

CERTIFICATION OF WORD COUNT: 6,801

<p>Supreme Court, State of Colorado          Court Address:          Colorado State Judicial Building          2 East 14<sup>th</sup> Avenue, Suite 400          Denver, CO 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; display: inline-block;"> <p>JUN 12 2008</p> </div> <p>OF THE STATE OF COLORADO              CLERK OF COURT</p> </div> <p style="text-align: center; margin-top: 20px;"><b>▲ COURT USE ONLY ▲</b></p>
<p>ORIGINAL PROCEEDING PURSUANT TO          § 1-40-107(2), C.R.S. (2007)          Appeal from the Ballot Title Setting Board</p> <p>IN THE MATTER OF THE TITLE, BALLOT          TITLE AND SUBMISSION CLAUSE FOR 2007-          2008 #123 ("Conditions of Employment")</p>	
<p><b>Petitioners:</b>          REED NORWOOD AND CHARLES BADER,          Proponents,</p> <p>v.</p> <p><b>Respondent:</b> JULIAN JAY COLE,          Objector,</p> <p>and</p> <p><b>Title Board:</b>          WILLIAM A. HOBBS, DAN CARTIN, and DAN          DOMENICO</p>	
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<p><b>PETITIONERS' OPENING BRIEF</b></p>	

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## STATEMENT OF ISSUES

1. Whether, after deciding at the first hearing that the measure comprises a single subject, the Title Board erred in reversing that ruling and in failing to find that the initiative addresses one topic: limiting the conditions of employment as to certain organizations defined in the measure as "labor organizations."
2. Whether the single subject requirement prevents the Title Board from setting a title for an initiative that has a potentially inconsistent effect on another measure on the same ballot.
3. Whether the single subject requirement prevents the Title Board from setting a title for an initiative that specifies it will prevail over a conflicting definition in the same constitutional article, including one in a measure on the same ballot, regardless of the number of votes cast for each.
4. Whether the Title Board correctly determined that the correction of a typographical error that was discussed with legislative staff at the review and comment hearing was a permitted change prior to submission of a final initiative text to the Board.<sup>1</sup>
5. Whether the ballot title originally set by the Board accurately and fairly reflects the intent of the measure.

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<sup>1</sup> This issue was addressed before the Title Board and resolved in favor of the Proponents. On June 9, 2008, the undersigned notified both counsel in this matter that this issue could be addressed by the Court and would be briefed by Proponents.

## PROCEDURAL STATEMENT

This matter arises on an appeal from the Title Setting Board, pursuant to C.R.S. § 1-40-107(2). The Board granted and then denied a title and ballot title and submission clause to the Proponents of Initiative 2007-2008 #123. A petition for review was timely filed, and an expedited briefing schedule was set.

## FACTUAL STATEMENT

On April 25, 2008, Reed Norwood and Charles Bader ("Proponents") submitted a draft of #123 to the Offices of Legislative Council and Legislative Legal Services. That draft provided:

*Be it enacted by the People of the State of Colorado:*

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

Section 17. Limits on conditions of employment.

(1) AN EMPLOYER SHALL NOT REQUIRE, AS A CONDITION OF EMPLOYMENT, THAT AN EMPLOYEE JOIN OR PAY DUES, ASSESSMENTS, OR OTHER CHARGES TO OR FOR A LABOR ORGANIZATION.

(2) AS USED SOLELY IN THIS ARTICLE, AND NOTWITHSTANDING ANY OTHER PROVISION OF LAW, "LABOR ORGANIZATION" MEANS ANY ORGANIZATION OF EMPLOYEES THAT EXISTS SOLELY OR PRIMARILY FOR A PURPOSE OTHER THAN DEALING WITH EMPLOYERS CONCERNING GRIEVANCES, LABOR DISPUTES, WAGES, RATES OF PAY, EMPLOYEE BENEFITS, HOURS OF EMPLOYMENT, OR CONDITIONS OF WORK. THIS DEFINITION SHALL PREVAIL OVER ANY CONFLICTING DEFINITION OF "LABOR ORGANIZATION" IN ARTICLE XXVIII, INCLUDING ANY PROVISION ADOPTED AT THE 2008 GENERAL ELECTION, REGARDLESS OF

THE NUMBER OF VOTES RECEIVED BY THIS OR ANY OTHER SUCH AMENDMENT.

On May 9, 2008, representatives of those offices held a hearing on the measure. Later that day, the Proponents submitted the necessary copies of the original, highlighted, and final versions of #123 to the Secretary of State's office for consideration by the Title Board. The final wording of the measure was unchanged, with two exceptions. Proponents corrected a typographical error to change "article XXVIII" to "article XVIII" and included immediately thereafter the phrase, "of this constitution", in proposed subsection 17(2) of the measure. Both changes were consistent with the introductory clause of the measure, "SECTION 1. Article XVIII of the constitution of the State of Colorado is amended BY THE ADDITION OF A NEW SECTION to read," as well as the Proponents' dialogue with legislative staff, based on the staff memo containing a summary of the proposed measure and technical and substantive questions about the initial draft. *See* Attachment A (Memorandum to Proponents of Initiative 2007-2008 #123, dated May 6, 2008) and Attachment B (Transcript of May 9 hearing before legislative staff) ("May 9 Tr.").

On May 21, 2008, the Title Board met to set a title for #123. At that time, Proponents pointed out the conflict between #123 and Amendment 47. The latter prohibits the conditioning of employment on requiring membership in or payments to a "labor **union**," effectively defined to include groups that engage in workplace



negotiations as well as any organization providing for the "mutual aid or protection" relating to employment.<sup>2</sup> #123 prohibits requiring membership in any "labor organization," defined to exclude entities that conduct certain workplace negotiations or advocacy but, by implication, leaves intact the prohibition against required membership in or payments to the more amorphous mutual aid or protection groups referenced by Amendment 47. Attachment C (Transcript of May 21 hearing before Title Board) ("May 21 Tr.") at 3:1-6; 4:11-5:17; 7:1-17.

On May 21, the Title Board set the following title on a 2 to 1 vote:

An amendment to the Colorado constitution concerning participation in certain organizations as a condition of employment, and, in connection therewith, prohibiting an employer from requiring an employee to join a "labor organization" or to pay dues, assessments, or other charges to or for such an organization; defining "labor organization" as one that exists solely or primarily for a purpose other than dealing with employers concerning grievances, labor disputes, wages, rates of pay, employee benefits, hours of employment or conditions of work; and providing that the definition of "labor organization" shall prevail over any other conflicting definition in article XVIII of the Colorado Constitution, including any other

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<sup>2</sup> The precise wording of Amendment 47's definition of "labor union," reflected in proposed Article XVIII, sec. 16(5), reads as follows:

AS USED IN THIS SECTION, "LABOR UNION" MEANS ANY ORGANIZATION OF ANY KIND, OR AGENCY OR EMPLOYEE REPRESENTATION COMMITTEE OR ORGANIZATION, THAT EXISTS FOR THE PURPOSE, IN WHOLE OR IN PART, OF DEALING WITH EMPLOYERS CONCERNING WAGES, RATES OF PAY, HOURS OF WORK, OTHER CONDITIONS OF EMPLOYMENT, OR OTHER FORMS OF COMPENSATION; ANY ORGANIZATION THAT EXISTS FOR THE PURPOSE OF COLLECTIVE BARGAINING OR OF DEALING WITH EMPLOYERS CONCERNING GRIEVANCES; AND ANY ORGANIZATION PROVIDING OTHER MUTUAL AID OR PROTECTION IN CONNECTION WITH EMPLOYMENT.

amendment adopted at the 2008 general election regardless of the number of votes each receives.

*See Attachment D hereto, p. 9.*

Julian Jay Cole timely filed a motion for rehearing, and the Title Board reconsidered its earlier decision on May 30, 2008. Cole objected to the jurisdiction of the Board to even set a title, contending that the correction of the above-mentioned typographical error constituted a substantial change that required resubmission of the initiative to the legislative offices pursuant to C.R.S. § 1-40-105. The Board denied that motion. Attachment E (Transcript of May 30 rehearing before Title Board) ("May 30 Tr.") at 46:5-14.

Cole also objected to the single subject of #123. One Board member expressed concern that there were two subjects – restricting the types of organizations that employers could require employees to join as a condition of employment and nullifying Initiative 2007-2008 #41 (now Amendment 47) ("#41"). Neither of the other two Board members agreed with this assessment. Another Board member asserted different grounds that the measure contains two subjects, namely that it limits employer-required organizational associations for employees and changes the rules of construction regarding implementation of the definition of "labor organization" in this measure over any conflicting provision of law. Neither of the other two Board members agreed with this assessment either.

However, each of the two afore-mentioned Board members voted for his own reason to deny a title to the measure over their individual concerns. By means of a 2 to 1 vote, the Board withdrew the title previously set for #123.

Cole made a number of arguments that the title was misleading, but the Board did not consider these arguments because of its single subject decision.

### **SUMMARY OF ARGUMENT**

The Title Board members erred in agreeing that no title should be set for #123. Neither its projected interaction with another initiative nor the clear statement that it prevails if it conflicts with any other provision of law offends the single subject requirement. Proponents ought not be penalized for providing the very detail that will adequately inform voters as to the substance of what is being proposed and the process of how it would interact with existing and proposed laws.

The Board did correctly decide that the correction of a typographical error did not require a restarting of the process. The change was discussed multiple times with legislative staff at the review and comment hearing after statements in the review and comment memo highlighted the discrepancy between the constitutional article expressly being amended, Article XVIII, and one reference in the original initiative text to "Article XXVIII."

However, time is running out on the Proponents. A reversal of the Board's decision would enable them to circulate petitions for the 2008 general election so

long as an adequate number of valid signatures must be submitted to the Secretary by August 4, 2008. If this Court rules that the title should have been set, it is respectfully requested that it expedite its order, setting forth any corrections to the title if they are required, and suspend the fifteen day period for the mandate to issue.

## LEGAL ARGUMENT

### I. Initiative #123 comprised a single subject.

#### A. Standard of review applicable to single subject claims.

The Title Board's decision in refusing to set titles for #123 and #124 on single subject grounds suggests voters are voting booth innocents, unable to weigh competing measures or appreciate the changes that these measures propose. This Court, while certainly concerned about ensuring that voters are informed and not misled in the initiative process, considers voters knowledgeable enough that they are presumed to know the law they are amending and to appreciate the impacts of their votes. *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000). Their informational base is deemed to be on par with that of legislators, *id.*, whose lawmaking activities are also subject to a single subject requirement. Colo. Const., art. V, sec. 21.

The Court's recognition about voters' capacity is consistent with the twin goals of the single subject requirement, ensuring the each measure passes on its

own merits and preventing the consideration of surreptitious provisions that would surprise voters. *In re Title, Ballot Title and Submission Clause for 2007-2008 #61*, slip op. at 7-8 (Case No. 08SA89) (decided May 16, 2008) (citations omitted). The single subject requirement prevents the Title Board from setting titles for measures that contain distinct purposes which are neither interdependent nor necessarily related to one another. *Id.* at 7 (citations omitted).

Ultimately, the single subject must be liberally construed to facilitate the citizens' right of initiative. *Id.* at 8 (citations omitted). The Court evaluates the substance of a measure to consider single subject claims but will not project the way in which a measure will be construed or applied, should it be enacted by voters. *Id.*

B. #123's single subject was not compromised because it uses an uncommon definition.

One Title Board member felt that #123 reflected two separate and distinct purposes: (1) *permitting employers to require employees to be members of organizations that bargain over wages, rates of pay, hours of work, conditions of employment, and grievances*, thus nullifying Initiative 2007-08 #41; and (2) *prohibiting employers from requiring employees to be members of other types of organizations* – including those formed for "mutual aid or protection in connection with employment," as expressly set forth in #41. May 21 Tr., 20:12-22:3. The Board member's objection was based upon #123's definition of "labor

organization" which he said is atypical and the opposite of what voters would expect. May 30 Tr., 77:6-22. Neither of the other two Board members agreed that this concern was sufficient to deny a ballot title on single subject grounds. May 30 Tr., 69:1-3; 82:6-19.

In fact, #123 simply prohibits employment conditioned on membership in "labor organizations" that are unrelated to workplace issues, which is said to be a second "subject" as noted above. Some groups may be commercial (employee credit unions, as one example) or political (the Socialist Workers Party, for instance) or even charitable in nature (a fallen workers fund), but all are tertiary to the employment relationship. Thus, Initiative #123 is intended to keep mandatory, non-work organizations, composed of or supported by employees, out of the workplace.

It is also noteworthy that #123 did not define the same term that is used in #41, "labor union." Instead, it uses the phrase, "labor organization," while acknowledging that the two measures are not consistent with one another. Even so, the Proponents' need not navigate through the shoals of measures that have already been proposed.<sup>3</sup> This Court made that point clear in its recent decision in #61.

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<sup>3</sup> Only the Board has a statutory restriction in this regard, as its ballot titles "shall not conflict with those selected for any petition previously filed for the same election." C.R.S. § 1-40-106(3)(b).

1. *Proponents can use uncommon definitions without violating the single subject requirement.*

Those who legislate, whether they are state legislators or voters, are not specifically constrained, as a matter of law, in how they define the terms used in their measures. Definitions of key words and phrases need not embrace the common meanings normally given to those terms. "The General Assembly may furnish its own definitions of words and phrases in order to guide and direct judicial determination of the intendments of the legislation **although such definitions may differ from ordinary usage.** If the General Assembly has defined a statutory term, a court must apply that definition." *People v. Swain*, 959 P.2d 426, 430 (Colo. 1998) (emphasis added).

The Title Board is no stranger to this legal precept. Initiatives have been crafted so that "common words have unique meanings," including definitions that are broader or narrower than typical usage. *In re Title, Ballot Title & Submission Clause Pertaining to Proposed Election Reform Amendment*, 852 P.2d 28, 34 (Colo. 1993). In the initiative realm, the only pertinent title-related question is whether a definition establishes a new or controversial standard. If it does, initiative law requires that such definition must be accurately summarized in the ballot title. *Id.*, citing *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238, 242 (Colo. 1990).

The Title Board is sufficiently comfortable with this precedent that it recently approved a title for a measure containing an unusual definition, and that approval is being contested before this Court. In the third "preferential treatment" initiative of this election season (Initiative 2007-2008 #82), the Board is defending a ballot title it set for a measure that bans preferential treatment but then, as a matter of its definitions, excludes the "adopting [of] quotas or awarding [of] points on the basis of race, sex, color, ethnicity, or national origin." Before this Court, the Title Board rejects the argument that using even a peculiar definitional clause is a surreptitious and separate purpose or subject.

**Petitioner argues that the measure's definition of 'preferential treatment' so significantly differs from the commonly-accepted definition that it must be deemed surreptitious.** This Court has rejected a single subject challenge made on the ground that the measure changed accepted definitions. *Industrial Commission v. Continental Inv. Co.*, 78 Colo. 399, 242 P. 49 (1925). The Workmen's Compensation Law provided that an employer who conducted a business by leasing or contracting out any part or all of work related to the business was an employer and was liable to pay compensation for death or injury resulting from the work to lessees or contractors. The employer argued that the definitions of 'employer' and 'employee' were not germane to the title because the definitions were not consistent with the common definitions of these words. The Court disagreed, holding that the general assembly had the power to 'declare the sense in which words are used both in the title and in the rest of the act.' *Id.* 78 Colo. At 403, 242 P. 50. **Thus, a proposed measure does not violate the single subject limitation because a definition within the proposal differs from a commonly-accepted definition.**

Opening Brief of Title Board at 6-7 (Case No. 08SA163) (emphasis added).



In *Continental Inv. Co.*, the legislature defined "employer" as one who contracts out or leases part or all of the work to a lessee, contractor, or sub-contractor. This definition departed from the meaning normally given to "employer" but was still consistent with and fit within the bill's title, "An Act to determine, define and prescribe relations between employer and employee...." 242 P. at 50. The bill "extend[s] the definition beyond the scope of that of the dictionary, perhaps, but nevertheless defin[es] it. If it has misdefined one of those words according to the dictionary, would the act to that extent be unconstitutional? If so, every act that defines a word must stay strictly with the dictionary or define that word also in the title, which has never been done so far as we are aware." *Id.*

The uncommon definition in the employer-employee relationship addressed in *Continental Inv. Co.* is obviously pertinent to an initiative such as #123 that addresses conditions on employment.<sup>4</sup> It is not, however, the only area where legislated terms are given non-traditional meanings. Criminal laws are crafted in this manner. *Palmer v. People*, 964 P.2d 524, 526 (Colo. 1998) (upholding legislature's specialized definitions of culpable mental states as they relate to "offenses," even though the same words or phrases found elsewhere in the Criminal Code will be applied using different meanings). Similarly, definitions

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<sup>4</sup> The single subject requirement for initiatives is to be construed in the same manner as the single subject requirement that applies to legislation. C.R.S. § 1-40-106.5(3).

within the statutes providing for welfare programs can be at odds with the commonly understood usage of a phrase like "dependent child." *Metzger v. People in the Interest of the Unborn Child of Genevieve Conzone*, 53 P.2d 1189, 1191 (Colo. 1936) (upholding General Assembly's definition of "dependent child" to include all children from the time of their conception and during the months before birth). So, too, can the insurance code employ definitions that are based solely on the legislature's discretion. *Security Life and Accident Co. v. Barnes*, 494 P.2d 1294, 1296 (Colo. Ct. App. 1971) (upholding legislative discretion in defining "insurance" to exclude contracts for annuities).

Like legislators, an initiative's proponents are permitted to craft substantive measures to meet their objectives. That precept applies with no less force to the definitional aspects of the proposed measure. The definition of a term derives its legal authority and legitimacy from one fact: "the lawmakers, having full power to so define it for the purposes of the act, said so." *Rhodes v. Industrial Comm'n*, 61 P.2d 1035, 1037 (Colo. 1936).

2. *The concern about the reach of an initiative's definitions is really a post-election issue.*

The objection to the application of "labor organization," as defined, assumes that, if both measures pass, #123's authority for required membership in certain groups will render inoperative #41's prohibition as to like groups. That is certainly the Proponents' desired result. While proponents' intent is pertinent in setting the

title and interpreting an enacted measure, C.R.S. § 1-40-106(3)(b), that intent is not always controlling on the courts. *See In re Title, Ballot Title and Submission Clause for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006). If both measures actually make the ballot and both actually pass, the courts may be called upon to interpret clashes in the two definitions used. First, they would seek to construe the provisions as consistent with one another. *Bolt v. Arapahoe County Sch. Dist. No. Six*, 898 P.2d 525, 532 (Colo. 1995). If they could not do so, one would prevail over the other. But absent concrete facts, it is premature to say in what regard these measures will be deemed to be in conflict.

There are definitely areas in the two definitions that conflict. For example, #41 prohibits any required employee involvement in an organization that addresses wages, rates of pay, grievances, and hours and conditions in the workplace. #123 permits it. There are areas where the two measures might co-exist. #41 prohibits an employee's mandatory involvement in entities that address "other forms of compensation" or provide "other mutual aid or protection," but those topics are unaddressed by #123. Finally, there are areas with some degree of overlap. #41 generally prohibits required participation in a collective bargaining organization, but #123 authorizes membership and support of organizations that engage in specific activities (advocacy on wages, hours, grievances, etc.) that are traditionally associated with "collective bargaining."

The precise legal impact for each category remains a matter for post-election application and interpretation. These areas of comparison are relevant *only* if both measures make the ballot, both measures are enacted, a dispute over one or more of these phrases arises thereafter, and the two phrases in question are found to be, in the words of #123, "conflicting." Interpretation of these two measures is strictly a post-election concern. *Proposed Election Reform Amendment*, 852 P.2d at 31. Proponents are permitted to leave construction of even key phrases to the period after an election. *In re Proposed Initiative on Water Rights*, 877 P.2d 321, 326-27 (Colo. 1994) (proponents could draft an initiative's terms without defining them, waiting for judicial interpretation after the election). To make that determination now would exceed this Court's role in the review of the Title Board's decision and reflect little more than an advisory opinion. Thus, projecting the effect of this initiative should not have been an underpinning of a multiple-subject finding by the Board.

3. *#123's specific definition addresses any single subject concerns.*

Including a clearly stated definition in the measure, rather than allowing voters to guess what is meant by a particular phrase, helps establish compliance with the single subject requirement. As the Board observed in the appeal on Initiative #82, even non-traditional definitions are legitimate elements to be included in the text of a ballot measure.

The definition of 'preferential treatment' avoids the potential for a surreptitious measure. The absence of a definition can complicate the ability of the Board and the Court to comprehend a measure and can result in the concealment of separate subjects within a complex proposal. *In re Title, Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.2d (sic) 273, 282 (Colo. 2006). The definition of 'preferential treatment' clarifies and narrows the measure and avoids the confusion and controversy that arose in other states.

Opening Brief of Title Board at 7 (Case No. 08SA163). The Board erred by failing to apply this same standard when it considered the single subject and ballot title of #123. Therefore, its decision should be overturned.

C. #123's single subject was not compromised because it will prevail over conflicting provisions, including any that are adopted at the 2008 election.

A single Title Board member asserted that #123 violates the single subject requirement because it states that it will prevail, notwithstanding any other law, including those adopted at the 2008 general election. May 30 Tr., 83:21-85:4. This view is without merit.

His concern was that changing rules of interpretation as they apply to implementing ballot measures is an additional purpose of #123. Yet, the change in question only applies to #123. It does not apply to any other initiative or in any other way outside of this specific context. This Title Board member suggested that the sentence in question is the functional equivalent of an initiative providing that it only needs 35% of the vote to win. May 30 Tr., 72:7-73:4. Further, the Board member concerned about this issue was unaware that this rule of construction is

based in statute, C.R.S. § 1-40-123, and thus can be superseded by a subsequent enactment. May 30 Tr. 70:2-4.

The wording used here allows voters to consciously know that they are voting on a measure that will be effective, despite competing measures on the same ballot. It is a vast improvement over the code words, "notwithstanding any other provision of law," May 30 Tr., 60:14-62:5, that lawyers typically use and voters typically overlook as legal jargon.<sup>5</sup> It is direct and capable of no misinterpretation. The Proponents have transparently communicated that this measure, if it is on the ballot and is passed, is intended to trump any conflicting measures.

The wording chosen is not vague, unclear, or veiled in any way and thus cannot be a surreptitious change to the law. In fact, this Court previously upheld an initiative's use of this precise verbiage, related to voters through the ballot title. In *In re Title, Ballot Title and Submission Clause, and Summary Pertaining to the Initiative Concerning "Taxation III,"* 832 P.2d 937 (Colo. 1992), the Court upheld a ballot title that stated the proposed ballot measure "specif[ies] which measure prevails if voters approve more than one measure at the 1992 general election limiting governmental taxes, revenues, spending, or appropriations." *Id.* at 941.

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<sup>5</sup> To cover all their bases, Proponents used this phrase in the definition of "labor organization," but it was not the sole means of preempting conflicting measures. #123 specifically states that it prevails over conflicting provisions and even goes to the extra length of stating that the vote totals of the other measures are not relevant in coming to this determination.

While the Court did not evaluate the single subject issue, it did find that the electorate was adequately informed of the change it was being asked to consider so that it could thoughtfully evaluate this proposal. *Id.*

In a similar vein, TABOR provides that it supersedes any conflicting provision of law. Colo. Const., art. X, sec. 20(1). Of the various judicial comments about TABOR's multiplicity of subjects, none has even mentioned this provision as implicating the single subject requirement. #123 is unambiguous in informing voters of the effect it would have if adopted. It does not conceal this fact in the folds of any complexity. As such, it meets the purpose and requirements of the ballot titling process.

This provision is no different than, say, an initiative's statement that it will be retroactive to a date certain. That provision runs counter to typical statutory rules of construction and voters' understanding of typical ballot measures before them. *See* C.R.S. § 2-2-402; *Bolt, supra*, 898 P.2d at 533. But an effective date that precedes the date on which the vote is finalized can be used by an initiative's proponents and is effective as a matter of law, so long as the proposed retroactivity is explicit in the measure and clear to voters when they consider the ballot title. *Id.*

Two of three Board members disagreed with the allegation that a clear statement of this measure's effect on competing measures was a second subject. This Court should do the same.

**II. The Title Board correctly found it had jurisdiction to set a title, as the Proponents based their two changes to initiative text on comments from the legislative staff during the review and comment hearing.**

A. Standard of review for jurisdictional claims.

This Court liberally construes the statutes governing the right of initiative. *Loonan v. Woodley*, 882 P.2d 1380, 1383 (Colo. 1994). That liberal construction includes applying the three-part substantial compliance standard to technical statutory requirements that apply to the initiative process. *In re Title, Ballot Title & Submission Clause for Initiative 1999-2000 #255*, 4 P.3d 485, 492-93 (Colo. 2000). When the legislative staff here gave its approval to make a typographical correction before submitting a final initiative text and the Title Board found this change was authorized based on the review and comment memorandum and hearing transcript, they were fostering the purpose of the statute which is to facilitate the right of initiative, were not attempting to mislead any party or the public generally, and came to their conclusion because this was an isolated instance that was addressed. *Id.*



- B. #123's Proponents need not need to resubmit a draft of their measure to the legislative offices in order to fix a typographical error.

Cole asserted before the Board that Proponents' change of "Article XXVIII" to "Article XVIII" in one reference in the initiative text was a substantial change that required Proponents to restart the initiative drafting process. The Board unanimously disagreed.

The legislative staff's memorandum lists the measure's purposes. It states, in part:

3. To state that the definition of "labor organization shall prevail over any conflicting definition of "labor organization in Article XXVIII of the Colorado constitution, including any provision adopted at the 2008 general election, regardless of the number of votes received by the proposed amendment or any other such amendment.

Attachment A at 2 (Memorandum dated May 6, 2008 to Reed Norwood and Charles Bader). When asked if this was an accurate recitation of the measure's purposes, counsel to Proponents stated:

MR. GRUESKIN: Not entirely, but that's my fault. There's a typo in subsection (2). The amendment is to article XVIII, by my – our typo was indicated that it's article XXVIII, in subsection (2). That's, obviously, a typographical error since you amended article XVIII.

Your memo accurately reflects that typographical error, but that's something we'd like to correct, obviously, since it would be inherently contradictory. So I'm assuming that you agree that would be a technical correction?

MR. POGUE: (Nods head.)

MS. FORRESTAL: Agreed.

MR. POGUE:                   Agreed.

May 9 Tr. at 4:11-24 (Attachment B).

One of the questions posed by legislative staff at the May 9 session also dealt with "Article XXVIII."

4.     On line 16, for proper citation format and to indicate that article XXVIII is within the Colorado constitution, would the proponents consider adding "OF THIS CONSTITUTION" after "ARTICLE XXVIII"?

Attachment A at 3 (Memorandum dated May 6, 2008 to Reed Norwood and Charles Bader). In response, counsel stated, "Well, as I earlier indicated, we'll make it article XVIII. We'll make it 'OF THIS CONSTITUTION.' And that is on line 16." May 9 Tr. at 7:3-5 (Attachment B).

Finally, the staff was aware that the measure was intended to address Article XVIII. One of their questions expressly referenced Article XVIII, not Article XXVIII.

3.     With regard to the headnote on line 6 of the proposed initiative:

a.     The proponents are adding a new section 17 to article XVIII of the Colorado constitution. However, there is not an existing section 16 in such article. Since section 16 does not already exist, would the proponents change "Section 17." to Section 16."?

Nevertheless, Cole stated at the rehearing that this was a substantive change and that it was not made in response to comments by the staff. The above-noted excerpts belie that assertion.

First, this was a typographical error, plain and simple. It was not a substantial change. The legislative staff never raised or even implied that Article XXVIII, which deals exclusively with campaign finance matters, was at issue in #123. Not one of their questions or statements of purpose suggested that campaign finance was within the orbit of matters they considered.

Second, this change was made based on the staff memorandum and the succeeding verbal exchange with Proponents' counsel. Staff did not directly point out the inconsistency between the two references to constitutional articles, but their memorandum asked whether it was the Proponents' intent to amend Article XXVIII to achieve certain purposes. Staff was informed that this was not the Proponents' purpose; they sought to amend Article XVIII to achieve those goals. Staff asked about the citation of Article XXVIII in the measure and was told that the Proponents intended to cite to Article XVIII instead.

The discussions summarized above could not have been a revelation to them; the headnote for #123, at all times, read: "SECTION 1. Article XVIII of the constitution of the State of Colorado is amended BY THE ADDITION OF A NEW SECTION to read...." All changes incorporated in the final draft were made "in

response to the directors' comments." *In re Title, Ballot Title, Submission Clause, & Summary Clause Adopted March 16, 1994*, 875 P.2d 861, 867 (Colo. 1994); see *In re Title, Ballot Title and Submission Clause for 2007-2008 #57*, Case No. 08SA91 at 15-16 (decided May 16, 2008) (technical and substantive questions of staff can provide basis for change made to draft initiative). After the dialogue at the May 9 meeting, anyone who attended the meeting or listened to it on the internet could only have concluded that this clerical issue would be corrected, with the foreknowledge and approval of staff, for the final version of the measure. *March 16, 1994*, 875 P.2d at 867 (purpose of the public meeting is to inform the proponents and the public of the potential impact of the initiative).

Third, because the change in question was a typographical correction, the Title Board itself could have made this change when the final initiative text was considered for title setting. For instance, if there are misspellings, formatting problems, or enumeration issues, they can be corrected by the Board itself at the Board hearing. *In re Title, Ballot Title & Submission Clause, Pertaining to Casino Gaming Initiative*, 649 P.2d 303, 311 (Colo. 1982).

The Board thus correctly denied Cole's motion for rehearing on this ground.

**III. The title set by the Board on May 21 was accurate and legally sufficient and should be reauthorized so that Proponents can begin petition circulation.**

A. Standard of review regarding accuracy and fairness of ballot titles.

The objectives of the Title Board in setting a title are well-known and statutorily prescribed. C.R.S. §§ 1-40-105, -106. In general, they must be clear, accurate in terms of characterizing the measure's text, brief, and in the form to be answered by a "yes" or "no" vote. *Id.*

Of importance here is the job that falls to this Court when the Board's decision is incorrect. "[W]here the reversal required the Board to set or amend the title, we give the Board specific instructions as to the wording of the title." #61, slip op. at 12. Thus, any failings in the title can be cured by this Court if such action becomes necessary. And while the Objectors did not flesh out their concerns before the Title Board, they are specifically set forth in their Motion for Rehearing.

B. #123 applies to "certain organizations."

Cole argues that the title states the measure applies to "certain organizations" but the measure actually does not. Motion for Rehearing at 1.

Proposed Colo. Const., art. XVIII, sec. 17(1) provides, "An employer shall not require, as a condition of employment, that an employee join or pay dues, assessments or other charges to or for a labor organization." The measure applies

to labor organizations, but because of the exclusion in the specific definition used here, the Board was concerned that referring to them in the single subject statement might be misleading. Instead, they referred to "certain organizations" so as not to use language that voters might misinterpret. The Board's approach could be seen as a little overly protective and therefore not entirely necessary, but it does not incorrectly communicate the substance of the measure in the title. This Court generally defers to the language choices of the Board and will not rephrase the language chosen to arrive at the most precise and exact title possible. #61, slip op. at 12, 13. This phrase must be read in conjunction with later references to and summaries of definitions of "labor organization." *See id.* at 13-14. The combination is sufficient to communicate needed information to voters.

C. The title is not confusingly similar to #41.

Cole argues that this title bears too great a resemblance to that given to Initiative #41.

This issue arose in the dispute over #61. The test cited there is whether "voters comparing the titles... would be able to distinguish between the two proposed measures." *In re Proposed Initiated Constitutional Amendment Concerning "Fair Treatment II,"* 877 P.2d 239, 233 (Colo. 1994). In #61, the introductory clauses of the two ballot titles tracked one another word-for-word. That is not the case here. The introductory clause for the ballot title for #41 reads:

"An amendment to the Colorado Constitution concerning participation in a *labor organization* as a condition of employment." See Attachment F.<sup>6</sup> The same clause for #123 reads: "An amendment to the Colorado Constitution concerning participation in *certain organizations* as a condition of employment." For #123, the definition that makes clear the reach of this reference is set forth in detail in the title's third sentence: "defining 'labor organization' as one that exists solely or primarily for a purpose other than dealing with employers concerning grievances, labor disputes, wages, rates of pay, employee benefits, hours of employment or conditions of work." The title for #41 contains no such language. #123's title is nine and one-half lines long; the title for #41 is only five and one-half lines. There is no reference to a misdemeanor criminal penalty in #123's title. There is no reference to the preemption of conflicting definitions in #41's title. Voters will be able to discern the difference.

D. The title is not confusingly similar to the title for #124.

#124 is a companion measure, filed by the same proponents, to test slightly less inclusive language on the issue of preempting conflicting provisions of law. #124 does not state that it prevails regardless of the number of votes it receives. The Board is not authorized to address in the title any companion measures,

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[http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20 Filings/Results/results\\_41.pdf](http://www.elections.colorado.gov/WWW/default/Initiatives/Title%20Board%20Filings/2007-2008%20Filings/Results/results_41.pdf)

petitions for which may not be circulated or filed. *In re Title, Ballot Title & Submission Clause, and Summary for 1997-98 #105*, 961 P.2d 1092, 1097 (Colo. 1998).

E. The title is not misleading as its single subject statement is accurate.

Cole argues that the single subject is not to affect conditions on employment but to redefine "labor organization." That reading ignores proposed Colo. Const., art. XVIII, sec. 17(1), set forth above. That is a substantive provision of law. It would be error to ignore in the single subject statement.

F. The title is not misleading, given how it defines "labor organization."

Cole argues that the title should tell voters that the measure defines what a labor organization is not, rather than what a labor organization is. But the title relates, almost verbatim, the text of the measure in this regard. It states that an affected organization is one that exists for reasons "other than" workplace representation on stated topics. The title meets the test that Cole seeks to impose.

G. The title is not incomplete or misleading because it does not refer to other provisions of law that may be affected.

Cole argues that the title should inform voters that #123's use of "labor organization" directly contradicts other usages of that term in Colorado law. The title is not the vehicle for projecting conflicts with other provisions of law. #255, 4 P.3d at 498. Like the single subject arguments discussed above, this action by the Board would require conjecture and interpretation of an initiative that may not pass



or, if it does, may not require judicial consideration of the issue raised here. The Board did not err by treading on this thin legal ice.

#### **IV. The Court should issue an expedited order.**

The initiative process is winding to an end. But for Proponents, each day lost before the signature turn-in date of August 4 is an additional hurdle to obtaining a place on the 2008 ballot. Therefore, if the Court finds that the Board erred and this measure is a single subject, it should take the following steps in order to facilitate the Proponents' right of initiative.

- Issue an expedited order that the measure comprises a single subject and a title should have been issued;
- If a written opinion is deemed necessary, issue that opinion at a later time when the press of the initiative deadlines is not as acute;
- State in the order that the title in its adopted at the May 21 Board meeting was adequate or, in the alternative, provide corrected wording for a title and a ballot title and submission clause to be used in connection with #123;
- Order that no further proceedings of the Title Board are necessary in connection with the May 21 title set by the Board, if that is approved by this Court, or a title that is reworded by the Court; and

- Suspend the fifteen day period that normally applies for the Court's mandate, as authorized by C.A.R. 41 (Court is authorized to change the time of the mandate by order).

### **CONCLUSION**

The Proponents should not have been penalized for using clear language that leaves few issues to the electorate's imagination. Legal wrangling over any remaining interpretative matters is a function of real-world applications of #41 and #123, should they both be presented to the voters and both pass.

The Title Board should have set a title for #123. It is hoped that the Court will rectify the Board's failure to do so, and in that regard, act with haste.

Respectfully submitted this 12<sup>th</sup> day of June, 2008.

**ISAACSON ROSENBAUM P.C.**

By: \_\_\_\_\_

Mark G. Grueskin


**ATTORNEYS FOR PETITIONERS**

**CERTIFICATE OF SERVICE**

I hereby certify that on the 12<sup>th</sup> day of June, 2008, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was served via over night delivery to the following:

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Hackstaff Gessler LLC  
1601 Blake Street, Suite 310  
Denver, Colorado 80202

Maurice G. Knaizer, Esq.  
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\_\_\_\_\_

# STATE OF COLORADO

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### MEMORANDUM

May 6, 2008

TO: Reed Norwood and Charles Bader

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #123, concerning conditions of employment

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

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

#### Purposes

The major purposes of the proposed amendment appear to be:

1. To amend the Colorado constitution by prohibiting an employer from requiring, as a condition of employment, that an employee join or pay dues, assessments, or other charges to or for a labor organization;
2. To define "labor organization" to mean any organization of employees that exists solely or

EXHIBIT   A

primarily for a purpose other than dealing with employers concerning grievances, labor disputes, wages, rates of pay, employee benefits, hours of employment, or conditions of work; and

3. To state that the definition of "labor organization" shall prevail over any conflicting definition of "labor organization" in article XXVIII of the Colorado constitution, including any provision adopted at the 2008 general election, regardless of the number of votes received by the proposed amendment or any other such amendment.

### Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

#### Technical questions:

1. Section 1 (8) of article V of the Colorado constitution states "The style of all laws adopted by the people through the initiative shall be, "Be it Enacted by the People of the State of Colorado"." On line 1 of the proposed initiative, would the proponents capitalize the word "enacted" to conform to this constitutional requirement?
2. It is standard drafting practice to indent the beginning of every section heading, subsection, etc., as the proponents have done for subsections (1) and (2) of the proposed initiative. Would the proponents consider adding a "left tab" on the following lines:
  - a. Line 3, before "**SECTION 1.**";
  - b. Line 6, before "**Section 17.**".
3. With regard to the headnote on line 6 of the proposed initiative:
  - a. The proponents are adding a new section 17 to article XVIII of the Colorado constitution. However, there is not an existing section 16 in such article. Since section 16 does not already exist, would the proponents change "**Section 17.**" to "**Section 16.**"?
  - b. It is standard drafting practice to not underline a headnote and for statutory text to immediately follow the headnote on the same line. Would the proponents make such changes, as indicated below?

**Section 16. Limits on conditions of employment. (1) AN  
EMPLOYER SHALL NOT REQUIRE . . .**

(2) AS USED SOLELY IN THIS ARTICLE, AND  
NOTWITHSTANDING . . .

4. On line 16, for proper citation format and to indicate that article XXVIII is within the Colorado constitution, would the proponents consider adding "OF THIS CONSTITUTION" after "ARTICLE XXVIII"?

Substantive questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Colorado law currently permits all-union agreements, which may require union membership or financial support. Do the proponents intend for this proposed measure to supersede this law and ban these types of agreements?
3. Colorado law currently has different definitions for the term "employer" depending on which area of law the term is used. Do the proponents wish to define "employer" for the purposes of this amendment? (See section 8-1-101, Colorado Revised Statutes, in the general department of labor definitions, and section 8-3-104, Colorado Revised Statutes, in the "Labor Peace Act").
4. The Colorado Supreme Court has held that in order to carry out the meaning and purpose of Section 1 of article V of the Colorado constitution, the one of two inconsistent amendments that received the most votes must prevail. (See 536 P.2d 308, 1975). Is it the intent of the proponents to override this interpretation of the Colorado constitution with the last sentence in subsection (2)?
5. Subsection (2) defines the term "labor organization". In other areas of Colorado law, the term is defined differently. For example, section 24-34-401 (6), Colorado Revised Statutes, states: "'Labor organization" means any organization which exists for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms, or conditions of employment, or of other mutual aid or protection in connection with employment."
  - a. On lines 12 and 13 of the proposed initiative, the proponents define "labor organization" to mean "any organization of employees that exists *solely or primarily* (emphasis added)..." Is it the intent of the proponents to exclude organizations that may exist "in part" for the same purposes outlined in the proposed initiative?
  - b. Line 13 of the proposed initiative states that a labor organization is an organization that exists for "a purpose *other than* dealing with employers...". This language conflicts with existing statutory definitions of "labor organization". Is this the intent of the proponents?

- c. The proponents do not include "collective bargaining" in the definition of "labor organization". Is this the intent of the proponents?
6. Would the proponents consider adding the words "a labor organization" after the word "join" on line 9 of the proposed initiative to clarify the intent of the proponents?

Proposed Initiative Measure 2007-2008 #123  
Concerning Conditions of Employment

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May 9, 2008

8:04 a.m.

HCR 0109, State Capitol

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A P P E A R A N C E S

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EXHIBIT     *B*



## P R O C E E D I N G S

1  
2 MR. POGUE: We'll bring the meeting to order  
3 for Initiative #123. This meeting is being  
4 tape-recorded. We'll go around and identify ourselves  
5 for the purpose of the listening audience.

6 I'm Bo Pogue with Legislative Council Staff.

7 MS. FORRESTAL: Kristen Forrestal with  
8 Legislative Legal Services.

9 MR. GRUESKIN: And I'm Mark Grueskin. I'm  
10 representing the proponents this morning.

11 THE REPORTER: I'm Shelly Lawrence. I'm the  
12 court reporter.

13 MR. POGUE: I'll state the purpose of the  
14 meeting. We are here to discuss the proposed  
15 initiative measure concerning conditions of employment,  
16 #123.

17 I will go ahead and read the following  
18 statutory requirement. Colorado law requires the  
19 directors of the Colorado Legislative Council and the  
20 Office of Legislative Legal Services to "review and  
21 comment" on initiative petitions for proposed laws and  
22 amendments to the Colorado constitution.

23 The purpose of the review and comment  
24 requirement is to help proponents arrive at language  
25 that will accomplish their intent and to avail the

1 public of knowledge of the contents of the proposal.  
2 Our first objective is to be sure we understand your  
3 intent and your objective in proposing the amendment.  
4 We hope that the statements and questions contained in  
5 this memorandum will provide a basis for discussion and  
6 understanding of your proposal.

7           The hearing is informal and conversational in  
8 nature, and there is a memorandum prepared by LCS and  
9 OLLS dated May 6, 2008, that contains comments on the  
10 proposed initiative. These comments are in the form of  
11 both Technical and Substantive questions. I'll go  
12 ahead and read the Purposes as stated in the  
13 memorandum.

14           The major purposes of the proposed amendment  
15 appear to be:

16           1. To amend the Colorado constitution by  
17 prohibiting an employer from requiring, as a condition  
18 of employment, that an employee join or pay dues,  
19 assessments, or other charges to or for a labor  
20 organization;

21           2. To define "labor organization" to mean  
22 any organization of employees that exists solely or  
23 primarily for a purpose other than dealing with  
24 employers concerning grievances, labor disputes, wages,  
25 rates of pay, employee benefits, hours of employment,

1 or conditions of work; and

2 3. To state that the definition of "labor  
3 organization" shall prevail over any conflicting  
4 definition of "labor organization" in article XXVIII of  
5 the Colorado constitution, including any provision  
6 adopted at the 2008 general election, regardless of the  
7 number of votes received by the proposed amendment or  
8 any other such amendment.

9 Do these purposes accurately reflect the  
10 intent of the proponents?

11 MR. GRUESKIN: Not entirely, but that's my  
12 fault. There's a typo in subsection (2). The  
13 amendment is to article XVIII, but my -- our typo was  
14 indicated that it's article XXVIII, in subsection (2).  
15 That's, obviously, a typographical error since you  
16 amended article XVIII.

17 Your memo accurately reflects that  
18 typographical error, but that's something we'd like to  
19 correct, obviously, since it would be inherently  
20 contradictory. So I'm assuming that you agree that  
21 that would be a technical correction?

22 MR. POGUE: (Nods head.)

23 MS. FORRESTAL: Agreed.

24 MR. POGUE: Agreed.

25 We'll go ahead and read the Technical

1 questions first, and we'll go back and forth between  
2 the questions. I'll start with question no. 1 of the  
3 Technical questions.

4 Section 1(8) of article V of the Colorado  
5 constitution states, The style of all laws adopted by  
6 the people through the initiative shall be, quote, Be  
7 It Enacted by the People of the State of Colorado, end  
8 quote. On line 1 of the proposed initiative, would the  
9 proponents capitalize the word "enacted" to conform to  
10 this constitutional requirement?

11 MR. GRUESKIN: We'll consider that comment,  
12 yes.

13 MS. FORRESTAL: It is standard drafting  
14 practice to indent the beginning of every section  
15 heading, subsection, et cetera, as the proponents have  
16 done for subsections (1) and (2) of the proposed  
17 initiative. Would the proponents consider adding a  
18 "left tab" on the following lines: Line 3, before  
19 "SECTION 1."; and Line 6, before "Section 17."?

20 MR. GRUESKIN: We'll consider doing that as  
21 well.

22 MR. POGUE: No. 3 is a multipart, and I'll go  
23 ahead and give you a chance to respond to A and B.

24 With regard to the head note on line 6 of the  
25 proposed initiative: A. The proponents are adding a

1 new section 17 to article XVIII of the Colorado  
2 constitution. However, there is not an existing  
3 section 16 in such article. Since section 16 does not  
4 already exist, would the proponents change "Section  
5 17." to "Section 16."?

6 MR. GRUESKIN: We'll consider that comment.

7 MR. POGUE: B. It is standard drafting  
8 practice to not underline a head note and for statutory  
9 text to immediately follow the head note on the same  
10 line. Would the proponents make such changes as  
11 indicated?

12 Indent, bold, Section 16. Limits on  
13 conditions of employment. (1), small cap, an employer  
14 shall not require, break, (2), small cap, as used  
15 solely in this article, and notwithstanding?

16 MR. GRUESKIN: Certainly -- the answer is  
17 we'll certainly make this change. As I understand it,  
18 though, there's no real change to subsection (2), it's  
19 really the connection at subsection (1) with the  
20 heading, not underlining the heading; is that correct?

21 MS. FORRESTAL: That's correct.

22 MR. GRUESKIN: Okay. Thank you.

23 MS. FORRESTAL: On line 16, for proper  
24 citation format and to indicate that article XXVIII is  
25 within the Colorado constitution, would the proponents

1 consider adding "OF THIS CONSTITUTION" after "ARTICLE  
2 XXVIII"?

3 MR. GRUESKIN: Well, as I earlier indicated,  
4 we'll make it article XVIII. We'll make it "OF THIS  
5 CONSTITUTION." And that is on line 16.

6 MR. POGUE: Now for the Substantive  
7 questions.

8 Question 1. Section 1(5.5) of article V of  
9 the Colorado constitution requires all proposed  
10 initiatives to have a single subject. What is the  
11 single subject of the proposed initiative?

12 MR. GRUESKIN: The single subject is the  
13 specification of conditions upon new employment.

14 MS. FORRESTAL: Okay. Colorado law currently  
15 permits all-union agreements, which may require union  
16 membership or financial support. Do the proponents  
17 intend for this proposed measure to supersede this law  
18 and ban these types of agreements?

19 MR. GRUESKIN: The intent of the proponents  
20 is to be more specific than I think I would otherwise  
21 be in terms of the kinds of nonworkplace memberships or  
22 financial support that can be mandated by an employer.  
23 So there's not a specific reference in the provision to  
24 the current law on union grievance. We're not changing  
25 that.

1 MS. FORRESTAL: Okay.

2 MR. POGUE: Question no. 3. Colorado law  
3 currently has different definitions for the term  
4 "employer" depending on which area of law the term is  
5 used. Do the proponents wish to define "employer" for  
6 the purposes of this amendment? Parenthetically, (See  
7 section 8-1-101, Colorado Revised Statutes, in the  
8 general department of labor definitions, and section  
9 8-3-104, Colorado Revised Statute -- Statutes, in the  
10 "Labor Peace Act").

11 MR. GRUESKIN: I think that the proponents  
12 would leave it to the General Assembly to adopt the  
13 appropriate definition of "employer" if that's  
14 necessary.

15 MS. FORRESTAL: The Colorado Supreme Court  
16 has held that in order to carry out the meaning and  
17 purpose of Section 1 of article V of the Colorado  
18 constitution, the one of two inconsistent amendments  
19 that receive the most votes must prevail. Is it the  
20 intent of the proponents to override this  
21 interpretation of the Colorado constitution with the  
22 last sentence in subsection (2)?

23 MR. GRUESKIN: Actually, the Supreme Court  
24 has since ruled that an initiative can be drafted to  
25 occupy solely the place of competing initiatives, as it

1 were, or any conflicting initiative. That decision was  
2 handed down by the Supreme Court in the 1990s.

3 So I think -- and I think the decision you  
4 referred to, while it's accurate, specifically  
5 referenced existing statute that provides for that  
6 arrangement should there not be a specific one within  
7 the initiative, since we're providing specific wording.

8 We're certainly not overriding that  
9 interpretation. We're simply occupying the role that  
10 the Supreme Court has said that the proponents can  
11 fill, which is to specifically say that the other  
12 competing initiatives might not -- will not take effect  
13 should both be adopted.

14 MS. FORRESTAL: Okay.

15 MR. POGUE: Question no. 5 is also a  
16 multipart, and I'll let you address each letter.

17 Subsection (2) defines the term "labor  
18 organization." In other areas of Colorado law, the  
19 term is defined differently. For example, section  
20 24-34-401(6), Colorado Revised Statutes, states: quote,  
21 "Labor organization" means any organization which  
22 exists for the purpose in whole or in part of  
23 collective bargaining, or of dealing with employers  
24 concerning grievances, terms, or conditions of  
25 employment, or of other mutual aid or protection in



1 connection with employment, end quote.

2 A. On lines 12 and 13 of the proposed  
3 initiative, the proponents define "labor organization"  
4 to mean, quote, any organization of employees that  
5 exists solely or primarily. Is it the intent of the  
6 proponents to exclude organizations that may exist "in  
7 part" for the same purposes outlined in the proposed  
8 initiative?

9 MR. GRUESKIN: We think that "solely or  
10 primarily" is a phrase that has been used a great deal  
11 and judicially interpreted. But rather than get into a  
12 discussion of what -- I'm not sure what "in part"  
13 means, but I know that the Courts are fairly  
14 comfortable interpreting "solely or primarily."

15 MR. POGUE: B. Line 13 of the proposed  
16 initiative states that a labor organization is an  
17 organization that exists for, quote, a purpose other  
18 than dealing with employers, quote. This language  
19 conflicts with existing statutory definitions of "labor  
20 organization." Is this the intent of the proponents?

21 MR. GRUESKIN: For that reason, the  
22 definition is introduced by the phrase "as used solely  
23 in this article." So this different definition is not  
24 intended to preempt the application of statutory  
25 definitions for other purposes.

1 MS. FORRESTAL: That actually wasn't really  
2 the intent of the question. If this just says labor  
3 organizations that does things other than what labor  
4 organizations does -- normally do. Is that the intent?

5 MR. GRUESKIN: The intent is to bring some  
6 clarity so that there is the ability to join what is  
7 often referred to as a union and not necessarily be  
8 bound with the much broader definition of "labor  
9 organization." For instance, there are other  
10 definitions that include mutual aid societies, which  
11 are, frankly, so vague as to be problematic.

12 The goal of the proponents is to embrace the  
13 concept that there ought to be certain limits on  
14 conditions of employment. Those limits ought to apply  
15 to nonwork-related types of organizations. You ought  
16 not be forced to join a political party in order to  
17 take your job.

18 So what this initiative is doing is crafting  
19 that limitation and making it much more specific than I  
20 think is otherwise being addressed right now.

21 MR. POGUE: C. The proponents do not include  
22 "collective bargaining" in the definition of "labor  
23 organization." Is this the intent of the proponents?

24 MR. GRUESKIN: Yes.

25 MS. FORRESTAL: Would the proponents consider

1 adding the words "a labor organization" after the word  
2 "join" on line 9 of the proposed initiative to clarify  
3 the intent of the proponents?

4 MR. GRUESKIN: We will consider that.

5 MR. POGUE: That completes the questions in  
6 the memorandum. Obviously, the proponents are not  
7 required to follow any of the suggestions contained in  
8 the memorandum. If you do address items raised -- not  
9 raised in the staff memorandum, you can resubmit the  
10 initiative to our office for another review.

11 At this point, do you have any questions?

12 MR. GRUESKIN: I don't. Thank you.

13 MR. POGUE: Thus ends the review and comment  
14 on #123.

15 (The proceedings concluded at 8:17 a.m. on  
16 the 9th day of May, 2008.)

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# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

May 6, 2008

TO: Reed Norwood and Charles Bader

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2007-2008 #123, concerning conditions of employment

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

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

#### Purposes

The major purposes of the proposed amendment appear to be:

1. To amend the Colorado constitution by prohibiting an employer from requiring, as a condition of employment, that an employee join or pay dues, assessments, or other charges to or for a labor organization;
2. To define "labor organization" to mean any organization of employees that exists solely or

primarily for a purpose other than dealing with employers concerning grievances, labor disputes, wages, rates of pay, employee benefits, hours of employment, or conditions of work; and

3. To state that the definition of "labor organization" shall prevail over any conflicting definition of "labor organization" in article XXVIII of the Colorado constitution, including any provision adopted at the 2008 general election, regardless of the number of votes received by the proposed amendment or any other such amendment.

### Comments and Questions

The form and substance of the proposed initiative raise the following comments and questions:

#### Technical questions:

1. Section 1 (8) of article V of the Colorado constitution states "The style of all laws adopted by the people through the initiative shall be, "Be it Enacted by the People of the State of Colorado"." On line 1 of the proposed initiative, would the proponents capitalize the word "enacted" to conform to this constitutional requirement?
2. It is standard drafting practice to indent the beginning of every section heading, subsection, etc., as the proponents have done for subsections (1) and (2) of the proposed initiative. Would the proponents consider adding a "left tab" on the following lines:
  - a. Line 3, before "SECTION 1.";
  - b. Line 6, before "Section 17."
3. With regard to the headnote on line 6 of the proposed initiative:
  - a. The proponents are adding a new section 17 to article XVIII of the Colorado constitution. However, there is not an existing section 16 in such article. Since section 16 does not already exist, would the proponents change "Section 17." to "Section 16."?
  - b. It is standard drafting practice to not underline a headnote and for statutory text to immediately follow the headnote on the same line. Would the proponents make such changes, as indicated below?

**Section 16. Limits on conditions of employment. (1) AN  
EMPLOYER SHALL NOT REQUIRE . . .**

(2) AS USED SOLELY IN THIS ARTICLE, AND  
NOTWITHSTANDING . . .

4. On line 16, for proper citation format and to indicate that article XXVIII is within the Colorado constitution, would the proponents consider adding "OF THIS CONSTITUTION" after "ARTICLE XXVIII"?

Substantive questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Colorado law currently permits all-union agreements, which may require union membership or financial support. Do the proponents intend for this proposed measure to supersede this law and ban these types of agreements?
3. Colorado law currently has different definitions for the term "employer" depending on which area of law the term is used. Do the proponents wish to define "employer" for the purposes of this amendment? (See section 8-1-101, Colorado Revised Statutes, in the general department of labor definitions, and section 8-3-104, Colorado Revised Statutes, in the "Labor Peace Act").
4. The Colorado Supreme Court has held that in order to carry out the meaning and purpose of Section 1 of article V of the Colorado constitution, the one of two inconsistent amendments that received the most votes must prevail. (See 536 P.2d 308, 1975). Is it the intent of the proponents to override this interpretation of the Colorado constitution with the last sentence in subsection (2)?
5. Subsection (2) defines the term "labor organization". In other areas of Colorado law, the term is defined differently. For example, section 24-34-401 (6), Colorado Revised Statutes, states: "'Labor organization" means any organization which exists for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms, or conditions of employment, or of other mutual aid or protection in connection with employment."
  - a. On lines 12 and 13 of the proposed initiative, the proponents define "labor organization" to mean "any organization of employees that exists *solely or primarily* (emphasis added)..." Is it the intent of the proponents to exclude organizations that may exist "in part" for the same purposes outlined in the proposed initiative?
  - b. Line 13 of the proposed initiative states that a labor organization is an organization that exists for "a purpose *other than* dealing with employers...". This language conflicts with existing statutory definitions of "labor organization". Is this the intent of the proponents?

- c. The proponents do not include "collective bargaining" in the definition of "labor organization". Is this the intent of the proponents?
6. Would the proponents consider adding the words "a labor organization" after the word "join" on line 9 of the proposed initiative to clarify the intent of the proponents?





Colorado  
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**NOTICE**  
**PUBLIC INITIATIVE HEARING**  
**Friday, May 9, 2008**

The Colorado Constitution authorizes the registered electors of Colorado to propose changes in the state Constitution and the laws by petition. The original draft of the text of proposed initiated constitutional amendments and laws must be submitted to the General Assembly's legislative research and legal services offices for review and comment. Pursuant to the requirements of Article V, Section 1 (5), Colorado Constitution, the offices must submit comments to proponents at a meeting open to the public.

The directors of the Legislative Council Staff and the Office of Legislative Legal Services will hold a meeting with the proponents of the attached initiative proposal, unless the proposal is withdrawn by the proponents prior to the meeting.

**Proposal Number:** 2007-2008 #123  
**Time and Date of Meeting:** 08:00 AM, Friday, May 9, 2008  
**Place of Meeting:** HCR 0109, State Capitol  
**Topic of Proposal:** Conditions of Employment

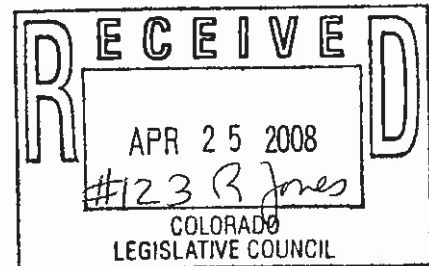
1 *Be it enacted by the People of the State of Colorado:*  
2

3 **SECTION 1.** Article XVIII of the constitution of the state of Colorado is amended BY THE  
4 ADDITION OF A NEW SECTION to read:  
5

6 **Section 17. Limits on conditions of employment.**  
7

8 (1) AN EMPLOYER SHALL NOT REQUIRE, AS A CONDITION OF EMPLOYMENT, THAT AN  
9 EMPLOYEE JOIN OR PAY DUES, ASSESSMENTS, OR OTHER CHARGES TO OR FOR A LABOR  
10 ORGANIZATION.

11 (2) AS USED SOLELY IN THIS ARTICLE, AND NOTWITHSTANDING ANY OTHER PROVISION OF LAW,  
12 "LABOR ORGANIZATION" MEANS ANY ORGANIZATION OF EMPLOYEES THAT EXISTS SOLELY OR  
13 PRIMARILY FOR A PURPOSE OTHER THAN DEALING WITH EMPLOYERS CONCERNING GRIEVANCES,  
14 LABOR DISPUTES, WAGES, RATES OF PAY, EMPLOYEE BENEFITS, HOURS OF EMPLOYMENT, OR  
15 CONDITIONS OF WORK. THIS DEFINITION SHALL PREVAIL OVER ANY CONFLICTING DEFINITION OF  
16 "LABOR ORGANIZATION" IN ARTICLE XXVIII, INCLUDING ANY PROVISION ADOPTED AT THE 2008  
17 GENERAL ELECTION, REGARDLESS OF THE NUMBER OF VOTES RECEIVED BY THIS OR ANY OTHER  
18 SUCH AMENDMENT.



**Proponents:**

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INITIATIVE TITLE SETTING REVIEW BOARD  
Wednesday, May 21, 2008  
Secretary of State's Blue Spruce Conference Room  
1700 Broadway, Suite 270  
Denver, Colorado

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2007-2008#123  
Conditions of Employment

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William A. Hobbs, Deputy Secretary of State  
Daniel D. Domenico, Solicitor General  
Daniel L. Cartin, Deputy Director of the  
Office of Legislative Legal Services  
Maurice G. Knaizer, Deputy Attorney General  
Cesi Gomez, Secretary of State's Office

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A P P E A R A N C E S

For the Proponents: Mark G. Grueskin, Esq.  
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EXHIBIT     C    

HULAC COURT REPORTING, LLC  
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PROCEEDINGS

(The proceedings commenced at 8:31 a.m.)

MR. HOBBS: Is anyone present yet for #2, agenda item no. 2 and Initiative #2, Prayer Time in Public Schools?

I'm going to move on then to #123, Conditions of Employment.

Okay. #123. Let's first hear from proponents.

Mr. Grueskin, I think you represent proponents. Take your time. I'm trying to get my papers organized, too, here.

MR. GRUESKIN: Sorry, Mr. Chair. Okay.

MR. HOBBS: Is there anything you'd like to tell us about this one? There may be some questions about it, but perhaps if there's anything that you're aware of that might -- that we'll be asking about, maybe I'll just give you a first shot at it.

MR. GRUESKIN: Well, this is obviously intended to have a preemptive effect as to the right to work initiative that's been certified for the ballot. It doesn't -- what it doesn't do is undo right to work in the sense that there is no such thing, it simply says that there are organizations that are subject to that kind of provision.

and the potential effect of this measure on #41. Both prohibit employers from requiring participation in labor organizations, basically. #41 has a -- I think has a definition of "labor organization"?

MR. GRUESKIN: It does.

MR. HOBBS: That is more like a labor union type --

MR. GRUESKIN: It's -- it's basically -- what you see here in terms of the exclusions is what's included in the other measure.

MR. HOBBS: Okay. So if #41 -- well, if it were not for the language of this measure that says this measure's definition of "labor organization" trumps all others, including #41, these two measures could be read together if voters could approve both of them, one would prohibit requiring participation in one kind of organization and this measure would require -- or prohibit employers from requiring participation in other kinds of organizations.

But the effect of this measure saying that this measure's definition of "labor organization" would then become #41's definition is to nullify -- as you said, preemptive, I think. It would nullify #41 even if the voters approve it. And the language of this measure, at the end, I think emphasis that, regardless

And it defines the -- Initiative 2007-2008#41, which is now I believe Amendment 47, has an expansive definition that defines a "labor union" as an organization that has a variety of employer-related impacts, as well as any other mutual aid social for employees.

That kind of language is so indefinite as to be inclusive of a variety of things that have really nothing to do with right to work or employment or even labor relationships, and therefore this measure was drafted to provide that the types of organizations that ought not -- membership in which or payment for which ought not to be a condition of employment are those that really are ancillary to the employment relationship.

An employee credit union, a political party, a get-well fund for a fellow worker, whatever it is, there are a number of scenarios in which employment could be conditioned upon either membership or payment that really doesn't have anything to do with the employment relationship. That's the purpose of this measure. And this measure is expressed that -- it is intended to prevail in terms of the two measures.

MR. HOBBS: So let me walk through it a little bit just to make sure I understand this measure

of the numbers of votes received by this or any other such amendment.

So even if #41 prevailed -- I mean, to the extent that someone might argue that the two definitions of "labor organization" are in conflict, and therefore the normal rule might apply that the one getting the most votes would prevail, the intent is that this one would still prevail?

MR. GRUESKIN: Correct. And just as a matter of disclosure, the ballot title set by the Title Board talks -- for #41 speaks exclusively of labor organizations; the text of the measure actually talks about labor unions. So the concern is that the -- I mean, you really have two distinct definitions, frankly, but they are intended to overlap and I believe functionally they overlap and because of the ballot title set for #41 they overlap.

And in light of the Supreme Court's case law, specifically there was a ballot title case, Taxation III cited at 832 P.2d 937 in 1992, the Court said that you can draft a measure to, in essence, preempt another measure. I think that the Supreme Court's recent decision on Initiative #61 indicates that that's so. The dissent was concerned about having an introductory clause that would confuse voters, but it didn't say

1 that you couldn't undertake that kind of drafting.

2 Now, how this ultimately gets applied, I  
3 guess, is a question for the Courts, but the intent was  
4 to reflect what voters will be voting on, which is the  
5 ballot title, and that ballot title in what is now  
6 Amendment 47 only speaks of labor organizations.

7 So, you know, I think you can set a title  
8 under either scenario. You could set a title under the  
9 sense that they are conflicting and one is intended to  
10 preempt, or that there may be some interpretation under  
11 which they are not conflicting. But in either event, I  
12 believe that you can set a ballot title.

13 MR. HOBBS: Well, isn't -- okay. But  
14 isn't -- doesn't this measure violate the  
15 single-subject rule? Under this theory then, the two  
16 different subjects of this measure, one -- one would be  
17 to prohibit employers from requiring participation in  
18 organizations other than unions, in other words, like  
19 you said, credit -- credit unions and get-well funds  
20 and things like that, but organizations other than  
21 traditional unions? The other subject, which seems, to  
22 me, quite different than that, is to nullify #41, which  
23 deals with that kind of a mirror image but a completely  
24 opposite type of organization. And how -- aren't those  
25 two different subjects?

1 examples that I -- I appreciate your examples. I mean,  
2 in my organization, you know, in state government,  
3 there's the Colorado State Managers Association that  
4 supervisors might belong to or the Colorado Information  
5 Managers Association, which is an association of IT  
6 people. So employers in state government could not  
7 require their IT people to belong to the IT  
8 association, those kinds of things.

9 But, again, those are all organizations that  
10 don't deal with labor disputes, wages, rates of pay,  
11 those kinds of things. So that seems to be basically  
12 what this measure does.

13 But because this measure also has language in  
14 it that says that the definition of "labor  
15 organization," which is -- which excludes what I think  
16 most people would think of as being a labor  
17 organization, since that trumps #41, it seems like it  
18 has an entirely separate and distinct effect, which is  
19 to also prohibit employers from requiring participation  
20 in unions. And that is kind of a hidden -- well, a  
21 hidden subject, but also a completely separate subject  
22 from the main -- the main effect of this measure.

23 I don't see how there's a single subject that  
24 incorporates both. You nullify another measure and  
25 substitute this one, but they're dealing with two

1 MR. GRUESKIN: I don't think so. I think  
2 that the purpose of this measure is to prohibit the  
3 conditioning of employment upon nonemployment-related  
4 organizations, that, you know, for whatever reason,  
5 qualify, as #41 provides, as a mutual aid society. I  
6 don't really know what those are, but I don't -- the  
7 proponents don't believe that that ought to be part of  
8 the law. And so I don't think that it's a second  
9 subject.

10 I think even if you were concerned that it's  
11 a second subject, the fact that it uses "labor  
12 organization" and not "labor union" is cause to believe  
13 that there is the possibility that down the road the  
14 Court may say that I'm wrong and that the ballot title  
15 language isn't sufficient to bring #123 within the  
16 ambit of the preemption model that I've referenced. So  
17 I don't believe it is the second subject.

18 MR. HOBBS: And I may not be entirely  
19 following this, but let me take one more run at it. I  
20 mean, this measure mostly seems to be about prohibiting  
21 employers from requiring participation in organizations  
22 like get-well funds, things that don't involve  
23 collective bargaining and things like that.

24 MR. GRUESKIN: Right.

25 MR. HOBBS: I mean, I -- and in one of the

1 different types of organizations. You're saying it's  
2 okay to require participation in a labor union but not  
3 okay to require participation in any other kind of  
4 organization. I'm trying to find the unifying  
5 principle there.

6 MR. GRUESKIN: Well, the unifying principle  
7 is that there are -- as the measure provides, there are  
8 limits on what sorts of conditions on employment an  
9 employer may set.

10 I absolutely agree, Mr. Hobbs. You know, I  
11 think that -- I mean, to the extent that you're right,  
12 then we may be saddled with 41 which applies both to  
13 typical labor union types of setups and everything  
14 else. And maybe I overlooked raising that  
15 single-subject argument when 41 was before you. But it  
16 seems to me that, you know, it's -- I'm not trying to  
17 equivocate about the purposes here.

18 MR. HOBBS: Um-hum.

19 MR. GRUESKIN: But it seems to me that if 41  
20 was is single subject, this one -- I believe it should  
21 be too. I understand your point.

22 MR. HOBBS: Okay. Well, of course we're  
23 still on the question answering stage, but we've kind  
24 of -- I've kind of moved into the single-subject  
25 question. So if there's other members of the Board

1 that have questions or if we want to continue the same  
2 line of inquiry, I'll leave to up to the other Board  
3 members.

4 Any other questions?

5 MR. DOMENICO: I don't -- I have discussion.  
6 I don't -- I don't think I have any questions.

7 MR. HOBBS: Well, why don't you just -- is it  
8 about the single subject, Mr. Domenico?

9 MR. DOMENICO: Um-hum.

10 MR. HOBBS: Why don't you go ahead.

11 MR. DOMENICO: Well, Mr. Grueskin's timing  
12 quite fortunate because last week I would have been  
13 quite certain that this violated the single subject for  
14 the reasons that Mr. Hobbs has been articulating, that  
15 this is basically -- I mean, this is a surreptitious  
16 measure that hides what it's trying to do and defines  
17 "labor organization" to mean the opposite of what  
18 "labor organization" generally is understood to mean.

19 But the Supreme Court has been quite clear  
20 that that's not our business, that people can push  
21 these kinds of measures and it's up to the people to  
22 figure that out. So I don't have a single-subject  
23 objection.

24 I think -- I guess my point is I think both  
25 Mr. Hobbs and Mr. Grueskin are right. I think this

1 doing this sort of thing.

2 MR. GRUESKIN: There is precedent, but it  
3 predates the single-subject requirement. So the Court  
4 didn't address the issue that you're raising.

5 MR. DOMENICO: Yeah. I mean, I -- it seems  
6 to me to really be a -- I mean, I guess you could say,  
7 oh, that's just sort of a procedural thing. But it's  
8 not a typical procedural thing where we're just --  
9 where the proponents are saying, well, this is how the  
10 agency shall implement this big substantive change  
11 we're making, this is kind of saying the rules don't  
12 apply to this measure, altering the interpretation  
13 rules. And I don't know what to make of that.

14 MR. GRUESKIN: Well, I would just suggest  
15 that maybe an analogy would be to the extent that, as a  
16 general rule of when initiatives become effective,  
17 initiative proponents also have the right to provide in  
18 their measure that there's a different date and a  
19 different scheme for making them effective. There have  
20 been a variety of those schemes.

21 Frankly, in 1998 the Supreme Court kept the  
22 medical marijuana measure off the ballot but it went on  
23 it in 2000. There was a series of effective dates in  
24 that measure, and they were all given effect. So I was  
25 always surprised that nobody ever raised that issue as

1 hides what it's really trying to do, but I don't think  
2 that, as the single-subject limitation has been  
3 interpreted very recently, we can do anything about  
4 that.

5 My single-subject concern has to do with the  
6 business about also changing the rule about which a  
7 measure takes precedence. That, to me, seems like a  
8 totally separate issue, or at least an interesting --  
9 as a conceptual matter, whether you can sort of make  
10 that kind of change in the way -- in the fundamental  
11 way that measures are supposed to relate to one another  
12 in a measure itself. I mean, it seems to me it would  
13 be the same thing as having a provision that said, at  
14 the end, and this measure shall not be subject to the  
15 single-subject requirement.

16 That's the -- that's the single-subject  
17 concern that I really have, that -- if you're both  
18 altering the substantive law of employer/employee  
19 relationships and you're altering the law of how  
20 measures are to be applied to one another and  
21 interpreted.

22 And that, I really don't -- maybe there's  
23 precedent for that, and if there is, then I'm willing  
24 to defer to it, but, to me, that seems like a difficult  
25 issue. I don't know if you have any precedent for

1 to whether that was a problem for the 2000 ballot, but  
2 they didn't.

3 I don't have a definitive answer for you, but  
4 I -- it sure seems to me that this is procedural. And  
5 as long as the title is reflective of it, there's  
6 certainly no -- there's no hiding the ball going on.

7 MR. DOMENICO: No, I agree with that. I  
8 just -- it seems to me it's really -- it's just  
9 something that I can't quite figure out how that is the  
10 same subject.

11 But I think I'm -- I think I'm willing to  
12 vote for it at this point, especially given that this  
13 cycle at least the Supreme Court seems to have decided  
14 that the single-subject requirement should not stand in  
15 the way of very much. So for now I think I'm willing  
16 to go forward, but I do -- I do have a concern about  
17 that.

18 MR. HOBBS: Mr. Cartin.

19 MR. CARTIN: Thank you, Mr. Chair.

20 Mr. Grueskin, I know that you addressed this  
21 in your opening comments, but I -- I mean, this is kind  
22 of a fundamental question. Just to be clear, it's the  
23 intent that in the language of the measure, the second  
24 sentence, "This definition shall prevail over any  
25 conflicting definition of 'labor organization,'" it's

1 the intent that even though 41 defines the term -- the  
2 text of 41 rather than the ballot title uses the term  
3 "labor union" and defines "labor union," that labor --  
4 that the term "labor organization" in 123, for example,  
5 jumping to the end, if both -- if both measures passed,  
6 that this definition in #123 of "labor organization"  
7 would trump or supersede the definition of "labor  
8 union" in 41?

9 MR. GRUESKIN: That's correct.

10 MR. CARTIN: And bear with me. The reason,  
11 again, that you didn't use "labor union" in 123, that  
12 you used "labor organization" instead of "labor union"  
13 in #123? Be patient with me here.

14 MR. GRUESKIN: No, no, it's a totally  
15 reasonable question. The original draft of right to  
16 work was couched as labor organization, and, frankly,  
17 the ballot title for that measure was couched as labor  
18 organization. The text of 41 was fine-tuned, but the  
19 ballot title was not.

20 And so there was this weighing process of  
21 figure out whether or not by being more accurate with  
22 the text and potentially having a ballot title that  
23 didn't actually reflect the fact that there was going  
24 to be this trumping, whether or not we would have  
25 achieved what we wanted to achieve. And so it was a --

1 trying to articulate -- and I should have done my  
2 homework here a little better. I'm trying to  
3 articulate for myself what the difference or  
4 differences are.

5 It seemed like with #61 the Court was saying  
6 that there was really only one purpose in effect and  
7 that it was not surreptitious. They recognize that the  
8 average voter may not understand the phrase at issue  
9 there about the State's authority to act consistently  
10 with standards set out under the U.S. Constitution and  
11 so forth, but that that -- even though the average  
12 voter may not understand that, it was -- I think the  
13 Court was saying, and I can't find the language that  
14 really supports what I'm about to say, that it was not  
15 surreptitious and it was not inherently confusing and,  
16 in fact, it was probably pretty much the law of the  
17 land anyway, it was not really changing anything very  
18 much.

19 And that's probably somewhat inaccurate. But  
20 basically that -- that part of #61 was not of major  
21 concern to the Court, just because it recognized the  
22 Supreme Court decisions and the mere difficulty with  
23 the language was not inherently deceptive.

24 When I compare that to #123, it seems to me  
25 there's a couple of differences. One is here we

1 it was just a judgment call.

2 MR. CARTIN: So you're not -- and this is  
3 probably -- is there potentially an issue down the line  
4 if both of these measures were to pass over kind of the  
5 plain meaning of 123?

6 MR. GRUESKIN: I think -- I think there  
7 potentially is, yes. And I think, you know, the Court  
8 might well evaluate whether or not an expressed intent  
9 is nearly as important as what the measure says. And  
10 if the plain meaning is clear, then I assume the Court  
11 would try to give effect to both.

12 MR. CARTIN: Thank you.

13 MR. GRUESKIN: I don't know that I was very  
14 much help.

15 MR. HOBBS: Well, I appreciate Mr. Domenico's  
16 comment that perhaps the jurisprudence here has changed  
17 a bit with, I think, the Supreme Court's decision on  
18 #31. I'm trying to review that. I guess at this point  
19 I don't view #31 as being quite that broad.

20 MR. DOMENICO: 61?

21 MR. HOBBS: 61. I'm sorry. Thank you.

22 And, to me, this measure, 123, is -- well,  
23 there's a lot of similarities with that case, but this  
24 measure is different. Its relationship to number --  
25 well, this measure is different than #61. And I'm

1 have -- by comparison, what we have in #123 is a -- is  
2 a definition of "labor organization," and the question  
3 is is that surreptitious or whatever. Well, that's not  
4 merely kind of vague to the average voter, that is an  
5 exactly opposite -- in my opinion, an exactly opposite  
6 definition than what the average voter commonly  
7 understands of what a labor organization is.

8 To me, this one, 123, is perhaps quite  
9 different from #161 in that that aspect is -- of #123  
10 is completely contrary to an average voter's  
11 understanding of the term "labor organization." And  
12 that's a big difference I think with number -- with 61.

13 And I guess, to me, the other difference is  
14 that it seems like -- I'm trying to think through  
15 whether this is really true, but it seemed like in 61  
16 the Court is saying basically it didn't have two  
17 separate subjects, it did not have two separate  
18 purposes, it effectively -- and I don't think the Court  
19 really said this, it effectively may nullify or be  
20 intended to nullify #31, but that was the purpose. I  
21 mean, that's all it did.

22 Here, it seems like #123 has two separate  
23 purposes, one is to nullify 41 with respect to required  
24 membership in labor organizations but substitute  
25 something really quite substantive, unlike #61 which is



1 a prohibition on requiring participation in nonunions,  
2 in other kinds of employment organizations. So it has  
3 an independent effect, it seems to me. And, again,  
4 that seems to be quite different than #61. I just --  
5 at this point, I just don't read #61 as governing the  
6 single-subject issue for #123.

7 MR. GRUESKIN: You know, these are close  
8 calls. I guess I don't have a lot to add to help you  
9 at all.

10 MR. DOMENICO: Everything you said is exactly  
11 what I said about 61. I mean, exactly what I said. I  
12 mean, it's -- these kinds of measures are what we're  
13 now going to see all the time now that the Court ruled  
14 that way on 61.

15 And I think they are confusing at best and  
16 deceptive at worst, but they have to do with -- I mean,  
17 61 had to do with -- as the Supreme Court was right to  
18 note, had to do with how you can take into account race  
19 and gender; this has to do with what employers can  
20 require of employees, and that's a single subject and  
21 that's it.

22 As I read 61, it's none of our business if it  
23 uses a definition in the first sentence that means the  
24 opposite of what it says in the second sentence.

25 And so I'm -- I'm a little frustrated, as you

1 surreptitiousness or look to see what is coiled up in  
2 folds.

3 But if I understand you correctly, you feel  
4 that -- it's your take that the measure has two  
5 subjects, one subject is to reach out and trump #41,  
6 now, I guess, Amendment 47, and, secondly, to establish  
7 a definition or standard of "labor organization" that  
8 does not comport with the ordinary meaning of that term  
9 in the public or voters' minds? Those are the two  
10 separate subjects that you're seeing with this measure,  
11 two unconnected purposes?

12 MR. HOBBS: Yeah. I guess, you know, I'm --  
13 I don't know that I necessarily see two subjects, and  
14 I -- although that's what I said. I guess I'm focusing  
15 more on two separate and distinct purposes.

16 I mean, I think it's possible to describe a  
17 single subject as you, I think, just did. I mean, it  
18 could relate to, you know, employer requirements of --  
19 you know, relating to membership and organizations or  
20 something. It's not that you cannot describe a  
21 unifying subject.

22 You know, I'm just kind of going back to the  
23 basic test, you know, that the Court has said, is that  
24 a measure violates the single subject when it has more  
25 than one subject and at least two distinct and separate

1 might gather, with the Supreme Court's interpretation  
2 of the single-subject rule, but I don't see how, after  
3 61, we can distinguish this. It does exactly same  
4 thing, it gives a definition of a word in the first  
5 sentence and then defines it in such a way that would  
6 be surprising to most people. And maybe here it would  
7 be surprising to a larger percentage of people than in  
8 61, but I don't see how that can be the distinguishing  
9 factor.

10 Given that, I don't know how, other than in  
11 some really long measure -- it seems to me this  
12 surreptitious aspect of the single-subject rule, I  
13 think, is out the window until the Supreme Court  
14 changes its mind. And here, obviously, these have to  
15 do with -- this has to do with labor -- with  
16 employee/employer relationships, and that seems like  
17 just as much of a single subject as the use of race or  
18 gender in government projects. And so I -- I don't see  
19 any way to distinguish it.

20 MR. HOBBS: Mr. Cartin.

21 MR. CARTIN: Thank you, Mr. Chair. And I  
22 guess that -- I'd like to follow up and just ask you a  
23 question, Mr. Hobbs, kind of on your take here with  
24 regard to the two purposes. Because I think that  
25 I'm -- I'm usually fairly reluctant to go into the

1 purposes which are not dependent upon or connected with  
2 each other. And that's what I'm -- I guess that's what  
3 I'm seeing at this point, is there are just really two  
4 separate purposes here.

5 And, in fact, I think the real purpose  
6 probably, and I -- maybe I shouldn't use that phrase,  
7 but the -- but what may be the primary purpose, which  
8 is to nullify #41, is hidden within the folds, if you  
9 will. I don't know how an average voter could  
10 understand it.

11 Again, this isn't like #61 where there's a  
12 phrase that an average voter might have difficulty  
13 understanding. I mean, this is the -- for an average  
14 voter to understand this -- that purpose of #123,  
15 they'd have to understand that the definition of "labor  
16 organization" in #123 is the opposite of what they  
17 might think it is. So, to me, that is a major and  
18 independent purpose of #123.

19 And in addition, a purpose appears to be to  
20 prohibit employers from requiring membership in other  
21 kinds of organizations that have nothing to do with  
22 bargaining or wages and rates of pay and those kinds of  
23 things, you know, like I say, just professional  
24 membership organizations or kind of garden variety  
25 things like, as Mr. Grueskin said, credit unions and

1 things like that. I don't really see that those are  
 2 connected or dependent upon one another. I think  
 3 they're two separate purposes.  
 4 MR. CARTIN: Can I take one more minute to  
 5 have a try?  
 6 MR. HOBBS: Okay. Go ahead. I'm sorry. My  
 7 answer was way too long-winded anyway.  
 8 MR. CARTIN: No. It seems to me that an  
 9 argument can be -- well, it seems what you have here,  
 10 even though maybe the text of 123 contemplates the  
 11 passage of both, is -- well, I think these could be  
 12 viewed as competing measures. That's probably stating  
 13 the obvious.  
 14 I guess my question is, is it -- and I'm just  
 15 asking for your take on it. If you have a measure that  
 16 clearly compete with -- competes with another measure  
 17 that's on the ballot, it's been before the Title Board,  
 18 has had a title set, where it's meant to supersede that  
 19 measure should both of them pass, and, in addition,  
 20 create some other substantive right or procedure or  
 21 goes in a different direction than the, using our  
 22 example here, the preceding measure, is there -- are  
 23 there circumstances under which that type of second  
 24 measure that does have a competing purpose, in your  
 25 mind, would have a single subject, could have a single

1 subject?  
 2 MR. HOBBS: Yeah, I think so, if I understand  
 3 your question. I mean, I think a measure that's --  
 4 whose purpose is to nullify or preempt another measure,  
 5 that could have a single subject.  
 6 I mean, if this measure only included the  
 7 language about the definition of "labor organization,"  
 8 you know, even perhaps including the -- well, the  
 9 definition of "labor organization," together with the  
 10 language that says this is -- this definition applies  
 11 throughout the article, notwithstanding any provision  
 12 of law and regardless of the numbers of votes received  
 13 and that kind of thing, I mean, I think that would be  
 14 an example of a measure that has a single subject, a  
 15 single purpose. And there may be a more direct route  
 16 to do that.  
 17 I mean, in this case, for example, the  
 18 measure could simply say that -- I think, that an  
 19 employer may require membership in all -- or  
 20 participation in a labor organization as a condition of  
 21 employment and this measure prevails over any other  
 22 measure regardless of the number of votes that may be  
 23 cast.  
 24 But, you know, my difficulty is that 123 then  
 25 goes on to address the membership in -- granted in

1 other organizations but exactly opposite organizations  
 2 And so that's -- that's where I see the second purpose  
 3 unconnected.  
 4 Granted, I mean, I guess I'll take a run at  
 5 defending the measure from single subject, but just for  
 6 the sake of putting this on the table, I mean, this  
 7 is -- but it's also going through my mind, is that, you  
 8 know, can proponents say to themselves is this a  
 9 reasonable way of looking at this measure.  
 10 The proponents say to themselves, you know,  
 11 #41 raises a good question, when should employers  
 12 require employees to belong to certain kinds of  
 13 organizations. That's a legitimate matter of public  
 14 policy. Our view -- our group of proponents thinks  
 15 that, you know, unions probably is a legitimate thing  
 16 for employers to require participation in, but other  
 17 things, you know, just generally employers ought not to  
 18 do that.  
 19 And so perhaps as a matter of public policy,  
 20 that is what a group of proponents may want to do, and  
 21 therefore they've got two different things in their  
 22 proposal, 123, that addresses the fact that, you know,  
 23 requiring membership in labor unions should be okay,  
 24 but other kinds of organizations it's not.  
 25 You know, I'm just trying to take a run at

1 can you -- could you, in a vacuum, come up with a  
 2 public policy position that says that's what -- that's  
 3 the right answer, and in order to achieve that result  
 4 you have to both nullify -- nullify #41 and substitute  
 5 a better public policy. I mean, I'm just not there  
 6 yet.  
 7 MR. DOMENICO: Well, that's exactly the  
 8 defense that the proponents of 61 put forward, was  
 9 that, well, we agree with kind of the broad idea of  
 10 the -- of the proponents of 31 or whatever it was, that  
 11 the State should make a statement against  
 12 discrimination based on race. And so that's why we  
 13 used the exact same language they used. But we just  
 14 want to make sure that everyone understands that it's a  
 15 little bit different.  
 16 I mean, Mr. Grueskin will make -- will  
 17 probably get an electronic copy of the brief filed by  
 18 the proponents in 61 and change some of the wording  
 19 around. It's the exact same argument here. We agree  
 20 that there are certain things that employees shouldn't  
 21 be required to do, that's why we're using this "labor  
 22 organization" language.  
 23 And it's their fault for using this broad  
 24 term when they could have been more precise, which  
 25 is -- and so we're being more precise by defining

1 what's what. And so how can you say that our measure,  
2 which is more precise, is more than one subject when  
3 this other one that's broader you've already upheld is  
4 a single subject.

5 I mean, it -- the -- I think this --  
6 everything about this parallels 61, from the measure  
7 itself to the arguments on both sides. And given where  
8 the Supreme Court came out, I don't -- I can't  
9 distinguish it enough.

10 On that point, I'm still struggling with the  
11 business about exempting the measure from rules of  
12 interpretation in addition to all this. But on that  
13 point, this seems exactly like 61 to me. And I wish I  
14 could come up with a reason to oppose it, but I can't.

15 MR. HOBBS: Mr. Grueskin.

16 MR. GRUESKIN: Can I just offer maybe two  
17 statutory cites that -- first of all, in terms of  
18 Mr. Domenico's concern, I've already, I think,  
19 substantively acknowledged, but there's a statute that  
20 says whichever gets the most. So this is a  
21 constitutional provision. It seems to me the  
22 constitutional provision has a right to preempt the  
23 statutory limitation.

24 As to Mr. Hobbs' concern, I totally  
25 understand where you're coming from. But the conundrum

1 to an employer organizations in the wrong, but there's  
2 an exception, why not just say that if that's what the  
3 measure -- if that's the idea?

4 Why say that it's -- I mean, it kind of gets  
5 to my -- possibly my biggest problem here, is that it's  
6 drafted in a way almost patently surreptitious, by  
7 saying you can't require people to participate in labor  
8 organizations and then defining that to mean something  
9 other than what a labor organization is.

10 MR. GRUESKIN: Well, it wasn't intended to be  
11 surreptitious. You know, I understand your point.  
12 Frankly, if I'd had maybe another cut at it or I could  
13 have passed a draft past you, you might be looking at  
14 the different language right now. I mean, that's --  
15 that's just what it comes down to.

16 MR. HOBBS: Further discussion on single  
17 subject? At this point, I'm still of the belief that  
18 the measure violates single subject. I certainly  
19 understand Mr. Domenico's point that -- that it's  
20 harder to make that case in light of the Court's  
21 decision in #61.

22 MR. DOMENICO: Yeah. I mean, I agree with  
23 you. I think it's -- it's surreptitious, it uses  
24 language in a way that is, if not intentionally,  
25 effectively confusing and deceptive. But that's

1 that the proponents find themselves in when you have  
2 one end of either spectrum represented is that the  
3 statutes are clear that this Board can't set a  
4 conflicting title. So we couldn't come up with a  
5 measure that, in essence, uses the word "not" in front  
6 of the specific provisions of #41, I believe.

7 I think that, you know, can you set up, as I  
8 think Mr. Cartin called them, competing measures that  
9 kind of craft their own place in the political and  
10 policy spectrum. But you can't set up a measure that  
11 is just anti whatever someone else already has gotten  
12 through this Board, because I think you've got a  
13 limitation.

14 MR. HOBBS: If I might. Why -- I mean, I  
15 don't want to get into the language. You know, we  
16 don't normally get into why did the proponents choose  
17 certain language. But by contrast, why would #123 not  
18 be drafted to say an employer shall -- an employer  
19 shall not require, as a condition of employment,  
20 participation in any employee organization, any  
21 employee organization, and then put in an exception  
22 that says but this doesn't apply to labor organizations  
23 or unions?

24 I mean, if the public policy that's sought  
25 here is it generally is requiring employees to belong

1 exactly why I voted against 61. And the Supreme Court  
2 had no trouble saying that that's not our business. So  
3 I can't justify voting against it on that point.

4 And at this point, I'm still -- I'm not  
5 convinced enough about the exemption from the statutory  
6 rules of interpretation to vote against it on that. So  
7 I don't know if I should make a motion.

8 So then I'll move then that we -- that the  
9 Board finds that measure #123 constitutes a single  
10 subject and move on to setting a title.

11 MR. CARTIN: Second.

12 MR. HOBBS: If there's no other discussion,  
13 all those in favor say aye.

14 MR. DOMENICO: Aye.

15 MR. CARTIN: Aye.

16 MR. HOBBS: All those opposed no.  
17 No.

18 That motion carries 2-1.

19 Let's turn to the staff draft which Ms. Gomez  
20 has displayed on the screen.

21 Mr. Grueskin, do you have some suggestions,  
22 an alternative draft?

23 MR. GRUESKIN: I'm nothing if not  
24 predictable.

25 I think the staff draft is largely just fine.

1 I acted on the language, frankly, because in light of  
2 the dissent on 61, I didn't think that the introductory  
3 phrase ought to raise those concerns.

4 And it also seemed to me that the staff  
5 draft, by relating -- by referring to certain  
6 organizations, really probably didn't give as much  
7 clarity as it could have. Hence, the title talks about  
8 limits on employer-required conditions of employment  
9 and then makes just a couple of very minor  
10 modifications, as you can see, referencing labor and  
11 labor organization.

12 I split up that one really long phrase in the  
13 middle. I just thought it read more easily. I used  
14 "providing" rather than "stating" there on the last  
15 clause. I didn't think that the concluding clause was  
16 as descriptive as it could be, in terms of the  
17 preemption issue, and I just tried to simplify that.  
18 But changes along those lines, or not, would be  
19 acceptable to the proponents.

20 MR. HOBBS: This reminds -- what I'm about to  
21 say sort of reminds me of things I've heard from  
22 Mr. Domenico, is, my difficulties with the title are  
23 probably related to my difficulties with single  
24 subject.

25 You know, number one, I don't know what to do

1 better to say something about concerning, you know,  
2 participation in certain organizations as a condition  
3 of employment or something like that that focuses on  
4 organizations.

5 MR. GRUESKIN: If that's the -- if that's the  
6 sense of the Board, we certainly don't object to  
7 language along that line.

8 MR. HOBBS: Well, I'm reluctant to say "labor  
9 organizations" given in the expression the single  
10 subject. I mean, I guess the structure I'm thinking  
11 about is just, you know, if the subject is employer  
12 requirements of participation in just certain  
13 organizations would be kind of my idea.

14 And then go on to say, and, in connection  
15 therewith, prohibiting an employer and then, you know,  
16 saying what the measure really does, including  
17 something to the effect that it's -- the organizations  
18 that it's talking about is organizations that exist for  
19 purposes other than dealing with labor disputes, et  
20 cetera.

21 MR. DOMENICO: Well, I share the difficulties  
22 Mr. Hobbs has because under -- because before this week  
23 I would have voted against this for the same reasons  
24 Mr. Hobbs voted against it.

25 And so that leaves me in a very difficult

1 about the fact that the measure defines "labor union"  
2 to be the opposite of what an average voter might  
3 think. You know, the staff draft and, Mr. Grueskin,  
4 your alternative, I think is accurate. A careful  
5 reader can certainly see for himself or herself that  
6 it's not -- that it's an unusual definition, and so  
7 maybe that's okay.

8 You know, but the question in my mind is do  
9 we need to do something further, and I'm thinking  
10 probably not. But it certainly is troubling to me for  
11 the same reason that I was troubled by the  
12 single-subject question.

13 I guess related to that, though, is the  
14 expression of the single subject concerns me a little  
15 bit because it's -- to the extent that it's saying that  
16 it's about limits on employer-required conditions of  
17 employment, isn't that -- I mean, it's a little more  
18 focused than that.

19 I mean, I was -- our suggestion was more to  
20 do with employer requirements for participation in  
21 certain organizations, perhaps more like, well, I don't  
22 know, the staff draft or -- or the title for #41, which  
23 was concerning participation in labor organizations as  
24 a condition of employment.

25 I'm wondering, by contrast, if it would be

1 position in trying to comply with the Supreme Court's  
2 analysis of single subject and with our duty to draft a  
3 title that is clear and not confusing and captures  
4 exactly what's going on. Because I think the measure  
5 itself is not clear and that makes it difficult.

6 I -- just to emphasize that, you know, the  
7 first time I read this, I didn't know that Mr. Grueskin  
8 was representing the proponents, and I thought it meant  
9 the exact opposite of what it actually means until I --  
10 I had to read the "other than" language three or four  
11 times to figure out what was going on.

12 Most of the voters, I'm not sure, will know  
13 that Mr. Grueskin and his friends are -- are the ones  
14 supporting this. So it's very difficult to get across  
15 that "labor organization" means everything other than  
16 what is typically understood to be a labor  
17 organization.

18 That said, we're stuck with the Supreme  
19 Court's decision. And the best I can do -- the  
20 single-subject language, I think, is -- I agree, "labor  
21 organization," I'd try to keep that out of that  
22 language if we can. I think there are a number of ways  
23 you could do it.

24 My only -- I actually wondered if we should  
25 just keep the "labor" language out of the entire title,

1 because I don't -- I think it only serves to confuse,  
2 but then I'm not sure we're doing a very good job of  
3 reflecting the measure.

4 So the best I could come up with, short of  
5 that, was to take Mr. Grueskin's suggestion on line 4,  
6 just put quotes around "labor organization" the first  
7 time it's used as a signal that it's got a definition,  
8 that it's a defined term. Other than that, I'm not  
9 sure how to make it any clearer to people what this  
10 does.

11 I think it's confusing. I think it's hard to  
12 tell. The "other than" language, especially the way  
13 these titles read, it's hard to tell whether you're in  
14 the middle of a triple negative or a quadruple negative  
15 and what's going on, but that's -- that's the format  
16 we're stuck with.

17 I guess, under the Supreme Court's precedent,  
18 we have to do the best we can and let the two sides  
19 fight it out between now and November. I don't know  
20 any better way to make these clearer when the measures  
21 themselves are so confusing.

22 But to use language that is -- that define  
23 terms in ways that is, if not the opposite of what  
24 would be generally understood, as the Supreme Court  
25 acknowledged, at least something that is different from

1 what many voters would think reading it. So I don't  
2 know how we'd improve on -- on this very much.

3 MR. HOBBS: Mr. Cartin.

4 MR. CARTIN: I would say I would be -- I  
5 would support your proposed revision, Mr. Hobbs, if  
6 what you're saying is you'd change the language to, "An  
7 amendment to the Colorado constitution concerning  
8 participation in certain organizations as a condition  
9 of employment."

10 I think that Mr. Grueskin said that the  
11 subject of the measure was -- and I hope I'm not  
12 misstating this, but it prohibits conditions of  
13 employment on -- prohibits conditioning the employment  
14 on membership in a nonunion group. I think that the  
15 revision that you have suggested is consistent with  
16 that and does about as good a job as can be done with  
17 the statement of the single subject.

18 And I guess I -- as far as putting quotations  
19 around "labor organization" on line 4, I guess since  
20 we've got quotations around "labor organization" down  
21 in lines 5 and 6 where it says defining labor  
22 organization, I'm not sure it's necessary. I  
23 understand what Mr. Domenico is trying to signal there,  
24 but I'm not sure at this point that --

25 MR. DOMENICO: Well, it seems more important

1 to me to have it there than anywhere else, the first  
2 time you use it, where it says, "Prohibiting an  
3 employer from requiring an employee to join a labor  
4 union -- or a labor organization." That's where most  
5 people -- I don't think it can be disputed, if they  
6 just read that part, would think union.

7 And the fact that then later on we'd put  
8 quotes around it, I don't think does a -- well, it  
9 doesn't do as good a job as we could possibly do in  
10 signaling to people that "labor organization" may not  
11 just mean what you think it does, and, in fact, we're  
12 going to define it here in a minute.

13 So if you don't want, excuse me, if you don't  
14 want multiple quotation marks around it, I would want  
15 to move -- to remove them from the later use and insert  
16 them there. Because I think that's where it's most  
17 important to have it, is the first time you use it.

18 Where you're talking about -- where -- where  
19 the confusion I think arises is in -- is in that  
20 sentence, and so that's where I would want to do what  
21 we can to signal that it's -- that you should check out  
22 what that term is defined to mean.

23 MR. CARTIN: I think it's up to the  
24 proponents.

25 MR. HOBBS: Mr. Grueskin, any objection to

1 enclosing that reference to "labor organization" with  
2 quotes?

3 MR. GRUESKIN: I think it's a helpful change.

4 MR. HOBBS: I like that, I think, the reasons  
5 Mr. Domenico said. I think really we need to call  
6 attention to that term, and I think -- I think it's  
7 reasonable to do that with quotation marks because this  
8 is -- you know, the casual reader can, you know, read  
9 that and maybe read no further.

10 Because once -- I think the eyes start to  
11 glaze over once you see defining labor organization,  
12 oh, I don't want to read the rest. I think really the  
13 quotes at least help signal that this is -- that this  
14 is a defined term and an important defined term.

15 MR. DOMENICO: Can we use bold print or red  
16 letters for "other than"? That's what I think is the  
17 part that really got my attention. Really, I had to be  
18 careful about.

19 MR. HOBBS: That's a good question. I think  
20 there are potentially some limitations with ballot  
21 preparation software that some county clerks have. So  
22 I'm -- although on the one hand, special effects like  
23 bolding and underlining might be problematic, all caps  
24 is used for some measures. I'm certainly open to the  
25 possibility of trying to find a way to emphasize the

1 "other than" language.  
 2 Mr. Gessler.  
 3 MR. GESSLER: Mr. Hobbs, if I may speak. I  
 4 have not signed up.  
 5 MR. HOBBS: Right. If you'll identify  
 6 yourself and then sign up later for Cesi.  
 7 MR. GESSLER: Certainly. My name is Scott  
 8 Gessler, and I represent an organization called The  
 9 Better Colorado. I'd just like to make one comment on  
 10 this.  
 11 I think the appropriate way to solve that  
 12 particular issue is to basically flip the sequence of  
 13 explaining what this measure does. Because the truth  
 14 is that the majority of this measure is -- and the  
 15 major import of this measure is in the second half.  
 16 This definition of "labor organization,"  
 17 which is truly the opposite of any common understanding  
 18 of the term "labor organization" and is the opposite of  
 19 any understanding that the law has ever had -- well,  
 20 maybe I can't say "ever had," but certainly that I'm  
 21 aware of and I would assume most people are ever aware  
 22 of, this is -- this completely redefines "labor  
 23 organization" to mean the exact opposite of how it's  
 24 been used in language and in law.  
 25 And because that's so important, and I agree

1 discussions about that on our motion for rehearing, but  
 2 this certainly purports to change "labor organization"  
 3 over any conflicting definition in article XVIII, so  
 4 it's a universal application, as well as any  
 5 conflicting other initiative that may occur.  
 6 So that's an extremely broad sweep that goes  
 7 beyond just this particular prohibition and this  
 8 particular initiative. So I think it should come  
 9 first, and I think the emphasis should be on what this  
 10 is really doing.  
 11 MR. HOBBS: Thank you. Oh, and, Mr. Gessler,  
 12 if you'll sign that.  
 13 MR. GESSLER: Certainly. May I do that  
 14 afterwards?  
 15 MR. HOBBS: Sure.  
 16 Further discussion?  
 17 MR. DOMENICO: I think those are actually  
 18 pretty good ideas. I think for now I'm -- I may want  
 19 to just wait to see a petition for rehearing that might  
 20 lay them out a little bit more concretely.  
 21 But I think Mr. Gessler makes a good point  
 22 that addresses somewhat Mr. Hobbs' difficulty with the  
 23 measure, which is just saying this deals with whatever  
 24 we were going to say, conditions of employment relating  
 25 to certain organizations, doesn't capture the

1 with Mr. Domenico that the "other than" is really the  
 2 critical language here, I would start off with that. I  
 3 mean, the Title Board is not constrained to following  
 4 the same sequence of language that an initiative  
 5 drafter puts together. The Title Board is charged with  
 6 creating a fair and accurate title which fairly  
 7 expresses the meaning. And so the most important part  
 8 of this is the definition.  
 9 So I think the appropriate way to handle that  
 10 is to start off with saying, you know, concerning the  
 11 pro- -- well, actually, I would actually argue it  
 12 should be concerning the definition of "labor  
 13 organization" because that's truly the import of this  
 14 and the prohibition is secondary. And the most  
 15 important thing that people need to understand is this  
 16 radical departure from existing law and common  
 17 language.  
 18 I mean, we can sort of, after a while,  
 19 redefine the English language to mean whatever we want  
 20 legally. But if you're not going to mislead people, if  
 21 you're going to be fair and accurate, that should be  
 22 the first thing in this and then explaining what the --  
 23 the prohibition.  
 24 And I would also emphasize that, you know,  
 25 this specifically purports, and I'm sure we'll have

1 additional aspect of this, which is to change the  
 2 definition of "labor organization" in other measures.  
 3 Then Mr. Gessler's point about making -- which, I think  
 4 the proponents made pretty clear, is, in fact, the main  
 5 point of this. It could be a way to address that.  
 6 But as I said, it may make more sense --  
 7 because I think -- as I've said a number of times,  
 8 there are lots of ways that we can write a title that  
 9 complies with the law. For now, I'm willing to vote to  
 10 approve something along the lines we've been discussing  
 11 but with the idea that on a motion for rehearing we  
 12 could improve it quite a bit.  
 13 MR. HOBBS: I guess I'll -- I mean, I think I  
 14 like -- or I certainly don't have any problem with the  
 15 motion -- from Mr. Grueskin's suggestions. But maybe  
 16 just for the sake of moving forward and seeing what the  
 17 Board wants to do, I'll work off the staff draft and  
 18 see if there's support then for changing the expression  
 19 of the single subject along lines that I think  
 20 Mr. Cartin described.  
 21 I don't know. Let's see. I guess if I  
 22 recall this accurately, I'm not sure of the most  
 23 efficient way to get to this result, but maybe strike  
 24 everything beginning from where the cursor is on the  
 25 screen down to the end of line 2 before "certain."

1 Yeah. And then insert "participation in," and then in  
2 line 3, after "organizations," insert "as a condition  
3 of employment." So that the expression of the single  
4 subject would read: "concerning participation in  
5 certain organizations as a condition of employment."

6 And to see if there's support, I'll go ahead  
7 and move that change.

8 MR. CARTIN: Second.

9 MR. HOBBS: Any discussion by the Board?

10 All those in favor say aye.

11 Aye.

12 MR. DOMENICO: Aye.

13 MR. CARTIN: Aye.

14 MR. HOBBS: All those opposed no.

15 That motion carries 3-0.

16 I think I'd -- I guess I would like to go  
17 ahead and move then Mr. Domenico's suggestion about  
18 quotes. And I also want to be incorporating some of  
19 Mr. Grueskin's suggestions.

20 Maybe in line 4, where it refers to,  
21 "requiring an employer to join," I would strike "an"  
22 and insert, quote, labor -- I'm sorry. I should say a.  
23 Before the quote mark, the article a, and then, quote,  
24 labor, and then after -- at the end of "organization"  
25 an end quote. So that clause would be -- would read:

1 "prohibiting an employer from requiring an employee to  
2 join a, quote, labor organization, end quote, or pay  
3 dues," comma, et cetera.

4 Any -- I'll go ahead and move that change and  
5 see if there's support.

6 MR. DOMENICO: I second it.

7 MR. HOBBS: Any further discussion?

8 All those in favor say aye.

9 Aye.

10 MR. DOMENICO: Aye.

11 MR. CARTIN: Aye.

12 MR. HOBBS: All those opposed no.

13 That motion carries 3-0.

14 Other changes to the staff draft? I'm just  
15 going to go through Mr. Grueskin's suggestions maybe to  
16 see which other -- what other ones we should just go  
17 ahead and incorporate.

18 In the next line, I believe, it goes on to  
19 say, "Pay dues, assessments, or other charges to or for  
20 such an organization." Insert the word "such."

21 Any opposition to that? Maybe I'll end up  
22 making this one motion, but just speak up if anybody  
23 opposes any of those changes.

24 Then after the -- oh. Okay. And then where  
25 the cursor is put a semicolon and insert "defining,

1 quote, labor organization, end quote, as one," and then  
2 it picks up with the current language, "that exists  
3 solely or primarily," et cetera.

4 Any opposition at this point?

5 The next suggestion from Mr. Grueskin --

6 Cesi, you're so far ahead of me. Maybe we  
7 should just go through this.

8 So where the cursor is strike the comma and  
9 insert a semicolon, and then strike the word "stating"  
10 and insert "providing."

11 And then after "Colorado constitution" in  
12 line 10, insert a comma and the phrase "including any  
13 other amendment adopted at the 2008 general election,"  
14 and then picking up the remainder.

15 After "number of votes," insert -- we'll  
16 strike -- well, after "number of votes," insert "each  
17 receives" and strike the remainder of the title,  
18 keeping the period. Those are the suggestions that  
19 Mr. Grueskin has.

20 We'll just go ahead and move those changes.

21 MR. DOMENICO: Second.

22 MR. HOBBS: Any further discussion?

23 If not, all those in favor say aye.

24 Aye.

25 MR. DOMENICO: Aye.

1 MR. CARTIN: Aye.

2 MR. HOBBS: All those opposed no.

3 That motion carries 3-0.

4 Further changes to the staff draft?

5 Is there a motion adopt the staff draft as  
6 amended?

7 MR. CARTIN: So moved.

8 MR. DOMENICO: Second.

9 MR. HOBBS: Move and seconded.

10 Let me read into the record then how the  
11 staff draft -- or how the title would read if the  
12 motion as adopted. And Cesi's showing it on the screen  
13 with the changes incorporated.

14 "An amendment to the Colorado constitution  
15 concerning participation in certain organizations as a  
16 condition of employment, comma, and, comma, in  
17 connection therewith, comma, prohibiting an employer  
18 from requiring an employee to join a, quote, labor  
19 organization, end quote, or to pay dues, comma,  
20 assessments, comma, or other charges to or for such an  
21 organization; semicolon, defining, quote, labor  
22 organization, end quote, as one that exists solely or  
23 primarily for a purpose other than dealing with  
24 employers -- employees concerning grievances, comma  
25 labor disputes, comma, wages, comma, rates of pay,

1 comma, employee benefits, comma, hours of employment,  
 2 comma, or conditions of work; semicolon, and providing  
 3 that the definition of, quote, labor organization, end  
 4 quote, in this amendment shall provide -- shall prevail  
 5 over any other conflicting definition in article XXVIII  
 6 of the Colorado constitution, comma, including any  
 7 other amendment adopted at the 2008 general election  
 8 regardless of the number of votes each receives,"  
 9 period, with the understanding that the same changes  
 10 will be made in the ballot title and submission clause.  
 11 I'm sorry?  
 12 MR. CARTIN: XVIII.  
 13 MR. HOBBS: Oh, XVIII. I'm sorry. I read  
 14 article XXVIII and I should have read article XVIII.  
 15 Thank you, Mr. Cartin.  
 16 Any other -- is there any other discussion?  
 17 The motion is to adopt this as the title.  
 18 All those in favor say aye.  
 19 Aye.  
 20 MR. DOMENICO: Aye.  
 21 MR. CARTIN: Aye.  
 22 MR. HOBBS: All those opposed no.  
 23 That motion carries 3-0.  
 24 And that concludes action on #123.  
 25 The time is 9:44 a.m.

1 CERTIFICATE  
 2 STATE OF COLORADO )  
 )  
 3 COUNTY OF DENVER )  
 4 I, SHELLY R. LAWRENCE, Registered  
 5 Professional Reporter and Notary Public within and for  
 6 the State of Colorado, commissioned to administer  
 7 oaths, do hereby state that the said proceedings were  
 8 taken in stenotype by me at the time and place  
 9 aforesaid and was hereafter reduced to typewritten form  
 10 by me; and that the foregoing is a true and correct  
 11 transcript of my stenotype notes thereof.  
 12 That I am not an attorney nor counsel nor  
 13 in any way connected with any attorney or counsel for  
 14 any of the parties to said action, nor otherwise  
 15 interested in the outcome of this action.  
 16 IN WITNESS THEREOF, I have affixed my  
 17 signature and seal this 27th day of May, 2008.  
 18 My commission expires: 03/18/2009.  
 19  
 20  
 21 \_\_\_\_\_  
 22 SHELLY R. LAWRENCE, RPR  
 23 Notary Public, State of Colorado  
 24  
 25

1 (The proceedings concluded at 9:44 a.m. on  
 2 the 21st day of May, 2008.)  
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STATE OF COLORADO  
Department of State  
1700 Broadway  
Suite 270  
Denver, CO 80290



Mike Coffman  
Secretary of State  
  
Holly Z. Lowder  
Director, Elections Division

May 28, 2008

**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 for a rehearing  
for a proposed initiative concerning

2007 - 2008 #123\*

Friday, May 30, 2008 at 8:30 a.m.

Secretary of State's Blue Spruce Conference Room

1700 Broadway, Suite 270

Denver, Colorado

You are invited to attend.

**MIKE COFFMAN**  
Secretary of State

**AUDIO BROADCASTS NOW AVAILABLE. PLEASE VISIT [WWW.SOS.STATE.CO.US](http://WWW.SOS.STATE.CO.US) AND CLICK ON THE "INFORMATION CENTER".**

**MOTION FOR REHEARING TEXT ALSO AVAILABLE ON OUR WEBSITE, LOCATED ON THE INITIATIVE INFORMATION PAGE UNDER "TITLE BOARD FILINGS".**

\* Unofficially captioned "Conditions of Employment" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

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COLORADO TITLE SETTING BOARD

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In re Title and Ballot Title and Submission Clause for Initiative 2007-2008 #123

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**MOTION FOR REHEARING**

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On behalf of Julian Jay Cole, a registered elector of the State of Colorado, the undersigned hereby moves for a rehearing of the title, ballot title, and submission clause for Initiative 2007-2008 #123 "Conditions of Employment", set by the Title Board on May 21, 2008. As grounds, Cole states as follows:

The Title Board does not have jurisdiction to set a title because the final version of the initiative, as filed with the Title Board, contains a substantive change from the version of the initiative filed with legislative council and the office of legislative legal services, and the change was not properly in response to a comment from legislative council and the office of legislative legal services in violation of C.R.S. § 1-45-105(2).

The proposed initiative violates Colorado's single subject requirement contained in C.R.S. § 1-40-106.5 because it contains the following separate subjects:

1. The initiative states what cannot be defined as a labor organization.
2. The initiative states that an employer cannot, as a condition of employment, belong to an undefined category of organizations labeled "labor organizations."
3. The initiative purports to apply to all current or future usages of the term "labor organization" in Article XVIII of the Colorado Constitution, regardless of the manner in which the term "labor organization" may be used in that Article.
4. The initiative creates new rules for resolving conflicts between this initiative and other initiatives appearing on the 2008 statewide ballot.

The title set by the Board is misleading, inaccurate, and incomplete for the following reasons:

1. The title misleadingly states that it applies to participation to "certain" organizations as a condition of employment, when in fact the initiative does not apply to "certain" organizations.
2. The title is confusingly similar to the title for Proposed Initiative No. 41, currently

certified for the ballot as Amendment 47.

3. The title is confusingly similar to the title for Proposed Initiative No. 124.
4. The title is misleading, because it states that the single subject concerns participation in certain organization as a condition of employment, when in fact the single subject of the initiative is to redefine the term "labor organization" in a manner contrary to previous definitions and contrary to normal language usage.
5. The title is misleading, because the initiative does not define a labor organization, but rather defines what a labor organization is not.
6. The title is incomplete and misleading, because it does not inform voters that the use of the term "labor organization" directly contradicts other usages of the term in Colorado law.

Respectfully submitted this 28th day of May, 2008.

By: 

Scott E. Gessler, Reg. No. 28944

Hackstaff Gessler LLC

1601 Blake St., Suite 310

Denver, Colorado 80202

(303) 534-4317

(303) 534-4309 (fax)

sgessler@hackstaffgessler.com

Attorney for Julian Jay Cole

Address of Petitioner:  
18977 W. 55th Cir.  
Golden, CO 80403

**CERTIFICATE OF SERVICE**

I hereby certify that on this 28th day of May, 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was placed in the United States mail, postage prepaid, to the following:

Mark Grueskin, Esq.  
Isaacson Rosenbaum P.C.  
633 17<sup>th</sup> Street  
Suite 2200  
Denver, Colorado 80202



---

**Cesiah Gomez**

---

**From:** Barbora Hurd [bhurd@hackstaffgessler.com]  
**Sent:** Wednesday, May 28, 2008 4:49 PM  
**To:** Cesiah Gomez  
**Cc:** 'Scott Gessler'; general@hackstaffgessler.com  
**Subject:** Motions for Rehearing (#113, #123, #124)  
**Attachments:** Motions for Rehearing 113, 123, 124.pdf

Dear Cesi,

Attached please find motions for rehearing regarding ballot initiative # 113, #123 and #124. The originals will be couriered to your office tomorrow morning. Please do not hesitate to call if you have any questions or need additional information.

Sincerely,

Barbora Hurd  
Paralegal to Scott E. Gessler, Esq.

Hackstaff Gessler, LLC  
1601 Blake Street, Suite 310  
Denver, Colorado 80202

ph. (303) 534-4317  
fax (303) 534-4309  
[bhurd@hackstaffgessler.com](mailto:bhurd@hackstaffgessler.com)

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

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

**Section 17. Limits on conditions of employment.** (1) AN EMPLOYER SHALL NOT REQUIRE, AS A CONDITION OF EMPLOYMENT, THAT AN EMPLOYEE JOIN OR PAY DUES, ASSESSMENTS, OR OTHER CHARGES TO OR FOR A LABOR ORGANIZATION.

(2) AS USED SOLELY IN THIS ARTICLE, AND NOTWITHSTANDING ANY OTHER PROVISION OF LAW, "LABOR ORGANIZATION" MEANS ANY ORGANIZATION OF EMPLOYEES THAT EXISTS SOLELY OR PRIMARILY FOR A PURPOSE OTHER THAN DEALING WITH EMPLOYERS CONCERNING GRIEVANCES, LABOR DISPUTES, WAGES, RATES OF PAY, EMPLOYEE BENEFITS, HOURS OF EMPLOYMENT, OR CONDITIONS OF WORK. THIS DEFINITION SHALL PREVAIL OVER ANY CONFLICTING DEFINITION OF "LABOR ORGANIZATION" IN ARTICLE XVIII OF THIS CONSTITUTION, INCLUDING ANY PROVISION ADOPTED AT THE 2008 GENERAL ELECTION, REGARDLESS OF THE NUMBER OF VOTES RECEIVED BY THIS OR ANY OTHER SUCH AMENDMENT.

Reed Norwood  
8071 S. Lamar Street  
Littleton, CO 80128

Charles Bader  
4859 Herndon Circle  
Colorado Springs, CO 80920-7051

May 9, 2008

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via **HAND DELIVERY**

Ms. Cesi Gomez  
Colorado Secretary of State  
1700 Broadway, Suite 270  
Denver, Colorado 80290

Re: Initiative 2007-2008 #123  
Initiative 2007-2008 #124

Dear Ms. Gomez:

Attached please find the required drafts of Initiative 2007-2008 #123 and 2007-2008 #124 which our office is filing on behalf of the Proponents for each measure.

Sincerely,



Amy Knight  
Legal Assistant to Mark G. Grueskin

aak  
enclosure  
1830720\_1.doc



## Ballot Title Setting Board

### **Proposed Initiative 2007-2008 #123<sup>1</sup>**

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

An amendment to the Colorado constitution concerning participation in certain organizations as a condition of employment, and, in connection therewith, prohibiting an employer from requiring an employee to join a "labor organization" or to pay dues, assessments, or other charges to or for such an organization; defining "labor organization" as one that exists solely or primarily for a purpose other than dealing with employers concerning grievances, labor disputes, wages, rates of pay, employee benefits, hours of employment, or conditions of work; and providing that the definition of "labor organization" in this amendment shall prevail over any other conflicting definition in article XVIII of the Colorado constitution, including any other amendment adopted at the 2008 general election regardless of the number of votes each receives.

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 concerning participation in certain organizations as a condition of employment, and, in connection therewith, prohibiting an employer from requiring an employee to join a "labor organization" or to pay dues, assessments, or other charges to or for such an organization; defining "labor organization" as one that exists solely or primarily for a purpose other than dealing with employers concerning grievances, labor disputes, wages, rates of pay, employee benefits, hours of employment, or conditions of work; and providing that the definition of "labor organization" in this amendment shall prevail over any other conflicting definition in article XVIII of the Colorado constitution, including any other amendment adopted at the 2008 general election regardless of the number of votes each receives?

*Hearing May 21, 2008:*

*Single subject approved; staff draft amended; titles set.*

*Hearing adjourned 9:44 a.m.*

---

<sup>1</sup> Unofficially captioned "Conditions of Employment" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

STATE OF COLORADO TITLE SETTING BOARD

In the Matter of:

Rehearing for Initiatives 2007-2008, Numbers 123 and 124

TRANSCRIPT FOR:

REHEARING

DATE TAKEN:

May 30, 2008

PAGES:

1-99

REPORTED BY:

Lori Martin, CRR



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E

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STATE OF COLORADO TITLE SETTING BOARD  
May 30, 2008

Rehearing For the Title, Ballot Title,  
and Submission Clause For Initiatives 2007-2008 No. 123  
and 2007-2008 No. 124.

The rehearing for the Title, Ballot  
Title, and Submission Clause For Initiative 2007-2008  
No. 123 and 2007-2008 124 commenced on May 30, 2008 at  
8:38 a.m., at 1700 Broadway, Suite 270, Blue Spruce  
Conference Room, Denver, Colorado 80290, before the  
State of Colorado Title Setting Board: Daniel D.  
Domenico, Solicitor General; Daniel L. Cartin, Office  
of Legislative Legal Services; William A. Hobbs, Deputy  
Secretary of State; and Maurice G. Knaizer, Assistant  
Attorney General.

The speakers were Scott E. Gessler, Esq.,  
Hackstaff Gessler LLC, and Mark G. Grueskin, Esq.,  
Isaacson Rosenbaum, P.C.

Reported by: Lori A. Martin, RMR, CRR.

1 agenda items today, both of these before us on motions  
2 for rehearing, No. 123 and No. 124. If there's no  
3 objection. I'd like to take these together. They are  
4 alternative versions of -- I think it's basically the  
5 same proposal, the same proponents, essentially the  
6 same motion for rehearing.

7 So with that, I will turn it over to  
8 Mr. Gessler to speak on behalf of the motion for  
9 rehearing.

10 MR. GESSLER: Thank you, Mr. Hobbs. For  
11 the record, my name is Scott Gessler. I represent  
12 Mr. Cole, who's the protester in this matter, and we  
13 have no objection to consolidating 123 and 124 because  
14 I think the arguments are -- are identical.

15 What I've handed out to the proponents as  
16 well as each member of the Title Board is a packet of  
17 information, and that contains a copy of the Review and  
18 Comment Memo for item No. 123, a copy of a transcript  
19 for the Review and Comment Hearing for No. 123, a copy  
20 of the transcript for the initial hearing before the  
21 board for 123. It contains a copy of the Review and  
22 Comment Memo for 124, the Review and Comment Memo -- or  
23 the Review and Comment Hearing transcript from 124, and  
24 the original Title Board hearing from 124.

25 And then finally, because I'll be

2

4

1 WHEREUPON, the following proceedings were  
2 taken.

3 \* \* \* \* \*

4 MR. HOBBS: Good morning. Let's go ahead  
5 and get started. This is a meeting of the title  
6 setting review board pursuant to Article 40 of Title 1,  
7 Colorado Revised Statutes. The date is May 30, 2008.  
8 The time is 8:38 a.m. We're meeting in the Secretary  
9 of State's Blue Spruce conference room, 1700 Broadway,  
10 Suite 270, Denver, Colorado.

11 The Title Setting Board today consists of  
12 the following: My name is Bill Hobbs. I'm deputy  
13 secretary of state, representing Secretary of State  
14 Mike Coffman. To my left is Dan Cartin, deputy  
15 director of the Office of Legislative Legal Services,  
16 who is the designee of the director of the Office of  
17 Legislative Legal Services Charlie Pike. To my right  
18 is Dan Domenico, solicitor general, who is the designee  
19 or the representative of Attorney General John Suthers.  
20 To my far left is Maurie Knaizer, deputy attorney  
21 general, who represents the Title Board. To my far  
22 right is Cesi Gomez of the Secretary of State's office.

23 There are sign-up sheets for anybody who  
24 wishes to testify on the items today. The meeting is  
25 reported in broadcast over the Internet. We have two

1 referencing it, a copy of the -- of the case in re --  
2 titled Ballot Title Submission Clause 2007/2008,  
3 No. 61, so I hope both the proponents and each member  
4 of the board actually do have all that information in  
5 that packet. And if there aren't any questions, I'll  
6 just proceed.

7 MR. HOBBS: Go ahead.

8 MR. GESSLER: My first argument and the  
9 first argument in the rehearing here has to do with the  
10 jurisdictional argument and basically the argument here  
11 is that the changes to the memorandum were not -- first  
12 of all, that they were substantive changes; and,  
13 secondly, they were not in response to a question or  
14 comment by Office of Legislative Legal Services or  
15 legislative counsel, and -- and basically just to go  
16 through exactly what it was, the original version of  
17 this initiative -- and this, I think, applies for 123  
18 and 124, but I'll use "initiative," singular,  
19 subsection 2 said, "This definition shall," the last  
20 sentence, "prevail over any conflict in definition of  
21 labor organization in Article XVIII of the" -- I'm  
22 sorry, it currently says, "in Article XVIII of this  
23 constitution." Originally it said "in Article XXVIII  
24 of this constitution," and then it says "including any  
25 provision adopted at the 2008 general election

5

7

1 regardless of the number of votes received by this or  
2 any other such amendment."

3 So, first of all, that is a substantive  
4 change, and I understand that the proponents  
5 characterize that as a typographical error, but if you  
6 look at Article XXVIII, it -- it directly discusses --  
7 it directly regulates labor organizations. It's the  
8 campaign finance and reform initiative that was adopted  
9 in 2002. So -- so the term "labor organization" has  
10 direct relevance to Article XXVIII; and, in fact, when  
11 we -- when we first looked at this -- and we were  
12 certainly taken aback by the approach that the  
13 proponents took but also the fact that this is a --  
14 that this changed the definition of labor organization  
15 in Article XXVIII and then exempted Article -- exempted  
16 or changed -- by changing the definitions, it  
17 effectively exempted certain types of organizations  
18 that traditionally would be considered labor  
19 organizations from campaign finance regulations, so  
20 that was a broad -- a broad change.

21 And then in comparison, we looked at  
22 Article XVIII, and we ran a word search, and  
23 Article XVIII of the constitution is entitled  
24 Miscellaneous. It's sort of a catchall area, and the  
25 term "labor organization" does not show up there at

1 MR. GESSLER: I would accept that  
2 characterization that a substantive change can also be  
3 a typographical error.

4 MR. DOMENICO: Right.

5 MR. GESSLER: And here it doesn't detract  
6 from the argument that here this is a substantive  
7 change. Whatever the cause of the substantive change,  
8 it's a substantive change. So I guess in -- under that  
9 reasoning, we wouldn't entirely disagree. So the first  
10 point is that this is a -- this is a substantive  
11 change.

12 Now, the second point is it needs to be --  
13 under 1-40-105(2), it basically needs to be -- an  
14 amendment has to be in direct response to the comments  
15 of the directors of the legislative legal counsel and  
16 the Office of Legislative Legal Services. So basically  
17 that has a couple points to it. First of all, it has  
18 to be a direct response; and, secondly, it has to be in  
19 response to the comments.

20 Now, if you look at the review and comment  
21 memo itself for item 123, this contains several  
22 sections. One is an introduction. Two is the  
23 recitation of the purposes. Three is clearly labeled  
24 Comments and Questions. These are the comments and  
25 questions, and there's sort of two components for the

6

8

1 all, and so it was absolutely reasonable to look at how  
2 this affected Article XXVIII, because Article XXVIII  
3 has the term "labor organization," and Article XVIII  
4 doesn't use the term "labor organization" at all.

5 So it only makes sense. So I think  
6 that -- and, plus, saying Article XXVIII versus  
7 Article XVIII is a big difference. It's not a matter  
8 of simply a -- a misspelled word or an improperly  
9 placed comma. This fundamentally changes the meaning  
10 of what this is, of what this provision is; and as a  
11 result, it's a substantive change. I mean, when you  
12 change the meaning of something, that's a substantive  
13 change. A typographical change is an error in typing  
14 that doesn't change, effectively change, the  
15 substantive meaning of something. I mean, I argue a  
16 substantive change changes the substance of what  
17 happens.

18 MR. DOMENICO: Well, wait. A typo can  
19 certainly change the substance. It can be both, right?  
20 I mean, if you wrote a sentence that says -- that says,  
21 "The income tax rate shall be 50 percent," and you meant  
22 to hit 10 percent or 4 percent, I mean, that's both a  
23 typo and a substantive change, right? I mean, just  
24 because it changes the meaning of something doesn't  
25 mean it's not a typo.

1 reasoning here. First of all, the comments and  
2 questions are the written comments and questions that  
3 are presented to the proponents. They're not what  
4 happens verbally at the hearing. The hearing is to  
5 explain the comments and questions. The comments and  
6 questions are the written comments and questions, and I  
7 think that has to be the instance if you look at the  
8 grounding of the text of 1-40-105. Basically it says  
9 no later than -- and I'm looking at 1-40-105,  
10 subsection 1 in the middle of it.

11 It says "no later than two weeks after the  
12 date of submission of the original draft unless it is  
13 withdrawn by the proponents, the directors of the  
14 legislative counsel and Office of Legislative Legal  
15 Services or their designees shall render their comments  
16 to the proponents of the petition concerning format or  
17 contents of the petition at a meeting open to the  
18 public. Where appropriate," and this is the key  
19 language, "such format or contents to the" -- "of the  
20 petition" -- I'm sorry. "Where appropriate, such  
21 comments shall also contain suggested editorial changes  
22 to promote compliance with the plain language provision  
23 of this section."

24 I'm sorry. That's not the critical point.

25 This is the critical point. "Except with the

9

11

1 permission of the proponents, the comments shall not be  
2 disclosed to any person other than the proponents prior  
3 to the public meeting with the proponents of the  
4 petition."

5 So you have comments that are not  
6 disclosed until the public meeting and at the public  
7 meeting, the comments are disclosed. So the comments  
8 are something that can be given to the proponents in  
9 advance and not disclosed to the public. In other  
10 words, the comments are the written comments here  
11 and -- and so that's what -- that's what the comments  
12 are. It's not -- and I would submit from several  
13 points, not only the literal language but from a policy  
14 standpoint, it's not sort of a broad-reaching,  
15 analytical discussion during a hearing and whatever  
16 comes up during the hearing happens to be a comment.  
17 The comments are grounded in the writing because of the  
18 purposes behind this, the literal language that the  
19 comments are something that are rendered and are not  
20 disclosed in advance until the public hearing. So the  
21 public hearing is different than the comments.

22 And thirdly, you know, it provides a very  
23 clear and clean basis for the -- to determine what this  
24 Title Board's jurisdiction is here. It's not a lasting  
25 definition, but it's a relatively solid one.

10

1 legislative counsel says, Well, gee, that's a good  
2 comment, or something along those lines off the cuff,  
3 which is essentially what happened here.

4 I mean, what this is for someone to go  
5 back and study this and say, Okay, look, based upon  
6 this, these are the changes that we suggest or these  
7 are our comments based upon a well-considered analysis  
8 of this rather than sort of an off-the-cuff  
9 give-and-take. So there's really more -- certainly the  
10 public needs to have notice of what's going on, but the  
11 actual purpose of the review and comment, I think, is  
12 to create a better initiative, not to allow proponents  
13 to sort of willy-nilly amend their initiative as things  
14 go forward, but only in direct response to a  
15 well-considered analysis here, and that's what the  
16 written review and comments are. So it's a  
17 well-considered analysis. That's the purpose for the  
18 review and comments.

19 Certainly a secondary purpose is to  
20 provide the public notice. That's the purpose of the  
21 public hearing, but the purpose of the review and  
22 comments is to give the -- is to give the proponents  
23 input into what's going on. Otherwise, there is no  
24 need to even have a direct response to a comment. I  
25 mean, that simply removes -- I think your argument

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1 removes it from the moorings of the purpose.

2 Basically, under your reasoning, as long  
3 as the public has notice of why a change is being made,  
4 it doesn't matter, so why would it even be necessary to  
5 be in direct response? The reason it's necessary to be  
6 in direct response to a comment is because of this  
7 well-considered analytical approach, not merely for  
8 notice. Otherwise, there would be no need for it to be  
9 in response to a comment. It could be simply to  
10 provide notice to the public that we're going to be  
11 doing this rather than in response to a comment.

12 MR. HOBBS: Mr. Gessler, I'm just not sure  
13 I'm entirely following you. It sounds like you're  
14 saying that the -- the meeting itself is a mere  
15 formality, that the written comments have been  
16 delivered to the proponents. I'm not sure what you  
17 picture happening at the meeting. I mean, I guess the  
18 memo is disclosed publicly. The proponents may comment  
19 or -- in response but are not required to. I -- you  
20 know, and I think the practice might be that the staff  
21 might read the questions, but I'm not sure that there's  
22 a point because if that's the limit -- and the memo  
23 kind of speaks for itself. If that's the limit of the  
24 discussion and there -- and that there cannot -- I  
25 think I hear you saying there cannot be a dialogue

1 MR. DOMENICO: Well, doesn't the -- the  
2 policy reasoning behind the requirement that changes be  
3 made in response to comments actually cut against  
4 interpreting it in that way in that I would think that  
5 the only justification for requiring that comments --  
6 that changes are in response to comments is that it  
7 allows for, at the hearing, opponents or the public or  
8 other interested people to understand why changes are  
9 being made; and if the written comments are  
10 confidential and they aren't disclosed until the  
11 hearing, then why should -- how does that match up with  
12 the reasoning behind requiring comments to be --  
13 requiring changes to be related to something brought up  
14 by -- during the process or in relation to comments or  
15 questions?

16 MR. GESSLER: Well, because the comments,  
17 I think, have more than simply that purpose to provide  
18 notice to the public in the hearing. I think the  
19 comments also are -- are the considered -- and this is  
20 the purpose of the whole review and comment. It's the  
21 considered analysis that legislative legal services and  
22 legislative counsel believe needs to be taken into  
23 consideration in either revising or reviewing the  
24 statute. It's not a give-and-take back and forth,  
25 whatever the proponents choose to bring up and the

13

1 based on those written comments that goes beyond --  
2 that leads beyond the comments on the paper. Is that  
3 correct?

4 MR. GESSLER: Not entirely. What I would  
5 say is the review and comment session is not a mere  
6 formality. I mean, it certainly performs two important  
7 roles: one is to provide additional guidance or give  
8 and take to the extent a proponent doesn't understand a  
9 comment, okay? For example, you know, a comment may  
10 be -- may say, You've not used the proper title  
11 structure in this particular instance, and the -- and  
12 would you consider changing it along these lines, and  
13 maybe the "along the lines" is somewhat incomplete and  
14 a proponent may say, Well, no problem. I'll change it  
15 along those lines. Should I put my period here or my  
16 semicolon here. And, I mean, that draws from my  
17 personal experience.

18 But if you look at the transcript on --  
19 I'm sorry. Let me finish that thought. The other  
20 purpose, obviously, is to provide the public notice of  
21 the comments. That's why they're -- that's why you  
22 have the public -- the public hearing, and that's when  
23 the review and comments are released, at the public  
24 hearing, so that that can be public. So it certainly  
25 fulfills those two purposes, okay?

14

1 But the purpose of the public hearing is a  
2 little bit different than the purposes of the review  
3 and comments themselves. They're questions and  
4 comments. And if you look at page 2 of the transcript  
5 for the hearing, the initial hearing, towards the  
6 bottom, line 23, it says, "The purpose of the" -- and  
7 then this is read by all, LCS or OLC. It says, "The  
8 purpose of the review and comment requirement is to  
9 help proponents arrive at language that will accomplish  
10 their intent and to avail the public of knowledge of  
11 the consent of the proposal."

12 So there's two purposes there, and I guess  
13 this goes back to my response to Mr. Domenico. One of  
14 the -- one of the purposes is to help the proponents  
15 arrive at language that accomplishes their intent, and  
16 that's based upon a well-considered analysis of the  
17 text itself, okay? Those are the review and comments.

18 And then the hearing is -- in the next  
19 paragraph -- I'm sorry. If you continue in that same  
20 paragraph, line 4 on page 3, it says, "We hope that the  
21 statements and questions contained in this memorandum  
22 will provide a basis for discussion and understanding  
23 of your proposal." So it's the memorandum itself that  
24 forms the basis as to what needs to be directly  
25 responded to.

15

1 MR. HOBBS: Well, it's a discussion,  
2 though, but it sounds like that discussion is kind of  
3 irrelevant if you go beyond the written comments of the  
4 staff.

5 MR. GESSLER: That's correct. I think  
6 their -- I think -- well. I mean, the discussion may be  
7 relevant for certain other things, but I think the  
8 discussion, if it goes beyond these direct comments.  
9 the questions and comments in here, it's irrelevant for  
10 making changes to the initiative language to bring it  
11 before the Title Board.

12 MR. HOBBS: Well, and you might be about  
13 to -- I'm not sure if we're going to get into the  
14 specifics here a little bit. but at least  
15 theoretically, it seems to me that it's just hard to  
16 draw a fine line here in that a comment might say, The  
17 form of your citation to Article XXVIII is we would  
18 suggest a standard form of citation. That could be the  
19 written comment. The proponents may come to the  
20 meeting saying, you know, We looked it up in  
21 response -- because you made the comment about the form  
22 of the citation, we discovered that that was a mistake,  
23 that we -- we should have said Article XVIII instead of  
24 Article XXVIII. So, you know, we're going to -- you  
25 know, we're going to correct that typographical error.

16

1 Then the staff might say, Well, that raises other  
2 questions, but you're saying they can't raise other  
3 questions?

4 MR. GESSLER: And I think your  
5 hypothetical explains exactly why my approach is  
6 correct. First of all, the language is "direct  
7 response." It's not a response. Now, I understand we  
8 can have arguments as to what's direct or not, but if  
9 they say, Look, the format is incorrect and the  
10 proponents turn around and say, Oh, you're right, the  
11 format is incorrect and, by the way, we used 10 rather  
12 than 5-0, that's not formatting. That goes to  
13 substance. That's not whether it should be spelled  
14 f-i-v-e versus the numeral 5, okay? So it has to be in  
15 direct response.

16 And, secondly, I would argue that -- I  
17 mean, you prefaced your comments, Mr. Hobbs, by saying  
18 there has to be -- it's very difficult to draw a clear  
19 line here. No, it's not. and the reason why it's not  
20 difficult to draw a clear line is because we have a  
21 written memorandum that has a section that says  
22 questions and comments, and so we go based upon the  
23 written text, and -- and with respect to your approach,  
24 that's exactly why I think it's wrong.

25 So we'll continue with your hypothetical

17

19

1 The proponents say no, it should be this article rather  
 2 than that article, and then the discussion turns into a  
 3 lot of substantive questions about Article XVIII versus  
 4 Article XXVIII. Well, that sort of defeats the  
 5 purpose. Yes, it's interesting to have that  
 6 broad-ranging discussion, but these should be  
 7 well-considered, researched, analyzed comments and  
 8 questions to an initiative. They shouldn't be  
 9 off-the-cuff discussions of what different policy  
 10 options there are, and by the way, this brings up an  
 11 idea here and perhaps you might want to do that.

12 I mean, I think the purpose here is you  
 13 give the OLLS two weeks to analyze this with X -- with  
 14 subject matter experts who can look at it and render  
 15 something in writing, because that's the way good laws  
 16 are made, in writing and review comments, and that  
 17 provides clarity, and it helps us have lines and  
 18 boundaries and understand what we are and are not  
 19 supposed to do. That's why there's a written text.

20 So I -- I think your hypothetical actually  
 21 illustrates the dangers of going down that road; and  
 22 along those dangers, it certainly, and I know I've made  
 23 this argument in the past before the board, opens it up  
 24 to manipulation, and I'm certainly not alleging that  
 25 here, but what I am saying is that it allows a -- a

1 direct response. Part of what tipped the issue in  
 2 favor of not setting a title in my mind was that it  
 3 changes words so numerous and substantial that it  
 4 really did seem like there -- there needed to be a more  
 5 complete review and comment.

6 Now, I -- I guess if -- an analogy -- I  
 7 could argue that the same thing could apply here, you  
 8 know, using my hypothetical that if, in the course of  
 9 discussion, proponents said, We noticed that we made a  
 10 typographical error and this really was supposed to be  
 11 Article XVIII, the staff might say, Oh, well, that  
 12 might raise new questions that we had not thought of  
 13 because we thought you actually meant Article XXVIII.

14 So I think that's -- maybe that's what  
 15 you're arguing is that -- that the review and comment  
 16 process is not well served if -- if -- if that can be  
 17 done orally, but then otherwise the staff may not be  
 18 prepared to ask the right questions and make the right  
 19 comments when they flow from kind of an off-the-cuff  
 20 discussion like that.

21 MR. GESSLER: And I'd argue that's exactly  
 22 the case here. For example, and we'll get into this  
 23 beyond the jurisdictional argument, Article XXVIII has  
 24 the definition of labor organization. We can analyze  
 25 and we can understand sort of what the results are of

18

20

1 proponent to say, Gee, I should have added a section  
 2 here, so I'll bootstrap that into some comment and say,  
 3 No, that's not really my purpose or what I really meant  
 4 to say is this and then hopefully draw additional  
 5 questions or draw the -- the people going through the  
 6 review and comment memo into a discussion on this  
 7 subject, I now have my substantive comments and  
 8 questions and can change this -- and can change my  
 9 initiative around in a major fashion. So it becomes  
 10 ungrounded and unmoored from the written text and the  
 11 consideration provided by staff.

12 MR. HOBBS: Well, I -- we had a real-world  
 13 situation at the last meeting of the Title Board, on  
 14 May 21, that -- that this reminds me of where we did  
 15 have a proponent that had made a number of changes  
 16 after the review and comment hearing, adding a number  
 17 of sections. I don't remember the number, but it dealt  
 18 with creation of a rail authority, added a number of  
 19 sections, and the proponent -- it was not obvious that  
 20 those were in response to the written comments. And  
 21 the proponent said, I didn't know I had to bring a  
 22 transcript, but, yes, this was -- this was all part of  
 23 the discussion that was had in the public meeting.

24 In that case, I mean, it is troublesome in  
 25 that it's hard to know whether the changes were in

1 changing this or creating this definition of labor  
 2 organization, or this non-definition of labor  
 3 organization, however you characterize it, but this  
 4 initiative also purports to change all, to govern all  
 5 definitions in Article XVIII, and that begins a host --  
 6 and I understand and we'll talk about the fact that  
 7 this is meant to be a direct preemptive strike on -- on  
 8 Amendment 47, but the language is not limited to  
 9 Amendment 47. When you use the term "all," all  
 10 definitions -- and it's in something called  
 11 "Miscellaneous," in the article itself. Well, how does  
 12 that govern if someone later comes up and says, Well,  
 13 now I've got something for labor organizations which  
 14 maybe isn't connected to conditions of employment, it  
 15 has nothing to do with that subject but instead has a  
 16 different subject and now it's in conflict with this  
 17 definition of labor organization? How does that play  
 18 out? Those are valid opportunities and valid  
 19 questions, substantive questions. But by calling this  
 20 a typo and glossing over it and moving into Article --  
 21 and moving into the remainder, it does not give the  
 22 staff adequate time or -- to even -- to even consider  
 23 the ramifications of that. Now, I think that's very  
 24 troubling here.

25 Before I sit down, does anyone have

21

23

1 questions on -- for -- for me on that?  
 2 MR. HOBBS: Mr. Cartin?  
 3 MR. CARTIN: Well, I'll wait.  
 4 MR. HOBBS: So are you going to -- I don't  
 5 know, Mr. Gessler. I thought maybe you were just going  
 6 to proceed with your other arguments, but I don't mind  
 7 breaking them up one by one. It's up to the board.  
 8 MR. GESSLER: I'm sorry. Perhaps I left  
 9 in a flourish of drama. Whatever the board prefers.  
 10 I'm happy to move on or allow Mr. Grueskin to respond  
 11 to the jurisdictional argument.  
 12 MR. HOBBS: We can do kind of a  
 13 back-and-forth on each issue. It keeps it a little  
 14 fresher. I --  
 15 MR. GESSLER: That's fine.  
 16 MR. HOBBS: Okay. Maybe Mr. Grueskin --  
 17 we'll hear from him on this particular issue.  
 18 MR. GRUESKIN: Thank you, members of the  
 19 board. Mark Grueskin appearing for the proponents.  
 20 The argument about the jurisdictional  
 21 issue, I think, can be addressed fairly quickly. The  
 22 Supreme Court has said that in a case, the citation of  
 23 which I don't recall, that the Administrative  
 24 Procedures Act doesn't apply to the -- in this process,  
 25 your process included, because these are public forums.

1 agree that would be a technical correction?  
 2 "MR. POGUE: (Nods head.)  
 3 "MS. FORRESTAL: Agreed.  
 4 "MR. POGUE: Agreed."  
 5 Then the issue does come up again on  
 6 pages 6 and 7 of the transcript in response to one of  
 7 the technical questions.  
 8 "MS. FORRESTAL:" on page 6, line 23, "On  
 9 line 16, for proper citation format and to indicate  
 10 that article XXVIII is within the Colorado  
 11 constitution, would the proponents consider adding 'OF  
 12 THIS CONSTITUTION' after 'ARTICLE XVIII'?  
 13 "MR. GRUESKIN: Well, as I earlier  
 14 indicated, we'll make it Article XVIII. We'll make it  
 15 'OF THIS CONSTITUTION.' And that is on line 16."  
 16 So it comes up in response to a question.  
 17 If you take a look at the legislative staff memo, the  
 18 staff wasn't confused. They didn't think this was a  
 19 campaign finance measure. Campaign finance doesn't  
 20 come up in the context here. As a matter of fact, they  
 21 specifically raise, under their substantive question  
 22 No. 4, whether or not this is an appropriate or  
 23 permissible way in which to have ballot measures to  
 24 interact with one another on the same ballot.  
 25 Obviously that's the case here.

22

24

1 They're more legislative, and I suppose we can argue  
 2 whether or not legislation is well considered or not,  
 3 but there's a lot of off-the-cuff activity in  
 4 legislative hearing. Whether this was off the cuff or  
 5 not, I suppose, is open to question; however, if you  
 6 take a look at the final draft of the measure as  
 7 submitted in the packet, Section 1 states,  
 8 "Article XVIII of the constitution is amended by" blah,  
 9 blah, blah, blah. That's how that always read.  
 10 That particular reference was never Article XXVIII.  
 11 The staff understood that.  
 12 So there was an inherent conflict where  
 13 the -- the introduction talks about Article XVIII and  
 14 then subsection 2 of Section 17 talks about  
 15 Article XXVIII. So I think that was pretty clear.  
 16 Nonetheless, there were two -- at least two times when  
 17 this issue came up. In the transcript that Mr. Gessler  
 18 provided you of the May 9 hearing, on page 4, there was  
 19 a summary of purposes, and there was a reference to  
 20 subsection 2 and Article XXVIII and I admitted that it  
 21 was my typo because the intention was that it would be  
 22 Article XVIII, and then I said, "Your memo accurately  
 23 reflects that typographical error, but that's something  
 24 we'd like to correct, obviously, since it would be  
 25 inherently contradictory. So I'm assuming that you

1 So they understood that this wasn't about  
 2 the issue, and, in fact, I think if you take a look at  
 3 the transcripts, you'll find no reference to  
 4 Article XXVIII at all other than that typographical  
 5 error. There was no consideration of the issue  
 6 raised.  
 7 Finally, these -- if you can't have give  
 8 and take and if you can't clarify internal  
 9 contradictions, you're necessarily limiting the ability  
 10 of proponents who don't have the benefit of having two  
 11 houses and two committee hearings and two floor  
 12 debates, to have a give and take that leads to  
 13 clarification, and that's what happened here.  
 14 MR. DOMENICO: Well, but, I mean, doesn't  
 15 1-40-105 actually provide for that kind of give and  
 16 take? But what it says is that if there's a  
 17 substantial amendment made to the petition that's not  
 18 in direct response to the comments, the way you have  
 19 that give and take is, then, to resubmit it to the  
 20 directors for comment, basically starting over.  
 21 And so, to me, I mean, there is something,  
 22 I think, to Mr. Gessler's point that the staff -- that  
 23 there's a reason for this process. I mean, part of it  
 24 is for the staff to be able to read it and provide  
 25 comments and questions based on what it says, and the



25

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1 hard part for us is we're sort of left guessing  
2 whether, if it had originally said XVIII rather than  
3 XXVIII, there would have been any different questions,  
4 and I don't know how we answer that question.

5 But I guess that sentence in 1-40-105(2),  
6 leaves me with two -- two questions only. One is, is  
7 this a substantial amendment. If it's not, then we can  
8 move on. And then the other question is, is the  
9 amendment in direct response to the comments? And,  
10 again, if -- if it is, we can move on, but if either of  
11 those -- well, I guess, if both of those apply -- if  
12 it's substantial and it's not in direct response, then  
13 doesn't the statute require it to be resubmitted to the  
14 directors? And so aren't those the two questions we  
15 should be focusing on, I guess?

16 MR. GRUESKIN: Absolutely, Mr. Domenico.  
17 Absolutely. And I would suggest to you it's not a  
18 substantial change because it parallels the  
19 introduction. It parallels the entire conversation,  
20 and it parallels the entire analysis provided to --  
21 provided by staff. And your second issue was whether  
22 it's a major change?

23 MR. DOMENICO: Well, the two issues, as I  
24 see it in there, are substantial amendment or in direct  
25 response.

1 get it before. They're not confused. There's no  
2 disadvantage to the public, and they can listen on the  
3 Internet, if they want to. If you partake in that  
4 process either in person or on the Internet, then you  
5 are part of -- or at least privy to the interchange  
6 about the measure. That's the idea. That kicks off  
7 the whole process.

8 And so I think both your questions are  
9 absolutely the right ones, Mr. Domenico. Both of them  
10 are answered, I think, fairly easily that the  
11 proponents acted within the statute by making the  
12 clarification that they did.

13 MR. HOBBS: It is curious to me that -- I  
14 mean, that there were not questions about this. I  
15 mean, and maybe this is -- doesn't lead anywhere, but  
16 given that the proposal before the review and comment  
17 stage was saying that the definition of labor  
18 organization prevails over anything else, any  
19 definition in Article XXVIII and knowing that that  
20 definition in this measure is basically saying labor  
21 organization means something other than a labor  
22 organization, I mean, that's a pretty dramatic effect  
23 on Article XXVIII.

24 MR. DOMENICO: Well, actually, I don't  
25 think labor organization is defined in Article XXVIII

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1 MR. GRUESKIN: In direct response. Right.  
2 And, frankly, if the proponents had come up with a  
3 definition of corporation or a definition of employer  
4 or a definition of something that was well outside the  
5 bounds and not addressed in the memo and not addressed  
6 in the give and take, then that would be appropriate,  
7 but in -- actually, last Friday, in the court's --  
8 Supreme Court's decision on No. 57, it specifically  
9 cited both the technical and the substantive questions  
10 as sufficient basis for making a change by proponents.

11 I think that both those questions are the  
12 right questions to ask. Both those questions are  
13 answered here. This is an unsubstantial change. It's  
14 a nonmaterial change except to the extent it  
15 clarifies -- I mean, think about the problem if it  
16 doesn't get clarified.

17 And, secondly, it's in direct response to  
18 issues raised by or comments made by the staff. I  
19 don't think that -- I mean, to use a litigation  
20 analogy, I don't think that you have to have a leading  
21 question in order for there -- for that to be a direct  
22 response. The whole purpose of these hearings is so  
23 that there can be some initial public airing of the  
24 matter. People can attend them and at that point, they  
25 get the memos, as Mr. Gessler points out. They don't

1 I was just looking at it. The term is used in there,  
2 but I -- I don't think there's actually a definition,  
3 unless I missed it.

4 MR. GESSLER: No. That's correct. There  
5 is no definition of labor organization.

6 MR. DOMENICO: Yes. So it's kind of odd  
7 either way whether it's referring to XVIII or XXVIII.  
8 It's kind of odd without -- it's sort of hard to figure  
9 out what's going on.

10 MR. HOBBS: I mean, even -- and that's a  
11 good point. I think the staff might have raised a  
12 question about even -- we note that there's no  
13 definition of labor organization in Article XXVIII.  
14 We're unclear as to your intention in saying that in  
15 Article XXVIII, labor organization means something  
16 other than labor organization, you know.

17 MR. DOMENICO: But there's also no  
18 definition in Article XVIII, so . . .

19 MR. HOBBS: Right.

20 MR. DOMENICO: Yet.

21 MR. HOBBS: And yet the -- I can sort of  
22 see -- even though I don't know why, right off, the  
23 staff didn't raise the question about the reference to  
24 Article XXVIII or of the impact on Article XXVIII, I  
25 can see that, you know, when a change is made so that

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1 instead of referring to Article XXVIII, subsection 2 of  
2 the proposal, it refers to Article XVIII, that there's  
3 actually less -- I'm not quite sure how to articulate  
4 this, less reason to comment on that.

5 And in that, there's no -- it's not quite  
6 semantical in that it's at least dealing -- it's the  
7 same problem in that there's no definition in  
8 Article XVIII, either, but I'm not sure that the staff  
9 would have any comments about the measure if it had  
10 simply referred to Article XVIII consistently.

11 MR. DOMENICO: Yeah. I mean, the problem  
12 is there's no -- really any hint in the memo or  
13 anywhere else that I've seen that the staff was asking  
14 questions based on it being Amendment -- or  
15 Article XXVIII, that that -- there's no hint that it  
16 was important to them that it referred to XXVIII, but  
17 that doesn't quite answer the question of whether it  
18 would have been important to them if it had said XVIII  
19 originally, that they would have asked different  
20 questions.

21 And so it still -- so the question is, to  
22 me, I don't actually think this is an indirect response  
23 to the comments from the directors. I think the  
24 example we sort of used, came up with together, that  
25 if -- if the question was -- if the question or comment

1 "labor organization."

2 MR. DOMENICO: Right, but --

3 MR. GESSLER: Not only is there no  
4 definition, but there's no usage. Article XXVIII does  
5 use the term extensively "labor organization" but does  
6 not contain the definition.

7 MR. DOMENICO: Right. I understand that.  
8 But -- and that's why it makes sense to me what you  
9 say, that it wouldn't be shocking and I actually don't  
10 necessarily think that as it was originally written  
11 the -- the intro necessarily conflicted with the text.  
12 You could put in the miscellaneous section of the  
13 constitution a definition that refers to another  
14 section, it seems to me, and so it -- it's not -- I  
15 don't quite agree that it's contradictory, as  
16 Mr. Grueskin said, inherently contradictory, but what  
17 it says is it'll prevail over any conflicting  
18 definition of labor organization in whichever article,  
19 and there's no definition in any article yet.

20 So, I mean, the question is, to me, not --  
21 I guess where I'm leaning is interpreting the statute,  
22 the use of "substantial amendment" not to mean an  
23 amendment that has some substantive effect on the law,  
24 because if it doesn't have a substantive effect, then  
25 it really is just a pure typo. It has to significantly

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1 was, do you really -- would you like to put your  
2 50 percent in written numbers rather than spelled out  
3 words and they said, Whoah, yes, and, in addition, what  
4 we really meant to say was 10 percent, that, to me, is  
5 an indirect response, and that -- that's sort of  
6 similar to what went on here; and at most, I mean, it  
7 was almost more that they just brought up a question  
8 having to do with the -- that part of the measure and  
9 Mr. Grueskin realized he'd made a typo.

10 On the other hand, the question of whether  
11 it's substantial is different to me, and it -- the  
12 language is substantial, not substantive, which I think  
13 makes a bit of a difference. I don't know if it should  
14 or not, but to me, I think it does. Sub -- I probably  
15 would agree that this -- this is substantive in the  
16 sense that it changes -- well, assuming that it --  
17 assuming that there is also another definition in XVIII  
18 eventually, that this would -- seeks to supersede, then  
19 that is a substantive change. If not, given that  
20 currently there's no definition of labor organization  
21 in either XVIII or XXVIII, I'm not sure it would be  
22 substantive anyway.

23 MR. GESSLER: May I just make one  
24 correction? It's not that there's a slight difference  
25 between XVIII and XXVIII. There's no usage in XVIII of

1 change what the law would do internally. It has to  
2 change the -- the amendment itself, the measure itself  
3 substantially, and this one -- I'm not sure it does  
4 that.

5 MR. HOBBS: And I -- I think that's a  
6 really good point. I -- I am looking at -- I mean,  
7 one -- the notes of the one case that I can find that  
8 may speak to this, a 1992 case In Re Limited Gaming,  
9 830 P.2d 963; and -- and in there, the court found that  
10 the measure as filed with the Secretary of State, and I  
11 think this is a quote, differs so substantially, the  
12 key word being "substantial," differs so substantially  
13 from the language submitted for review and comment that  
14 the revised version in effect constitutes a new  
15 proposal requiring resubmission for review and  
16 comment.

17 MR. GESSLER: May I ask the pin cite on  
18 that?

19 MR. HOBBS: 830 P.2d at 966 (sic).

20 MR. GESSLER: Thank you.

21 MR. HOBBS: If my notes are correct, and  
22 I'm not sure I have an accurate quote there, but -- but  
23 it seemed like that in that particular case, the court  
24 was emphasizing that there was a substantial -- not  
25 substantive, but substantial change to the measure,

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1 and -- and that it, in effect, constituted a new  
2 proposal.

3 Now, I don't know that that's to say that  
4 the court would not find a problem if something was a  
5 substantial change that didn't amount to effectively a  
6 new proposal. I mean, that's a pretty high standard to  
7 meet given the purpose of review and comment, that you  
8 could -- I wouldn't -- I wouldn't argue that this case  
9 means that as long as you don't rewrite the proposal  
10 you can make substantial changes and not submit it for  
11 review and comment, but -- but it does seem like it's  
12 not so much a question of substantive change but  
13 substantial change.

14 MR. DOMENICO: And I guess the difficulty  
15 is if, in fact -- I forget what this is in response to,  
16 but if it were already on the books, if Article XVIII  
17 already had a definition of labor organization in it  
18 and then this happened, someone came in, if -- and  
19 tried to do this, then I really would think that you're  
20 making a substantial change to what would happen,  
21 because Article XXVIII -- if you're just saying, Well,  
22 we're defining it for Article XXVIII, then you're not  
23 accomplishing the same thing. The difficulty is that  
24 the -- that's not on the books yet and so neither  
25 section has a change or has a definition that would be

1 said, how does this impact that definition, I think I  
2 would have more heartburn over the fact that the  
3 proponents would come and then change the section of  
4 the -- of the article of the constitution within which  
5 this provision is ultimately intended to be located  
6 than I do right now and may feel as though it were more  
7 of a substantial amendment than it is -- than it is,  
8 but the fact that the memo did not include any  
9 questions on that, at least for me, kind of proves up  
10 that it's not a substantial amendment.

11 Secondly, I do think -- even if it is,  
12 that it's in response to the comments, and I look at  
13 the question under Purposes, No. 3, "To state that the  
14 definition of 'labor organization' shall prevail over  
15 any conflicting definition of 'labor organization' in  
16 Article XXVIII of the Colorado constitution," that  
17 was -- that was asked and answered as indicated on  
18 page 4 of the transcript, and the fact that this  
19 particular question popped up under Purposes rather  
20 than the comments and questions portion of the memo,  
21 I'm not inclined to read comments that narrowly.

22 The second instance of question No. 4,  
23 under the Technical Questions, "On line 16, for proper  
24 citation format and to indicate that Article XXVIII is  
25 within the Colorado constitution, would the proponents

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1 superseded; and in that sense, the measure -- well, I  
2 mean, it -- I think this is a close call.

3 MR. HOBBS: Mr. Cartin?

4 MR. CARTIN: Thank you, Mr. Chair. I  
5 think that -- I think that Mr. Gessler has made a very  
6 interesting argument here. Here is kind of where I'm  
7 coming at this from. I -- I'm not going to -- I'm not  
8 sure we can speculate on why the staff did or did not  
9 include certain questions in the comment memo, but I  
10 think the fact that there weren't questions in the memo  
11 that tied into Article XXVIII indicate to me that this  
12 amendment isn't a substantial amendment. If there had  
13 been questions, for example, in the memo that said  
14 there's no -- the proponents have said this definition  
15 shall prevail over Article XXVIII of labor  
16 organization, there's no definition of labor  
17 organization, what do the proponents intend here, if  
18 there had been a question about Article -- about the  
19 definition of person in Article XXVIII which includes a  
20 labor organization -- for example, a question that  
21 said, this is intended to modify the definition of  
22 person, the political committee definition in  
23 Article XXVIII provides that all political committees  
24 establish finance, maintained or controlled by a single  
25 labor organization, if there had been a question that

1 consider adding 'OF THIS CONSTITUTION' after  
2 'ARTICLE XXVIII,'" that question was raised and  
3 responded to in the transcript by Mr. Grueskin, where  
4 he again pointed out the typographical error, and I'd  
5 point out that staff, in Question 3(a), under the  
6 Technical Questions says, "With regard to the headnote  
7 on line 6 of the proposed initiative: The proponents  
8 are adding a new section 17 to Article XVIII of the  
9 Colorado constitution." And so, to me -- rather than  
10 XXVIII, which synchs up with the amending clause  
11 language that was submitted with the original proposal.

12 So, to me, it's not a substantial change  
13 for those reasons. I -- that's a -- I hope I didn't --  
14 I think that's a very interesting argument, a very  
15 interesting question, but that's kind of where I'm at  
16 on it.

17 MR. GESSLER: May I -- may I --

18 MR. HOBBS: Go ahead.

19 MR. GESSLER: -- make a few responses?  
20 I'm looking at the case that Mr. Hobbs cited and  
21 specifically the language that he looked at, and  
22 there's a preceding sentence that says -- is truly  
23 controlling. It says, "However, the adoption of  
24 language in a subsequent draft of a proposal that  
25 substantially alters the intent and meaning of central

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1 features of the initial proposal presents a  
2 difficult" -- "different situation," and then it goes  
3 on to characterize it. It says, "In that circumstance,  
4 the revised document in effect constitutes an entirely  
5 different proposal from the one previously reviewed by  
6 the legislative office."

7 So it's -- the "entirely different  
8 proposal" is actually a characterization of the test  
9 that you use, and I think the test that should be used  
10 is, first of all, looking at the language. So I  
11 respectfully would disagree with Mr. Cartin's position  
12 that you don't -- you don't look at a contextual  
13 analysis of what staff may or may not have asked, and  
14 certainly I think everyone agrees that that's a  
15 somewhat speculative enterprise; but, more directly,  
16 that's not how you determine what's substantial and  
17 what's not; if they had asked a question, that  
18 indicates that it's substantial versus not asking a  
19 question.

20 I think really what the test is, is you  
21 look -- I mean, you look at the language, and you say  
22 does the language substantially alter the intent and  
23 meaning of one of the central features, and one of the  
24 central features here is -- in fact, there's only about  
25 three features, four features in the whole thing, and

1 just, you know, think about the problem if it doesn't  
2 get clarified.

3 Well, the problem is that it has a really  
4 substantially, substantively -- I don't think there's  
5 any real difference between those two words -- meaning  
6 because it affects Article XXVIII versus Article XVIII,  
7 and there's real consequences to that.

8 The second thing I'd point out, is it in  
9 direct response. Well, I mean, again, I guess I go  
10 back to the written language here. The review and  
11 comment memo has a section that says comments and  
12 questions. These are our comments, and these are our  
13 questions, and I understand we -- you know, I certainly  
14 have a disagreement, respectfully so, with Mr. Cartin  
15 as to the breadth of that, but to take that reasoning  
16 further, if someone says, well, is this what it means.  
17 no, this isn't what it means. Really, what it means is  
18 something radically different, and I can say, Well,  
19 that's now in response to a comment, and with respect  
20 to the technical question, Article XXVIII, where it  
21 says, would you -- and specifically the language says,  
22 "for proper citation format and to indicate that  
23 Article XXVIII is within the Colorado constitution,  
24 would the proponents consider adding 'OF THIS  
25 CONSTITUTION' after 'ARTICLE XXVIII.'" okay, and then

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1 one of the central features is dealing with overriding  
2 another section of the constitution.

3 So I think -- I think really the test is  
4 looking at the language and the technical versus the  
5 substantive questions. In the paragraph above, it  
6 says, "One purpose of the public meeting with the  
7 legislative offices as required by" -- the various  
8 sections -- "is to encourage linguistic refinement of  
9 drafts." So I think really a technical is a linguistic  
10 refinement. You know, maybe someone uses the term  
11 "alternative" instead of "alternate." That would be, I  
12 think, an appropriate technical change, you know, or --  
13 or adding a preposition where one should be used for  
14 proper idiomatic approach. So I think to look at  
15 substantial, you have to look at the intent and the  
16 meaning, whether it alters the intent or the meaning.

17 And I will submit to the board that, you  
18 know, certainly when I initially looked at that, I  
19 was -- you know, I contacted quite a few clients to  
20 explain to them what this thing would mean, because  
21 it -- it altered Article -- well, it defined the  
22 current -- the current term "labor organization" in  
23 Article XXVIII, which has far-reaching consequences,  
24 and I think, you know, a percentage suggested -- said,  
25 Well, if we don't have this clarification, you know,

1 he said -- and then Mr. Grueskin goes on. He says,  
2 "Well, as I earlier indicated, we'll make it  
3 Article XVIII," not Article XXVIII. That is not a  
4 direct response to the question.

5 There's a reason the word "direct" is in  
6 there, and that is to fairly respond to the question.  
7 The question here is, "would you consider adding 'OF  
8 THIS CONSTITUTION'" afterwards in order to indicate  
9 that we're talking about the Colorado constitution, in  
10 order to clarify. So, I mean, that was the question.  
11 So, I mean, there has to be a meaning to the word  
12 "direct." That's why the legislature used the word  
13 direct here. There has to be meaning to the term  
14 comment and question.

15 And when you title a memorandum, your  
16 consideration has gone into the comments and questions.  
17 I mean, the language -- terms in the same way, in the  
18 same format and the same structure should be given the  
19 same meaning, and when you have something entitled  
20 "Comment," you say, Well, that's not just the comment,  
21 there is stuff that's beyond that, then I think that  
22 really violates the plain meaning, and ultimately what  
23 we do here should, if at all possible -- and here it's  
24 very possible -- ground things in the plain language of  
25 the statutes and ground things -- ground our analysis

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1 in the plain language of the -- of the memorandum,  
2 itself.

3 I probably don't have much more to say, so  
4 I'll stop running at the mouth and --

5 MR. DOMENICO: Are you ready to discuss  
6 this issue?

7 MR. HOBBS: I think we -- yes. Let's go  
8 ahead and just discuss the issue. It's a close call.

9 MR. GRUESKIN: Mr. Hobbs, can I make one  
10 comment?

11 MR. HOBBS: Yes, Mr. Grueskin. Go ahead.

12 MR. GRUESKIN: I -- I think you're about  
13 to walk down a really dangerous path. I really do. I  
14 think you're trying to figure out whether or not, in a  
15 statute that's supposed to be liberally construed to  
16 encourage the right of initiative, whether or not  
17 comment means comment and question or whether it  
18 includes purpose. Whether or not -- I mean, in the 57  
19 decision, one of the technical questions that they  
20 cited as the basis for a substantive change that was  
21 made was whether or not the right verb tense was used,  
22 but the fact is the provision came up.

23 I think that you -- you have an  
24 extraordinarily weighty job because your work product  
25 projects to petition signers and voters the -- the

1 in arriving at the language that achieves their purpose  
2 and through benefiting from the services of  
3 professional drafters. The second is to inform the  
4 public about a measure.

5 Here, it sounds like the first purpose was  
6 achieved, the -- out of this, the proponents realized  
7 that they had a -- an error in an article that they  
8 were referring to. So I -- I don't see that there  
9 would be any value right off in returning this to  
10 proponents for resubmission, for review and comment. I  
11 can't quite see that there's a value -- and really to  
12 skip to both tests, I don't see right off that there's  
13 a value in the proponents returning for review and  
14 comment for -- for this particular change.

15 Now, I don't think that's a  
16 black-and-white question, but I -- but I agree that  
17 there is perhaps a need for us to liberally construe  
18 this, look at it in terms of substantial compliance,  
19 and try to avoid overly technical constructions that  
20 operate as artificial barriers to the initiative  
21 process.

22 MR. DOMENICO: The problem is, though,  
23 there's a statute that says we don't have jurisdiction  
24 to set a title if any substantial amendment is made  
25 that's not in direct response to a question unless it's

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1 issues that they get to decide. This isn't, frankly,  
2 of that ilk. I mean, the Supreme Court has been  
3 generous in its evaluation of what is and isn't a  
4 substantial comment made in response, and I just -- I  
5 think that you're walking down a path that you really  
6 don't want to walk down, because this isn't a statute  
7 that's supposed to be narrowly and tightly and strictly  
8 construed. You're supposed to be in a position to be  
9 able to say, Hum, close call, and I think every one of  
10 you has said that. Well, you know what? The court  
11 recently said, in a different case, the tie goes to the  
12 speaker; and in this instance, that speaker or speakers  
13 are the proponents of the initiative.

14 I'm not saying this isn't a legitimate  
15 avenue of inquiry, and I'm not saying that you don't  
16 have tough calls in this regard, but this to me doesn't  
17 seem to be one of them. My -- my comment.

18 MR. HOBBS: And I tend to agree. I think  
19 you've said it better -- you helped me, maybe, think  
20 through the way I was approaching this, is that I -- I  
21 think it is dangerous for us to take an overly  
22 technical and narrow view of this. I mean, I'm trying  
23 to step back and look at the purpose of review and  
24 comment, which someone may correct me, but basically,  
25 as I recall, the two purposes are to aid the proponents

1 resubmitted, and -- and so I don't think it's as easy  
2 as just saying, Well, construe it liberally and then  
3 that's -- that's close enough.

4 And, I mean, Mr. Cartin's comments  
5 actually made this harder for me in that I agree, if --  
6 if there had been a lot of questions about how this  
7 worked with Amendment (sic) XXVIII, then it would be  
8 pretty clear that -- that it should go back because the  
9 staff was focused on the wrong thing. The problem is  
10 it would be an easier question in favor of Mr. Grueskin  
11 if there had been any questions about -- that indicated  
12 that everyone had just been considering this to be  
13 Amendment XVIII -- or Article XVIII all along; and, in  
14 fact, the memo itself correctly characterized -- used  
15 the sections in the draft, and it wasn't a -- they used  
16 XXVIII when it was appropriate to use XXVIII, and  
17 there's no hint in there that they just read it as  
18 being XVIII.

19 And as Mr. Cartin's questions pointed out,  
20 it really could have a major -- if, in fact, the people  
21 voted into the constitution an amendment that said this  
22 definition shall prevail over any other definition of  
23 labor organization in Article XXVIII, as I think your  
24 questions pointed out, that might really change the  
25 law, the campaign finance law, and so that makes it

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1 harder for me.

2 On the other hand, I do think that the  
3 focus -- to the extent we have any guidance, the focus  
4 is generally internal to the measure, whether it  
5 significantly changes one of the purposes of the  
6 measure itself rather than it significantly changes  
7 something else; and in that sense, this little bit at  
8 the end about the definition prevailing over a  
9 conflicting definition -- which I have another problem  
10 with -- but it doesn't change the action part of this  
11 measure. What the measure is doing is dealing with  
12 what employers may or may not require.

13 And so in that sense, changing what it  
14 prevails over is not a substantial amendment to the  
15 measure itself, even though it would, I think, if it  
16 were in the original language, make a significant  
17 difference or potentially make a significant  
18 difference; and to the extent that makes sense, that  
19 puts me close enough to the fence to agree that while I  
20 don't think it would be -- it's an artificial barrier  
21 or it's dangerous to enforce the statute as it's  
22 written, I do think that -- that when you've got a word  
23 like "substantial amendment," combined with our  
24 instruction to construe the process liberally in favor  
25 of the right of initiative, I do think that substantial

1 that we go ahead to the other issues that Mr. Gessler  
2 has raised, and -- and if there's some support in the  
3 board for changing its prior action, then we consider  
4 at that point whether that boots out anything else that  
5 Mr. Gessler is raising. Is that okay?

6 (No response.)

7 MR. HOBBS: Okay. Mr. Grueskin, if you  
8 want to go on with your other objections.

9 MR. GESSLER: Thank you, Mr. Hobbs.

10 The next objection talks about the single  
11 subject issues, and I know there was a fair amount of  
12 discussion last time. I think what this -- this  
13 initiative does, and I'll talk about sort of the  
14 central features of the motion for rehearing first, and  
15 that is it -- it defines what a labor organization is  
16 not, and then it says what labor organizations -- that  
17 employers can't use labor organizations -- or  
18 participation in a labor organization as a condition  
19 for employment; but what it also does is it creates new  
20 rules for interpretation, and it creates not one but  
21 two new rules of interpretation.

22 The first rule of interpretation is that  
23 it says it will supersede or it will control over all  
24 other definitions within purportedly but certainly as  
25 this board has decided, Article XVIII of the Colorado

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1 should be read in such a way that it doesn't -- that in  
2 a close case like this, the tie goes to the petitioner  
3 or whomever we want to call it, so I think, on this  
4 one, I'm willing to go on.

5 MR. HOBBS: Let me just ask the board  
6 procedurally how you want to handle each of the  
7 objections. I mean, we -- we -- we can just wait. If  
8 there is a motion, we can take a motion if someone  
9 wants to offer a motion -- offer a motion for rehearing  
10 on this issue or we can just keep going on, I mean,  
11 and, you know, we -- and it sounds like no one will  
12 offer that motion. I mean, I don't think I would  
13 second it. I don't think I would make that motion.  
14 So, do you, Mr. Domenico?

15 MR. DOMENICO: No.

16 MR. CARTIN: No.

17 MR. HOBBS: Okay. So just procedurally  
18 I'm wondering if, you know, we -- if we come to one  
19 where someone wants to make a motion, we can. The  
20 question then will be what about the other grounds for  
21 the motion for rehearing, but maybe we can get to that  
22 when it comes up. I -- I just -- I raise that because  
23 I wonder, you know, what kind of record or -- or what  
24 state we want to leave this in if there's an appeal.

25 At this point, maybe I'll just suggest

1 constitution, so that's one rule of -- sort of a  
2 conflict of law rule or rule of interpretation.  
3 It's -- it's not limited, when -- the use of that word  
4 "all" is not limited to conditions of labor employment  
5 or conditions of employment. It says "all." It can be  
6 any provision, okay, any conflicting definition of  
7 labor organization in Article XXVIII, so I mean, you  
8 can have definitions of labor organization in  
9 Article XXVIII that purport to conflict with this one  
10 or ones that don't purport to conflict with this one.  
11 You can have definitions in Article XXVIII of labor  
12 organization that deal with --

13 MR. DOMENICO: XVIII, right?

14 MR. GESSLER: I'm sorry, XVIII. I've got  
15 XXVIII on the mind.

16 You can have definitions of labor  
17 organization in Article XVIII that -- that talk about  
18 conditions or related to conditions of labor employment  
19 or ones that aren't related to conditions of labor  
20 employment, so "any" is -- is a different approach and  
21 has rules of interpretation for this initiative versus  
22 another -- another provision within Article XVIII,  
23 whether or not it has anything to do with labor  
24 conditions.

25 MR. DOMENICO: But there aren't any now,

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1 right?

2 MR. GESSLER: That's correct.

3 MR. DOMENICO: There aren't any other  
4 definitions.

5 MR. GESSLER: So right now it's sort of a  
6 black hole, and I'd argue -- well, I think the court --  
7 you know, the -- you don't look at, you know, sort of  
8 the effects or consequences of it as much as looking at  
9 internally what it means. So conceivably there could  
10 never be anything else in Article XVIII or there could  
11 be a lot of different things in the future in  
12 Article XVIII because, again, the definition is -- or  
13 the topic of Article XVIII is miscellaneous.

14 MR. DOMENICO: But if somebody wanted to  
15 avoid that problem, if they wanted to amend the  
16 constitution in such a way to deal with labor  
17 organizations but didn't want to use this definition,  
18 couldn't they just stick it in a different article and  
19 then -- and then there would be no problem?

20 MR. GESSLER: Maybe. I don't know. I --  
21 I don't know, but that's a good question and I think  
22 sort of highlights the uncertainty of this.

23 The other point, and this is the one that  
24 the board discussed, is that it creates rules of  
25 interpretation regarding "any other provision adopted

1 inherently conflicting and diametrically opposite  
2 within the same initiative, then you can't have a  
3 single subject. That was their argument.

4 And the court said, no, they're not  
5 inherently conflicting within the same initiative. You  
6 can have something that says X and then a modification  
7 of X, and it's all part of the same subject, and I  
8 think that decision and that analysis, I think,  
9 essentially received unanimous agreement, by all seven  
10 justices.

11 That's not the case with this. That's not  
12 the case with No. 40 -- with No. 123. What No. 123  
13 says is here is X, this is what X does, and now, by the  
14 way, we're going to use this to overrule any other  
15 initiatives that are outside of this initiative. It's  
16 fundamentally different reasoning. Now, I recognize  
17 they're similar in the sense that -- well, I would at  
18 least characterize they're sneaky, okay? I mean,  
19 they're similar in that they take an existing  
20 initiative, they mimic the language of that, they  
21 create -- create an opposite definition of a critical  
22 part of a proposed amendment and create a conflict  
23 there, okay, so they both -- they both have that  
24 central feature.

25 But as far as the legal signals as to why

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1 at the 2008 election regardless of the number of votes  
2 received by this or any other amendment," and the  
3 proponents were forthright, and they said this is a  
4 preemptive strike against Amendment 47. I don't think  
5 they used the word "strike," but they did use the word  
6 "preemption," and, you know, that the intent is to  
7 override that, and I think this is clearly a second --  
8 second subject and certainly, if I remember correctly,  
9 Mr. Hobbs agreed with that position. I would like to  
10 directly address the recent case, Amendment No. --  
11 regarding Proposed Initiative No. 61, and I think  
12 Mr. Domenico had issues with that.

13 In this case, the reasoning for this case  
14 and the single subject is fundamentally different than  
15 the reasoning adopted by the court in Amendment -- I'll  
16 call it initiative -- Proposed Initiative No. 61, and  
17 that's why -- and I'm confident of that analysis, which  
18 is why I passed out the case, so people have -- so we  
19 all have the text in front of us. Well, what happened  
20 in that case is the petitioners or the objectors -- I  
21 think it was Corry -- basically said, Look,  
22 Initiative 61 does two things. In the first half of  
23 Initiative 61, it says X, and in the second half of  
24 Initiative 61, it says not X; and those are two  
25 inherently conflicting things and because they're so

1 one -- why No. 61 did not meet single subject, it's a  
2 much different argument than the one we're making here,  
3 and the one we're making here says, look, you can  
4 define labor organization how you want or how you not  
5 want because this really doesn't define labor  
6 organization. It defines what labor organization is  
7 not, okay, but you can't then go ahead and say this  
8 definition will prevail and change the current rules of  
9 interpretation for how -- how this conflicts with any  
10 other proposed initiative, including the number of  
11 votes received. That moves into a separate subject.  
12 That's not connected to whether you call it the  
13 definition of a labor organization or the -- the  
14 conditions of employment. It's not connected with  
15 that. It's instead a completely different subject.

16 Now, as Mr. Grueskin has pointed out, the  
17 court has said you can write an initiative like that,  
18 and he frankly admitted that that was before the single  
19 subject rules, so, yeah, you can write -- you may be  
20 able to write that, but it's still a second subject,  
21 and that's exactly what's happening here.

22 So -- so there's really two different  
23 subjects that I'm talking about, one that I didn't go  
24 into as much detail, the change of "any," any provision  
25 in Article XVIII, whether or not it has to do with



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1 labor -- conditions of labor employment or not, it's  
2 broad-sweeping in its scope. Second is the rules of --  
3 the rules of sort of conflict resolution with respect  
4 to initiatives that fundamentally change statute and  
5 current Supreme Court rulings on how you de-conflict --  
6 assuming there's a conflict, how you de-conflict those  
7 initiatives, so -- so those are specifically different  
8 subjects.

9 I'm happy to address questions before I go  
10 on on that particular point.

11 MR. HOBBS: Let me ask you, Mr. Gessler.  
12 I -- I mean, I do have -- still have some issues about  
13 this measure's compliance with the single subject  
14 requirement, but -- but I'm mostly concerned right now  
15 about the impact of the court's decision in No. 61, so  
16 I appreciate you bringing that up.

17 Putting aside the details of how this  
18 measure is drafted, couldn't you say that this measure  
19 really is a lot like No. 61 in that if you step back  
20 and look at it, what it is saying is that employers  
21 can't require membership in any organization as a  
22 condition of employment, but there's an exception, and  
23 the exception being employers can require membership in  
24 a labor organization. I mean, to me, that's kind of  
25 what this is saying. It's sort of like 61. There's a

1 basically said, okay, here is the definition of  
2 affirmative action, and it sort of says with this  
3 exception that basically nullifies the rule, okay? And  
4 I think what the court -- and I don't know what the  
5 court said, but I think one way to interpret the  
6 court's opinion is to basically say, look, I mean,  
7 you've got two inherently conflicting definitions of  
8 affirmative action, and it's up to the people to decide  
9 which one they want, okay? That's what they're doing.  
10 That's what the political battle is all about, okay.

11 And the court unfortunately, in my view,  
12 but nonetheless rejected any confusion issues that --  
13 that were raised, those confusion arguments, so the  
14 court said go fight it out. This is a little bit  
15 different. This -- this initiative isn't just fight it  
16 out. This initiative is if you fight it out, we're  
17 going to win if we pass. It doesn't matter what you do  
18 on the other one, we're automatically going to win,  
19 based on sort of the end purpose here, and the way it's  
20 resolved. It changes sort of the way -- the rules of  
21 interpretation and how to resolve conflicts between  
22 initiatives. So -- so that's, I think, fundamentally  
23 different than No. 61.

24 And then also ultimately in 61, I mean,  
25 you really sort of have to -- have to recognize that 61

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1 general prohibition against discrimination, the  
2 statement of a general principle. Again, that's not  
3 the way it's drafted, but that's the way I'm  
4 interpreting it, is that there's a statement of general  
5 principle. An employer shouldn't require their  
6 employees to belong to certain -- to organizations of  
7 any type, and then it makes an exception for labor  
8 organizations, unions, and that's like No. 61. There's  
9 a prohibition against discrimination and then basically  
10 saying, well, there are some forms of what some people  
11 might consider preferential treatment or discrimination  
12 that -- that will be allowed. It's -- again, it's the  
13 same -- it's an exception to the general rule, and  
14 couldn't I -- couldn't I look at this one as very  
15 similar to No. 61?

16 MR. GESSLER: That aspect of it, I think,  
17 you could. I mean, they're both poison pills. They're  
18 both poison pill initiatives, as I characterize them.  
19 But I think you have to -- with respect to the effect  
20 of what it does, I mean, yeah, I think they're similar  
21 in the sense they're both poison pills, but they're  
22 dissimilar if you look at the analysis that the  
23 local -- that the court employed in 61 versus the rules  
24 of resolution in this particular instance.

25 No. 61 -- I'm sorry. Yes, No. 61

1 is, I mean, limited to that particular fact situation,  
2 as well, in the sense that it said -- let me just pull  
3 up the exact language here. The court says -- if I  
4 can -- just one moment, please.

5 It says here, and this will be my next  
6 subject. Under headnote 4 on page 6, it says, "Nothing  
7 in the second sentence of the initiative constitutes a  
8 second subject. Instead" -- here is the operative  
9 language -- "the initiative affects one general purpose  
10 and thus contains a single subject," and the purpose  
11 had to do with affirmative action and how you -- and  
12 how you define that. Here is the -- here is the  
13 difference in this one. In this one, it says "an  
14 employer shall not require as a condition of employment  
15 that an employee join or pay dues or assessments or  
16 other charges to or for a labor organization," and then  
17 rather than defining what a labor organization is, it  
18 defines what a labor organization is not. It's not --  
19 it says it's not this, it's not that, it's not another  
20 thing.

21 So rather than being connected, it's  
22 purposely disconnected. Rather than being dependent  
23 upon, it's purposely independent from, and so that's  
24 a -- a further violation of the single subject. It is  
25 a -- that also differs from 61.



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1 I see Mr. Domenico sometimes squinting in  
2 a skeptical fashion, so I'm happy to answer any  
3 questions about that, but I don't think I need to  
4 belabor any points.

5 MR. DOMENICO: No, that part of your  
6 argument I'm struggling to understand. I -- the part  
7 of your argument that I -- that I brought up last time,  
8 and I'm still really struggling with, is the provision  
9 that attempts to override the rules of construction for  
10 initiatives. That part has nothing to -- 61 had  
11 nothing to say about that. I mean, I -- I think the  
12 court's decision in 61 basically authorizes people to  
13 engage in -- in this sort of deceptive, confusing,  
14 tricky way of writing initiatives and leave it up to  
15 the political process to point that out.

16 And so given 61, the fact that it took me  
17 about ten readings and sort of a flow chart to  
18 understand what was going on in here, is irrelevant,  
19 but I agree with you. 61 says nothing about this  
20 attempt not only to change the law of -- or preempt  
21 another initiative about union dues, but it attempts to  
22 change the substantive law of constructive -- of how  
23 the court is to interpret and apply initiatives, and 61  
24 doesn't say anything about that, and that's the only  
25 aspect of this single subject argument that still

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1 troubles me at all, and it -- but it troubles me quite  
2 a bit, and I wonder if you have any -- any authority  
3 for the idea that this kind of change of a rule of  
4 interpretation can't be coupled with a -- the  
5 substantive measure.

6 MR. GESSLER: Certainly Proposed  
7 Initiative 55. I'm just kidding on that.

8 I think that there -- there is not much  
9 authority along those lines, and I know Mr. Grueskin  
10 used the -- the example, well, this is just sort of  
11 like the date of implementation. It's just like the  
12 date of implementation, it's no different than that;  
13 but I think it's much different than that, and I think  
14 the strongest argument there is, you know, there's a  
15 body of case law and specific statutory statements that  
16 are outside of labor conditions, that are outside of  
17 Article XVIII that basically say, look, this is how we  
18 interpret the will of the people: If there is two  
19 conflicting provisions, we interpret it as the one that  
20 gets the most votes, based on sort of the democratic  
21 process, and that's the way the initiative should work.  
22 That's an important thing.

23 And to rejigger those rules when those  
24 rules -- when that rejiggering is not necessary to  
25 determine what's a labor organization, it's not

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1 necessary to determine what's a condition -- a  
2 condition of labor employment, it's not connected to  
3 that, and it's done for admittedly the straight-up  
4 purpose, I mean -- and the proponents admit it. The  
5 purpose is to preempt No. 47, okay, or preempt any  
6 other one that comes up dealing with that. It's the  
7 preemption that is certainly -- it's a much, much  
8 different beast that we're talking about here as  
9 compared to labor conditions, and it's self-consciously  
10 trying to short-circuit the democratic rules of  
11 interpretation on this.

12 So I -- I mean, I'll frankly admit that I  
13 think that's our strongest single subject argument, but  
14 I also think, in this instance it's -- it is a winner  
15 because it is a -- it's a serious problem, and the  
16 reason why I spent so much time on 61 is I thought you  
17 had been persuaded that 61 controlled in this  
18 instance -- or someone did. I think Mr. Domenico, but  
19 I may be mistaken.

20 MR. DOMENICO: No.

21 MR. GESSLER: But, I mean, that's why I  
22 provided the transcripts.

23 MR. DOMENICO: I think it controls but on  
24 the other side. Mr. Hobbs was --

25 MR. HOBBS: Yeah, that's right

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1 MR. GESSLER: So, anyway, that's -- that's  
2 the best I can answer that question.

3 MR. HOBBS: Mr. Cartin? Is that -- or,  
4 Mr. Domenico, are you -- do you want to pursue that?

5 MR. DOMENICO: Well, I don't have any more  
6 questions. I -- I -- and I don't know if Mr. Grueskin  
7 has anything to add to what he said last time. I --  
8 this is one I probably am going to offer a motion on.  
9 I mean, I don't know if you want to discuss it or if  
10 Mr. Grueskin wants to --

11 MR. HOBBS: Well, I think Mr. Cartin has a  
12 couple of questions of Mr. Gessler.

13 MR. GESSLER: Oh, certainly. I'm sorry.

14 MR. CARTIN: Mr. Gessler, I want to focus  
15 on your argument that this -- that it -- kind of this  
16 preemptive clause is a separate subject and just ask a  
17 couple questions, one or more of which may be loaded.

18 But the first clause of subsection 2 says,  
19 as used solely in this article and notwithstanding any  
20 other provision of the law. Would you agree that the  
21 clause "notwithstanding any other provision of the  
22 law," is one that's commonly found in a variety of  
23 statutes, if not perhaps -- and I don't know about the  
24 constitution. "Notwithstanding any provision of  
25 law" -- "notwithstanding any other provision of law."

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1 Have you sometimes seen that in other statutes?

2 MR. GESSLER: I think I have. Normally  
3 what I see -- and I'm not trying to weasel out of your  
4 assumptions here, but normally I think what I've seen  
5 is "notwithstanding any other provision within this  
6 subsection" or "notwithstanding any provision within  
7 this title," where it's very limited along those lines  
8 for -- for those, but I'm sure I'm going to simply  
9 assume that I've seen something similar to that.

10 MR. CARTIN: Well, is it your argument  
11 that if -- if the second sentence of subsection 2 was  
12 not in the measure, that would -- that would alleviate  
13 your -- that would address, directly address your  
14 single subject argument or would remove the argument  
15 that you are making that the measure does not contain a  
16 single subject?

17 MR. GESSLER: Yes.

18 MR. DOMENICO: Yes.

19 MR. CARTIN: Doesn't the "notwithstanding  
20 any other provision of the law" clause really have the  
21 same -- here is my lawyer question, okay? Doesn't it  
22 really have the same effect as the second sentence?

23 From purely a textual standpoint or a drafting  
24 standpoint, can the argument be made that -- that "this  
25 definition shall prevail over any conflicting

1 specific governs over the more general or the more  
2 recent governs over the older one. I mean, you have  
3 those rules of interpretation that are external,  
4 external to the language and the intent of the  
5 initiative itself or the measure itself.

6 So it's an external rule of interpretation  
7 and what the court, I believe, said in those  
8 conflicting initiatives is, look, those are  
9 irreconcilably conflicting. One says functionally  
10 notwithstanding the other one. We don't care what the  
11 other one says, we control. So they were conflicting  
12 with one another, so the court said let us go outside  
13 of the language, let us go outside of the amendment to  
14 come up with rules of interpretation to determine how  
15 we're going to resolve this conflict.

16 So the reason I say no is because -- and I  
17 don't have the language of Amendment 47 in front of me,  
18 okay, but I'm assuming that Amendment 47 purports to be  
19 comprehensive and controlling, okay? And so what  
20 happens is you've got an irreconcilable conflict or at  
21 least this anticipates that you're going to have an  
22 irreconcilable conflict by its -- by its  
23 interpretation.

24 And the -- and the critical issue, and I  
25 think the one that I'm really focusing on for purposes

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1 definition of labor organization," et cetera, given the  
2 language "notwithstanding any other provision of the  
3 law" is -- this is legalese kind of a belt with the  
4 suspenders for this particular provision? It's  
5 surplus? It's more or less the clarification.

6 If that -- if the second sentence wasn't  
7 included in 123 and both 47 -- now 47, right? -- and  
8 123 passed, wouldn't the "notwithstanding any other  
9 provision of the law" language make this definition --  
10 this definition of labor organization the -- the  
11 superseding definition?

12 MR. GESSLER: No. And my point goes back  
13 to the ballot initiative that implemented Gilco  
14 versus -- I believe it was the TABOR provision at that  
15 time, and you had two -- two initiatives that  
16 internally basically said notwithstanding anything else  
17 out there, this is what must happen; and they were  
18 directly conflicting with one another, so they were  
19 internally consistent, used in a way which is commonly  
20 used; and -- and in instances like that, you know,  
21 where you see "notwithstanding any other provision of  
22 the law" and maybe you have another section that says  
23 notwithstanding -- you know, sort of two sections  
24 pointing to each other, notwithstanding each section,  
25 you know, what a court will say is, well, the more

1 of this argument, is the last phrase of the last  
2 sentence, "regardless of the number of votes received  
3 by this or any other such amendment," because you could  
4 include language "including any provision adopted in  
5 the 2008 general election," and that is meaningless  
6 under the court -- current court rules and the  
7 statutory interpretation. That's meaningless if the  
8 other one says the same thing and gets more votes.

9 It's tough. We've got a separate matter  
10 in which we interpret these rules, so -- so I accept a  
11 few of your premises, but I do not accept the logic  
12 because I think there are -- are other controlling  
13 factors outside of that that have to be considered.

14 MR. DOMENICO: Can I ask a question that's  
15 sort of a follow-up or related to that? I don't have  
16 47 in front of me, but it's occurred to me -- and I  
17 probably should have looked at it more carefully. Is  
18 it possible -- would it be possible to apply both of  
19 these in the sense that, as you've pointed out what  
20 this measure does, what 123 does, it says an employer  
21 can't require you to pay dues to these things that we  
22 define as a labor organization, and then effectively 47  
23 sort of says you can be required to pay dues to any of  
24 these organizations, labor unions.

25 Why can't you apply both of those in

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1 the -- and basically, then, nobody has to pay anything  
2 to any organization that either fits within 123's  
3 definition or 47's definition?

4 MR. GESSLER: I guess my response to that  
5 is perhaps, perhaps not. I think the inquiry, though,  
6 is irrelevant, with all due respect, and the reason why  
7 is you don't go to the effects of this language, you  
8 don't -- the effects of this language and you don't  
9 compare it to the effects of another one and sort of  
10 engage in that type of analysis to determine whether or  
11 not there's a single subject. You look at the language  
12 of the initiative itself without going beyond that to  
13 see how it affects or interplays with other -- and,  
14 truthfully, Amendment 47 is still contingent. We don't  
15 know if it's -- if there's a challenge against it now.  
16 We don't even know if it'll ultimately pass.

17 So, I mean, that's sort of a speculative  
18 inquiry, and I think you sort of have to stay within  
19 the language in front of you here, so I will -- if  
20 pressed, I'm happy to take up the invitation to sort of  
21 engage in that analysis, but at this point, I would  
22 argue that it's not necessary.

23 MR. DOMENICO: No. That's fine.

24 MR. HOBBS: If there aren't any other  
25 questions, perhaps we could hear from Mr. Grueskin.

1 be a condition for union membership in order to go to  
2 work for a particular employer.

3 I say we were -- we were too candid or too  
4 explicit because we didn't rely just on the  
5 "notwithstanding" language. It would have had that  
6 legal effect, but we specifically put in there both the  
7 language that is the source of this particular  
8 contingent. the fact that it was a -- it was a triple  
9 scoop, if you will, because we used "notwithstanding,"  
10 we used the reference to any other measure at this --  
11 adopted at this election, and at least as to 123, we  
12 also put in "regardless of votes cast."

13 Now, there is no way the voters won't know  
14 the impact of their vote. Had we only used  
15 "notwithstanding," my guess is they might not have  
16 known, but I think, in any event, it's a -- it becomes  
17 a nonissue, and it becomes a nonissue for this reason:  
18 The courts presume that the voters know the law that  
19 they're amending. Therefore, to the extent that we put  
20 this on the table as a condition of this qualification  
21 on -- on conditions of employment, in essence, there is  
22 nothing deceptive, there's nothing misleading. There's  
23 frankly been perfect, repetitive candor for the voters.  
24 There's no question that they'll know what they're  
25 voting on.

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1 MR. GRUESKIN: You know, it's a rare day  
2 when I'm criticized for being too candid and too  
3 deceptive, and so I'm having a little bit of a problem  
4 knowing exactly what my identity is, but I think  
5 actually, I'll -- I'll veer with the -- towards the too  
6 candid side because, if anything, the point raised by  
7 Mr. Cartin is exactly right. You have  
8 "notwithstanding" language in one measure. You don't  
9 have "notwithstanding" language in the other. The  
10 courts are going to interpret them so that, to the  
11 extent they can, they give effect to both; and,  
12 frankly, with notwithstanding -- notwithstanding --  
13 notwithstanding the notwithstanding language.  
14 Notwithstanding the characterization that this is  
15 deceptive, one of the original concerns about 47 is  
16 that it has language that says that the organizations  
17 affected either conduct certain types of labor,  
18 traditional labor management related activities or any  
19 other mutual aid society for employees.

20 The whole point was, at some point, the  
21 proponents of 47 were right. You ought not be able to  
22 require membership in certain organizations as a  
23 condition of employment, and 123 leaves that part of 47  
24 standing. What it doesn't do is negate the history of  
25 labor management relations such that it wouldn't also

1 They may or may not accept it. They may  
2 or may not like it, but that doesn't mean that they  
3 don't know what they're voting on. If they know what  
4 they're voting on, then it's not a single subject  
5 issue. If the issue is can you amend this procedure as  
6 well as, under subsection 1, impose a restriction on --  
7 on conditions of employment, remember, this is a  
8 condition that's directly related to this measure.  
9 This isn't, with all appropriate deference, a Doug  
10 Bruce measure where the intent is to change all  
11 procedures relating to all types of ballot measures,  
12 not just this one, as well as obtain a certain  
13 substantive change. So I think that's probably not the  
14 real issue.

15 If the concern is that this is deceptive  
16 because people won't really understand what it means  
17 for one measure to prevail over another, well, the  
18 court's already addressed that. The court said it's  
19 not misleading. If it's not misleading, I don't see  
20 how it can be deceptive.

21 We had the benefit of a conversation at  
22 the hearing two weeks ago, so I'm not inclined to do  
23 anything other than answer your questions, if you have  
24 them.

25 MR. HOBBS: Mr. Domenico?

1 MR. DOMENICO: I want to make clear, I  
 2 don't think that this part of it that we've been  
 3 discussing is deceptive or confusing at all. The part  
 4 that I find confusing and deceptive is -- is the  
 5 beginning, how you define a labor organization as  
 6 essentially the opposite, everything other than what  
 7 people think of as a labor organization, which is what  
 8 Mr. Hobbs' issue was last time. I think 61, for better  
 9 or worse, says we can reject it because of that, so I  
 10 don't have a problem on this point with deceptiveness,  
 11 although I should say, while I have such an influential  
 12 group of people here, that I would beg anyone dealing  
 13 with legislation to never use the word  
 14 "notwithstanding." It's inherently ambiguous and  
 15 confusing, and so that's my little request of all these  
 16 influential people today.

17 The problem -- the single subject issue I  
 18 see, though, is that this measure does one thing. It  
 19 says which sorts of organizations you may or may not be  
 20 permitted to require employees pay dues to. That's  
 21 fine, but then it also changes the law of how measures  
 22 are interpreted, and I don't think that's the same as  
 23 simply saying, well, this -- notwithstanding any other  
 24 provision. This affects -- giving -- if a court were  
 25 to give effect to that language, it would change this

1 measure and the competing measure, and it could be --  
 2 there are a number of rules of interpretation that are  
 3 in the statute. I don't think this one's in the  
 4 statute anywhere. I think it's just case law, but  
 5 that, to me, I don't think matters that you're changing  
 6 the substantive rules of interpretation, and it sort of  
 7 troubles me. I'm not entirely sure it's a single  
 8 subject issue, but it -- I don't see how a court could  
 9 actually give effect to that partly because if it did,  
 10 then every measure in the future will have this and  
 11 you'll just have a feedback loop in a hall of mirrors  
 12 where every provision says it -- it applies regardless  
 13 of the number of votes.

14 I don't see how you could say, well -- I  
 15 mean, what would be the difference from this and one  
 16 that said, oh, and this measure shall go into effect if  
 17 it gets 35 percent of the vote? How is that any  
 18 different than this?

19 MR. GRUESKIN: I suppose that since both  
 20 sides get 35 percent of the vote, you inherently have a  
 21 problem with that.

22 MR. DOMENICO: No. I mean just say there  
 23 were no competing measure but someone said, well, we  
 24 want our measure to go into effect. We don't want to  
 25 have to do what you normally have to do to win the

1 political battle on this issue, and so say these --  
 2 someone came in with their -- it doesn't matter, no  
 3 competing -- no competing measure and they just added a  
 4 provision at the end that said, Notwithstanding any  
 5 other provision of the constitution, this shall go into  
 6 effect if it gets at least 35 percent of the vote?

7 MR. GRUESKIN: Here is the difference.  
 8 What No. 123 does, it doesn't fundamentally change  
 9 the nature of democracy. This rule of interpretation  
 10 that we're -- we seem wedded to is frankly one that if  
 11 we hadn't put this second sentence in there, I ask you  
 12 whether or not voters go to the polls knowing that the  
 13 courts will try to evaluate measures to figure out  
 14 whether there's a conflict and where there's a  
 15 conflict, they'll interpret it one way, where there's  
 16 not a conflict, there is -- they'll interpret it  
 17 another way. Having a measure that gets a third of the  
 18 vote become law is a fundamental change to Article V,  
 19 section 1, and the right of voters to determine,  
 20 through a majority, the way their government is  
 21 structured, and I would suggest to you that there is an  
 22 essential and pretty critical difference between the  
 23 two.

24 MR. DOMENICO: But, I mean, it would --  
 25 it's not -- I'm not saying that you're saying that --

1 that the measure says like he compared it to changing  
 2 forever for any measure.

3 MR. GRUESKIN: Yes, but the way democracy  
 4 works is the presumption of all voters is something  
 5 that -- something that is to have at least a majority  
 6 of support.

7 MR. DOMENICO: I understand that. I  
 8 understand that, but the way our -- the Supreme Court  
 9 has said the way our -- our initiative, our direct  
 10 democracy works, at least, is when there are  
 11 conflicting initiatives that pass at the same time, the  
 12 court has to choose one, and the best way to do that is  
 13 to pick the one that gets the most votes. I mean, what  
 14 if -- I don't -- the -- say it wasn't 35. Say it was  
 15 48 or 55. Say they wanted to say, well, this only goes  
 16 into effect if it really gets a lot of support of the  
 17 people, for whatever reason. I mean, I don't know that  
 18 that fundamentally changes democracy, but it doesn't  
 19 seem any different than saying what law -- I mean,  
 20 democracy has rules about what laws go into effect,  
 21 what has to happen for a law to go into effect, I mean,  
 22 so I'm not sure I see the difference between saying  
 23 35 percent and -- which is the rule in certain cases  
 24 and the rule in other cases now is if there are  
 25 conflicting provisions, the one that gets more votes.

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1 That's the fundamental rule of what it is, what you  
2 have to do to change certain laws, and you're not only  
3 trying to change the law but change that aspect of how  
4 laws are put in place.

5 MR. GRUESKIN: Yes, but we're not trying  
6 to change the fundamental thing that Amendment 47 does  
7 because of subsection 1. If we had only included a  
8 definition, then I think you could make your argument,  
9 but the point is, is that the starting presumption that  
10 you can change the imposition of conditions of  
11 employment is the common boundary between the two  
12 measures. The question is what conditions can you  
13 change and, frankly, the ability of voters to say, "You  
14 know, what? This language is simply, you know -- I  
15 don't mind changing the conditions as to all these  
16 amorphous mutual aid societies. And I don't really  
17 like the question of unions which have obviously a  
18 different effect." How is that not multiple subjects?

19 My point is what we've been able to do in  
20 this measure is to be able to parse that out; and as to  
21 the procedural issue of which one takes effect, it  
22 seems to me that that's, A, part of the political  
23 debate; B, it's part of your title; and, C, it's part  
24 of the political discussion.

25 MR. DOMENICO: But you just said that the

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1 rules about what law takes effect, what you have to do  
2 to -- to get a law in -- into the books is the  
3 fundamental question of democracy. The current rule is  
4 if -- if this sentence weren't in there and this  
5 measure got 51 percent and 47 got 60 percent, the --  
6 and they conflict, then the rule is that this measure  
7 wouldn't have any effect, that it wouldn't have done  
8 what has to be done in order to become law under our  
9 democratic system. That's not just procedural. That's  
10 a fund -- as you said, that's a fundamental point of  
11 democracy, and that's where -- I mean -- I mean, say a  
12 measure said -- tried to suspend for the -- for itself  
13 the single subject rule. How is that different than  
14 this? That's not really a fundamental part of  
15 democracy, it's more of just kind of a protection or  
16 more like a rule of interpretation, I guess.

17 MR. GRUESKIN: Because that's a  
18 pre-election issue. You can't suspend a part of the  
19 constitution, a part of the constitution that hasn't  
20 been amended yet that applies to that second part of  
21 the constitution.

22 MR. DOMENICO: But, I mean, that's what  
23 I'm saying.

24 MR. GRUESKIN: Find me a part of the  
25 constitution that limits our ability to do this. The

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1 General Assembly has -- actually, there is a statute.  
2 The General Assembly has embodied that in order to ease  
3 the matter of interpretation.

4 MR. DOMENICO: The Supreme Court has said  
5 that you can't put into effect a law, that if you pass  
6 a law that conflicts with another one that's passed in  
7 an initiative at the same time, that the one that gets  
8 more votes prevails. That's the existing law in  
9 Colorado, right?

10 MR. GRUESKIN: That is the existing law.

11 MR. DOMENICO: So you're trying to change  
12 that law, and you're also trying to change --

13 MR. GRUESKIN: Only in the context of this  
14 law.

15 MR. DOMENICO: Right.

16 MR. GRUESKIN: Right. Remember, only in  
17 the context of this law.

18 MR. DOMENICO: Right. My hypothetical  
19 would only be in the context of that law.

20 MR. GRUESKIN: Look, it's probably time  
21 for us to get off the head of this pin. You got a vote  
22 to make. I understand that. I don't know that this  
23 conversation is really advancing anything. I'm happy  
24 to continue to have it, but either fundamentally you  
25 see the restriction that it's limited to this law and

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1 that people in your ballot title will be apprised of  
2 that or not, but I don't -- I -- you know, with all due  
3 deference, I'm not trying to cut short this  
4 conversation particularly, but I don't know that I'm  
5 adding anything to your understanding or appreciation  
6 of the measure, and you're simply not -- and you're  
7 obviously not changing my mind, so I don't know that  
8 it's really productive for us to continue to dance this  
9 dance.

10 MR. DOMENICO: Fair enough.

11 MR. HOBBS: Further questions for  
12 Mr. Grueskin?

13 Mr. Gessler, do you have any -- before I  
14 turn to board discussion on the single subject issue,  
15 do you have anything else on the single subject?

16 MR. GESSLER: No, I don't.

17 MR. HOBBS: Okay. Well, discussion by the  
18 board, then.

19 I am inclined, still, to believe that the  
20 measure violates the single subject rule. I -- I think  
21 it's a really close call. I can -- in my own mind, I  
22 can articulate it either way. I'm -- I'm actually not  
23 troubled by the part of 123 -- 123 that -- that changes  
24 the -- for purposes of just this proposal, changes the  
25 statutory provision about when there's a conflict, the

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1 measure with the most votes prevails. It -- from a  
2 single subject point of view, I think that's in  
3 furtherance of the purpose of the measure, so I -- I  
4 personally don't see a single subject problem with  
5 that.

6 And I think I would not see a single  
7 subject problem if all it did was trump Amendment 47.  
8 And regardless of how it's drafted, I mean, it could be  
9 argued that it's surreptitious the way -- the way it  
10 trumps or attempts to trump Amendment 47 by defining  
11 labor organization to be anything other than a labor  
12 organization; but, again, if that's all it did, that's  
13 to me still a single subject, and there's nothing -- as  
14 we were discussing yesterday, I think there's no  
15 prohibition against surreptitious drafting, if that's  
16 what this is. It would still be a single subject.

17 Where my difficulty comes in is that the  
18 measure goes on to prohibit providers from requiring  
19 participation in other organizations other than the  
20 Amendment 47 organizations, and the question is, is --  
21 is that -- in my mind, the question is, is that a  
22 separate subject. You know, I think it probably is.  
23 I -- again, I can argue it the other way, that it is  
24 all -- the measure is about the subject of, I think, as  
25 we expressed in the title, participation in certain

1 it more like No. 61? And I'm leaning towards believing  
2 it's more like Public Rights in Waters, that, yes, we  
3 can define a broad enough subject for conditions of  
4 employments to cover anything in the measure, but the  
5 measure really deals with two things that I don't see  
6 that are particularly well connected. One is whether  
7 Amendment 47 will prohibit employers from requiring  
8 union membership or participation, the other being  
9 other types of organizations.

10 And I -- those other types of  
11 organizations are just so broad and so unrelated to  
12 union membership that that's why I wonder if that's a  
13 separate subject. I think even, you know, we've talked  
14 about credit unions, get well funds, professional  
15 organizations. I'm guessing that the judicial  
16 department could not require judges to be members of  
17 the Bar Association or attorneys who work for the  
18 judicial department to be members of the Bar  
19 Association, because I don't think those are labor  
20 organizations but -- but that the Bar Association is a  
21 labor organization.

22 That all seems quite distinct from the  
23 question of whether employers could require  
24 participation in a labor organization, and -- and in  
25 wrestling with whether or not that's a separate subject

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1 organizations as a condition of employment. and -- and  
2 it may very well be that a group of proponents can say  
3 that this is a public policy area that -- that they  
4 want to speak to, maybe because Amendment 41 raised the  
5 issue, and the way they want to speak to this issue is  
6 to say that there are some situations where employers  
7 should not require employees to be participants in  
8 certain organizations and other cases where employers  
9 could. That's permissible. And looked at from that  
10 point of view, maybe this is all one subject.

11 It -- it is troubling to me in trying  
12 figure out if the labor union side of this and the  
13 non-labor union side that are two separate subjects.  
14 that -- that they really -- or it seemed like they  
15 really are two inherently different types of  
16 situations, and this -- this really kind of goes to the  
17 heart of where I'm struggling with it. It's -- if this  
18 really were about the public policy issue of  
19 participation in organizations and the ability of  
20 employers to require it, that steers me towards  
21 defining single subject requirements, but I'm really  
22 having trouble accepting that. That sounds more like  
23 Public Rights in Waters.

24 And, in a nutshell, I'm trying to figure  
25 out if this is more like Public Rights in Waters or is

1 or not, whether these are two separate subjects, then I  
2 do come back to the surreptitious issue, because,  
3 again, the constitution doesn't prohibit surreptitious  
4 issues. It doesn't prohibit log rolling.

5 What it -- the way I read the companion  
6 legislation that the General Assembly enacted when it  
7 referred the single subject measure to the voters in  
8 1994 was that the General Assembly said they wanted  
9 to -- they wanted the single subject for initiatives to  
10 be -- to take -- to be interpreted in a way that  
11 protects against the same practices that the single  
12 subject rule for bills was intended to protect against,  
13 such as log rolling and surreptitious matters.

14 When I look at 123 and 124, then it  
15 bothers me more that -- that part of it is  
16 surreptitious because it says that -- that the part  
17 that deals with labor organizations is -- is not what  
18 you think. It's -- it's defined -- because, again, it  
19 defines labor organizations to be something other than  
20 a labor organization, and that troubles me as far as  
21 trying to resolve -- well, that -- that consideration  
22 of whether the measure is surreptitious, I think, helps  
23 me determine whether or not there is a violation of the  
24 single subject requirement. I think that's what the  
25 General Assembly asks us to do, and if -- if the

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1 measure had been drafted differently, then I might feel  
 2 differently, but that's not the measure before us.  
 3 What is before us is the measure that prohibits  
 4 employers from requiring participation in non-labor  
 5 union organizations and then trumps -- as a second  
 6 subject, I think, trumps Amendment 41. Now, I just err  
 7 on the side of believing or lean toward believing that  
 8 those are two separate subjects, even though I think  
 9 it's a really close call.

10 In my question earlier to Mr. Gessler,  
 11 I -- I could see that this could be characterized as  
 12 falling under Amendment 61. I could also see that it  
 13 falls under Public Rights in Water, and that's -- at  
 14 this point in the discussion, that's where I am, that  
 15 it's more like Public Rights in Water, where we are  
 16 attempting to determine if we can take a -- if we can  
 17 define a broad subject like conditions of employment in  
 18 order to cover what I think is two essentially  
 19 unrelated things going on in the measure.

20 So, in any event, I think I'm probably  
 21 where I was before, that I think the measure violates  
 22 the single subject -- both 123 and 124 violate the  
 23 single subject requirement. Any other discussion by  
 24 the board? Mr. Cartin.

25 MR. CARTIN: Real brief, going back to the

1 last sentence of subsection 2 creates new rules for  
 2 resolving conflicts between this initiative and other  
 3 initiatives appearing on the 2008 statewide ballot and  
 4 that, therefore, they are multiple subjects, again, for  
 5 the reasons I've stated, I think that that sentence is  
 6 part and parcel of the measure. It is a unique  
 7 provision that I don't think that it amounts -- I guess  
 8 what I would say is I would reiterate Mr. Hobbs'  
 9 arguments as far as he stated that that particular  
 10 clause could not, in his mind, raise a single subject  
 11 problem.

12 And I'll stop there. I guess, to sum up,  
 13 again, the reason I don't think it's two subjects and  
 14 why I believe that the current title for the measure  
 15 accurately contains a single subject measure is because  
 16 it's a prohibition on the conditions of employment,  
 17 membership in a non-union type of group; and, in my  
 18 mind, it's -- I would -- I would deny the motion for  
 19 rehearing on the single subject argument.

20 MR. HOBBS: Mr. Domenico?  
 21 MR. DOMENICO: Well, I agree with  
 22 Mr. Cartin on the part of the matter that -- and,  
 23 therefore, disagree with Mr. Hobbs' reasoning because I  
 24 do see this as essentially -- that part of it, at  
 25 least, all as dealing with conditions, what employers

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1 original Title Board meeting on -- on 123 and 124, I  
 2 won't restate all of the reasons why I've concluded  
 3 that 123 and 124 contain a single subject. I  
 4 understand Mr. Hobbs' argument. It's refined and, as  
 5 always, well considered, and I respectfully disagree.

6 Going back, it seems to me that what 123  
 7 and 124 do is provide that an employer shall not  
 8 require as a condition of employment that an employee  
 9 join or pay dues, assessments or charges to or for a  
 10 labor organization. The measure then defines what a  
 11 labor organization is, notwithstanding any other  
 12 provision of the law. It further adds a clause  
 13 specifying or clarifying that it's, in my mind, a  
 14 direct extension of the "notwithstanding any other  
 15 provision of the law" clause, that the definition  
 16 prevails over any other conflicting definition of labor  
 17 organization in Article XXVIII of the constitution. In  
 18 that regard, it narrowly addresses the definitions in  
 19 that article of the constitution.

20 And so with all due respect to  
 21 Mr. Gessler, I -- I don't -- I mean, his argument that  
 22 this particular -- I think, as he said it, created new  
 23 rules for resolving conflicts between this initiative  
 24 and other initiatives appearing on -- Mr. Gessler's  
 25 argument, his motion for a hearing that the -- that the

1 can and can't require people to -- what kind of  
 2 organizations people can and can't require their  
 3 employees to join. Basically it's the same subject, I  
 4 think, as 47, it just takes a very different approach.  
 5 And the part that troubled me with that was that it's  
 6 written in such a confusing way, but I think that,  
 7 under 61, doesn't amount to a single subject problem.

8 My problem really is with the last  
 9 sentence, which I don't think is comparable to simply  
 10 saying "notwithstanding any other provision of law,"  
 11 which is hardly unique, is very common, and is  
 12 essentially required in a lot of drafting. To make it  
 13 clear, it's basically a shortcut to having it say, lay  
 14 out exactly how a law interacts with existing law.  
 15 That, to me, is very different than what this last  
 16 sentence does. It's not at all a belt and suspenders.  
 17 The last sentence does something that you couldn't do  
 18 in any other way. It's, to me, no different than  
 19 saying this measure shall take effect if it gets 45  
 20 percent of the vote, and it's no different than saying  
 21 this measure shall -- the single subject requirement  
 22 shall not apply to this measure. And whether you  
 23 characterize a 40 percent majority or a 50 percent  
 24 majority or a 60 percent majority as the fundamental  
 25 requirement of democracy, and you can't change that but



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1 you can change this requirement for how -- how  
2 initiatives become law, because it's somehow less  
3 fundamental is -- doesn't resolve the single subject  
4 problem for me.

5 I mean, this measure tries to make a  
6 substantive change in the -- in what employers and  
7 employees -- the relationship between employers and  
8 employees, which is fine, but it also tries to make a  
9 substantive change in how an initiative becomes law;  
10 and there is no -- that, to me, is a -- is a second  
11 subject. If -- if this is allowed, every measure will  
12 have something like this in it if it's got a chance of  
13 having a conflicting measure, and you'll end up with a  
14 mess.

15 But while that doesn't really answer the  
16 question, it does bring up why this is a problem, that  
17 essentially if, by coming in last and including this  
18 sort of thing they get around some of the typical  
19 rules, that's not really a problem, but it does -- a  
20 single subject problem, but it does point out a problem  
21 for the initiative process.

22 And, to me, a measure can't exempt itself  
23 from the rules. That is, a single subject. If you  
24 want to change the rules about how an initiative  
25 becomes a law, then I think you have to change the

1 possible for the board to adopt a motion for violating  
2 the single subject but for quite different reasons. I  
3 mean, Mr. Domenico and I really disagree on -- on that  
4 last point, but -- and, actually, it bothers me a  
5 little bit to end up with that result, but if that's  
6 the way it is --

7 MR. DOMENICO: Me, too.

8 MR. HOBBS: Mr. Cartin?

9 MR. CARTIN: I just wanted to clarify.

10 Mr. Domenico, does that reasoning apply to No. 124, as  
11 well?

12 MR. DOMENICO: Yes, I think it does, even  
13 though that last sentence is slightly different in 124.

14 MR. CARTIN: Because you don't have the  
15 lengthy --

16 MR. DOMENICO: To the extent -- to the  
17 extent that that sentence is meant to have any effect,  
18 I think it can only really be interpreted to be  
19 intended to have the same effect, which is to exempt  
20 itself from the typical rules of interpretation. I  
21 mean, if the last sentence ended itself after  
22 Article XVIII, I might be okay with it and agree that  
23 it's simply a boots-and-suspenders type of thing, but  
24 if that sentence is meant to have any effect, it's  
25 meant to say that the Supreme Court -- if we get

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1 rules; and, of course, as Mr. Hobbs said, it advances  
2 the purpose of the measure, but so would a 40 percent  
3 requirement advance it. And to me, suspending the  
4 rules of how a measure -- what a measure has to do to  
5 become a law, even if it only applies to that measure,  
6 is still a separate subject, and it's -- it's not  
7 necessary to the -- to anything else. All it does is  
8 says, Our opponents -- whatever they do doesn't matter  
9 as long as we get 50 percent plus more, and that is  
10 changing not just this measure but changing what  
11 another measure would normally have to do; and that, to  
12 me, is a single subject -- or is a separate subject.

13 This obviously isn't necessary to the measure.  
14 Whereas I do think, in some cases, the  
15 "notwithstanding" language could be necessary to make  
16 clear what's going on, this is not the least bit  
17 necessary to the -- to accomplishing the goals, except  
18 in the sense of exempting the measure from the typical  
19 rules, and so I -- I'm afraid I think that's a single  
20 subject or a separate subject from the substantive --  
21 the other substantive subject of employer/employee  
22 relationship.

23 So for different reasons, I guess I'm in  
24 agreement with Mr. Hobbs.

25 MR. HOBBS: So it would be potentially

1 50 percent plus one and it doesn't matter what else  
2 anybody else does, which changes the rules of how  
3 initiatives become law, which is the second subject  
4 that I see.

5 MR. HOBBS: And although I won't change  
6 Mr. Domenico's mind, I still -- I think I want to  
7 respond, for the record, on one thing that you said.

8 I think if this measure said that this  
9 met -- you know, if either of these measures said that  
10 40 percent constitutes passage of this measure, I would  
11 not find a problem with that on single subject grounds.  
12 Again, I think that would fit quite well within the  
13 subject and the purpose of the proposal. I personally  
14 think it would be ineffective, but all ---

15 MR. DOMENICO: How could it be  
16 ineffective?

17 MR. HOBBS: Because the measure -- that  
18 provision would never take effect because it -- because  
19 the rules in place right now are that -- the rules that  
20 would be applied to determine if that takes effect is  
21 whether or not a majority of the voters pass it; and if  
22 a majority of the voters don't pass it, that would  
23 never be effective.

24 MR. DOMENICO: So does that analysis, do  
25 you think, apply to this in the sense that if they get



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1 fewer votes, that it won't go into effect?

2 MR. HOBBS: No, because I think once -- if  
3 this measure -- we'll say 123 or 124 -- received the  
4 majority of the votes, it would go into effect. Now,  
5 and at least purportedly it would trump Amendment 47  
6 regardless of the number of votes that Amendment 47  
7 got, I mean, that this measure would be in effect. I  
8 don't know for sure whether it would work. I'm just  
9 saying at least the difference is that the voters would  
10 have approved a measure that says that it trumps a  
11 measure that gets more votes, but that wouldn't be the  
12 case if the measure said 40 percent, because the  
13 measure would never take effect.

14 I'm not sure, but, I mean, there are other  
15 scenarios we discussed about single subject I'm not  
16 sure of, but my point being all of those things in my  
17 mind are the -- they're problems, but they're not  
18 single subject problems, but they are ways that  
19 proponents might think of how they can advance their  
20 cause and ensure that they get the result they want.

21 MR. DOMENICO: Well, I just find that  
22 pretty remarkable that that's all that is required by  
23 the -- that as long as it advances their cause, that  
24 the single subject rule isn't implicated. I -- I mean,  
25 ~~changing the rules of how something becomes a law is an~~

1 have not yet dealt with which I think are objections to  
2 the titles themselves.

3 They -- if the board were to find that the  
4 measures violate the single subject requirement, the  
5 titles become moot. I don't see anything wrong with  
6 the board going ahead and dealing with those, if we  
7 wanted to, but it -- but I guess, at this point, I'm  
8 suggesting that maybe the right motion would be just  
9 that the board be inclined to set titles on the basis  
10 of violation of single subject and grant the motions  
11 for rehearing to that extent.

12 MR. DOMENICO: I second that motion.

13 MR. HOBBS: And then, I guess, if -- if  
14 that motion is adopted, we'll leave it up to the board  
15 as to whether or not there is any further action that  
16 it wants to take.

17 Is there any further discussion on the  
18 motion, then? If not, all in favor say "aye."

19 MR. DOMENICO: Aye.

20 MR. HOBBS: Aye. All those opposed, "no."

21 MR. CARTIN: No.

22 MR. HOBBS: That motion carries two to  
23 one.

24 MR. HOBBS: Any further action, then? We  
25 ~~have not discussed the other grounds raised in the~~

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1 incredibly, as Mr. Grueskin pointed out, fundamental  
2 aspect of democracy, and to say that just because  
3 changing a fundamental aspect of democracy also  
4 advances your cause of -- of getting your provision  
5 into law is, therefore, not a different subject is  
6 really remarkable to me.

7 MR. CARTIN: My last comment, Mr. Chair,  
8 is that I -- and I don't think this is going to change  
9 anybody's mind, but I do think we do need to be mindful  
10 of 1-40-106.5(2), and as the court has recently pointed  
11 out, if not reminded, that the Title Board must  
12 construe the single subject requirement liberally so as  
13 not to impose any undue restrictions on the initiative  
14 process, and I -- as always, I understand and respect  
15 the arguments of my colleagues here, but I think one  
16 could reasonably conclude, based on the arguments here  
17 today and the text of the measure, that 123 and 124  
18 contain a single subject.

19 MR. HOBBS: Okay. I guess I'll offer a  
20 motion that the board grant the motion to the extent  
21 that the measures 123 and 124 violate the single  
22 subject rule; and in offering a motion, I'm also trying  
23 to figure out whether there's support for that, whether  
24 we would want to deal with the other objections in the  
25 ~~motion for rehearing -- motions for rehearing which we~~

1 motions for rehearing that relate to the titles. I --  
2 in general, I think, although we haven't had the  
3 benefit of the discussion on the objections to the  
4 titles, I'm not personally inclined to go forward with  
5 the discussion on those issues. I think the titles are  
6 sufficient. I don't necessarily, though, want to  
7 preclude a discussion that might be helpful in an  
8 appeal or whatever, so I'll leave it up to the board if  
9 you want to go forward and consider the motions for  
10 rehearing with respect to the titles.

11 Mr. Knaizer.

12 MR. KNAIZER: Can I just bring up one  
13 matter? In 61, if I recall correctly, the board  
14 reversed itself on the single subject issue and decided  
15 it wasn't a single subject. It did not, then,  
16 consider, if I'm recalling correctly, some of the  
17 changes to the substance of the titles or to the  
18 content of the titles. The court then reversed the  
19 board on the single subject issue and then went on to  
20 consider whether or not the titles were sufficient even  
21 though the board did not consider the suggested changes  
22 to the title.

23 So I'm wondering, just suggesting to the  
24 board that they may want to consider the possibility of  
25 ~~looking at the request to amend the title, considering~~

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1 the possibility that the Supreme Court may reverse.  
2 That is within the court's discretion.

3 MR. HOBBS: And just to clarify, then,  
4 even though the board did not consider the objections  
5 to the titles, the court considered the objections to  
6 the titles although the later court rejected those  
7 objections.

8 MR. KNAIZER: Correct. The court looked  
9 at the titles that were originally set by the board  
10 even though the board had not reviewed the objections  
11 raised by the protester.

12 MR. HOBBS: And the court took -- took  
13 into consideration that the titles perhaps should be  
14 amended based on the other objections?

15 MR. KNAIZER: Correct.

16 MR. HOBBS: But declined to make any  
17 changes?

18 MR. KNAIZER: Correct.

19 MR. HOBBS: So here we could either  
20 further amend the titles or we could leave it as -- we  
21 could either amend the titles if -- if we want to or we  
22 could leave it as we did with No. 61, which would still  
23 allow objectors to raise issues with respect to the  
24 sufficiency of the titles themselves.

25 MR. KNAIZER: That's correct.

1 this isn't a fascinating conversation, but maybe I can  
2 cut short the conversation a little bit. In 61, as in  
3 previous cases where the court decided that you  
4 incorrectly refused to set the title, it went ahead and  
5 set the title. In 61 it said, "Where the reversal  
6 requires the board to set or amend the title, we give  
7 the board specific instructions as to the wording of  
8 the title. Accordingly, we must remand 61 to the board  
9 and articulate the title to be set."

10 So, I mean, I'm sure that you're  
11 enthralled and there's probably some sense of -- of,  
12 you know, this Kumbaya thing. It's the end of the  
13 cycle, it's the last measure. Do you really want to  
14 say good-bye to each other over this; but if that's not  
15 the case, well, I think the court will evaluate any  
16 sort of concerns with the title and -- and impose  
17 certain requirements as to whatever title gets set.

18 Now, I'm really not trying to cut short  
19 your process, but I just think it's important for you  
20 to have as part of your conversation that the court  
21 won't just defer to the title you already set, it will  
22 consider anything the objectors would say in their  
23 brief as to the decisions as to the title.

24 MR. HOBBS: No. I think the point is well  
25 taken. To me, it is -- and it follows up on what

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1 MR. DOMENICO: Here is the difficult  
2 position that the Supreme Court has left us in. If we  
3 don't move on to try to write the title, then the  
4 Supreme Court will -- if they overturn us on an appeal,  
5 the Supreme Court will consider the objections, but I  
6 think only applying their typically deferential  
7 standard of review, which is essentially to say, well,  
8 is this a permissible one, and they won't do what we  
9 normally do, which is try to improve it in any way we  
10 can, and so that -- if we don't amend the titles at  
11 all, we may not have written the best title that we  
12 could; and in 61, presuming that that goes forward, the  
13 title that we didn't really consider the objections to  
14 is what will be on the ballot.

15 On the other hand, if we do try to change  
16 the title, I'm not sure how we do that. Do Mr. Hobbs  
17 and I try to change it in such a way that it reflects  
18 our concerns? I mean, do I insist on putting some  
19 statement up front about changing the rules of what  
20 becomes an initiative? Does Mr. Hobbs try to change  
21 it? Do we pretend that we were wrong and that  
22 Mr. Cartin's interpretation is right? It's a little  
23 difficult.

24 MR. HOBBS: Mr. Gueskin?

25 MR. GRUESKIN: Maybe I can -- not that

1 Mr. Domenico is saying. It's a little hard, I think,  
2 for us to know what to do at times without knowing what  
3 the court -- the court's view of the single subject  
4 arguments might be and that we might be spinning our  
5 wheels a bit trying to figure out what a title would be  
6 if a court were to find no violation of single subject.

7 So on the one hand, I want to be fair to  
8 Mr. Gessler and provide an opportunity, but at this  
9 point, I guess I don't see much merit in trying to  
10 improve the titles without knowing the court's view on  
11 the -- this -- the disparate single subject objections.

12 MR. CARTIN: I agree with that.

13 MR. HOBBS: Mr. Gessler, do you have any  
14 contrary view if we -- I mean, I -- it sounds to me  
15 like you could still make your objections to the  
16 titles, but --

17 MR. GESSLER: Well, I -- certainly, I  
18 mean, the objections are part of the record, and if  
19 this goes forward on appeal, we'll certainly phrase  
20 that. I guess in part I'm also looking at Article V,  
21 section 1, subsection 5.5, where it says "If a measure  
22 contains more than one subject such that a ballot title  
23 cannot be fixed that clearly expresses a single  
24 subject, no title shall be set and the measure shall  
25 not be submitted to the people for adoption or

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1 rejection at the polls." I mean, that is some plain  
2 language there.

3 On the other hand, I -- I do sense that we  
4 have a bit of a mish before us, and I'm not strongly  
5 inclined to argue one way or the other on this.

6 MR. HOBBS: Well, I -- unless there's a  
7 motion, then I don't think any further action is  
8 required. So hearing no other motions, then that  
9 concludes the action on No. 123 and No. 124. The time  
10 is 11 o'clock.

11 I do want to note that we may need a  
12 meeting on June 4, the first Wednesday in June. I  
13 think the remanded No. 61 mandate may take effect  
14 some -- I don't know, sometime after today, but we may  
15 need to act on No. 61 on June 4. If that's the case,  
16 there will be a -- I think it would be a very brief  
17 meeting. I cannot be present because I'll be in a  
18 clerk's conference out of town, so it may be that I  
19 will be looking at finding the other two board members,  
20 looking at their schedules, and hopefully there will be  
21 a time where the other two board members could -- I  
22 think that was Ms. Eubanks and Mr. Domenico on No. 61?

23 MR. DOMENICO: Yes.

24 MR. HOBBS: So we'll contemplate having a  
25 meeting sometime on June 4. With that, then I think

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1 that concludes our agenda, and we are adjourned. Thank  
2 you.

3 WHEREUPON, the within proceedings were  
4 concluded at the approximate hour of 11:00 a.m. on the  
5 30th day of May, 2008.

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REPORTER'S CERTIFICATE

STATE OF COLORADO )  
 ) ss.  
CITY AND COUNTY OF DENVER )

I, LORI A. MARTIN, Registered Merit Reporter, Certified Realtime Reporter, and Notary Public, State of Colorado, do hereby certify that the within proceedings were taken in machine shorthand by me at the time and place aforesaid and were thereafter reduced to typewritten form; that the foregoing is a true transcript of the proceedings had.

I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

IN WITNESS WHEREOF, I have affixed my signature this 9th day of June, 2008.

My commission expires June 2, 2012.

\_\_\_\_ Reading and Signing was requested.

\_\_\_\_ Reading and Signing was waived.

Reading and Signing is not required.





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June 9, 2008

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Re: Rehearing for Initiatives 123 and 124

We are filing with your office by Messenger Service the following Original Deposition(s) and/or Original Exhibit(s):

- \_\_\_\_\_ Exhibit(s).
- \_\_\_\_\_ Master Videotape(s)/DVD(s).
- \_\_\_\_\_ Signed, no amendment(s),  
copy enclosed.
- \_\_\_\_\_ Signed, with amendment(s),  
copy enclosed.
- \_\_\_\_\_ Unsigned, notice duly given  
pursuant to the Rules of  
Civil Procedure.
- \_\_\_\_\_ Unsigned, notice duly given  
\_\_\_\_\_, since trial is set for  
\_\_\_\_\_.
- Initiatives 123 and 124 No signature required.

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**CONCORDANCE**

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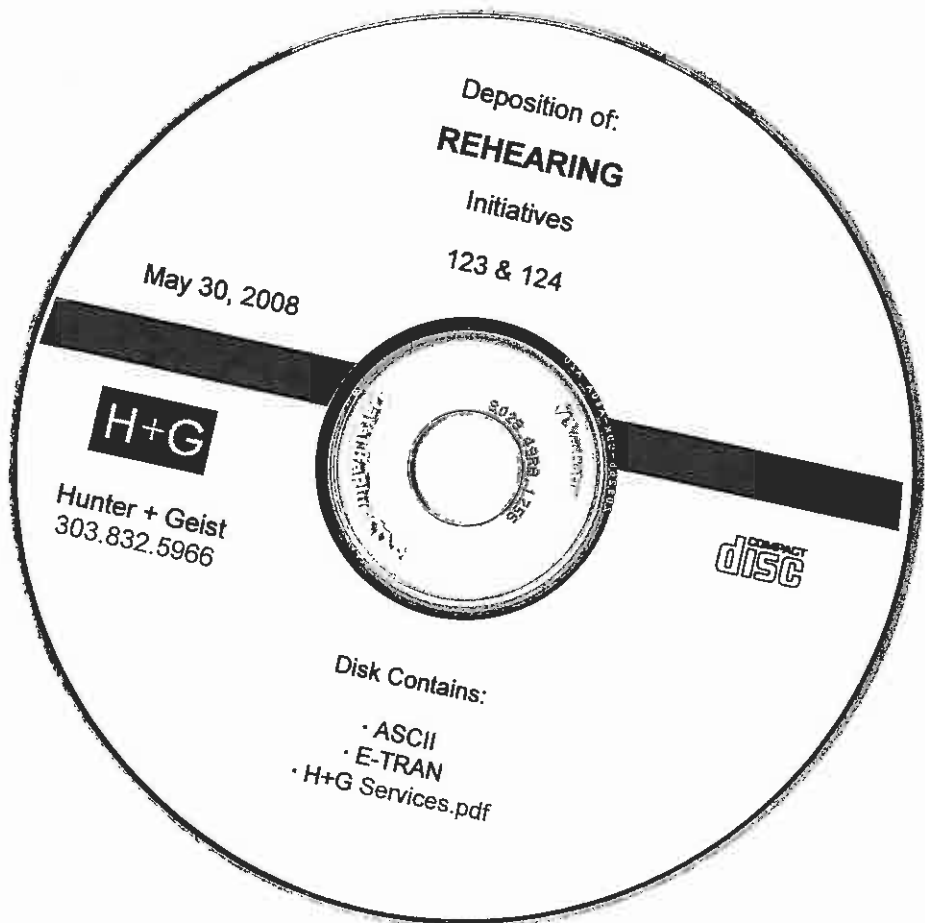
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**Ballot Title Setting Board**

**Proposed Initiative 2007-2008 #41<sup>1</sup>**

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

An amendment to the Colorado constitution concerning participation in a labor organization as a condition of employment, and, in connection therewith, prohibiting an employer from requiring that a person be a member and pay any moneys to a labor organization or to any other third party in lieu of payment to a labor organization and creating a misdemeanor criminal penalty for a person who violates the provisions of the section.

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 concerning participation in a labor organization as a condition of employment, and, in connection therewith, prohibiting an employer from requiring that a person be a member and pay any moneys to a labor organization or to any other third party in lieu of payment to a labor organization and creating a misdemeanor criminal penalty for a person who violates the provisions of the section?

*Hearing October 3, 2007:*

*Single subject approved; staff draft amended; titles set.*

*Hearing adjourned 2:02 p.m.*

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<sup>1</sup> Unofficially captioned "Prohibition on Certain Conditions of Employment" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.