendations of the management of the bank to determine the means for additional capitalization to fulfill the purposes of the bank. It should not be necessary to include these provisions in the title, although

proponents would not object if the title board decides to mention that the bank may use deposits in the bank as capital.

9. The title fails to mention that in removing funds from private institutions, the state may be required to breach contracts and incur costs of early withdrawal.

PROPONENTS RESPONSE: This is a minor point that is unnecessary and inappropriate to include in the title. The state owned bank provides many benefits to the state of Colorado that it does not enjoy under the present system, but it is not appropriate to put selling points in the ballot title, any more than it is appropriate to mention minor disadvantages.

10. The title fails to reflect that the bank would not be obligated to pay any rate of return on state deposits and would have no incentive to do so.

PROPONENTS RESPONSE: This final objection is without merit. The initiative requires that the bank be governed under rules and regulations so as to "ensure its financial soundness and ethical management to serve the public interest of the citizens of Colorado." This is a detail that would best be covered in the rules and regulations of the bank. It is inappropriate for a title to include every detail, which would only serve to confuse the electorate.

CONCLUSION

The title as approved unanimously by the title board adequately meets the requirements of the Constitution and statutes governing initiatives in Colorado and the motion for rehearing should be denied, with the possible exception of a few additions that might be considered as mentioned above.

Respectfully submitted this 28th day of April, 2016.

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