

ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2005)
Appeal from the Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT
TITLE AND SUBMISSION CLAUSE, AND
SUMMARY FOR 2005-2006, #109

Petitioners:

JEAN DUBOFSKY and PATRICK STEADMAN,
Objectors,

v.

Respondents:

KEVIN LUNDBERG and WILL PERKINS,
Proponents,

and

Title Board:

WILLIAM A. HOBBS, JASON DUNN, and
SHARON EUBANKS.

Isaacson Rosenbaum P.C.
Mark G. Grueskin, #14621
633 17th St., Ste. 2200
Denver, CO 80202
303-292-5656
Paid \$75.00

2006

Jun 01 Petition for Review of Final Action of
Ballot Title Setting Board Concerning
Proposed Initiative 2005-2006 #109
("Prohibition on Legal Status Similar to
Marriage") filed.

Jun 02 ORDERED - all parties to file
SIMULTANEOUS BRIEFS due on or
before JUNE 12, 2006.

IT IS FURTHER ORDERED - all briefs
shall be filed and served upon opposing
parties by hand delivery or through an
overnight delivery service.

* Simultaneous Briefs DUE: 6/12/06

<p>SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203</p>	<div style="border: 1px solid black; padding: 5px; text-align: center;"> <p>FILED IN THE SUPREME COURT</p> <div style="border: 1px solid black; padding: 5px; margin: 5px 0;"> <p>JUN 01 2006</p> </div> <p>OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p> </div>
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board</p> <p>Petitioners:</p> <p>Jean Dubofsky and Patrick Steadman, Objectors, v.</p> <p>Respondents:</p> <p>Kevin Lundberg and Will Perkins, Proponents, and</p> <p>Title Board: WILLIAM A. HOBBS, JASON DUNN, and SHARON EUBANKS</p>	
<p>Attorneys for Petitioners: Mark G. Grueskin, #14621 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: 303-292-5656 Fax Number: 303-292-3152 E-mail: mgrueskin@ir-law.com</p>	<p style="text-align: center; font-size: 2em;">06SA172</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>Case No.:</p>
<p style="text-align: center;">PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #109 ("PROHIBITION ON LEGAL STATUS SIMILAR TO MARRIAGE")</p>	

Jean Dubofsky and Patrick Steadman ("Petitioners"), being registered electors of the State of Colorado, through their undersigned counsel, respectfully

petition this Court pursuant to § 1-40-107(2), C.R.S. (2005), to review the actions of the Ballot Title Setting Board with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2005-2006 #109 ("Prohibition on Legal Status Similar to Marriage").

I. Actions of the Ballot Title Setting Board

The Title Board conducted its initial public meeting and set titles for proposed Initiative 2005-2006 #86 on May 17, 2006. The Petitioners filed a Motion for Rehearing pursuant to § 1-40-107(1), C.R.S. (2005), on May 24, 2006. The Motion for Rehearing was heard at the final meeting of the Title Board for this election cycle on May 25, 2006. At the rehearing, the Board denied Petitioners' Motion. Petitioners hereby seek review of the final action of the Title Board with regard to proposed Initiative 2005-2006 #109 pursuant to § 1-40-107(2), C.R.S. (2005).

II. Issues Presented

A. The ballot title violates the single subject requirement because the phrase, "similar to marriage," is so broad and so vague that it necessarily will mean different things to different voters. Given its inherent ambiguity, this initiative is the epitome of a surreptitious ballot measure and thus violates the single subject requirement provided by Colo. Const., art. V, sec. 1(5.5).

B. Initiative #109 is centered around a purposefully obscure phrase, "similar to marriage." Because the ballot title merely repeats this indecipherable phrase, voters cannot understand the effect of a "yes" or "no" vote, and the title is thus misleading in violation of Colorado law.

III. Supporting Documentation

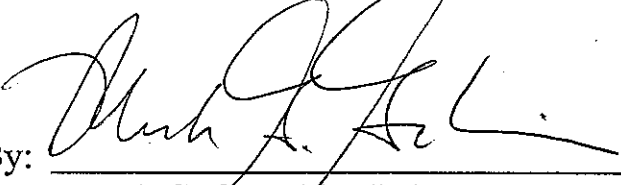
As required by § 1-40-107(2), C.R.S. (2005), a certified copy of the Petition, with the titles and submission clause of the proposed constitutional amendment, together with a certified copy of the Motion for Rehearing and the rulings thereon, are submitted herewith.

IV. Relief Requested

Petitioners respectfully request this Court to reverse the actions of the Title Board with directions to decline to set a title and to return the proposed Initiative to the proponents.

Respectfully submitted this 1st day of June, 2006.

ISAACSON ROSENBAUM P.C.

By: 
Mark G. Grueskin, #14621

ATTORNEY FOR PETITIONERS

Addresses of Petitioners:

Jean Dubofsky
1000 Rose Hill Drive
Boulder, CO 80302

Patrick Steadman
1257 Corona St.
Denver, CO 80218

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2006, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #109 ("PROHIBITION ON LEGAL STATUS SIMILAR TO MARRIAGE")** was placed in the United States mail, postage prepaid, to the following:

Michael J. Norton, Esq.
Burns, Figa & Will
6400 S. Fiddler's Green Circle,
Suite 1030
Englewood, Colorado 80111

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

_____



STATE OF COLORADO

DEPARTMENT OF
STATE

CERTIFICATE

I, **GINETTE DENNIS**, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2005-2006 #109"...

.....IN TESTIMONY WHEREOF I have unto set my hand
and affixed the Great Seal of the State of Colorado, at the
City of Denver this 26th day of May, 2006.

Ginette Dennis

SECRETARY OF STATE

STATE OF COLORADO
Department of State
1700 Broadway
Suite 270
Denver, CO 80290



Ginette Dennis
Secretary of State

J. Wayne Munster
Acting Director, Elections Division

May 23, 2006

NOTICE OF REHEARING MEETING

You are hereby notified that the Secretary of State,
Attorney General, and the Director of the Office of Legislative

Legal Services will meet to consider all

Motions for Rehearing filed by the deadline of

Wednesday, May 24, 2006 at 5:00 p.m.

Meeting will take place on

Thursday, May 25, 2006 at 9:00 a.m.

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 270

Denver, Colorado

You are invited to attend.

GINETTE DENNIS
Secretary of State

**AUDIO BROADCASTS NOW AVAILABLE. PLEASE VISIT WWW.SOS.STATE.CO.US AND CLICK
ON THE "INFORMATION CENTER".**

RECEIVED

MAY 24 2006

ELECTIONS / LICENSING
SECRETARY OF STATE

COLORADO TITLE SETTING BOARD

In re Title and Ballot Title and Submission Clause Set For Initiative 2005-06 #109

MOTION FOR REHEARING

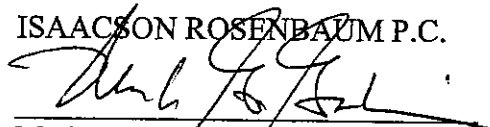
On behalf of Jean Dubofsky and Patrick Steadman, registered electors of the State of Colorado, the undersigned moves for a rehearing of the title and ballot title and submission clause set for Initiative 2005-06 #109 on May 17, 2006.

A. The ballot title violates the single subject requirement because the phrase, "similar to marriage," is so broad and so vague that it necessarily will mean different things to different voters. As such, voters will not comprehend the scope or nature of this measure and may unintentionally vote to prohibit the state and its political subdivisions from recognizing a wide variety of legal relationships that are generally accepted today. While proponents of an initiative have latitude in crafting their measure, they cannot use key phrases that defy common understanding and have the effect of surreptitiously changing current law. In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #25, 974 P.2d 458, 467 (Colo. 1999) (Title Board must be able to discern the consequences of a measure in order for it to find that the measure reflects a single subject); § 1-40-106.5(1)(e)(II), C.R.S. (single subject requirement intended to prevent surreptitious measures from being presented to voters and to prevent surprise and fraud from being practiced upon voters).

B. Initiative #109 is centered around a purposefully obscure phrase, "similar to marriage," and the ballot title which merely repeats this phrase is misleading and does not accurately or fairly relate the legal changes flowing from adoption of this initiative. In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29, 972 P.2d 257, 268 (Colo. 1999) (clear ballot title cannot be set where a ballot measure contains a "material ambiguity or concealed intent" in connection with one of its central provisions); § 1-40-106(3)(b), C.R.S. (voters must be able to understand the "effect of a 'yes' or 'no' vote").

Respectfully submitted this 24th day of May, 2006.

ISAACSON ROSENBAUM P.C.


Mark G. Grueskin, #14621
633 17th Street, Suite 2200
Denver, CO 80202
Phone: 303-292-5656
Fax: 303-292-3152

Addresses of Objectors:

Jean Dubofsky
1000 Rose Hill Drive
Boulder, CO 80302

Patrick Steadman
1257 Corona St.
Denver, CO 80218

CERTIFICATE OF SERVICE

I hereby certify that on the 24 th day of May, 2006, a true and correct copy of the foregoing **MOTION FOR REHEARING** was sent via facsimile device to the following:

Michael Norton, Esq.
Burns Figa & Will
6400 S. Fiddler's Green Circle, #1030
Englewood, CO 80111
FAX: 303-796-2777

Amy Knight

RECEIVED

APR 26 2006

ELECTIONS/LICENSING
SECRETARY OF STATE

PROPOSED INITIATIVE
2005-2006 #109

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

SECTION 1. Article II of the Colorado constitution is amended BY THE ADDITION OF A NEW SECTION to read:

Section 32. Legal Status of Marriage.

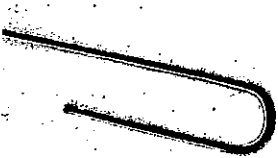
NEITHER THE STATE NOR ANY OF ITS POLITICAL SUBDIVISIONS MAY CREATE OR RECOGNIZE A LEGAL STATUS SIMILAR TO THAT OF MARRIAGE, AS DESCRIBED IN SECTIONS 14-2-101 THROUGH 14-2-104, COLORADO REVISED STATUTES (2005), FROM THE "UNIFORM MARRIAGE ACT".

SECTION 2. Effective date.

This section shall take effect upon proclamation of the vote by the governor.

Representative **Clevin Lundberg**
P. O. Box 378
Berthoud, CO 80413
email: replundberg@mac.com
(H) 970-532-3070

Wilfred G. Perkins
2508 Pine Bluff Road
Colorado Springs, CO 80909
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(H) 719-632-9547



Ballot Title Setting Board

Proposed Initiative 2005-2006 #109¹

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution prohibiting the creation or recognition by the state or its political subdivisions of a legal status similar to that of marriage, as described in the "Uniform Marriage Act" in the 2005 version of the Colorado Revised Statutes.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution prohibiting the creation or recognition by the state or its political subdivisions of a legal status similar to that of marriage, as described in the "Uniform Marriage Act" in the 2005 version of the Colorado Revised Statutes?

Hearing May 17, 2006:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 3:14 p.m.

Hearing May 25, 2006:

Motion for Rehearing denied.

Hearing adjourned 1:10 p.m.

¹ Unofficially captioned "Prohibition on Legal Status Similar to Marriage" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), 1 C.R.S. (2005)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE
AND SUBMISSION CLAUSE, AND SUMMARY FOR
2005-2006, #109
JEAN DUBOFSKY AND PATRICK STEADMAN,
OBJECTORS,

Petitioner

v.

KEVIN LUNDBERG AND WILL PERKINS,
PROPONENTS,

Respondents,
and
WILLIAM A. HOBBS, JASON R. DUNN, AND
SHARON EUBANKS,

Title Board
JOHN W. SUTHERS, Attorney General
MAURICE G. KNAIZER, Deputy Attorney General*
1525 Sherman Street, 5th Floor
Denver, CO 80203
303-866-5380
Registration Number: 05264
*Counsel of Record

FILED IN THE
SUPREME COURT

JUN 09 2006

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

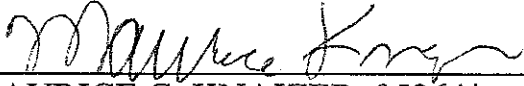
▲ COURT USE ONLY ▲

Case No.: 06SA172

NOTICE OF TITLE BOARD

The Title Board hereby notifies the Court that it will not be filing a brief in this case. Due to several pending election matters, undersigned counsel is unable to file the brief by the deadline set by the Court. The Board does not wish to prejudice or impair the rights of the proponents by seeking an enlargement of time at this stage of the petition cycle.

JOHN W. SUTHERS
Attorney General



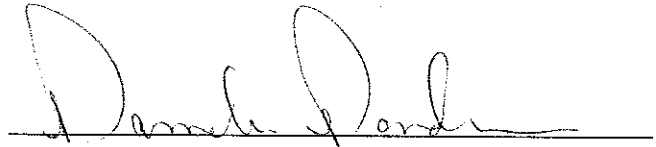
MAURICE G. KNAIZER, 05264*
Deputy Attorney General
Public Officials Unit
State Services Section
Attorneys for the Title Board
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within NOTICE OF TITLE BOARD
upon all parties herein by depositing copies of same in the United States mail, Express
Mail, postage prepaid, at Denver, Colorado, this 9th day of June
2006 addressed as follows:

Mark G. Grueskin
Isaacson Rosenbaum P.C.
633 17th St., Ste. 2200
Denver, CO 80202

Michael J. Norton
Burns, Figa & Will
6400 S. Fiddler's Green Cir.
Ste. 1030
Englewood, CO 80111

A handwritten signature in dark ink, appearing to read "Daniel J. Norton", is written over a horizontal line.

CERTIFICATION OF WORD COUNT: 2,967

SUPREME COURT, STATE OF COLORADO

Court Address:

2 East 14th Avenue

Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2006)

Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT
TITLE AND SUBMISSION CLAUSE, AND
SUMMARY FOR 2005-2006 #109

Petitioners:

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Respondents:

Kevin Lundberg and Will Perkins, Proponents,
and

Title Board:

WILLIAM A. HOBBS, JASON DUNN, and
SHARON EUBANKS

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FILED IN THE
SUPREME COURT

JUN 12 2006

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

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Case No.: 06 SA 172

PETITIONERS' OPENING BRIEF

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ISSUES PRESENTED

1. Whether the ballot title set for Initiative #109 violates the single subject requirement because its central phrase, "similar to marriage," is inherently ambiguous, such that voters may enact a measure that changes the law in ways they could not anticipate.
2. Whether the ballot title's repetition of a purposefully obscure phrase prevents voters from understanding the effect of a "yes" or "no" vote and is thus misleading under Colorado law.

STATEMENT OF THE FACTS

Kevin Lundberg and Wilfred Perkins ("Proponents") are the two registered electors who have proposed Initiative 2005-06 #109 ("#109") which amends Article II of the Colorado Constitution to add yet another element to the current gay marriage/domestic partnership debate in this state. It provides:

Neither the state nor any of its political subdivisions may create or recognize a legal status similar to that of marriage, as described in sections 14-2-101 through 14-2-104, Colorado Revised Statutes (2005), from the "Uniform Marriage Act".

The title set by the Title Board for #109 reads as follows:

An amendment to the Colorado constitution prohibiting the creation or recognition by the state or its political subdivisions of a legal status similar to that of marriage, as described in the "Uniform Marriage Act" in the 2005 version of the Colorado Revised Statutes.

The ballot title and submission clause contains the same language, except that it is preceded by the words, "Shall there be," and the punctuation at the end of the title is changed to a question mark.

STATEMENT OF THE CASE

The Title Board met on May 17, 2006 and set a title for this measure. On May 24, 2006, Jean Dubofsky and Patrick Steadman submitted a Motion for Rehearing, which was heard at the Board's May 25 meeting. The Board denied the Motion for Rehearing. A timely appeal of that decision was filed with the Court, pursuant to § 1-40-107(2), C.R.S.

SUMMARY OF ARGUMENT

This ballot measure prohibits the creation or recognition of any "legal status similar to that of marriage." Even after three hearings – one before legislative staff and two before the Title Board – this phrase remains a mystery. Where an initiative defies explanation, it also violates the single subject requirement and reflects an initiative for which no clear title can be set.

The measure should be returned to its authors because it fails to comply with the single subject requirement and because the title set by the Board fails to inform voters about the true meaning of the measure.

LEGAL ARGUMENT

I. The Proposed Initiative does not reflect a single subject.

A. Single subject standards

The Court needs no introduction to the notion of the single subject requirement for initiated ballot measures. By this stage in the election cycle, the issue has been raised multiple times. And while its novelty may have worn off, its relevance has not. See *In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2005-06 #74*, Case No. 06SA041 (decided May 30, 2006), slip op. at 15 (recent holding that proposal that set a ten-year cap on all measures enacted under TABOR violated the single subject requirement).

An initiative violates the single subject requirement when it "relate[s] to more than one subject" and has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *In the Matter of the Title, Ballot Title and Submission Clause for 2003-2004 #32 & #33*, 76 P.3d 460, 461 (Colo. 2003). The subject matter of an initiative must be "necessarily and properly connected" by something more than a broad "common characteristic." *In re Proposed Initiative for "Public Rights in Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995). Neither the Title Board nor this Court may address the relative merits of a proposal, but they may both evaluate the substance of an initiative to determine

whether it complies with the single subject requirement. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 1997-98* #30, 959 P.2d 822, 825 (Colo. 1998).

The acknowledged purpose of the single subject requirement is to forbid "the joining of incongruous subjects in the same measure thereby ensuring that each proposal depends on its own merits for passage." *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02* #43, 46 P.3d 438, 441 (Colo. 2002) (*internal quotations omitted*). The prevention of surreptitious measures and voter surprise goes to the very heart of the single subject requirement. § 1-40-106.5(1)(e)(II), C.R.S.

The Title Board's jurisdiction is dependent upon finding that a proposed initiative contains a single subject. "If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set." COLO.CONST., art. V, § 1(5.5). Thus, where a measure contains more than one subject, the Title Board may not proceed as if the measure warranted a ballot title. *In the Matter of the Title, Ballot Title and Submission Clause and Summary for 1999-2000* #25, 974 P.2d 458, 467 (Colo. 1998).

- B. "Similar to marriage" is an exceedingly broad phrase that will govern public treatment of diverse types of relationships.

If the single subject requirement is meant to allow voters to know what it is they are asked to enact, this measure fails the test. Its key phrase – "legal status similar to that of marriage" – is a cipher, but voters are not given the decoder ring. As a result, different voters will necessarily look at this phrase quite differently and, after they cast their ballots, they will be surprised at the breadth and nature of the very different relationships that are prohibited by this measure.

As a matter of law, the one court that has looked at this issue has agreed with the Petitioner here. What is "similar to" marriage? It is not limited to relationships between same-sex partners. *Citizens for Equal Protection, Inc. v. Bruning*, 368 F.Supp.2d 980, 995 (D.Neb. 2005). In fact, it would apply to "numerous relationships or living arrangements" including "roommates, co-tenants, foster parents, and related people who share living arrangements, expenses, custody of children, or ownership of property." *Id.* As such, it is not particularly surprising that the court held such a prohibition to be "both exceedingly vague and overly broad." *Id.*, n. 11.

In Colorado, the measure could apply to various, quite distinct relationships. For instance, the proponents are quite convinced that their measure addresses domestic partnerships between same-sex couples. They provided a written response to legislative staff at their review and comment hearing, and in answer to

the question about what effect it would have on a referred measure to authorize domestic partnerships, they stated: "Should the initiative be adopted by the people of the State of Colorado, any legislation that would create domestic partnerships or civil unions for same sex couples and would, as a result, extend official or legal recognition to or otherwise recognize such relationships would be unconstitutional." See attachment to Letter from Michael Norton to Kirk Mlinek (April 25, 2006) at p. 2 (answer to Comment 5) (attached hereto as **Exhibit A**). Given the language used, that cannot be the complete list of relationships addressed by this initiative. The question, though, is what other ones are affected? Certainly, #109 would prohibit the legal status that is recognized in Colorado between cohabiting adults in sexually intimate relationships who contract with one another. *Salzman v. Bachrach*, 996 P.2d 1263, 1268-69 (Colo. 2000). Likewise, #109 would likewise prohibit the recognition of civil unions, whether or not they are between same-sex couples or heterosexual couples.¹ And the *Bruning* court's observation of other legal relationships that are directly affected underscores a key

¹ Several countries recognize non-marital civil unions between opposite-sex as well as same-sex couples: France, Canada, Hungary, Israel, parts of Australia, Croatia, Norway, New Zealand and Portugal. G. Blumberg, Legal Recognition of Same-Sex Conjugal Relationships: the 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective, Symposium: Integration, Difference, & Citizenship: Celebrating 40 years of the UCLA Law Review, 51 UCLA L.Rev. 1551, 1571-75 (2004).

point: we have only gotten a glimpse of the many marriage-like associations that will be affected by #109.

Yet, to the ordinary voter, there is no obvious link between these relationships – or others – as falling within the general rubric of "similar to marriage." In fact, this measure is exactly what an initiative should not be: a Rorschach test for voters. Each voter will consider the phrase "similar to marriage" using his or her own life experience and reference points. Such a phrase, already judicially acknowledged to be "overly broad and exceedingly vague," will not be viewed by any two voters in exactly the same way. And for this reason, the measure cannot be deemed to be a single subject.

The Constitution requires that an initiative's single subject "be clearly expressed in its title." Colo. Const., art. V, sec. 1(5.5). The mandate that there be a "clear" single subject is not to be lightly taken.

It will not do to say that the general subject of legislation may be gathered from the body of the act, for, to sustain the legislation at all, it must be expressed in the title. Moreover, **we are bound to assume that the word "clearly" was not incorporated into the constitutional provision under consideration by mistake.** It appears in but few of the corresponding provisions of other state constitutions; a fact that could hardly have been unobserved by the convention.

That this word was advisedly used, and was intended to affect the manner of expressing the subject, we cannot doubt. **The matter covered by legislation is to be "clearly," not "dubiously" or "obscurely," indicated by the title.** Its relation to the subject must not rest upon a merely possible

or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it.

Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind.

#25, 974 P.2d at 462, *citing In re Breene*, 24 P. 3, 4 (Colo. 1890). Where the Board is uncertain about the reach or precise meaning of the measure, it cannot constitute a single subject. #25, 974 P.2d at 467 (Colo. 1999) (Title Board must be able to discern the consequences of a measure in order for it to find that the measure reflects a single subject).

The extent of this vagueness is best demonstrated by the confusion shown by the Proponents about the scope of their own measure. Before the legislative staff in the review and comment hearing, the Proponents stated that the measure would not prohibit the creation or authorization of contractual relationships that extend certain rights or benefits to persons in same-sex relationships. *See* attachment to Letter from Michael Norton to Kirk Mlinek (April 25, 2006) at p. 2 (answer to Comment 5) (attached hereto as **Exhibit A**). At the rehearing, they submitted a pleading that stated just the opposite. *See* Proponents' Response to Motion for Rehearing at 2, 7 (attached hereto as **Exhibit B**). The conflict led the Title Board chairman to comment, "I'm just having trouble reconciling all of that in my mind." May 25, 2006 Transcript ("Tr.") 21:18-19 (attached as **Exhibit C**). Even after the Proponents explained what they were intended to do, the chair still found the two

sets of comments "a little inconsistent." Tr. 24: 16-19. Only after the Solicitor General explained to the Proponents that their measure could be interpreted to prohibit the creation of a legal status "creating a shortcut to those benefits" associated with marriage, Tr. 28:5-21, were the Proponents grapple with the language that heretofore no one in the room had been able to understand.

The Proponents' only consistent statement throughout these proceedings was that "similar to marriage" is purely a question of sexual intimacy. This phrase, they informed the legislative staff, "applies to all intimate relationships of unmarried persons who are unrelated by blood or adoption. A non-sexual relationship would not be similar to marriage." *See* attachment to Letter from Michael Norton to Kirk Mlinek (April 25, 2006) at p. 5 (answer to Comment 6(b)). Yet, marriage has never been characterized solely or even predominately by sex. "Marriage cannot be identified or defined solely by sexual, procreational, or financial aspects." *Bruning*, 368 F.Supp.2d at 995; *cf. Salzman*, 996 P.2d at 1267 ("norms and behaviors have changed to such an extent that we now join the majority of courts in other states in holding that nonmarried cohabitating couples may legally contract with each other so long as sexual relations are merely incidental to the agreement").

Given the inherent ambiguity of "similar to marriage" and the confusion of the Proponents, the people of Colorado could well end up living with the "evils to be guarded against" by the single subject requirement: "the passage of unknown and alien subjects, which might be coiled up in the folds" of a measure. *In re Breene*, 24 P. at 3-4. As such, the Court should return the title to the Board for its failure to satisfy the constitutional single subject requirement for initiatives.

II. The ballot title is misleading.

A. Statutory requirements for an accurate, fair title

A measure's ballot title need not address every detail of an initiative. It must, however, be:

- fair, § 1-40-106(1), C.R.S.;
- not misleading, § 1-40-106(2), C.R.S.;
- stated so that the meaning of a "yes" or "no" vote is apparent to voters, *id.*;
- set forth so that it clearly expresses the true intent and meaning of an initiative, *id.*;
- brief, *id.*;
- not in conflict with any other title set by the board, *id.*; and

- unambiguous in stating the principle of the provision sought to be added, amended, or repealed. *Id.*

Ballot titles that fail to meet these standards must be returned to and corrected by the Board. § 1-40-107(2), C.R.S.

The Court has often noted that it is not its job to set a perfect title. But it is its responsibility to ensure that voters are not misled or confused about what a ballot measure proposes to achieve after reading the measure's title on a petition or a ballot. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Proposed Election Reform Amendment*, 852 P.2d 28, 33 (Colo. 1993). And in this regard, the Court is inclined to defer to the Board's decision unless there are concerns that voter understanding of a proposed measure is threatened by the language in the title. *Id.* at 32.

B. "Legal status similar to marriage" is an obscure phrase that blocks voter understanding about the nature of this measure.

As noted above, Initiative #109 is centered around a purposefully obscure phrase, "similar to marriage." The ballot title merely repeats this phrase and is thus not at all informative to voters.

Fundamentally, voters should be able to discern from the ballot title what they are being asked to do as a matter of law. But as to this measure, no voter can know what legal changes flow from adoption of this initiative. The phrase "similar

to marriage" is intended to connote a prohibition of governmental approval of same-sex relationships that result in benefits or rights to the persons in such a relationship. But the ballot title does not communicate that fact, because the measure was worded to avoid it. Instead, the measure is cloaked in broad terms, and the resulting ballot title will confuse voters. It cannot be said in such instances that the measure or the title enable voters to understand the "effect of a 'yes' or 'no' vote". § 1-40-106(3)(b), C.R.S.

It is true that a measure can contain vague phrases, even if they are intended to be judicially interpreted after the election. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for a Proposed Initiative on Water Rights*, 877 P.2d 321, 327 (Colo. 1994). But the Proponents cannot build a measure that contains a "material ambiguity or concealed intent" in connection with one of its central provisions. *See In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 268 (Colo. 1999). Here, even the proponents did not understand how ambiguous their own initiative was until the Petitioners pointed out, and the Title Board helped clarify, their inconsistent position on a key element of the measure. Faced with an initiative that contains a material ambiguity that is merely repeated in the ballot title, the Board erred by setting a title.

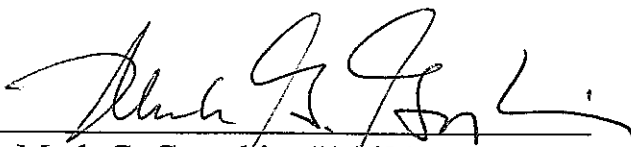
It should be noted that the Petitioners are not arguing that the Board should have attempted to define "similar to marriage" in the title. Of course, that is something the Board cannot do where the measure itself provides no such guidance. It is maintained, though, that the Board should not set a title where the scope of a measure is so uncertain, owing to a material ambiguity in the measure that its confines are unknown. *Id.* Proponents should not be permitted to write, and the Board should not be permitted to title, measures that are so open-ended as to be indecipherable. *See In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2005-06 #55*, Case No. 06SA20 (decided June 12, 2006) slip. op. at 23-24. As it has done in previous matters, the Court should apply this principle here and return this measure to its authors for another attempt at writing a measure that voters can understand and the Board can appropriately summarize.

CONCLUSION

For the reasons set forth herein, the Board erred by setting a title, and its actions should be reversed until such time as the Proponents draft a measure without material ambiguities that block voter understanding.

Respectfully submitted this 12th day of June, 2006.

ISAACSON ROSENBAUM P.C.

By: 
Mark G. Grueskin, #14621

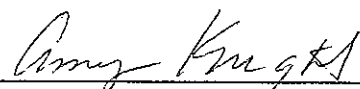
ATTORNEY FOR PETITIONERS

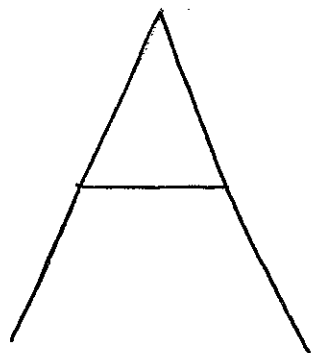
CERTIFICATE OF SERVICE

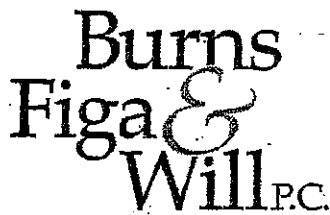
I hereby certify that on this 12th day of June, 2006, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was served via hand delivery or over night delivery, to the following:

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MICHAEL J. NORTON
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April 25, 2006

Via Hand-Delivery

Kirk Mlinek
Director, Legislative Council Staff
Room 029
State Capitol Building
Denver, CO 80203

RE: Proposed Initiative 2005-2006 #109
Our File No. 1913.58

Dear Mr. Mlinek:

As you will recall, I represent the proponents of the above-entitled proposed initiative, to wit:

Representative Kevin Lundberg
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The proponents are pleased to respond to the comments of the Legislative Council Staff and the Office of Legislative Legal Services contained in the April 21, 2006, memorandum ("Staff Memorandum") relating to this proposed initiative.

First, with regard to the technical comments in the Staff Memorandum, the proponents accept technical comments 1, 2, 3, 5, and 6, and will incorporate those technical comments into a revised proposed initiative which will be submitted to the Title Setting Review Board following this Review and Comment hearing.

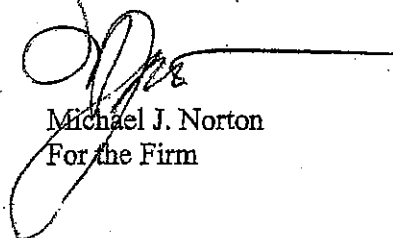
With regard to the Staff Memorandum's technical comments, 4, 7, and 8, the proponents observe the following:

1. With regard to technical comment number 4, the proponents have reviewed a number of proposed constitutional initiatives which have included proposed Section 2. The proponents are willing to accept this technical comment and will delete proposed Section 2 if the Legislative Council Staff and the Office of Legislative Legal Services assures the proponents that this section is not necessary to the validity of the initiative should it be passed by the people of the State of Colorado.
2. With regard to technical comment number 7, the proponents believe that sections 14-2-101 through 14-2-104, C.R.S. (2005), the "Uniform Marriage Act," do, indeed, provide a definition of marriage as, among other things, "only between one man and one woman." See section 14-2-104(1)(b), C.R.S. (2005). Therefore, the proponents do not accept this technical comment and will not change the word "definition" in the proposed initiative.
3. With regard to technical comment number 8, the proponents believe that it is necessary to include the reference to the year, i.e., 2005, in the statutory citation in the proposed initiative due to the potential that some or all of these statutory sections may be altered or amended by a future legislature. As a result of this potential, it is necessary to include not only the specific statutory sections, but the effective year thereof, in the proposed initiative. Therefore, the proponents will not accept this technical comment and will retain the citation of the year, i.e., 2005, in the proposed initiative.

With regard to the Staff Memorandum's substantive comments, the proponents submit the enclosed responses to these substantive comments and request that this written submittal, including these responses, be made a part of the record of proceedings on this proposed initiative.

Thank you for your courtesy.

Sincerely,



Michael J. Norton
For the Firm

Enclosure

April 25, 2006
Page 3

BURNS FIGA & WILL P.C.

cc: Representative Kevin Lundberg (with enclosure)
Mr. Perkins (with enclosure)

SUBSTANTIVE COMMENTS

1. Comment 1 - Why propose an amendment to the Colorado Bill of Rights rather than another portion of the state constitution?

Answer: The purpose of the initiative is to protect and preserve the historical institution of marriage between one man and one woman in the State of Colorado. The definition of marriage as between one man and one woman is based upon thousands of years of tradition and is rooted in immutable and empirical facts of nature with respect to human reproduction. The initiative is intended to apply to any "legal status," partnership, or union created as a substitute for or counterfeit of traditional marriage, whether formed within the state of Colorado or formed elsewhere. The proponents believe that the most important place in Colorado's constitution to enshrine and protect this historic definition of marriage is in the Bill of Rights.

2. Comment 2 - Shouldn't the title be changed to reflect that the proposed initiative deals with "the legal status of unions similar to marriage" rather than, as suggested, "Legal Status of Marriage?"

Answer: This is more of a "technical" question. The proponents are open to suggested changes to this title as may be appropriate and properly reflect the intentions of the proponents.

3. Comment 3 - What does the term "state" mean? Does it include "general assembly," "a state agency such as the department of public health and environment," does it include the judicial branch and the courts of the judicial branch?

Answer: Yes. The term "state" is meant to include "general assembly," "a state agency such as the department of public health and environment," and the judicial branch and the courts of the judicial branch of the State of Colorado.

4. Comment 4 - What is meant by the term "political subdivisions?"

Answer: The term "political subdivisions" is meant to include all of the instrumentalities of the State of Colorado, including, but not limited to, "counties" and all elected or appointed employees thereof acting in an official capacity for or on behalf of any such county (e.g., a county clerk and recorder); cities, including all home rule and all statutory cities, and all elected or appointed employees thereof acting in an official capacity for or on behalf of any such city; and municipalities, and all elected or appointed employees thereof acting in an official capacity for or on behalf of any such municipality. "Political subdivisions" is not intended, however, to include "private sector grantees" or "private sector contractors."

5. Comment 5 - What would the effect of the proposed initiative be on legislation, such as legislation that would create domestic partnerships or civil unions for same sex couples that might be created by the general assembly in the future? How would the measure affect legislation that extended certain rights or benefits to persons of the same sex that are related to each other but are not in an intimate relationship such as the reciprocal beneficiary bill introduced this legislative session (Senate Bill 06-166)?

Answer: Should the initiative be adopted by the people of the State of Colorado, any legislation that would create domestic partnerships or civil unions for same sex couples and would, as a result, extend official or legal recognition to or otherwise recognize such relationships would be unconstitutional.

The initiative would not prohibit individuals in a same-sex relationship from receiving benefits, if any, that such individuals are now entitled to receive under current law. The initiative would, however, prevent same sex couples from receiving benefits as a *couple* because it would prohibit the government from granting rights and benefits to such a same sex couple on the basis of a legal union, whether called a domestic partnership, a civil union, or by some other name. The initiative would not prohibit the granting of benefits to an individual government employee that he or she could share with another person of his or her choice, providing the extension of benefits was generally available to all unmarried employees and was not premised on the existence of a relationship.

The initiative would not prohibit laws creating or authorizing, for example, the designation of guardians; the appointment by, for example, a power of attorney, of agents; the execution of wills in favor of each other; the grant of rights to assist in raising a person's children; the creation between any two or more unmarried adults of an otherwise lawful trust relationship; or an otherwise lawful reciprocal beneficiary status that would permit any two or more unmarried adults to choose to undertake legal obligations, including healthcare obligations, to each other, so long as any such laws are not dependent upon official recognition of anything other than a contractual relationship. Thus, the initiative would not affect legislation similar to Senate Bill 06-166.

6. Comment 6 - What is a "legal status similar to that of a marriage" and "to whom would it apply?"

Answer: (a) "Legal status" refers to extending official or governmental recognition and legal effect to a relationship, and treating two people as a unit because of that relationship. For example, granting benefits to a government employee because he or she is cohabiting with another person is extending legal status to the relationship; making it illegal to commit a violent act (i.e., domestic violence) against a person with whom one resides or with whom one previously had an intimate relationship does not create or recognize a legal status unless the statute premises the prohibition on a spouse-like relationship.

(b) This applies to all intimate relationships of unmarried persons who are unrelated by blood or adoption. A non-sexual relationship would not be similar to that of marriage.

(c) "Similar" is used in its ordinary sense of "like," "much the same," or "resembling." Extending benefits or creating responsibilities because of an intimate relationship would be treating that relationship as "similar" to marriage.

(d) The initiative applies to the government, not to private parties. A court enforcing a private contract or will of any kind is not recognizing a legal status; the court would not be enforcing a contract or will because of an intimate relationship, but because the contract or will complied with the legal requirements for the execution and enforcement of such documents.

7. Comment 7 – What is meant by "to recognize a legal status similar to that of marriage?"

Answer: To "recognize" means to acknowledge a status and/or to give legal effect to a status, either through the courts, such as treating a relationship as having legal effect, or through other governmental action such as extending benefits, etc. The initiative would prohibit the recognition of any non-marital, non-familial relationship, such as domestic partnerships or civil unions that have legal effect in another jurisdiction or any marriage that does not meet the requirements of sections 14-2-101 through 14-2-104, C.R.S. (2005).

The initiative would not prohibit individuals in a same-sex relationship from receiving benefits, if any, that such individuals are now entitled to receive under current law. The initiative would, however, prevent same sex couples from receiving benefits as a *couple* because it would prohibit the government from granting rights and benefits to such a same sex couple on the basis of a legal union, whether called a domestic partnership, a civil union, or by some other name, other than marriage.

The initiative would not prohibit the granting of benefits to an individual government employee that he or she could share with another person of his or her choice, providing the extension of benefits was generally available to all unmarried employees and was not premised on the existence of a relationship.

The initiative would not prohibit laws creating or authorizing, for example, the designation of guardians; the appointment by, for example, a power of attorney, of agents; the execution of wills in favor of each other; the grant of rights to assist in raising a person's children; the creation between any two or more unmarried adults of an otherwise lawful trust relationship; or an otherwise lawful reciprocal beneficiary status that would permit any two or more unmarried adults to choose to undertake legal obligations, including healthcare obligations, to each other, so long as any such laws are not dependent upon official recognition of anything other than contractual relationship.

8. Comment 8 – How would the initiative affect House Bill 06-1344 should both the initiative and the bill be approved by the people?

Answer – The initiative, a constitutional measure, would trump House Bill 06-1344, should both be approved by the people. In other words, in this unlikely event, House Bill 06-1344, which is equivalent to a legislative enactment and not a constitutional amendment, would be thereupon unconstitutional.

9. Comment 9 – How would the initiative impact section 14-2-104, C.R.S.

Answer – The initiative incorporates sections 14-2-101 through 14-2-104, C.R.S. (2005), by reference. There would be no impact on these statutory provisions by the passage of the initiative. However, should these statutory sections be thereafter altered or amended, the 2005 version of these sections would be the definition of a marriage for the purposes of this then-approved constitutional amendment.

10. Comment 10 – How would the initiative impact any current local laws and policies regarding partnerships (e.g., Denver, Boulder, Aspen)?

Answer – The initiative would not prohibit local governmental units, including counties, home rule cities, statutory cities, and municipalities, from continuing current benefits, such as health insurance, but would require that such benefits be extended equally to all unmarried employees. As stated above, because the initiative applies to the government only, it would have no effect on private sector policies.

11. Comment 11 – How would the initiative affect common law marriages, which are recognized in Colorado?

Answer – The purpose of the initiative is to protect and preserve historical marriage between one man and one woman in the State of Colorado. A common law marriage is a valid marriage within the definition of sections 14-2-101 through 14-2-104, C.R.S. (2005). Therefore, the initiative would have no effect on valid common law marriages.

12. Comment 12 – What enforcement mechanisms or penalties are associated with the initiative?

Answer – The initiative, the purpose of which is to protect and preserve traditional marriage between one man and one woman in the State of Colorado, including otherwise valid common law marriages, would be self-executing. Should a clerk and recorder refuse to adhere to this constitutional provision and issue a marriage license or a certificate of domestic partnership to a same sex couple despite this constitutional provision, any such act would be void ab initio.

13. Comment 13 – How will the initiative change current laws respecting the creation or recognition of domestic partnerships or civil unions?

Answer - The initiative would prohibit the state, any state agency, or any state or local political subdivision, including any county, city, or municipality, from granting, establishing, or extending official or legal recognition to or otherwise recognizing a non-familial or non-marital relationship that is not otherwise prohibited by law (e.g., marriages prohibited by consanguinity). In other words, neither the state nor any political subdivision of the state, including the courts of this state, may create a status similar to marriage simply by calling it a different name, whether that name be "domestic partnership" or "civil union." "Domestic partnerships" or "civil unions" could no longer be created or recognized by any Colorado governmental entity.

14. Comment 14 – What are the goals of the initiative?

Answer - The initiative would amend the Colorado constitution to provide that a marriage between one man and one woman is the only legal union that shall be valid or recognized in this state. The purpose of the initiative is to protect and preserve traditional marriage between one man and one woman in the State of Colorado.

The initiative is intended to refer to unions formed within the state of Colorado and to unions formed elsewhere. The initiative would prohibit the state, any state agency, or any state or local political subdivision from granting, establishing, or extending official or legal recognition to or otherwise recognizing a non-familial or non-marital relationship that is not otherwise prohibited by law (e.g., marriages prohibited by consanguinity). In other words, neither the state nor any political subdivision of the state may create a status similar to marriage simply by calling it a different name, whether that name be "domestic partnership," "civil union," or something else.

B

COLORADO TITLE SETTING BOARD

In re Title and Ballot Title and Submission Clause Set For Initiative 2005-06 #109

RESPONSE TO MOTION FOR REHEARING

On behalf of Representative Kevin Lundberg and Wilfred G. Perkins, proponents of Initiative 2005-06 #109 (herein "Proponents"), the undersigned respectfully responds to the Motion for Rehearing filed on behalf of registered electors Jean Dubofsky and Patrick Steadman (herein "Motion for Rehearing") as follows:

1. The Motion for Rehearing is based upon the fallacious grounds that (a) the ballot title violates the single subject requirement because the phrase "similar to marriage" is overly broad and vague; and (b) the ballot title, which repeats this phrase "similar to marriage," is misleading and does not accurately or fairly relate the legal changes flowing from adoption of this initiative.

2. As to the first issue raised by the Motion for Rehearing, the single-subject requirement, set forth in section 1, subsection 5.5, Article V, Colorado constitution, is designed to: (1) prevent joining in the same measure subjects having no necessary or proper connection; and (2) protect the voters from surprise and fraud. See C.R.S. § 1-40-106.5(e). An initiative that tends to effect or carry out one general object or purpose satisfies the single-subject requirement. See *In re 1999-2000 #200A*, 992 P.2d 27, 31 (Colo. 2000); *In re Proposed Initiative "Public Rights in Waters II"*, 898 P.2d 1076, 1079 (Colo. 1995). Unless a proposal has at least two distinct and separate purposes that are dependent upon or connected with each other, it does not violate the single subject requirement. See *In re 1999-2000 #200A*, 992 P.2d at 30; *In re 1999-2000 # 104*, 987 P.2d 249, 253 (Colo. 1999). An initiative does not violate the single-subject requirement if the matters encompassed are necessarily or properly connected to each other rather than disconnected and incongruous. See *In re Proposed Ballot Initiative on Parental Rights*, 912 P.2d 1127, 1131 (Colo. 1996).

3. As is reflected in Proponents April 25, 2006, letter, attached hereto as Exhibit A and incorporated herein by this reference, in response to comments and questions from the Legislative Council Staff and Office of Legislative Legal Services, Initiative 2005-06 #109 does not contain two distinct and separate subjects.

4. The purpose of Initiative 2005-06 #109 is to protect and preserve the historical institution of marriage as defined in sections 14-2-101 through 14-2-104, C.R.S. (2005), the Uniform Marriage Act. The definition of marriage as between one man and one woman is based upon thousands of years of tradition and is rooted in immutable and empirical facts of nature with respect to human reproduction. The initiative is intended to apply to any "legal status," partnership, or union created as a

substitute for or counterfeit of traditional marriage, whether formed within the state of Colorado or formed elsewhere.

5. "Legal status" refers to extending official or governmental recognition and legal effect to a relationship, and treating two people as a unit because of that relationship. For example, granting benefits to a government employee because he or she is cohabiting with another person is extending legal status to the relationship; making it illegal to commit a violent act (*i.e.*, domestic violence) against a person with whom one resides or with whom one previously had an intimate relationship does not create or recognize a legal status unless the statute premises the prohibition on a spouse-like relationship.

(a) This applies to all intimate relationships of unmarried persons who are unrelated by blood or adoption. A non-sexual relationship would not be similar to that of marriage.

(b) "Similar" is used in its ordinary sense of like, "much the same," or "resembling." Extending benefits or creating responsibilities because of an intimate relationship would be treating that relationship as "similar" to marriage.

(c) The initiative applies to the government, not to private parties. A court enforcing a private contract or will of any kind is not recognizing a legal status; the court would not be enforcing a contract or will because of an intimate relationship, but because the contract or will complied with the legal requirements for the execution and enforcement of such documents.

6. To "recognize" means to acknowledge a status and/or to give legal effect to a status, either through the courts, such as treating a relationship as having legal effect, or through other governmental action such as extending benefits, etc. The initiative would prohibit the recognition of any non-marital, non-familial relationship, such as domestic partnerships or civil unions that have legal effect in another jurisdiction or any marriage that does not meet the requirements of sections 14-2-101 through 14-2-104, C.R.S. (2005).

7. As is clear from its language, Initiative 2005-06 #109 will, if adopted by the people of Colorado, prohibit extending official status to the relationships of unmarried, unrelated adults, such as domestic partnerships or civil unions. Therefore, it would prohibit governmental entities from creating "same-sex marriage," whether called "same-sex marriage," domestic partnership, civil union, or some other or different name. Any legal status granted to an unmarried couple for the purpose of extending any benefits or rights would violate Initiative 2005-06 #109, if adopted by the people of Colorado. For example, both Hawaii and Vermont have adopted reciprocal beneficiary statutes that extend benefits to couples based on the legal status of a reciprocal beneficiary "relationship." The purpose of the Hawaii scheme is "to extend certain rights and benefits which are presently available only to married couples to couples composed of two

individuals who are legally prohibited from marrying under state law." Haw. Rev. St. § 572C-1. The purpose of the Vermont scheme is to provide certain benefits, protections and responsibilities "that are granted to spouses" to certain related persons who enter "a consensual reciprocal beneficiaries relationship." Vt. Stat. § 1301(a). Because both of these approaches create a legal status for unmarried couples, and focus on the couple or relationship, they would violate the proposed amendment.

8. The prohibition of creating or recognizing a legal status for unmarried persons similar to that of marriage affirms that marriage is a unique legal status. Although marriage is often spoken of as a contract, it is one of a kind. Unlike private contracts, which generally implicate no public interests, marriage has public consequences because it establishes the fundamental family unit of a stable society. As a result of the public interest in and regulation of marriage, it cannot be dissolved solely by the mutual consent of the parties. The essence of the legal status of marriage is that it involves domestic relations with public ramifications, including public recognition, licensing, registration, and/or regulation. Thus, a legal status would be "similar to that of marriage" if it involves public recognition, licensing, registration, or regulation of domestic relations.

9. As to the second issue raised by the Motion for Rehearing that Initiative 2005-06 #109 is misleading and does not accurately or fairly relate the legal changes flowing from adoption of this initiative, the Motion for Rehearing misperceives the Title Setting Board's responsibilities and duties in setting titles. C.R.S. § 1-40-106(3)(b) provides guidance to the Title Setting Board in setting titles for proposed initiatives. The Board is to consider the public confusion that might be caused by misleading titles and is to, whenever practicable, avoid titles for which the general understanding of the effect of a "yes" or "no" vote will be unclear. The title is also to correctly and fairly express the true intent and meaning of the proposed constitutional amendment. Similarly, the Board is required to apply judicial decisions construing constitutional single-subject requirements for bills and is to follow the same rules employed by the general assembly in considering titles for bills. See C.R.S. § 1-40-106(3). As is the potential later role of the Court, the Board is not to "address the merits of the proposed initiatives, interpret their language, or suggest how they will be applied if adopted by the electorate." See *In re 1999-2000 #104*, 987 P.2d at 254; *In re # 25A Concerning Hous. Unit Constr. Limits*, 954 P.2d 1063, 1065 (Colo. 1998). That is because the proponent of the measure best understands the reasons for initiating the change or addition to the constitution or statutes. See *Initiative Concerning Unsafe Workplace Env't*, 830 P.2d at 1034.

10. The articulated purpose of Initiative 2005-06 #109 is to protect and preserve the historical institution of marriage between one man and one woman in the State of Colorado. Initiative 2005-06 #109 neither violates the single-subject requirements of Colorado law nor is it or its title misleading, unfair, inaccurate, or otherwise fail to express the true intent and meaning of Initiative 2005-06 #109. See *In re 1999-2000 #227 and #228*, 3 P.3d 1 (Colo. 2000).

WHEREFORE, having fully responded to the Motion for Rehearing, Proponents respectfully state as aforesaid.

DATED this 25th day of May, 2006.

BURNS, FIGA & WILL, P.C.

By: 

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Burns
Figa &
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MICHAEL J. NORTON
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April 25, 2006

Via Hand-Delivery

Kirk Mlinek
Director, Legislative Council Staff
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Denver, CO 80203

RE: Proposed Initiative 2005-2006 #109
Our File No. 1913.58

Dear Mr. Mlinek:

As you will recall, I represent the proponents of the above-entitled proposed initiative, to wit:

Representative Kevin Lundberg
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The proponents are pleased to respond to the comments of the Legislative Council Staff and the Office of Legislative Legal Services contained in the April 21, 2006, memorandum ("Staff Memorandum") relating to this proposed initiative.

First, with regard to the technical comments in the Staff Memorandum, the proponents accept technical comments 1, 2, 3, 5, and 6, and will incorporate those technical comments into a revised proposed initiative which will be submitted to the Title Setting Review Board following this Review and Comment hearing.

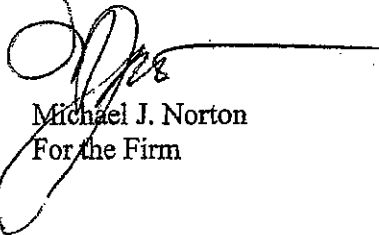
With regard to the Staff Memorandum's technical comments, 4, 7, and 8, the proponents observe the following:

1. With regard to technical comment number 4, the proponents have reviewed a number of proposed constitutional initiatives which have included proposed Section 2. The proponents are willing to accept this technical comment and will delete proposed Section 2 if the Legislative Council Staff and the Office of Legislative Legal Services assures the proponents that this section is not necessary to the validity of the initiative should it be passed by the people of the State of Colorado.
2. With regard to technical comment number 7, the proponents believe that sections 14-2-101 through 14-2-104, C.R.S. (2005), the "Uniform Marriage Act," do, indeed, provide a definition of marriage as, among other things, "only between one man and one woman." See section 14-2-104(1)(b), C.R.S. (2005). Therefore, the proponents do not accept this technical comment and will not change the word "definition" in the proposed initiative.
3. With regard to technical comment number 8, the proponents believe that it is necessary to include the reference to the year, i.e., 2005, in the statutory citation in the proposed initiative due to the potential that some or all of these statutory sections may be altered or amended by a future legislature. As a result of this potential, it is necessary to include not only the specific statutory sections, but the effective year thereof, in the proposed initiative. Therefore, the proponents will not accept this technical comment and will retain the citation of the year, i.e., 2005, in the proposed initiative.

With regard to the Staff Memorandum's substantive comments, the proponents submit the enclosed responses to these substantive comments and request that this written submittal, including these responses, be made a part of the record of proceedings on this proposed initiative.

Thank you for your courtesy.

Sincerely,



Michael J. Norton
For the Firm

Enclosure

April 25, 2006
Page 3

BURNS FIGA & WILL P.C.

cc: Representative Kevin Lundberg (with enclosure)
Mr. Perkins (with enclosure)

SUBSTANTIVE COMMENTS

1. Comment 1 - Why propose an amendment to the Colorado Bill of Rights rather than another portion of the state constitution?

Answer: The purpose of the initiative is to protect and preserve the historical institution of marriage between one man and one woman in the State of Colorado. The definition of marriage as between one man and one woman is based upon thousands of years of tradition and is rooted in immutable and empirical facts of nature with respect to human reproduction. The initiative is intended to apply to any "legal status," partnership, or union created as a substitute for or counterfeit of traditional marriage, whether formed within the state of Colorado or formed elsewhere. The proponents believe that the most important place in Colorado's constitution to enshrine and protect this historic definition of marriage is in the Bill of Rights.

2. Comment 2 - Shouldn't the title be changed to reflect that the proposed initiative deals with "the legal status of unions similar to marriage" rather than, as suggested, "Legal Status of Marriage?"

Answer: This is more of a "technical" question. The proponents are open to suggested changes to this title as may be appropriate and properly reflect the intentions of the proponents.

3. Comment 3 - What does the term "state" mean? Does it include "general assembly," "a state agency such as the department of public health and environment," does it include the judicial branch and the courts of the judicial branch?

Answer: Yes. The term "state" is meant to include "general assembly," "a state agency such as the department of public health and environment," and the judicial branch and the courts of the judicial branch of the State of Colorado.

4. Comment 4 - What is meant by the term "political subdivisions?"

Answer: The term "political subdivisions" is meant to include all of the instrumentalities of the State of Colorado, including, but not limited to, "counties" and all elected or appointed employees thereof acting in an official capacity for or on behalf of any such county (e.g., a county clerk and recorder); cities, including all home rule and all statutory cities, and all elected or appointed employees thereof acting in an official capacity for or on behalf of any such city; and municipalities, and all elected or appointed employees thereof acting in an official capacity for or on behalf of any such municipality. "Political subdivisions" is not intended, however, to include "private sector grantees" or "private sector contractors."

5. Comment 5 - What would the effect of the proposed initiative be on legislation, such as legislation that would create domestic partnerships or civil unions for same sex couples that might be created by the general assembly in the future? How would the measure affect legislation that extended certain rights or benefits to persons of the same sex that are related to each other but are not in an intimate relationship such as the reciprocal beneficiary bill introduced this legislative session (Senate Bill 06-166)?

Answer: Should the initiative be adopted by the people of the State of Colorado, any legislation that would create domestic partnerships or civil unions for same sex couples and would, as a result, extend official or legal recognition to or otherwise recognize such relationships would be unconstitutional.

The initiative would not prohibit individuals in a same-sex relationship from receiving benefits, if any, that such individuals are now entitled to receive under current law. The initiative would, however, prevent same sex couples from receiving benefits as a *couple* because it would prohibit the government from granting rights and benefits to such a same sex couple on the basis of a legal union, whether called a domestic partnership, a civil union, or by some other name. The initiative would not prohibit the granting of benefits to an individual government employee that he or she could share with another person of his or her choice, providing the extension of benefits was generally available to all unmarried employees and was not premised on the existence of a relationship.

The initiative would not prohibit laws creating or authorizing, for example, the designation of guardians; the appointment by, for example, a power of attorney, of agents; the execution of wills in favor of each other; the grant of rights to assist in raising a person's children; the creation between any two or more unmarried adults of an otherwise lawful trust relationship; or an otherwise lawful reciprocal beneficiary status that would permit any two or more unmarried adults to choose to undertake legal obligations, including healthcare obligations, to each other, so long as any such laws are not dependent upon official recognition of anything other than a contractual relationship. Thus, the initiative would not affect legislation similar to Senate Bill 06-166.

6. Comment 6 - What is a "legal status similar to that of a marriage" and "to whom would it apply?"

Answer: (a) "Legal status" refers to extending official or governmental recognition and legal effect to a relationship, and treating two people as a unit because of that relationship. For example, granting benefits to a government employee because he or she is cohabiting with another person is extending legal status to the relationship; making it illegal to commit a violent act (i.e., domestic violence) against a person with whom one resides or with whom one previously had an intimate relationship does not create or recognize a legal status unless the statute premises the prohibition on a spouse-like relationship.

(b) This applies to all intimate relationships of unmarried persons who are unrelated by blood or adoption. A non-sexual relationship would not be similar to that of marriage.

(c) "Similar" is used in its ordinary sense of "like," "much the same," or "resembling." Extending benefits or creating responsibilities because of an intimate relationship would be treating that relationship as "similar" to marriage.

(d) The initiative applies to the government, not to private parties. A court enforcing a private contract or will of any kind is not recognizing a legal status; the court would not be enforcing a contract or will because of an intimate relationship, but because the contract or will complied with the legal requirements for the execution and enforcement of such documents.

7. Comment 7 – What is meant by "to recognize a legal status similar to that of marriage?"

Answer: To "recognize" means to acknowledge a status and/or to give legal effect to a status, either through the courts, such as treating a relationship as having legal effect, or through other governmental action such as extending benefits, etc. The initiative would prohibit the recognition of any non-marital, non-familial relationship, such as domestic partnerships or civil unions that have legal effect in another jurisdiction or any marriage that does not meet the requirements of sections 14-2-101 through 14-2-104, C.R.S. (2005).

The initiative would not prohibit individuals in a same-sex relationship from receiving benefits, if any, that such individuals are now entitled to receive under current law. The initiative would, however, prevent same sex couples from receiving benefits as a *couple* because it would prohibit the government from granting rights and benefits to such a same sex couple on the basis of a legal union, whether called a domestic partnership, a civil union, or by some other name, other than marriage.

The initiative would not prohibit the granting of benefits to an individual government employee that he or she could share with another person of his or her choice, providing the extension of benefits was generally available to all unmarried employees and was not premised on the existence of a relationship.

The initiative would not prohibit laws creating or authorizing, for example, the designation of guardians; the appointment by, for example, a power of attorney, of agents; the execution of wills in favor of each other; the grant of rights to assist in raising a person's children; the creation between any two or more unmarried adults of an otherwise lawful trust relationship; or an otherwise lawful reciprocal beneficiary status that would permit any two or more unmarried adults to choose to undertake legal obligations, including healthcare obligations, to each other, so long as any such laws are not dependent upon official recognition of anything other than contractual relationship.

8. Comment 8 – How would the initiative affect House Bill 06-1344 should both the initiative and the bill be approved by the people?

Answer – The initiative, a constitutional measure, would trump House Bill 06-1344, should both be approved by the people. In other words, in this unlikely event, House Bill 06-1344, which is equivalent to a legislative enactment and not a constitutional amendment, would be thereupon unconstitutional.

9. Comment 9 – How would the initiative impact section 14-2-104, C.R.S.

Answer – The initiative incorporates sections 14-2-101 through 14-2-104, C.R.S. (2005), by reference. There would be no impact on these statutory provisions by the passage of the initiative. However, should these statutory sections be thereafter altered or amended, the 2005 version of these sections would be the definition of a marriage for the purposes of this then-approved constitutional amendment.

10. Comment 10 – How would the initiative impact any current local laws and policies regarding partnerships (e.g., Denver, Boulder, Aspen)?

Answer – The initiative would not prohibit local governmental units, including counties, home rule cities, statutory cities, and municipalities, from continuing current benefits, such as health insurance, but would require that such benefits be extended equally to all unmarried employees. As stated above, because the initiative applies to the government only, it would have no effect on private sector policies.

11. Comment 11 – How would the initiative affect common law marriages, which are recognized in Colorado?

Answer – The purpose of the initiative is to protect and preserve historical marriage between one man and one woman in the State of Colorado. A common law marriage is a valid marriage within the definition of sections 14-2-101 through 14-2-104, C.R.S. (2005). Therefore, the initiative would have no effect on valid common law marriages.

12. Comment 12 – What enforcement mechanisms or penalties are associated with the initiative?

Answer – The initiative, the purpose of which is to protect and preserve traditional marriage between one man and one woman in the State of Colorado, including otherwise valid common law marriages, would be self-executing. Should a clerk and recorder refuse to adhere to this constitutional provision and issue a marriage license or a certificate of domestic partnership to a same sex couple despite this constitutional provision, any such act would be void ab initio.

13. Comment 13 – How will the initiative change current laws respecting the creation or recognition of domestic partnerships or civil unions?

Answer - The initiative would prohibit the state, any state agency, or any state or local political subdivision, including any county, city, or municipality, from granting, establishing, or extending official or legal recognition to or otherwise recognizing a non-familial or non-marital relationship that is not otherwise prohibited by law (e.g., marriages prohibited by consanguinity). In other words, neither the state nor any political subdivision of the state, including the courts of this state, may create a status similar to marriage simply by calling it a different name, whether that name be "domestic partnership" or "civil union." "Domestic partnerships" or "civil unions" could no longer be created or recognized by any Colorado governmental entity.

14. Comment 14 – What are the goals of the initiative?

Answer - The initiative would amend the Colorado constitution to provide that a marriage between one man and one woman is the only legal union that shall be valid or recognized in this state. The purpose of the initiative is to protect and preserve traditional marriage between one man and one woman in the State of Colorado.

The initiative is intended to refer to unions formed within the state of Colorado and to unions formed elsewhere. The initiative would prohibit the state, any state agency, or any state or local political subdivision from granting, establishing, or extending official or legal recognition to or otherwise recognizing a non-familial or non-marital relationship that is not otherwise prohibited by law (e.g., marriages prohibited by consanguinity). In other words, neither the state nor any political subdivision of the state may create a status similar to marriage simply by calling it a different name, whether that name be "domestic partnership," "civil union," or something else.

C.

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4 INITIATIVE TITLE SETTING REVIEW BOARD
5 THURSDAY, MAY 25, 2006, 12:09 P.M.
6 SECRETARY OF STATE'S BLUE SPRUCE CONFERENCE ROOM
7 1700 BROADWAY, SUITE 270
8 DENVER, COLORADO
9

10 The following proceedings were taken on
11 Thursday, May 25, 2006, commencing at 12:09 p.m., before
12 Deborah D. Mead, Certified Shorthand Reporter and Notary
13 Public within and for the State of Colorado.
14
15
16

17 THE BOARD:
18 William Hobbs, Chairman
19 Sharon Eubanks
20 Dan Domenico
21
22

23 PROPOSED INITIATIVE 2005-2006 #109
24
25

P R O C E E D I N G S

THE CHAIRMAN: Okay. Let's resume. The time is 12:09 p.m. The next item on the Title Board's agenda is 2005-2006 No. 109. And just for the record, now sitting on the Board we have Sharon Eubanks for the Office of Legislative Legal Services and Dan Domenico for the Office of the Attorney General.

This measure is before us on a motion for rehearing for Gene Debosky and Patrick Stedman.

Mr. Grueskin. I'll turn it over to you, Mr. Grueskin.

MR. GRUESKIN: Thank you, Mr. Chairman. My name is Mark Grueskin. I'm with the law firm of Isaacson Rosenbaum, and our firm represents Gene Debosky and Patrick Stedman in this matter.

I wasn't here for all the discussion on a previous matter, but while I was hoping that this would be somewhat of a novel matter for you to consider, I actually think you ad nauseam had an opportunity to consider the legal issue that I'd like to raise with you here.

Our motion for rehearing is fairly targeted -- fairly targeted in this regard. I have a question for you. What does "similar to marriage" mean? And without expecting a specific answer, I will tell you that the

1 record is void of any answer.

2 Given the hearing on May 17, you all were
3 pressed and, I think, had 21 different measures before
4 you. But the typical discussion with Proponents didn't
5 really get to occur. And I'm not sure that you had the
6 wherewithal to ask that question, and the Proponents
7 didn't really offer up an answer.

8 And I would suggest to you that "similar to
9 marriage" is a little bit like pornography; you may know
10 it when you see it, but you sure can't define it. And
11 the problem is is that when the three of you or the five
12 people sitting at your table or the 15 people sitting in
13 this room go into the voting booth, we should all have
14 pretty much the same idea of what we're voting on, what
15 we're voting to authorize or what we're voting to
16 prohibit, or at least what a measure is going to
17 effectively accomplish.

18 But I would submit that this is a measure that
19 was designed to be all things to all people, which is
20 problematic because ultimately it won't be. Ultimately
21 it will be applied judicially in such a way as to be
22 something less than all things to all people.

23 And while it may feel good to think you know
24 what a measure means as you're voting on it, it is
25 disturbing to find out after the election that you were

1 wrong; that, in fact, you voted for something or against
2 something for a reason that had nothing to do with what
3 that measure actually does.

4 And I'm not talking about Nirvana or Utopia
5 here. I'm talking about what the Supreme Court requires,
6 not just of what you do, but what they require of
7 Proponents.

8 The initiative process is not like being in a
9 park where you have a little sailboat and you just set it
10 off on the pond and see where it goes. You have to have
11 some sort of mission. And you have to be able to
12 communicate that mission to the voters. You have to be
13 able to communicate it to petition signers. And before
14 you even get to that phase, you have to communicate it to
15 the Title Board, and that simply hasn't been done.

16 I think don't anybody knows what "similar to
17 marriage" means, and I would suggest to you that the only
18 time it's been judicially interpreted was when Nebraska
19 adopted a similar type of provision in its constitution.
20 And the federal court there, frankly, rejected the
21 opportunity to define marriage or the kinds of
22 relationships that are similar to marriage.

23 It said in the case of Citizens for Equal
24 Protection, Inc. versus Bruning at 368 F.Supp.2nd 980
25 decided in 2005, it observed, "The Court holds only that

1 the prospective prohibition of any relationship 'similar
2 to' marriage is both exceedingly vague and overly
3 broad."

4 They talked about relationships that could be
5 similar to marriage, relationships that I would doubt you
6 would think would be similar to marriage.

7 But the point is that none of us really knows
8 what this is. Is it supposed to counter the other
9 measures on the ballot relating to domestic partnership?
10 Well, I think that the Proponents have at least stated
11 that that is one intent. But that isn't how they define
12 "similar to marriage." In fact, they haven't defined
13 "similar to marriage."

14 What they've said is that there can be no
15 creation or recognition of a legal status similar to
16 marriage. It doesn't require that it be a same-sex
17 relationship. It doesn't even require that it be an
18 intimate relationship. It simply says that Colorado and
19 its political subdivisions can't create or recognize any
20 such relationship.

21 Now, is there any sort of clarification on the
22 record, something that could guide you? Well, I think
23 there is. And if I could approach, I'd like to provide
24 you with a document that was submitted at the review and
25 comment hearing.

1 The Proponents responded to the review and
2 comment memo in writing, and the pages are unnumbered.
3 We have a two-page -- three-page letter, and then pages
4 of substantive comments. And as you can see in the
5 second unnumbered page, the question was asked, "What is
6 a 'legal status similar to that of marriage' and 'to who
7 would it apply?'" .

8 The first answer talks about what legal status
9 is, but I urge you to go to subparagraph (b). "This
10 applies to all intimate relationships of unmarried
11 persons who are unrelated by blood or adoption. A
12 non-sexual relationship would not be similar to that of
13 marriage."

14 So the definition of what is similar to
15 marriage appears to be, if you take out the negatives in
16 the second sentence, a sexual relationship. So basically
17 if you have an intimate relationship and there's sex, it
18 will be similar to marriage.

19 But it's nowhere defined as such in the
20 measure. Voters would have no way of knowing that. And
21 frankly, in light of my most recent loss at the Supreme
22 Court with Mr. Knaizer, what the court has said is that
23 the statements of intent that depart from the measure are
24 irrelevant.

25 In the case that decided the title challenge

1 on No. 75, there were statements of clear intent by the
2 Proponents, and the objectors relied upon those
3 statements and the court upheld the Title Board's
4 decision, because you did not, because you based your
5 decision solely on the wording of the measure.

6 So is this helpful? I don't know. I think in
7 the broader scheme of things if it ever got to that, it
8 might be one thing that was looked at.

9 But your objective isn't to figure out what a
10 title is that ultimately will be part of a measure that
11 passes and survives judicial scrutiny. We're not talking
12 about whether or not it's Constitutional now. We're
13 talking about whether or not voters are going to know
14 what they are doing when presented with a petition and
15 what they are doing when they're in a polling booth.

16 And I would suggest to you that language that
17 keys around the phrase "similar to marriage" is
18 meaningless and intended to be so obscure that you can
19 read into it whatever you choose to read into it. And
20 that, Mr. Chairman, I would suggest is a major problem.
21 It's a major problem because it both violates the single
22 subject requirement and it necessarily leads to a
23 misleading title.

24 As I've cited in my motion, the Supreme Court
25 has said that you have to be able to discern, you, the

1 Title Board, you have to be able to discern the
2 consequences of the measure, and that was the court's
3 word, not mine, in order to find out whether or not it
4 represents a single subject.

5 Unless you were able to answer my opening
6 question about what is similar to marriage, and unless
7 your answers were all the same, my guess is that you
8 can't meet that standard.

9 And in any event, the goal of the title
10 setting process is to make sure -- to set up a reasonable
11 speed bump, to make sure that people aren't voting on
12 things that are going to surprise them once they're in
13 law. And this will most certainly surprise people once
14 it's in law, because they cannot possibly know, whether
15 it's in the petition signing or the voting process, what
16 they're voting on.

17 I'd also suggest to you that this is one of
18 those phrases that is, because it's intended to be vague,
19 is a material ambiguity much like the phrase in No. 29
20 that I cite in my motion for rehearing. There the
21 Proponents used a phrase in terms of recall petitions
22 about "not to exceed a particular percentage," which the
23 court interpreted and said, Well, gees, that means that a
24 recall petition could be signed by one person. But the
25 measure doesn't say that. The title certainly would have

1 to reflect it if that's what you could discern.

2 And I would suggest to you that it is
3 impossible to describe what is similar to marriage,
4 because the measure doesn't do so. The measure's
5 intended to be a trap for voters. If you can see what
6 you want to see in a measure, but the person who preceded
7 you in the voting booth and the person who followed you
8 into the voting booth don't necessarily read the language
9 the same way, we've got a problem.

10 And anytime you have a problem that
11 substantial, I would suggest to you you cannot set a
12 title. You cannot set a title because you cannot figure
13 out what the subject is and whether the relationships
14 have anything to do with one another, the relationships
15 that are being prohibited.

16 And secondly, there's no way that you can set
17 a clear ballot title, because, frankly, there's nothing
18 on the record that would suggest to you what this really
19 does or what it really means.

20 And so I would urge you to reconsider your
21 decision in the first instance that this represents a
22 single subject, and in the second instance that a fair
23 title can be set, and withdraw the title and, as you're
24 jurisdictionally empowered to do, give the measure back
25 to Proponents, and let them try again so that we really

1 know what they meant to do.

2 THE CHAIRMAN: Thank you. Are there questions
3 for Mr. Grueskin? Ms. Eubanks.

4 MS. EUBANKS: In terms of your argument, would
5 it be fair to say in general people would know what
6 marriage means; so would it be possible in terms of this
7 measure, even though there might be different types of, I
8 don't know, relationships or legal statuses similar to
9 marriage -- I mean if you're prohibiting something other
10 than marriage, even though you don't know what that
11 universe is -- I mean civil unions or domestic
12 partnerships are fairly recent developments. Who knows
13 what else there may be some time in the future. Is it so
14 ambiguous for others in terms of the theory of this
15 measure having a single subject because it's prohibiting
16 any sort of legal status other than marriage, I mean in
17 terms of we don't know what that universe is, but
18 whatever it is, it's prohibited?

19 MR. GRUESKIN: I think that the ambiguity
20 doesn't lie in the prohibition or even in the legal
21 status. It's what is "similar to marriage." You've
22 identified civil unions and domestic partnerships. A
23 number of foreign countries authorize civil unions
24 between heterosexual couples. That relationship couldn't
25 be recognized here.

1 The Federal District Court in Nebraska, when
2 it invalidated the "similar to marriage" language there,
3 do you know what relationships it pointed to as being
4 among the threatened relationships? Foster parents,
5 cotenants; people who share living arrangements,
6 expenses, custody of children or ownership of property,
7 all of which are legal rights and authorized in terms of
8 either statute or common law; and the fourth one they
9 said was implicated were roommates.

10 Now, realistically, are civil unions and
11 domestic partnerships perhaps on people's mind when they
12 walk into the voting booth? I'll acknowledge that in
13 this election season they probably will be. But it's not
14 limited to domestic partnerships or civil unions.

15 A disinterested federal judge has said it is
16 so wide-ranging I can only figure out a few of the
17 relationships that are implicated. And he ultimately
18 came to the conclusion that it was overly vague and
19 exceedingly vague and, therefore, was unconstitutional.

20 If that's the case, if we don't know what
21 "similar to" means, the Proponents don't have an
22 absolute right to put that kind of measure on the
23 ballot. I think Mr. Domenico in an earlier hearing
24 talked about the key question: Do voters as a body have
25 a sense of what this is going to do? Not, Are there

1 varying interpretations? But do the words actually used
2 in the title communicate enough that voters say, I know
3 what I'm voting on?

4 It is not possible with this language to
5 answer that question in the affirmative. And because of
6 that, you cannot set a title.

7 MS. EUBANKS: Thank you.

8 THE CHAIRMAN: Any other questions?

9 MR. DOMENICO: Do you think that the clause
10 that follows the "legal status similar to marriage" in
11 both the title and the measure itself, referring to the
12 Uniform Marriage Act, add anything to the understanding
13 of marriage, of the phrase "similar to that of
14 marriage"?

15 MR. GRUESKIN: I don't think that that really
16 identifies anything other than the criteria for marriage
17 that existed in 2005.

18 MR. DOMENICO: Right.

19 MR. GRUESKIN: Frankly, the criterion, if we
20 really use that criterion, those criteria, marriage is
21 defined in current statute as a union between a man and a
22 woman.

23 Well, in that event, both Ms. Eubanks and I
24 would be grossly mistaken when we walked into the -- into
25 the voting booth and vote on this thing, because a civil

1 union and domestic partnership which we thought was
2 similar to marriage necessarily can't be.

3 So, I mean, the confusion, if anything, is
4 compounded by that phrase, which is intended to limit
5 what marriage was viewed as being at a certain point in
6 time.

7 I don't know if that answers your question,
8 but ...

9 MR. DOMENICO: No. It does. Thank you.

10 MR. GRUESKIN: Sure.

11 THE CHAIRMAN: Any other questions?

12 MR. GRUESKIN: Thank you very much.

13 THE CHAIRMAN: Thank you. Is there anybody
14 else who wishes to testify on the motion for rehearing?

15 Mr. Norton.

16 MR. NORTON: Yes, Mr. Hobbs. Thank you.

17 Mr. Chairman, members of the Board, Michael J.
18 Norton on behalf of the Proponents, representing Kevin
19 Lundberg and Wilfred G. Perkins.

20 When I learned this morning of this hearing, I
21 took the liberty of preparing a response to the motion
22 for rehearing which, if I may approach --

23 THE CHAIRMAN: Yes, please.

24 MR. NORTON: -- I would like to submit to the
25 Board at this time.

1 And I would respectfully request that this
2 response be incorporated in the record at this point in
3 time. I have a few extra copies here, but not that many,
4 I will put on the table.

5 I think that the arguments of the motion for
6 rehearing are specious and fallacious, and I have
7 attached to the response the same letter that
8 Mr. Grueskin tendered to the Board as Exhibit A, which
9 does go into fairly exhaustive detail in response to
10 questions and issues raised by the Office of Legislative
11 Counsel and Legislative Legal Services, which among other
12 things, included a question about what does "similar to"
13 mean.

14 And I would direct the Board's attention to
15 that attachment, Exhibit A, and specifically attachment
16 to Exhibit A, which is the substantive comments section
17 whereon -- with response to Comment 6 from the Office of
18 Legislative Counsel, issues regarding what does legal
19 status similar to that of marriage mean or very carefully
20 addressed, and I incorporate those arguments at this time
21 into the record as to what legal status is, as to what
22 relationships are covered, when in fact, relationships
23 which are in any way, shape or form counterfeits for or
24 substitutes of marriage are covered by this proposed
25 initiative.

1 And "similar to" is used in its ordinary
2 common-sense meaning, meaning like, much the same as or
3 resembling. We are to interpret statutes, including
4 Constitutional initiatives and statutes and amendments in
5 plain and ordinary and common-sensical meaning, and I
6 think that the questions of the Board, at least as I
7 perceive them, demonstrate the fallaciousness of this
8 argument.

9 I don't want to really go through in any
10 detail the verbiage content of my response. It sets
11 forth the responsibilities of this board, and I think
12 subsequently, if it should become necessary, the courts
13 as well.

14 But clearly this initiative as proposed
15 complies with the single subject requirement of the
16 Constitution as guided by statutes and case law, and
17 quite clearly the title is not deceptive, misleading,
18 unfair or otherwise in need of any kind of amendment or
19 clarification from the decision made by the Board last
20 week.

21 I would cite to the Board a case decided on
22 May 26, 2005, in the Commonwealth of Kentucky, Franklin
23 Circuit Court, Charlotte Wood and/or others versus
24 Commonwealth of Kentucky, Civil Action No. 04-CI-01537,
25 an unpublished decision which really dealt with very much

1 this same issue, although it also added the -- was a
2 broader and more expansive amendment which was on the
3 November 2, 2004 ballot in Kentucky, and passed by a
4 fairly sizeable margin of 1.2 million plus to 417,000 and
5 some odd votes.

6 And the amendment language was, Are you in
7 favor of amending the Kentucky Constitution to provide
8 that only a marriage between one man and one woman shall
9 be a marriage in Kentucky, and that the legal status
10 identical to or similar to marriage from married
11 individuals shall not be valid or recognized? Very much
12 language like is in this Proposed Initiative 109 before
13 this board on this motion for rehearing.

14 The plaintiffs in that case, similar to
15 Mr. Grueskin in the motion for rehearing in this case,
16 argued that the electorate was unable to discern from the
17 language of the amendment the impact on suits for
18 wrongful death, intestate inheritance, hospital
19 visitation, medical decisions, decision making capacity
20 for burial and funeral arrangements, protection under
21 Kentucky's domestic violence statutes for spousal abuse,
22 the ability of businesses and local governments to
23 provide health insurance or bereavement leave to domestic
24 partners, the legal status of existing contractual
25 agreements between unmarried individuals as to durable

1 powers of attorney, health care surrogate designations,
2 designations of guardianship and adoption agreements.

3 The fact that the courts in Kentucky found
4 those arguments to be specious, I urge this court,
5 likewise, to find the arguments of the motion for
6 rehearing to be without merit and to deny that motion.

7 We're not here to decide the need, wisdom or
8 social desirability of the Initiative 109. It's really
9 not up to this board to determine and decide whether or
10 not the potential implications or consequences of this
11 amendment are made known to the electorate. That will
12 surely flow from the point in time, if at all, that this
13 amendment makes it onto the ballot for this upcoming
14 November.

15 Thank you. Members of the Board, I'd be
16 pleased to answer any questions.

17 THE CHAIRMAN: Any questions for Mr. Norton?

18 Okay. Thank you.

19 Mr. Grueskin.

20 MR. GRUESKIN: Well, I guess I would like to
21 call the Board's attention to two things.

22 In the response submitted, which I have just
23 seen, Paragraph 7 suggests -- doesn't suggest, it states
24 that there are statutes in states that approve reciprocal
25 beneficiary relationships. And it concludes saying these

1 approaches create a legal status for married couples and
2 focus on the couple relationship, therefore, they would
3 violate the proposed amendment.

4 Well, okay, I accept that.

5 But then if you go to the letter that was
6 submitted to review and comment, under Comment No. 5, the
7 Proponents were asked whether or not their measure would
8 have any effect on a measure like Senate Bill 06-166,
9 which provided for reciprocal beneficiaries. And the
10 final paragraph basically goes through the various rights
11 involved, and the last sentence says, "Thus, the
12 initiative would not affect legislation similar to Senate
13 Bill 06-166."

14 So now we've got a contradiction. Either it
15 does or it doesn't affect those kinds of relationships.

16 It pretty much makes my case. If the
17 Proponents don't know, or if the Proponents haven't made
18 up their mind, or if it changes over time, how are voters
19 supposed to know? And what are voters supposed to
20 think? And why is it that this measure, which the
21 Proponents of which can't actually tell you what "similar
22 to marriage" means, why is it that this measure should be
23 on the ballot?

24 I would suggest to you also, if you take a
25 look at Page 3 of their motion, Paragraph 8, the last

1 sentence says, "Thus, a legal status would be 'similar to
2 that of marriage' if it involves public recognition,
3 licensing, registration, or regulation of domestic
4 relations."

5 How in the world would people know that? And
6 why in the world, other than a statement of intent by
7 Proponents, why in the world would the courts be so
8 limited?

9 And even if they were limited, think of the
10 nature of relationships that involve any of the
11 following: public recognition, licensing, registration or
12 regulation of domestic relations. You don't have to be
13 married in order to be subject to the domestic relations
14 laws. You don't have to be married in order for Fourth
15 Amendment zones of privacy to be implicated based upon a
16 relationship.

17 And I would suggest to you that the definition
18 here, had it been in the measure, at least would have
19 provided voters with some standards. But it's not in the
20 measure. And if it's not in the measure, based on the
21 decision in No. 75, you can't use it as the defining
22 aspect of the title.

23 If there is no defining aspect of the title,
24 you'd leave it up to voters. And if the Proponents can't
25 really know whether or not it extends to a list of

1 relationships, how in the world is everybody else
2 supposed to know?

3 This is as problematic a measure -- not
4 withstanding its brevity, and not withstanding the fact
5 that the title reflects the verbiages in the measure,
6 this is as problematic a measure as I can remember in
7 terms of having voters have any sense of what this is
8 about.

9 And you cannot rely upon the public debate
10 over the issue or the Blue Book, because people will be
11 asked to sign petitions with this information there.

12 And how will it be supplemented? Unlike other
13 instances in which there is actually a text that tells
14 you more, they will have no idea. And that, I would
15 suggest to you for the court's purposes, is every bit as
16 problematic as what's on the ballot in terms of how they
17 vote.

18 This doesn't represent an identifiable
19 subject, because we can't really know what "similar to
20 marriage" means. And because it doesn't represent an
21 identifiable subject, it cannot possibly represent the
22 single subject. And if it doesn't represent a single
23 subject, you don't have jurisdiction. The Proponents can
24 try this one again.

25 But this is a measure that, like others where

1 the court has had problems with these kinds of booby
2 traps, that ought to be returned to the Proponents so
3 that it can be improved for consideration at some other
4 point.

5 Thank you.

6 THE CHAIRMAN: Any questions for
7 Mr. Grueskin?

8 Mr. Norton, actually I would like to ask you a
9 follow-up on that, because I am a little confused.

10 MR. NORTON: Certainly, Mr. Chair.

11 THE CHAIRMAN: You know, since we just got
12 your brief this morning, I am having some difficulty
13 squaring it with the responses to legislative counsel.

14 I thought I understood that, that -- but I'm
15 having trouble understanding, again, Paragraph 7 of your
16 brief this morning, that I think you're saying the effect
17 would be to prohibit reciprocal beneficiary statutes.
18 And I'm just having trouble reconciling all of that in my
19 mind.

20 MR. NORTON: I think, Mr. Chair, this relates
21 to Mr. Grueskin's comments about Comment No. 5 in the
22 substantive comments of the attachment to the legislative
23 counsel.

24 And let me say in response to Mr. Grueskin's
25 observations and to this question from the Chair that the

1 language that should be relied upon in terms of the
2 response to this question is the preceding three
3 paragraphs.

4 I, frankly, have to admit to the Board that
5 I'm not sure I know precisely what Senate Bill 06-166 did
6 or proposed to do at the time that these comments were
7 drafted.

8 What I presumed and surmised was Senate Bill
9 06-166 sought to implement things or relationships such
10 as that set forth in the legislative counsel's
11 questioning, which is set forth in bold at Comment
12 No. 5. And that is what this language answers or seeks
13 to answer, to the extent that Senate Bill 06-166 creates
14 domestic partnerships.

15 Let me just paraphrase Paragraph 1. To the
16 extent that Senate Bill 06-166 served to create domestic
17 partnerships or civil unions for same-sex couples and
18 would as a result extend official or legal recognition to
19 or otherwise recognize such relationships, that under
20 Amendment 109 or Initiative 109 would be
21 unconstitutional.

22 Similarly, however, 109 would not prohibit the
23 range of things that are set forth in that full
24 paragraph, the receipt of benefits that individual are
25 now entitled to receive under current law.

1 However, the initiative would prevent same-sex
2 couples from receiving benefits as a couple because it
3 would prohibit the government from granting rights and
4 benefits to such a same-sex couple on the basis of
5 illegal union, no matter what it may be called, domestic
6 partnership, civil union, or by some other name.

7 The initiative would not prohibit the granting
8 of benefits to an individual government employee that he
9 or she could share with some other person of that
10 person's choice, providing the extension of benefits was
11 generally available to all unmarried employees and was
12 not premised on the existence of a relationship
13 equivalent to, similar to, counterfeit of, or substitute
14 of a marriage.

15 And then the same argument applies in the
16 final paragraph.

17 To the extent that I misunderstood what Senate
18 Bill 06-166, in fact, beyond those questions did, I made
19 an error in the final sentence in that section.

20 To the extent that there is any conflict in
21 the initiative, and I don't know if there is, but to the
22 extent that there is any conflict, the initiative would
23 prevail.

24 I hope that answers the question, although in
25 much more detail than you probably desired.

1 THE CHAIRMAN: No. I think so. I'm just --
2 I'm really struggling to try to think all of that
3 through.

4 I appreciate the reference to Comment 5. I
5 think that's a fairly clear written statement from
6 Proponents there on what they believe the measure would
7 prohibit and what it would not.

8 I'm still a little bit stuck, though, on your
9 response in Paragraph 7, the bottom of Page 2. I just
10 want to understand.

11 I mean, I think your position is that,
12 although Hawaii and Vermont adopted reciprocal
13 beneficiary statutes that extend benefits to couples
14 based on a legal status, et cetera, I think you're saying
15 that would be prohibited by this measure, and I'm
16 wondering is that correct, and if so, why. It seems a
17 little inconsistent -- and, again, I'm just trying to
18 puzzle this out. It seems a little inconsistent with
19 Proponents' responses to Comment 5.

20 MR. NORTON: I don't see it as inconsistent,
21 Mr. Chair. I see it as consistent, with the exception of
22 the last sentence, which, I confess, I don't fully know
23 the implications of Senate Bill 06-166. I see the two
24 responses as fully consistent with one another.

25 THE CHAIRMAN: And probably where I'm

1 confused, but I'm not sure I can shed any light here.

2 When I read the measure, I really don't have the
3 difficulty that I think Mr. Grueskin is describing. I
4 mean, you know, I -- and I appreciate very much the
5 Nebraska case, but it's hard for me to read this measure
6 and see how this measure could extend to cotenants, for
7 example.

8 MR. NORTON: Could extend to what, sir?

9 THE CHAIRMAN: Cotenants. Roommates.

10 MR. NORTON: I agree, for Fourth Amendment
11 search and seizure issues or rights of privacy in
12 general?

13 THE CHAIRMAN: I don't see those relationships
14 as being similar to marriage. I don't see that there
15 could be any reasonable confusion about it.

16 I understand that there's questions of
17 interpretation of what is marriage and what is similar to
18 marriage. But just reading the measure by itself, I'm
19 not -- I'm just not quite there yet with Mr. Grueskin.

20 But then when you start to break it apart,
21 based -- looking at these materials, you know, on the one
22 hand I was looking at the measure as comparing the legal
23 status of various relationships.

24 But the materials seem to suggest that what
25 the measure may prohibit is not just alternative --

1 recognition of alternative relationships that are like
2 marriage, but rather granting benefits that are currently
3 available to spouses, granting them in non-marital
4 situations. And that potentially is, I think, huge and
5 goes far beyond what I understood the measure to be
6 about.

7 MR. NORTON: I think, Mr. Chair, you are
8 correct. I do not think the measure is intended to deal
9 with or otherwise affect the kinds of situations or
10 relationships that you've just suggested, unless that
11 relationship is created or recognized as a marriage or
12 something that is similar to a marriage.

13 MR. DOMENICO: Could I just ask you this
14 similar question I asked Mr. Grueskin about the reference
15 to the Uniform Marriage Act.

16 Looking at the sections you have cited, those
17 are, for the most part, technical licensing sections.
18 The only real description of marriage I see in there is
19 that it's between one man and one woman. Is that
20 essentially the description?

21 The language in the title or in the measure is
22 as described in the Sections 14-2-101 through 14-2-104
23 from the Uniform Marriage Act. The only real description
24 in there of marriage, besides that it has to go through
25 some licensing process, is that it's between a man and a

1 woman. Is that what that's intended to reference?

2 MR. NORTON: Well, I think, frankly, as
3 Ms. Eubanks pointed out, you start with marriage. You
4 start with marriage as defined in the Uniform Marriage
5 Act, and "similar to" modifies or relates to marriage as
6 defined in the Uniform Marriage Act.

7 Those specific sections of the Uniform
8 Marriage Act, Mr. Domenico, do, as you asked, contain
9 some technical language in terms of, first of all, the
10 Section 14-2-101, contains the short title, which is
11 stated as the Uniform Marriage Act. Section 14-2-102
12 contains the purposes and rules of construction regarding
13 the underlying purposes, to strengthen and preserve the
14 integrity of marriage and to safeguard meaningful family
15 relationships and to provide adequate procedures for the
16 solemnization and registration of marriage.

17 Section 103 talks about the uniformity of its
18 application and construction.

19 And then Section 104 contains the
20 formalities. And Section 104 is really the heart and
21 guts of what a marriage is, because Subsection (1)(b)
22 specifies that it is only between one man and one woman.
23 So it breathes that definition, one man and one woman, and
24 the rest of those three -- or excuse me -- those four
25 into this proposed constitutional amendment.

1 I don't know if that answers the question.

2 MR. DOMENICO: No, I think it does.

3 MR. NORTON: But I think it strengthens the
4 amendment as opposed to weakens it.

5 MR. DOMENICO: No. It does. And let me, just
6 to follow on Chairman Hobbs' question, make sure I
7 understand sort of where we're getting here is, I mean
8 essentially marriage as a civil institution, as a
9 government institution, a shortcut to certain legal
10 benefits of the type Mr. Hobbs referred to.

11 You are not proposing and you don't understand
12 this measure to forbid people who are unmarried from
13 gaining those benefits? The measure, as I understand it,
14 prevents the creation of other statuses, legal
15 relationships, that serve the same purpose of creating a
16 shortcut to those benefits.

17 So people can still, in essence, contract or
18 go through the steps to get those benefits, whether or
19 not they're married, same-sex couples, but they wouldn't
20 be able to -- the State or its subdivisions wouldn't be
21 able to create a similar shortcut, is that ...

22 MR. NORTON: I think that's an accurate way of
23 looking at it, Mr. Domenico. And so long as those
24 benefits, whatever they might be, and benefits could be
25 extremely broad and amorphous, but the answer to Comment

1 No. 5 on the attachment to the response specifies at
2 least some of the benefits that Proponents and
3 Mr. Grueskin have raised concerns about being in
4 jeopardy.

5 So long as those benefits are not premised on
6 the recognition or creation of a legal status similar to
7 marriage, this amendment would not affect it.

8 MR. DOMENICO: Thank you.

9 THE CHAIRMAN: Thank you.

10 MR. NORTON: Thank you.

11 THE CHAIRMAN: Mr. Grueskin.

12 MR. GRUESKIN: In light of the preceding
13 conversation, it seems to me that there is a new issue, a
14 truly problematic issue in front of you.

15 This measure isn't about limiting the creation
16 or recognition of status. It's about limiting the
17 capacity of people to access certain benefits or
18 opportunities provided by the status of marriage. It
19 doesn't say that. It doesn't say that.

20 Now, one of the responses in -- to Question
21 No. 5 says the initiative would prevent same-sex couples
22 from receiving benefits as a couple because it would
23 prohibit the government from granting rights and benefits
24 to such a couple on the basis of a legal union, whether
25 called domestic partnership, civil union, or by some

1 other name.

2 So if this is really all about benefits, which
3 is what you've just heard, it's not about the creation of
4 a status or even the recognition of a status; it's about
5 what flows from that status.

6 Now, you're in a box, and you're -- you know
7 what? I'm so glad I'm not you right now, because now
8 you're presented with an initiative that says one thing
9 and Proponents that say another. And the court has told
10 you three days ago, Forget what the proponents tell you
11 it means, you need to look at it and see what it actually
12 says. So not withstanding all the comments that have
13 been presented to you, you need to take a look at it and
14 see what it really says.

15 And I would suggest to you that this is a
16 little bit like the Wizard of Oz standing behind the
17 curtain, where someone is basically saying, Pay no
18 attention to what these words actually say, this is what
19 we mean flow from them.

20 And based on the court's decision of three
21 days ago, that's not good enough. Mr. Domenico, I don't
22 think, agrees with me.

23 MR. DOMENICO: Well, no, I think one or the
24 other of us, I think, misheard what Mr. Norton was
25 telling us.

1 What I thought he told us was, in fact, this
2 doesn't cut off benefits; it cuts off the creation of a
3 status similar to marriage that creates -- that allows
4 for a shortcut to those benefits.

5 So I heard him to say essentially what -- the
6 opposite of what you're saying, that this isn't about the
7 eliminating the access to certain benefits. It's about
8 eliminating a shortcut to those, and the shortcut is the
9 recognition of a certain legal status based on a
10 relationship. And one of us seems to be mishearing.

11 MR. GRUESKIN: Well, it's probably me.

12 MR. DOMENICO: Well, I don't know.

13 MR. GRUESKIN: And you know, I'll grant you
14 the fact that it is probably me.

15 But I would suggest to you that there is
16 nothing in this measure that talks about benefits. The
17 question before you and the question before voters is,
18 What does this thing actually say?

19 And what this thing actually says is that the
20 State and its political subdivisions can't create or
21 recognize any relationship that's similar to marriage.
22 What does that mean?

23 You know what? We've been here for, what, I
24 don't know, 45 minutes to an hour, and I have as of yet,
25 other than I did listen to my own comments, but I have as

1 of yet to hear anyone say, I know what "similar to
2 marriage" means, or it's pretty clear what "similar to
3 marriage" means.

4 I don't think that there's any question that
5 marriage is a defined term. It means a relationship
6 between a man and a woman. There's nothing about -- at
7 least when I got married, there was no agreement about
8 benefits or relative benefits, and actually there was no
9 agreement about sex either, but ... I'm not sure either
10 benefits or sex defines whether or not you're married.

11 The question is is there a status in the words
12 of the initiative, is there a legal status that is --
13 provide -- notwithstanding the fact that Mr. Norton may
14 disagree, there is a legal status and there are legal
15 capacities that flow from being married, and that flow
16 from certain relationships that may be analogized to
17 marriage. Nobody knows what those are.

18 And you know what, if I'm wrong, I'm asking
19 you, will you fill in the void? And if I'm not wrong, I
20 don't see how that you can -- how you can set a title.

21 And if I -- and Mr. Domenico is probably
22 right, if I've misinterpreted Mr. Norton's comments, I
23 apologize to Mr. Norton, and I apologize to the Board for
24 taking up more time on the last day of its last meeting.

25 Thanks.

1 THE CHAIRMAN: Ms. Eubanks.

2 MS. EUBANKS: Mr. Grueskin, while it seems
3 that the discussion of what may fall within the scope of
4 that term as it appears in the measure, seems applicable
5 to both the arguments that you've set forth in your
6 motion for rehearing, it seems like you've been focussing
7 primarily sort of on single subject.

8 Are you pursuing the second argument, even if
9 we were to find the single subject in terms of the title
10 still being misleading because people don't know -- I
11 mean, you've been focusing more on the single subject and
12 I just wanted to clarify whether or not you're pursuing
13 both of your arguments.

14 MR. GRUESKIN: Ms. Eubanks, I am pursuing both
15 of my arguments, because it seems to me that even if you
16 decide that this passes muster in terms of single
17 subject, there still has to be an adequate representation
18 so the people know what they're voting on in terms of the
19 accuracy of the title.

20 And so if you deem it a single subject, it
21 seems to me the same problems appear, because people
22 cannot possibly know what they're voting on.

23 MS. EUBANKS: Thank you.

24 THE CHAIRMAN: Mr. Norton, do you have
25 anything to add or ...

1 MR. NORTON: I have one final, parting
2 comment, Mr. Chair, and that is in light of
3 Mr. Grueskin's comments, I suggest that you accept his
4 offer to disregard not only what he has said, but I ask
5 you to disregard what I have said, and put it in the
6 plain and simple language of the initiative.

7 THE CHAIRMAN: Is there anybody else who
8 wishes to testify? If not, I'll turn to discussion by
9 the Board.

10 MR. DOMENICO: Well, I'll start. It seems to
11 me that I share some of the concerns with this that I
12 expressed earlier about a measure that includes terms
13 that are open to multiple interpretations. But for the
14 same reasons I discussed before, I don't think that makes
15 it impossible to set a title.

16 It would be rather perverse if our system was
17 that we require titles and measures to be extremely
18 detailed and complex and rejected short, simple
19 constitutional amendments along the lines of the original
20 constitutional amendments.

21 So I think the fact that some of these
22 provisions may be open for debate, unless that ambiguity
23 leads the measure and title to be misleading somehow, I
24 don't think that means we can't set a title or that it
25 causes it to violate the single subject prohibition.

1 So that said, I agree that there's a lot of
2 room for discussion about some of these, and I'm sure
3 that in the coming years there will be that
4 discussion.

5 But I don't think it's misleading in any way,
6 and so I -- I don't have a problem either with the single
7 subject or the jurisdiction to set a title on that
8 basis.

9 I think that's all I'd like to address.

10 THE CHAIRMAN: All right. I think that's
11 where I am at this point. I'm still trying to think this
12 through.

13 But, you know, it's a given that any measure
14 that we have, there's going to be legal questions about
15 them. It seems like every single one of these, every
16 single meeting we face the fact that there's ambiguities
17 and there's questions.

18 And you know, some of the ones that we've seen
19 seem to have -- lately we've had more questions than
20 others. You know, No. 125 today, for example, Damages
21 for Mineral Extraction, a lot of questions about it.

22 And the question in my mind is, you know, is
23 there a point at which a measure -- well, a general
24 measure that doesn't provide a lot of detail, you know,
25 is there a point where Proponents have to provide that

1 detail?

2 Our discussion this morning, I think on
3 No. 125, led me to believe that like the sections in
4 Article 2, the Bill of Rights section in the State
5 Constitution, Proponents can have general statements that
6 leave a lot of questions unanswered.

7 And at the same time we know from the case law
8 that the uncertainties about a measure can arise to such
9 a level that the measure is incomprehensible, that we
10 cannot set a title, if the measure is incomprehensible.

11 I'm not sure that's a sufficient statement of
12 the law here, but I recognize that the fact that there
13 may be a point at which the Board cannot express a single
14 subject because the measure cannot be understood well
15 enough.

16 My understanding of the measure at this point,
17 though, is that we have not reached that point.

18 And I don't know that I can add anything to --
19 I hesitate to try to add anything to what has been said
20 about it, because I'm just going to repeat some things.

21 I think there's a general concept of what
22 marriage is and, therefore, what is similar to marriage.
23 And I think the measure on its own terms prohibits
24 recognizing some legal status similar to marriage. And I
25 have been concerned about are there hidden effects, are

1 there things that relate to benefits here that I'm not
2 fully apprising. And I think that's not the case.

3 I'm putting a lot of weight on Proponent's
4 response to Comment 5, back to the review and comment
5 memo. And I think there's a paragraph that seems to
6 accurately describe my understanding about this measure.

7 The initiative would not prohibit individuals
8 in a same-sex relationship from receiving benefits. What
9 it would prohibit is government from granting rights and
10 benefits to a same-sex couple on the basis of a legal
11 union, whether it's call domestic partnership, civil
12 union or something else.

13 And in other words, taking a measure the face
14 value, it's about recognizing similar relationships,
15 regardless of what they're called.

16 My understanding is then a domestic --
17 so-called domestic relationship -- or excuse me --
18 domestic partnership or civil union could -- the measure
19 might prohibit the legislature from recognizing such a
20 relationship. I say "might," because I think it would
21 depend on how that relationship was defined. If it's
22 defined to be similar to marriage, I think this proposal
23 before us would prohibit the legislature from recognizing
24 such a relationship.

25 But on the other hand, the way I understand

1 the measure, the legislature can recognize a relationship
2 such as cotenancy, notwithstanding the Nebraska case. I
3 don't think cotenancy is similar to marriage. And I
4 think the legislature would still be able, if this
5 measure were to pass, the legislature would still be able
6 to recognize such a relationship.

7 Going back to the response to Comment 5, the
8 Proponents have said that the initiative would not
9 prohibit the granting of benefits to an individual
10 government employee that he or she could share with
11 another person of his or her choice, providing the
12 extension of benefits was generally available to all
13 unmarried employees and was not premised on the existence
14 of a relationship.

15 So I think I have satisfied more or less my
16 concern about this having a much greater effect than I
17 had originally thought it did. It seems to me it's not
18 about prohibiting the granting of benefits that happen to
19 be associated with marriage, granting those benefits in
20 other situations.

21 I'm not articulating that very well, but I --
22 I guess what I'm trying to say is I think in a sense the
23 general principle here is fairly clear: The legislature
24 couldn't recognize a relationship equivalent to
25 marriage.

1 I assume that relationship to benefits in the
2 sense that their -- because by inference then if the
3 legislature were to recognize a similar relationship with
4 the effect that the benefits associated under the Uniform
5 Marriage Act or whatever then transfer over automatically
6 somehow. And maybe the measure is about benefits. But
7 -- again, that would get into questions that I don't
8 think we have to answer here.

9 The general principle seems clear enough, like
10 No. 125 and like the others that we've faced, that it
11 does seem to be a single subject, and I think the titles
12 reasonably reflect that single subject.

13 Mr. Domenico.

14 MR. DOMENICO: Just to follow up on that,
15 something I wanted to point out that sort of highlights
16 that for me. In fact, the language of the title in the
17 measure refers to a legal status similar to that of
18 marriage, highlighting the legal status that one gets
19 when one is married; whereas the motion for rehearing the
20 language in quotes is "similar to marriage." It leaves
21 out the legal status similar -- well, it leaves out
22 essentially the "legal status" part, which is an
23 important thing, I think, that it doesn't just forbid
24 anything that's like marriage; it forbids recognition of
25 a legal status similar to marriage. And I think that

1 highlights the point and sort of separates what's being
2 discussed in the motion for rehearing from the actual
3 language in the title. And I think that highlights the
4 point you were making about the status versus the
5 benefits.

6 THE CHAIRMAN: Ms. Eubanks.

7 MS. EUBANKS: Might as well get my two cents
8 in for the record.

9 I don't see this as a single subject issue.
10 And the reason is that, although there may be questions
11 about which legal statuses are affected or would be
12 prohibited by this measure, whether it's roommates or
13 whatever, if you take that argument, it seems that we
14 would be saying that you could only have a measure that
15 prohibits civil unions or domestic partnerships or
16 roommates or -- and to me, just the fact that there's
17 perhaps more than one legal status that may be prohibited
18 by the measure, I don't see that as constituting two
19 different purposes.

20 Here you've got a measure that's prohibiting a
21 legal status similar to measure -- to marriage, even
22 though that may be various legal statuses. And so I just
23 -- I just don't see it as a single subject issue.

24 I do see it much more similar to the
25 discussion we had on 125 in terms of being vague,

1 ambiguous in terms of what may be affected by that term
2 "legal status similar to that of marriage."

3 And in terms of the discussion we had earlier
4 this morning, we may not know from the measure itself all
5 of the legal statuses that may be affected by this
6 measure.

7 Does that mean that we can't set a title? Is
8 it misleading or is it similar to like on 125, it's going
9 to be something that's going to be either through
10 implementing legislation or litigation, those questions
11 are going to be answered.

12 And I think that that's where we are right
13 now. I don't think that the title, as we have set it, by
14 including that term, is misleading of the intent and
15 purpose of the measure. In terms of what it may
16 ultimately impact, that remains to be seen. But I just
17 don't see it being misleading. I think the title
18 accurately reflects the intent and purpose of the
19 measure.

20 And so that's where I am.

21 THE CHAIRMAN: Thank you.

22 Well, on the basis of that discussion, is
23 there a motion with respect to the motion for rehearing?

24 MR. DOMENICO: I will move that we deny the
25 motion for rehearing.

1 MS. EUBANKS: I second that.

2 THE CHAIRMAN: Any further discussion?

3 If not, all those in favor say aye.

4 THE BOARD: Aye.

5 THE CHAIRMAN: All those opposed, no.

6 That motion carries three to zero.

7 That concludes action on No. 109. The time is

8 1:10 p.m. Thank you.

9 (The hearing concluded at 1:10 p.m.,

10 May 25, 2006.)

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C E R T I F I C A T E

I, Deborah D. Mead, Certified Shorthand Reporter and Notary Public, do hereby certify that previous to the commencement of the examination, the deponent was duly sworn to testify to the truth; that the said testimony was taken in shorthand by me at the time and place aforesaid and was thereafter transcribed by me; that the same is a full, true, and correct transcription of my shorthand notes then and there taken.

I further certify that I am not attorney, nor counsel, nor in any way connected with any attorney or counsel for any of the parties of said action, nor otherwise interested in the outcome of this action.

IN WITNESS WHEREOF, I have affixed my signature and seal this____ day of____, 2006.

My commission expires June 18, 2009.



Deborah D. Mead
Certified Shorthand Reporter

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

Original Proceeding Pursuant to § 1-40-107(2),
C.R.S. (2006)

Appeal from the Ballot Title Setting Board

Petitioners:

JEAN DUBOFSKY and PATRICK STEADMAN,
Objectors

Respondents:

REPRESENTATIVE KEVIN LUNDBERG and
WILFRED G. PERKINS, Proponents, and

Title Board:

WILLIAM A. HOBBS, JASON DUNN and
SHARON EUBANKS

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FILED IN THE
SUPREME COURT

JUN 12 2006

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

▲ COURT USE ONLY ▲

Case No. 06SA172

**RESPONSE TO PETITION FOR REVIEW OF FINAL ACTION OF
BALLOT TITLE SETTING BOARD CONCERNING PROPOSED
INITIATIVE 2005-2006 #109 ("PROHIBITION ON LEGAL STATUS
SIMILAR TO MARRIAGE")**

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Introduction

Respondents, Colorado State Representative Kevin Lundberg and Wilfred G. Perkins as proponents of Proposed Initiative 2005-2006 #109 (Prohibition on Legal Status Similar to Marriage) (hereinafter “Proponents”), by and through their undersigned counsel, respectfully submit their Response Brief in opposition to Petitioners Dubofsky and Steadman’s (hereinafter “Petitioners”) petition for review of the final action of the Initiative Title Setting Review Board (hereinafter “Title Board”) with respect to the Proposed Initiative 2005-2006 #109 “Prohibition on Legal Status Similar to Marriage”¹ (hereinafter “Proposed Initiative”).

Petitioners’ appeal of the Title Board’s action has two fatal flaws. The first flaw, sufficient in and of itself to require affirmance of the Title Board action, is that the Petitioners’ Motion for Rehearing filed with the Title Board complained about a phrase that is not in the proposed amendment, to wit: the phrase “similar to marriage.” (See Motion for Rehearing dated May 24, 2006.) In fact, Proposed Initiative 2005-2006 #109 provides as follows: “Neither the state nor any of its political subdivisions may create or recognize a legal status *similar to that of marriage*, as described in sections 14-2-101 through 14-2-104 Colorado Revised

¹ As noted by the Title Board, “Prohibition on Legal Status Similar to Marriage” is an unofficial caption designated by legislative staff for tracking purposes. The unofficial caption is not part of the title set by the Title Board.

Statutes (2005), from the ‘Uniform Marriage Act’.” (emphasis added). Similarly, the ballot title designated and fixed by the Board states: “Shall there be an amendment to the Colorado constitution prohibiting the creation or recognition by the state or its political subdivisions of a legal status *similar to that of marriage* . . . ?” (emphasis added.)

The significance of this misquote by Petitioners is amplified by the second fatal flaw. Petitioners take the phrase out of context. The context of the phrase is “*legal status* similar to that of marriage,” as defined by current Colorado law, *i.e.*, Sections 14-2-101 through 14-2-104, Colorado Revised Statutes (2005). Thus, utilizing standard and ordinary rules of grammar and common usage, the word “that” is a pronoun which is a replacement for the phrase “legal status.” If the pronoun were replaced with its antecedent, the phrase about which Petitioners complain would read “similar to the legal status of marriage.” Petitioners’ Motion for Rehearing did not challenge this language and should, on these bases, be denied.

I. Statement of Issue Presented for Review

Proponents object to Petitioners’ description of the issues presented for review. Under the circumstances, the only issue properly before this Court is whether the Title Setting Board abused its discretion in denying Petitioners’

Motion for Rehearing, which Motion for Prehearing was premised upon language that is not used in either Proposed Initiative 2005-2006 #109 or its ballot title as fixed by the Title Board.

II. Nature of the Case and History of Proceedings

Proponents accept Petitioners' description of the actions of the Title Board.

III. Argument

This Court has held that “[i]n reviewing the actions of the [Title] Board, we grant ‘great deference to the board’s broad discretion in the exercise of its drafting authority.’” In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #265, 3 P.3d 1210, 1213 (Colo. 2000) (citations omitted). Nevertheless, petitioner may not raise an issue on appeal that was not presented to the Title Board. *Id.* at 1215-16.

Because the Petitioners did not challenge the actual ballot title of the Proposed Initiative as fixed by the Title Board, there is no need for this Court to address whether the ballot title as fixed by the Title Board complies with the single-subject rule or accurately and fairly characterizes the Proposed Initiative.

Nevertheless, Proponents will address those issues in the event that this Court chooses to consider issues not properly raised.

For a substantive review of the Title Board's action under C.R.S. § 1-40-107(2), the Colorado Supreme Court's role "is to determine whether the titles and summary it has adopted: (1) comply with the single-subject requirement for initiatives; and (2) clearly, accurately, and fairly characterize the proposed initiative." In Re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 200A, 992 P.2d 27, 30 (Colo. 2000). In reviewing the Title Board's action, the Court does not engage in policy choice or the determination of the "efficacy, construction, or future application" of the initiative. *Id.* See also In re Proposed Initiative on Parental Notification of Abortions for Minors, 794 P.2d 238, 241 (Colo. 1990) ("Neither this court, nor the Board may go beyond ascertaining the intent of the initiative so as to interpret the meaning of the proposed language or suggest how it will be applied if adopted"). The Proposed Initiative contains a single subject, the legal status of marriage, which it limits to the marital relationship described in the "Colorado Uniform Marriage Act" at C.R.S. § 14-2-101 through § 14-2-104 (2005).

By prohibiting the creation or recognition by the state or its political subdivisions of a legal status similar to that (*i.e.*, the "legal status") of marriage, the Proposed Initiative is implementing the single subject purpose and therefore does not violate COLO. CONST. art. V, sec. 1(5.5). Additionally, because the Proposed

Initiative Ballot Titel conveys a clear understanding of a “yes” or “no” vote, it is not misleading and should be resolved in favor of the Title Board’s determination. Armstrong v. Davidson, 10 P.3d 1278, 1282 (Colo. 2000).

A. Petitioners Failed to Present a Proper Challenge to the Title Board.

The Motion for Rehearing before the Title Board focused on one phrase, to wit: “similar to marriage.” Because that phrase is not in the Proposed Initiative language or the Proposed Initiative’s Ballot Title, the Title Board properly denied the motion. Indeed, it would have been clear error for the Title Board to grant a motion challenging language that is not in the Proposed Initiative or the Proposed Initiative’s Ballot Title.

Because the Motion for Rehearing addressed only a challenge to the phrase, to wit: “similar to marriage” which does not appear in the Proposed Initiative language or the Proposed Initiative’s Ballot Title, the only issue properly before this Court is whether the Title Board abused its discretion in rejecting Petitioners’ challenge. See In re 1999-2000 # 265, 3 P.3d at 1213. Petitioners cannot now change or expand their challenge to make it a challenge to the actual language of the Proposed Initiative or the Proposed Initiative’s Ballot Title.

It is well established that a petitioner may not raise an issue on review that was not raised in the Motion for Rehearing or at the rehearing before the Title

Board. *Id.* at 1215-16 (“Because they did not raise the issue before the Board they cannot now urge this contention as a grounds for reversing the Board”).

Whether or not this issue of the error in Petitioners’ challenge was addressed by the Title Board in the rehearing is immaterial to this Court’s review. The rule against raising a new issue to reverse the Title Board does not apply to raising a different reason to affirm. This Court may affirm on any basis supported by the record. See *Compass Bank v. Kone*, No. 04CA1914, __ P.3d __, 2006 WL 74141 at *5 (Colo. App. Jan. 12, 2006).

B. The Ballot Title Contains a Single Subject as a Matter of Law.

1. “Similar to” is a common statutory phrase.

Insomuch as the Colorado Legislature historically uses the phrase “similar to” in its legislative enactments, which enactments have, in general, thereupon been signed into law by the Governor, both the Colorado Legislature and the Executive Branch apparently think that the phrase “similar to” conveys accurate and useful information to the public and others.

A Westlaw search of the words “similar to” in the Colorado Statutes database (co-st) produces 2,112 documents. Most of those documents contain the phrase in historical and statutory notes explaining that a section is “similar to” a former or another statute. However, ninety-three of those documents use “similar

to” in a substantive manner within the body of a statute.² It does not appear that any Colorado court has ever ruled that a statute was impermissibly broad, vague, obscure or misleading because of the use of the phrase “similar to.” Thus, even if the phrase at issue were “similar to marriage,” it would not be improperly vague, broad, obscure, or misleading. As noted above, however, the phrase at issue is not “similar to marriage” as complained of by Petitioners.

² C.R.S. § 2-3-505(2)(d); C.R.S. § 4-2-707(1); C.R.S. § 4-2.5-518(2) (amended 2006); C.R.S. § 4-2.5-527; C.R.S. § 4-3-404(c); C.R.S. § 4-3-405(c); C.R.S. § 6-1-1001(1); C.R.S. § 6-16-104(5); C.R.S. § 6-16-111(1)(c); C.R.S. § 7-50-101(1); C.R.S. § 7-50-102(1); C.R.S. § 7-51-101(1); C.R.S. § 7-51-102(1); C.R.S. § 8-12-106(1)(g); C.R.S. § 8-12-107(1)(f); C.R.S. § 8-12-108(1)(m); C.R.S. § 8-15.5-104(1)(a); C.R.S. § 8-73-105(2); C.R.S. § 10-2-701; C.R.S. § 10-2-903(1)(b), (2)(c); C.R.S. § 10-3-118(4)(c)(IV)(e)(I); C.R.S. § 10-4-508.5(1)(a), (2); C.R.S. § 10-4-509(5); C.R.S. § 10-7-607(4)(e)(III)(g); C.R.S. § 10-7-611(5)(f)(X); C.R.S. § 10-8-513(4); C.R.S. § 10-13-103(1)(a); C.R.S. § 10-16-105(7.2)(a); C.R.S. § 10-16-1002(6)(b)(I), (II); C.R.S. § 10-18-105(3); C.R.S. § 10-19-105; C.R.S. § 10-20-103(13); C.R.S. § 10-20-104(1)(a)(II)(C); C.R.S. § 10-20-108(2)(b); C.R.S. § 10-20-108(3)(c)(III); C.R.S. § 10-20-108(22)(c); C.R.S. § 10-20-110(4); C.R.S. § 11-41-107(2)(h); C.R.S. § 11-48-105(1); C.R.S. § 11-51-201(1); C.R.S. § 11-51-201(9.6)(a); C.R.S. § 11-103-304(1)(b); C.R.S. § 11-104-202(8)(a); C.R.S. § 11-109-306(1)(b); C.R.S. § 11-4-111(2.5); C.R.S. § 11-8-110(2); C.R.S. § 12-22-303(7.5)(a)(I), (II), (20); C.R.S. § 12-28-101(1), (3)(b)(I); C.R.S. § 12-36-116(2); C.R.S. § 12-38.1-106(1)(a); C.R.S. § 12-43-222(1)(t)(IV); C.R.S. § 12-47.1-801(1)(e); C.R.S. § 12-61-403(2)(a)(VII); C.R.S. § 12-64-108(4)(b); C.R.S. § 13-6-212(1); C.R.S. § 13-8-110(3); C.R.S. § 13-9-109(3); C.R.S. § 13-25-120(2); C.R.S. § 14-5-205(c)(2); C.R.S. § 14-10-104(2); C.R.S. § 14-11-101(2); C.R.S. § 15-1.5-119(2); C.R.S. § 18-1.3-203(1)(e); C.R.S. § 18-15-104(4)(a); C.R.S. § 18-18-102(6)(a)(I), (II) (21); C.R.S. § 19-5-103.7(4)(b)(II); C.R.S. § 22-32-128; C.R.S. § 24-50-136(3); C.R.S. § 24-50-504(2)(a); C.R.S. § 24-50-602(1)(a); C.R.S. § 24-60-905; C.R.S. § 24-80-205(1); C.R.S. § 25-5-203(2.5); C.R.S. § 25-7-112(1.5)(b)(II); C.R.S. § 25-16-306(4)(b); C.R.S. § 26-4-120(1); C.R.S. § 26-19-107(3); C.R.S. § 27-10-102(5)(b)(III), (d); C.R.S. § 27-10.5-102(11)(a); C.R.S. § 29-11-201; C.R.S. § 31-4-112; C.R.S. § 31-10-104(5); C.R.S. § 34-1-104.5(2); C.R.S. § 34-33-110(2)(b)(V)(e); C.R.S. § 35-23.5-105(1), (2); C.R.S. § 35-29.5-104(1)(h); C.R.S. § 35-57-113(1)(i); C.R.S. § 35-57.5-113(1)(i); C.R.S. § 35-57.8-107(2)(e); C.R.S. § 37-92-501(4)(a)(III); C.R.S. § 39-5-201(1); C.R.S. § 39-28-302(1); C.R.S. § 42-2-126.5(2)(b).

2. In its context in the Proposed Initiative, the phrase, “similar to” is concrete and clear.

Contrary to the Petitioner’s assertion, the Proposed Initiative’s Ballot Title does not violate the single-subject requirement or subvert the requirement’s purpose. COLO. CONST., art V, sec. 1(5.5); C.R.S. § 1-40-106.5(1)(a). “[A]n initiative that ‘tends to effect or to carry out one general object or purpose,’ does satisfy the single-subject requirement.” *In Re 1999-2000 No. 200A*, 992 P.2d at 30 (quoting *In re “Public Rights in Water II”*, 898 P.2d 1076, 1079 (Colo. 1995)). The purpose of the single-subject requirement is to prevent joining in the “same act disconnected and incongruous measures” and to prevent surprise and fraud from being practiced upon Colorado voters. *In re 1999-2000 No. 200A*, 992 P.2d at 30; C.R.S. § 1-40-106.5(e).

The purpose of the Proposed Initiative is to protect and preserve the historical institution of marriage as defined in sections 14-2-101 through 14-2-104 (2005), the Uniform Marriage Act. The definition of marriage as between one man and one woman is based upon thousands of years of tradition and is rooted in immutable and empirical facts of nature with respect to human reproduction. The Proposed Initiative is intended to apply to any “legal status,” partnership, or union

created as a substitute for or counterfeit of traditional marriage, whether formed within the state of Colorado or formed elsewhere.

Thus the Proposed Initiative has one purpose and one purpose only – to preserve the historical institution of marriage by precluding marriage imitations. Nothing in the Ballot Title suggests multiple subjects, and therefore the Title Board’s determination should be affirmed. *Armstrong*, 10 P.3d at 1282.

Petitioners erroneously argue that “the phrase, ‘similar to marriage’” in the Proposed Initiative Ballot Title violates the single-subject requirement because it is “broad and so vague that it necessarily will mean different things to different voters.” (Petition at 2.) The actual language, “legal status similar to that [the legal status] of marriage,” is by no means broad and vague. It defies reason and logic to claim that people generally do not have a basic understanding of what the legal status of marriage is. Petitioners have not explained how this language necessarily means different things to different people.

Previously, this Court has held that a marriage initiative which expressly addressed varying forms of valid marriages (common-law marriage, validly licensed marriage) did not violate the single-subject requirement because it furthered the single purpose of defining marriage as between one man and one woman. *In re 1999-2000 #227 and #228*, 3 P.3d 1, 4-5 (Colo. 2000). Though the

phrase “legal status similar to that of marriage” would preclude a variety of marriage counterfeits, such as civil unions, domestic partnerships, life partnerships, etc., the Proposed Initiative is only effectuating one purpose – precluding marriage imitations, regardless of what they are called.

Identical or similar language used by several other states in similar constitutional amendments is evidence of its generally understandable meaning. Constitutional amendments in Arkansas, Kentucky, Louisiana, and Texas utilized language similar to the Proposed Initiative’s phrase “legal status similar to that of marriage” in initiatives or legislative proposals that placed this issue before electors of those other states. ARK CONST. amend. 83, § 2; KY. CONST. § 233A; LA. CONST. art. 12, § 15; TEX. CONST. art. 1, § 32.

The ballot question submitted to the electors in Kentucky asked: “Are you in favor of amending the Kentucky Constitution to provide that only a marriage between one man and one woman shall be a marriage in Kentucky, and that a *legal status identical to or similar to marriage* for unmarried individuals shall not be valid or recognized?” 2004 Ky. Acts. ch. 128, § 2. This ballot question was challenged and subsequently upheld as satisfying Kentucky’s single-subject requirement. Wood v. Commonwealth of Kentucky, Civ. A. No. 04-CI-01537,

2005 WL 1258921 at *6 (Ky. Cir. Ct. May 26, 2005) (applying the single subject rule as required under KY. CONST. § 256).

Similarly, the Louisiana Supreme Court recently upheld the Louisiana constitutional amendment regarding marriage, though it was challenged under the Louisiana single-object requirement of LA. CONST. art 13, § 1(b). Forum for Equality PAC v. McKeithen, 893 So.2d 715, 737 (La. 2005). The Louisiana amendment was proposed by the legislature and “submitted to the electors of the state of Louisiana, for their approval or rejection.” *Id.* at 717 (citing 2004 La. Acts 926). The Louisiana Supreme Court reversed the district court’s declaration that the third sentence of the amendment – “A legal status identical or substantially *similar to that of marriage* for unmarried individuals shall not be valid or recognized” – constituted a separate subject from the other three sentences of the amendment. *Id.* at 728-29 (emphasis added). The Louisiana Supreme Court held that the amendment contained a single plan for protecting marriage, and that the sentence in question was an element implementing the single plan. *Id.* at 736.

The only court that has come to a contrary decision did so in a complete vacuum. See Citizens for Equal Protection v. Bruning, 368 F. Supp. 2d 980 (D. Neb. 2005). In an embarrassing decision, the court ruled in part that the Nebraska marriage amendment was unconstitutionally vague because of the phrase ““similar

to' marriage." *Id.* at 995. The ruling was embarrassing because neither "similar to marriage" nor even "similar to" is in the Nebraska amendment. NEB. CONST., art. I, sec. 29.³ Accordingly, as with Petitioners here, there was no context from which the court could legitimately address the phrase "similar to marriage." Indeed, the issue was never raised in any party's brief. *See* Party Briefs available at www.domawatch.com.⁴

The Proposed Initiative utilizes the "similar to that of marriage" language as an implementation of its purpose to eliminate marriage imitations. "Implementation details that are 'directly tied' to the initiative's 'central focus' do not constitute a separate subject." *In Re 1999-2000 No. 200A*, 992 P.2d at 30 (citing *In re Initiative for 1997-98 # 74*, 962 P.2d 927, 928 (Colo. 1998)). The prohibition of the creation or recognition of a legal status similar to that of marriage is the tool by which the Proponents choose to implement their goal of protecting the historical institution of marriage as defined by statute. *See In re 1999-2000 No. 200A*, 992 P.2d at 31 (holding that neither the initiative proponents' motivations nor the initiative's legal effects are to be construed but rather only the

³ The Nebraska language reads: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." *Id.* Thus, it is clear that "similar" in the Nebraska amendment refers to a relationship similar to a civil union or domestic partnership.

⁴ www.domawatch.org/circuitissues/eighthcircuit/citizensforequalprotectionvbruning.html.

effect of the implementation provisions). This implementation detail does not violate the single subject requirement but furthers the goal of the single purpose – the protection of the unique legal status of marriage. By prohibiting the creation or recognition of a legal status similar to that of marriage, the Proposed Initiative is affirming that marriage is a unique legal status that should not be replicated outside the confines of its current statutory definition.

The use and subsequent validation of the “similar to” language by other states and their reviewing courts reflects that the language’s use is neither too vague nor overbroad for electors in Colorado to comprehend and answer “yes” or “no” to on Election Day. The Proposed Initiative contains a single subject, the preclusion of marriage imitations, and utilizes the “similar to” language in furtherance of achieving that goal. As such, the court should uphold the Title Board’s language as compliant with the single subject requirement of COLO. CONST. art. 5, sec. 1(5.5).

C. The Ballot Title Contains a Single Subject as a Matter of Fact.

“Legal status similar to that of marriage” does not logically relate to more than one subject. “Legal status” refers to extending official or governmental recognition and legal effect to a relationship, and treating two people as a unit because of that relationship. For example, granting benefits to a government

employee because he or she is cohabiting with another person is extending legal status to the relationship; making it illegal to commit a violent act (*i.e.*, domestic violence) against a person with whom one resides or with whom one previously had an intimate relationship does not create or recognize a legal status unless the statute premises the prohibition on a spouse-like relationship. “Similar” is used in its ordinary sense of “like,” “much the same,” or “resembling.” Extending benefits or creating responsibilities because of an intimate relationship would be treating that relationship as “similar” to marriage. But extending benefits to all state employees on an equal basis, or extending certain benefits to all unmarried state employees on an equal basis, would not involve creating or recognizing a legal status similar to that of marriage.

The prohibition of creating or recognizing a legal status similar to that of marriage affirms that marriage is a unique legal status. Although marriage is often spoken of as a contract, it is one of a kind. Unlike private contracts, which generally implicate no public interests, marriage has public consequences because it establishes the fundamental family unit of a stable society. As a result of the public interest in and regulation of marriage, it cannot be dissolved solely by the mutual consent of the parties. The essence of the legal status of marriage is that it involves domestic relations with public ramifications, including public recognition,

licensing, registration, and/or regulation. Thus, a legal status would be “similar to that of marriage” if it involves public recognition, licensing, registration, or regulation of domestic relations.

The Proposed Initiative applies to the government only, not to private parties. A court enforcing a private contract or will of any kind is not recognizing a legal status; it is recognizing a private agreement or instruction. The court would not be enforcing a contract or will because of an intimate relationship, but because the contract or will complied with the legal requirements for the execution and enforcement of such documents.

As is clear from its language, the Proposed Initiative will, if adopted by the people of Colorado, prohibit extending official status to the intimate relationships of unmarried, unrelated adults, such as domestic partnerships or civil unions. Therefore, it would prohibit governmental entities from creating “same-sex marriage,” whether called “marriage,” domestic partnership, civil union, or some other name.

Any legal status granted to an unmarried couple for the purpose of extending any benefits or rights would violate the Proposed Initiative. For example, both Hawaii and Vermont have adopted reciprocal beneficiary statutes that extend benefits to couples based on the legal status of a reciprocal beneficiary

“relationship.” The purpose of the Hawaii scheme is “to extend certain rights and benefits which are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law.” Haw. Rev. Stat. § 572C-1. The purpose of the Vermont scheme is to provide certain benefits, protections and responsibilities “that are granted to spouses” to certain related persons who enter “a consensual reciprocal beneficiaries relationship.” Vt. Stat. § 1301(a). Because both of these approaches create a legal status for unmarried couples, and focus on the couple or relationship, they would violate the proposed amendment. In contrast, the reciprocal benefits contract legislation recently proposed in Colorado by Senator Mitchell or other similar legislation would not violate the Proposed Initiative. S.B. 06-166, 56th Gen. Assem., 2d Reg. Sess. (Colo. 2006), http://www.leg.state.co.us/clics2006a/csl.nsf/fsbillcont3/3AA56AE77373E092872570CB005A0AA0?Open&file=166_01.pdf. Senator Mitchell’s legislation would simply have created a type of private contract with a set of default rules, available to any two unmarried persons who cannot marry each other. Such a private contract would not constitute a “legal status similar to that of marriage.”

D. The Initiative Ballot Title is not Misleading.


The Initiative Ballot Title is not misleading, but rather conveys a clear, general understanding of the effect of an elector's "yes" or "no" vote. In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104, 987 P.2d 249, 254 (Colo. 1999); C.R.S. § 1-40-106(3)(b). The Title Board's determination of a title is upheld where the language repeats the language of the proposed amendment and "expresses the true intent and meaning of the measure." In re #25A Concerning Hous. Unit Constr. Limits, 954 P.2d 1063, 1065 (Colo 1998) (quoting In re Proposed Initiative Concerning "Automobile Insurance Coverage", 877 P.2d 853, 857 (Colo. 1994)). As the Title Board determined, the Proposed Initiative's Ballot Title correctly and fairly expresses the intent of the Initiative to protect the historical institution of marriage by prohibiting the creation or recognition of a legal status resembling marriage.

In reviewing Title Board actions, this court grants "great deference to the board's broad discretion in the exercise of its drafting authority." In re Proposed Ballot Initiative on Parental Rights, 913 P.2d 1127, 1131 (Colo. 1996) (quoting In re Proposed Initiative Concerning "State Personnel Sys.", 691 P.2d 1121, 1125 (Colo. 1984)). This court will only revise an action of the Title Board if it is "clearly misleading." *Id.*

Because the language chosen by the Title Board fairly reflects the intent and meaning of the Proposed Initiative, it is proper and should be upheld. *Id.* The plain meaning of the Proposed Initiative will be presented to the electors through the chosen ballot title. There is no ambiguity in the phrase “legal status similar to that of marriage,” as it is intended to reflect the use of “similar to” in its ordinary sense. As mentioned above, similar language was also presented to the electorates in Arkansas, Kentucky, Louisiana, and Texas – reflecting the language’s character as unambiguous and straightforward.⁵ The Proposed Initiative Ballot Title is not misleading, and therefore the language chosen by the Title Board should be affirmed. *In re #25A Concerning Hous. Unit Constr. Limits*, 954 P.2d at 1065 (citing *In re Workers Comp. Initiative*, 850 P.2d 144, 146 (Colo.1993)).

Respectfully submitted this 12th day of June 2006.

BURNS, FIGA & WILL, P.C.

By: 
Michael J. Norton

Attorneys for Respondent
Kevin Lundberg

⁵ Indeed, the Arkansas Supreme Court rejected a challenge to the ballot title language, “legal status for unmarried persons which is identical or substantially similar to marital status.” *May v. Daniels*, ___ S.W.3d ___, 359 Ark. 100, 2004 WL 2250882 at *4 (Ark. 2004). The Court held that the term “marital status” was not vague or misleading. *Id.* at *5.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of June 2006, a true and correct copy of the foregoing RESPONSE TO PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2005-2006 #109 ("PROHIBITION ON LEGAL STATUS SIMILAR TO MARRIAGE") was served by hand delivery, to the following:

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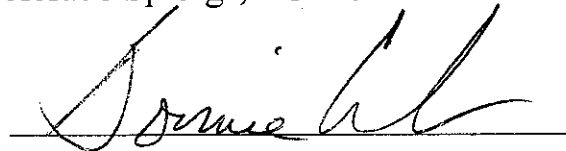
Maurice G. Knaizer
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Denver, CO 80203

And by U.S. Mail to:

Representative Kevin Lundberg
P.O. Box 378
Berthoud, Co 80413

And by U.S. Mail to:

Wilfred G. Perkins
2508 Pine Bluff Road
Colorado Springs, CO 80909

A handwritten signature in black ink, appearing to read "Wilfred G. Perkins", is written over a horizontal line.

SUPREME COURT, STATE OF COLORADO
TWO EAST 14TH AVENUE
DENVER, COLORADO 80203

Case No.06SA172

ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2),
C.R.S. (2005)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND
SUMMARY FOR 2005-2006, #109

Petitioners:

JEAN DUBOFSKY and PATRICK STEADMAN, Objectors,

v.

Respondents:

KEVIN LUNDBERG and WILL PERKINS, Proponents,

and

Title Board:

WILLIAM A. HOBBS, JASON DUNN, and SHARON EUBANKS.

ORDER OF COURT

Upon consideration of the Petition for Review, together
with briefs filed herein, and now being sufficiently advised in
the premises,

IT IS ORDERED that the actions of the Title Board are

AFFIRMED.

BY THE COURT, EN BANC, JUNE 16, 2006.



Copies mailed via the State's Mail Services Division on *6-16-06* EAC
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