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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2), C.R.S. (2007) Appeal from the Ballot Title Setting Board **Petitioners:** Reed Norwood and Charles Bader, Proponents, v. **Respondent:** Julian Jay Cole, Objector, and **Title Board:** William A. Hobbs, Dan Cartin, and Daniel Dominico	**▲COURT USE ONLY▲**
Attorneys for Respondent: Scott E. Gessler, #28944 Mario D. Nicolais, II #38589 Hackstaff Gessler LLC 1601 Blake Street, Suite 310 Denver, Colorado 80202 Telephone: (303) 534-4317 Fax:(303)534-4309 E-mail: sgessler@hackstaffgessler.com mnicolais@hackstaffgessler.com	Case Number: 08SA199

OPENING BRIEF OF THE RESPONDENT

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I. STATEMENT OF THE ISSUES

A. Proposed Ballot Initiative 2007-2008 No. 123 ("Initiative 123") seeks to prohibit membership in a "labor organization" as a condition of employment, and it creates an exemption for any current or future definition of "labor organization." At the same time, it creates new rules to govern how this court should resolve a conflict between this ballot issue and any other ballot issue simultaneously enacted in the 2008 election. Is this new rule for resolving conflicting issues a second subject?

B. Initiative 123 states that the exemptions it creates for the term "labor organization" will apply to "any" section in Article XVIII of the Colorado Constitution, regardless of whether other sections address the subject of conditions of employment for labor organization members. Does this broad override of any other potential definition of labor organization create a second subject?

C. The initiative attempts to change the definition of "labor organization" in order to preempt a measure currently qualified for the ballot. At the same time, Initiative 123 prohibits conditioning employment on participation in organizations other than those regulated by the preempted measure. Is Initiative 123's preemption of another initiative a different subject than Initiative 123's prohibition on conditions for employment?

D. The Title Board initially set a title in this matter, but deferred in-depth discussion of the title pending a motion for rehearing. At the motion for rehearing

the Title Board declined to set a title, and therefore did not revisit the title. Should this Court provide the Title Board the opportunity to set an accurate title?

E. Assuming that the Court chooses to set a title, is the earlier title adopted by the Title Board inaccurate?

II. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a challenge to the Title Board's finding that Initiative 123 violated the single subject requirement. At the same time, the Proponents have requested that this Court adopt the title originally set by the Title Board at the initial hearing. The Title Board did not consider objections to the accuracy of the title at the Motion for Rehearing or set a title, because the Title Board found that Initiative 123 violated the single subject requirement.

B. Proceedings Below

On May 21, 2008, the Title Board considered Initiative 123 and determined that it had jurisdiction to set a title, whereupon it set a title for the initiative. Julian Cole filed a timely motion for rehearing on May 28, arguing *inter alia* that: (1) the Title Board did not have jurisdiction because following the review and comment hearing the proponents made a substantive change to the initiative language that was not in response to a question or comment; (2) that the initiative violated the single subject requirement; and (3) that the title for Initiative 123 was inaccurate

and misleading. These same objections were made to Proposed Ballot Initiative 2007-2008 #124 ("Initiative 124") which contained nearly identical language.

At the Motion for rehearing, the Title Board consolidated this matter with Initiative 124 and considered both initiatives jointly. The Title Board rejected the argument that the proponents had made a substantial change that was not in response to a comment or question. The Title Board, however, accepted the single subject objection, reversing its earlier position. The Title Board found that the measure did not have a single subject, by a 2-1 majority, but the two majority members relied upon different reasoning. Because the board found a single subject violation, it declined to entertain objections to the accuracy of the earlier title.

C. Statement of Facts

Initiative 123 does several things. Most importantly, it exempts from the definition of "labor organization" all organizations normally treated as "labor organizations." It does this by defining "labor organization" as "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."[1] In taking this unusual approach to defining the term "labor organization" the proponents had one overriding goal – to preempt the definition of "labor organization" in Amendment

[1] Proposed Colo. Const. art. XVIII, § 17(2) (emphasis added).

47, a measure that is currently qualified for the ballot. As the Proponents forthrightly admitted at the Motion for Rehearing, Initiative 123 "is obviously intended to have a preemptive effect as to the right to work initiative that's been certified for the ballot."[2]

Second, the initiative prohibits employers from requiring participation in a labor organization as a condition of employment. It is unclear what constitutes a "labor organization." The initiative does not define the term "labor organization," but rather defines exemptions from the term "labor organization."

Third, the initiative contains two rules for resolving conflicts between initiative and other laws. First, the exemption from the definition of labor organization will override any conflicting definition in Article XVIII of the Colorado Constitution. Second, Initiative 123 will govern over any conflicting initiative adopted in the 2008 general election, regardless of the number of votes this or any other initiative receives.

III. SUMMARY OF THE ARGUMENT

Initiative 123 fails the single subject test for three reasons. First, it creates new rules for resolving conflicts between competing initiatives, that may or may not involve the same subject. This conflict resolution rule is a different subject than prohibiting certain conditions of employment or defining exemptions to the term "labor organization."

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[2] Tr. 2:19-21, May 21, 2008, **Exhibit B**.

Second, the initiative contains a second subject because it applies the "labor organization" exemptions to all sections in Article XVIII of the Colorado constitution, even if the conflicting sections are unconnected to conditions of employment. In this instance, the initiatives override provision is not limited to what is necessary and connected to conditions of labor employment. Rather, it reaches out and changes the operation of unconnected laws.

Finally, the initiative seeks to preempt the definition of "labor organization" in a competing ballot issue, which is unconnected to banning employers from requiring "labor organization" membership. An initiative may certainly set up a direct conflict with another, competing initiative. But in this case, the conditions on employment have nothing to do with the conflict created by the exemptions to the term "labor organization.

If it determines that Initiative 123 has a single subject, this Court should nonetheless remand the matter to the Title Board to set a title. Remand recognizes the unique function of the Title Board in balancing competing interests, and the Title Board did not have the opportunity to consider the protestor's comments or comments from the public following its initial title setting. Indeed, in some instances the Title Board specifically deferred consideration of changes to the title, in anticipation of a motion for rehearing. Thus, the current title is not a product of the Title Board's full review of titles, as mandated by Colorado statute.

Furthermore, the previous title does not incorporate this Court's single subject guidance.

If this Court decides to review the previous title, it should nonetheless remand, because the previous title contained several misleading and incorrect descriptions of Initiative 123.

IV. ARGUMENT

A. Standards of Review and Interpretation

While the Court does not address the merits or future application of the proposed initiative, it must "sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated."[3] The Court makes "all legitimate presumptions in favor of the propriety of the Board's actions."[4]

When reviewing the accuracy of titles and submission clauses, this Court does not rewrite the titles for Board, but only reverses the Board's action if the titles contain a "material and significant omission, misstatement, or

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[3] *In re Title, Ballot Title, & Submission Clause &Summary for 1997-1998*, No. 84 961 P.2d 456, 458 (Colo. 1998); *In re Title, Ballot Title, & Submission Clause & Summary for 1997-1998 No. 30*, 959 P.2d 822, 825 (Colo. 1998).

[4] *In re Title, Ballot Title, & Submission Clause & Summary for Pet. Procedures*, 900 P.2d 104, 108 (Colo. 1995).

misrepresentation."[5] The Title Board is not required to draft the best possible titles, and titles must not contain every detail of the measure.[6]

B. Initiative 123 contains multiple subjects

1. Single subject standard

Under Colorado law, every proposed initiative must contain a single subject,[7] and no initiative may contain "more than one subject, which shall be clearly expressed in its title."[8] An initiative violates the single subject requirement when it: (1) relates to more than one subject; and (2) has at least two distinct and separate purposes that are not dependant upon or connected with each other.[9]

This Court has recently stated that, "even when provisions share some common characteristic, they do not satisfy the single-subject requirement unless

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[5] *In re Title, Ballot Title, & Submission Clause for 2007-2008 No. 62*, No. 08SA90, 2008 WL 2081571, at *13 (Colo. 2008); *In re Title, Ballot Title, Submission Clause & Summary for 1997-1998 No. 62*, 961 P.2d 1077, 1082 (Colo. 1998).

[6] *In re Title, Ballot Title, Submission Clause & Summary for 2007-2008 No. 57*, No. 08SA91, Slip Op. at 10 (Colo. 2008).

[7] Colo. Const. art. V, § 1(5.5).

[8] Colo. Const. art. V, § 1(5.5).

[9] *In re Title, Ballot Title, Submission Clause & Summary for "Pub. Rights in Waters II"*, 898 P.2d 1076, 1078-79 (Colo. 1995); *In re Title, Ballot Title, & Submission Clause for 2005-2006 No. 55*, 138 P.3d 273, 277 (Colo. 2006); *In re Title, Ballot Title, & Submission Clause for 2007-2008 No. 61*, No. 08SA89, 2008 WL 2081574, at *3 (Colo. 2008); *Blake v. King*, No. 08SA91, 2008 WL 2167847 (Colo. 2008).

they have a unifying or common objective."[10] Consequently, themes that are "too general and too broad" cannot be applied to unite separate and discrete subjects into a single subject.[11] Themes such as "water,"[12] "monetary impact,"[13] "non-emergency government services,"[14] "environmental conservation" and "conservation stewardship"[15] have each been rejected topics too broad to link discrete subjects. In each case this Court prohibited "grouping distinct purposes under a broad theme ... [to] satisfy the single subject requirement."[16] That prohibition promotes the goal of barring "disconnected or incongruous measures" from passing in the same legislative act.[17]

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[10] *In re Title, Ballot Title & Submission Clause for 2007-2008 No. 62*, No. 08SA90, 2008 WL 2081571, at *8 (Colo. 2008).

[11] *In re Title, Ballot Title, Submission Clause & Summary for "Pub. Rights in Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995); *In re Title, Ballot Title, & Submission Clause for 2007-2008, No. 17*, 172 P.3d 871, 875-76 (Colo. 2007).

[12] *In re Title, Ballot Title, Submission Clause & Summary for "Pub. Rights in Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995).

[13] *In re House Bill No. 1353*, 738 P.2d 371, 373 (Colo. 1987), (interpreting the single subject requirement for bills).

[14] *In re Title and Ballot Title & Submission Clause for 2005-2006 No. 55*, 138 P.3d 273, 282 (Colo. 2006).

[15] *In re Title, Ballot Title & Submission Clause for 2007-2008, No. 17*, 172 P.3d 871, 875-76 (Colo. 2007).

[16] *In re Title and Ballot Title & Submission Clause for 2005-2006, No. 55*, 138 P.3d 273, 278 (Colo. 2006).

[17] *In re Title and Ballot Title & Submission Clause for 2005-2006, No. 55*, 138 P.3d 273, 278 (Colo. 2006).

2. Initiative 123 seeks to create rules for resolving conflicts between competing initiatives, which is a different subject than prohibiting certain conditions of employment or defining exemptions to the term "labor organization."

On one hand, Initiative 123 states that employers cannot require employees to join a labor organization as a condition for their employment, and the initiative exempts certain types of organization as "labor organizations." On the other hand, the initiative states that it will take precedence over any other conflicting initiative adopted in the 2008 election. This second provision effectively overturns C.R.S. § 1-40-123, which states that "in case of adoption of conflicting provisions, the one that receives the greatest number of affirmative votes shall prevail in all particulars as to which there is a conflict."[18] This second provision forms a separate subject.

The change to § 1-40-123 is not logically connected to (1) prohibiting certain conditions of employment or (2) exempting certain organizations from the term "labor organization." Rather, it changes the rules of ballot issue adoptions not only for Initiative 123, but also for other initiatives on the ballot that may conflict, but have different subjects than Initiative 123. No longer does Initiative 123 merely affect conditions on employment, but it also affects other initiatives that conceivably conflict with the new exemptions to the term "labor organization," whether or not those exemptions have anything to do with conditions of

[18] C.R.S. § 1-40-123 (2007).

employment. This open-ended application to other initiatives extends beyond employment conditions and is similar to the problem the Court identified in *In the Matter of the Title, Ballot Title, and Submission Clause, for 2007-2008, #17.* In that case, an initiative created a mission of conservation stewardship, but improperly coupled it with rules for resolving economic interest conflicts in every instance.[19] Likewise, Initiative 123 creates a new approach to "labor organizations" but couples it with rules for resolving conflicts between this measure and other measures appearing on the 2008 ballot.

Finally, Initiative 123's override provision seeks to change the rules by which it is enacted and goes into effect. This is different than a mere enforcement provision, which becomes effective after any conflicts with other initiatives are resolved. Rather, it is similar to a hypothetical provision within an initiative that states the initiative goes into effect with only 45 percent of the popular vote. In both instances – the conflict override and the 45 percent threshold – the initiative's provisions change the rules by which it is enacted. This effort to change the underlying rules of how a ballot measure becomes law constitutes a separate and distinct subject.

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[19] *In re Title, Ballot Title, & Submission Clause for 2007-2008, No. 17*, 172 P.3d 871, 874-875 (Colo. 2007).

3. The initiative contains a second subject because it applies the "labor organization" exemptions to all sections in Article XVIII, even if the conflicting sections are unconnected to conditions of employment.

Similar to the change to rules that resolve conflicts between adopted initiatives, the exemptions to the term "labor organization" also override "any" conflicting definitions within Article XVIII of the state constitution.[20] This is an exceptionally broad application of the "labor organization" exemptions – so broad, in fact, that it goes well beyond the initiative's subject on conditions for employment.

Article XVIII of the Colorado constitution is entitled "miscellaneous," which highlights the fact that nearly any type of provision may be placed within that article. Indeed, at the moment no provision in Article XVIII addresses conditions of employment or labor organizations.[21] Accordingly, the exemptions to the term "labor organization" may apply to a disparate and unconnected group of provisions – now and in the future – many of which will not be logically connected to the subject of conditions for employment. For example, in the future a provision may use the term "labor organization" to create new state employee representative councils, in which every state employee gets to vote for council members. Even if this new structure concerns employee representation and does not involve conditions for employment, it will nonetheless be subject to Initiative

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[20] Proposed Colo. Const. art. XVIII, § 17(2).

[21] *See, e.g.* Colo. Const. art. XVIII, § 1 (homestead exemption laws).

123's broad override of the term "labor organization." Initiative 123's prevailing definition is not limited to statutory conflicts that are connected to conditions for employment. Rather, Initiative 123 aggressively seeks to override other constitutional definitions, regardless of their connection to conditions of labor employment.

4. The initiative seeks to preempt the definition of "labor organization" in a competing ballot issue, a subject that is unconnected to banning employers from requiring "labor organization" membership.

Finally, as one member of the Title Board recognized, the initiative has two distinct subjects because Initiative 123 is primarily designed to preempt Amendment 47, another ballot issue that has qualified for Colorado's ballot. Indeed, the proponents forthrightly explained in their very initial remarks for the very first Title Board hearing, that "[w]ell, this is obviously intended to have a preemptive effect as to the right to work initiative that's been certified for the ballot."[22]

Initiative 123 preempts the existing ballot measure by exempting certain types of organizations from the definition of "labor organization." According to the proponents, Initiative 123 "was drafted to provide that the types of organizations that ought not -- membership in which or payment for which ought

[22] Tr. 2:19-20, May 21, 2008.

not to be a condition of employment are those that really are ancillary to the employment relationship."[23]

Proponents may certainly choose to define exceptions to "labor organization" in a manner that conflicts with another initiative. But Initiative 123 couples this provision with an unrelated requirement that "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."[24] This creates a second subject for two compelling reasons. First, the condition on employment is not connected with overriding the definition of "labor organization" in a competing ballot measure. Indeed, Initiative 123 avoids defining what constitutes a "labor organization;" be design, therefore, the initiative's regulations affecting "labor organization" are unconnected with the exemptions to "labor organization."

Second, this Court has held that undefined terms may create a second subject if it is impossible to determine how they will be enforced.[25] In *In re 2005-2006 No. 55*, an initiative failed to define the terms "non-emergency" and "services."[26] Because of that failure, this Court stated that it could not "discern

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[23] Tr. 3:10-15, May 21, 2008.

[24] Proposed Colo. Const. art. XVIII, § 17(1).

[25] *See In re Title and Ballot Title & Submission Clause for 2005-2006 No. 55*, 138 P.3d 273, (Colo. 2006).

[26] *In re Title and Ballot Title & Submission Clause for 2005-2006 No. 55*, 138 P.3d 273, 279 (Colo. 2006).

how the General Assembly or the courts would 'enforce' this initiative."[27] Likewise, it is impossible to discern how the General Assembly or courts may enforce Initiative 123, because it does not define what a labor organization is. Although a labor organization may not include a small category of organizations, it nonetheless conceivably includes an infinite possibility of organizations that may be described as "labor" organizations, ranging from professional liability insurance companies to public policy non-profits that analyze labor issues. Like the proposal in *In re No. 55*, it is impossible to determine how Initiative 123 will be enforced.

C. The previous title set by the board is inaccurate and misleading

1. This Court should remand and allow the Title Board an opportunity to set a new title.

Colorado law gives the Title Board primary responsibility for setting a title, and this Court should defer to that arrangement. The Title Board is particularly well-suited for setting a title, because it allows substantial discussion and analysis by three board members, proponents, members of the public, and any protestor. Furthermore, Colorado statute specifically allows the Title Board to incorporate well-considered comments during a motion for rehearing, and indeed the Title Board often makes changes based on new information and new arguments during a motion for rehearing – comments from both the protestors, as well as members

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[27] *In re Title and Ballot Title & Submission Clause for 2005-2006 No. 55*, 138 P.3d 273, 279-80 (Colo. 2006).

of the public who may speak at a motion for rehearing.[28] Although the Title Board is not expected to write a perfect title,[29] it endeavors to do the best it can in light of competing interests. This Court reviews a title for error – not to rewrite the title[30] or reproduce the Title Board's deliberations.

If this Court determines that the initiative contains a single subject, it should remand the matter for the Title Board to set a title.

The Court should not simply adopt the earlier title. In this matter, the Title Board chose not to consider objections during the hearing, preferring instead to wait until the motion for rehearing. For example, during the hearing for Initiative 123, one board member explicitly refused to entertain a comment, saying "I think those are actually pretty good ideas. I think for now I'm -- I may want to just wait to see a petition for rehearing that might lay them out a little bit more concretely . . . ."[31] After discussing some of the challenges that the board members faced in setting a title, he continued "[f]or now, I'm willing to vote to approve something along the lines we've been discussing but with the idea that on a motion for

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[28] *See* C.R.S. § 1-40-107(2) (2007).

[29] *In re Title, Ballot Title, & Submission Clause for 2007-2008 No. 62*, No. 08SA90, 2008 WL 2081571 at *10 (Colo. 2008).

[30] *Id.* at *13.

[31] Tr. 40:17-20, May 21, 2008.

rehearing we could improve it quite a bit.[32] The Title Board truncated title discussions, expecting an opportunity to improve its work during a motion for rehearing. But the Title Board never reconsidered the title, because it later determined that Initiative 123 violated the single subject provision.

There are other reasons this Court should not review a title that has not been subject to a motion for rehearing. First, it cuts off the right of the public to comment on motions for rehearing and provide input into the Title Board's process. Indeed, members of the public are allowed the opportunity to react to a ballot title, and the Title Board should have the opportunity to consider public comment during a motion for rehearing.

Second, in this case the Title Board set a title without guidance from this Court as to the measure's single subject. During the initial hearing, the Title Board expressed considerable frustration in setting a title, and indeed the motion for rehearing exposed sharp differences among title board members as to the proper single subject. If this Court decides to provide single subject guidance to the Title Board, it is only proper that the Title Board, proponents, petitioners, and members of the public be provided an opportunity to consider and react to the single subject guidance.

Finally, remand to the Title Board recognizes the Title Board's unique role. Petitioners recognize that this Court recently approved title language in a similar

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[32] Tr. 41: 9-12, May 21, 2008.

situation where the Title Board did not consider title at a motion for rehearing.[33] But the Petitioners respectfully state that this Court did not fully consider the Title Board's role in balancing competing interests. The Title Board should have an opportunity to fulfill its statutory duties.

2. The title misleadingly states that it applies to participation in "certain" organizations, when in fact the initiative does not apply to "certain" organizations.

As originally set by the Title Board, the title begins "An amendment to the Colorado constitution concerning participation in *certain* organizations as a condition of employment, and, in connection therewith . . ."[34] In common language, the word "certain" means "known for sure; established beyond doubt" or "specific but not explicitly named or stated."[35] But the organizations affected by Initiative 123 are not certain, because the initiative fails to define what is a "labor organization." Thus, it is not known for sure – or established beyond a doubt – exactly what type of organizations are subject to the regulation. For example, the organization could be a professional liability insurance cooperative for teachers, or it could even be a bar association. By only stating what is exempt from "labor

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[33] *In re Title, Ballot Title, & Submission Clause 2007-2008 No. 61,* No. 08SA89, 2008 WL 2081574 at *15-16 (Colo. 2008).

[34] Former ballot title and submission clause, **Exhibit C** (emphasis added).

[35] Oxford Am. Coll. Dictionary, 227 (1st ed. 2002).

organization" the initiative does not establish beyond a doubt the type of organizations involved.

The current initiative demonstrates that a failure to define critical terms creates an initiative that is too general and too broad. Lack of a concrete definition means surprised voters may inadvertently be including groups such as employee softball teams, health care organizations, bar associations, employer charities, professional and social groups, or even online groups such as FaceBook or MySpace. Because of the initiative's failure to define "labor organization," a wide universe of potential organizations may be affected, far beyond what the term "certain organizations" implies. The original title is consequently misleading to voters and should be radically altered.

3. The single subject is to define certain exemptions from "labor organization," not prohibit employers from demanding membership in a "labor organization" as a condition of employment.

If this Court deems the title to have a single subject, it should recognize that the main, overriding purpose is to preempt Amendment 47 by altering the definition of "labor organization." The proponents readily recognize this as the initiative's overriding goal, and one member of the Title Board thought that this approach was a good idea that merited further discussion upon rehearing.[36] Accordingly, the voters should be informed that the subject of the provision is to preempt Amendment 47. Initiative 123 calls upon voters to make a clear policy

[36] Tr. 40:17-41:12, May 21, 2008.

choice, and accordingly the Title Board and this Court should further the initiative process by ensuring that voters will understand the clear choices before them.

Otherwise, voters will be mislead about their clear choices. When ballot titles do not clearly state the policy choices voters are being called upon to decide, the process becomes vulnerable to fraud and gamesmanship. Accordingly, this Court should remand the matter for the Title Board with instructions to describe the single subject as a change to the commonly held definition of "labor organization," rather than conditions on employment.

4. The title is misleading, because the initiative does not define what is a "labor organization," but rather defines exemptions from the term "labor organization."

The title states that the initiative has the effect of "defining labor organization as . . ."[37] In common usage, the term "define" means "state or describe exactly the nature, scope, or meaning of."[38] But in fact the initiative does not define what is a labor organization. Rather, the initiative identifies a small subset of what a labor organization cannot be. Logically, one cannot define a term by identifying an incomplete list of exclusions. Here, one can describe an organization in an infinite number of ways, and therefore one cannot define a "labor organization" merely by carving out a few narrow exclusions.

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[37] Former ballot title, **Exhibit C**.

[38] Oxford Am. Coll. Dictionary, 359 (1st ed. 2002).

Although Initiative 123 uses the term "define" to identify the exemptions to the term "labor organization," neither this Court nor the voters should be mislead by simply copying the word "defining" into the ballot title. Functionally, the initiative exempts certain organizations from the term "labor organization." It does not, by any fair reading of the English language, actually "define" a term.

5. The title does not inform voters that the initiative changes the term "labor organization" in a way contrary to common usage.

As used in the title, the term "labor organization" means organizations that do not have a purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, employee benefits, hours of employment, or conditions of work. In short, Initiative 123 attempts to create an ill-defined category of "labor organization" that means anything but the commonly accepted usage of the term. Indeed, legislative staff immediately recognized that this initiative's use of the term "labor organization" is directly contrary to current statutory definitions. For example, C.R.S. § 24-34-401(6) 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."

Initiative 123 represents a reversal of the term "labor organization." It is like defining the term "white" to mean "black." Ballot titles must not mislead the

public, and blandly burying this radical departure from current law in the middle of a paragraph misleads voters – particularly when the main purpose of Initiative 123 is to override the common definition of "labor organization" used elsewhere. Ultimately, ballot titles should present voters with an informed choice, to prevent confusion and surprise. Here, the only meaningful and credible way to inform voters of a conflict between definitions is to indicate that Initiative 123 changes the common definition of "labor organization."

Finally, Initiative 123 reverses the normal meaning of "labor organization" by slipping the expression "other than" into the title. Because voters will skim over these two words, the ballot title may easily lead voters to believe that the initiative defines, rather than excludes, the types of groups the public generally believes to constitute "labor organizations." Indeed, Solicitor General Domenico admitted "it took me about ten readings and sort of a flow chart to understand what was going on in here."[39] Titles should be simple and clear, and the initiative process will suffer and lose credibility if the Title Board or this Court fails to at least highlight the stark differences between initiatives designed to compete with other initiatives. Otherwise, the process is easily subject to gamesmanship, fraud, and voter surprise.

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[39] Tr. Pg. 57, ln 16-18, May 30, 2008, **Exhibit A.**

6. The title is confusingly similar to the title for Proposed Initiative No. 41, currently certified for the ballot as Amendment 47.

The title is also confusing because it closely tracks the title currently set Amendment 47. The former title language for Initiative 123 states:

> 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. . . ."

And the beginning language for Amendment 47 is nearly identical:

> 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 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. . . .[40]

But the effect is diametrically opposite. The similar wording and structure will easily lead voters to the surprise result of supporting an amendment contradictory to what they had intended.

It is true that the titles in their entirety are different. But critically, the main points of both titles are identical – the conditions of employment, and the focus on "labor organizations." This Court may, during these extensive briefings by the parties, carefully parse and analyze the differences between the two measures, but the ballot titles are designed to provide a quick and accurate summary, because

[40] Amendment 47, **Exhibit D**.

voters quickly read the titles. Differences in directly conflicting titles should be readily apparent – not hidden within the folds of the title itself.

V. CONCLUSION

This Court should affirm the Title Board's decision. Alternatively, it should remand the matter to the Title Board in order to set a title.

Respectfully submitted this 13th day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June, 2008, a true and correct copy of the foregoing **OPENING BRIEF OF THE RESPONDENT** was served via hand delivery, to the following:

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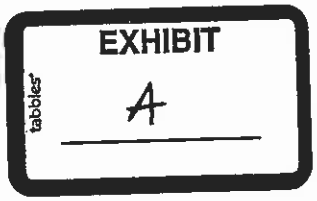

STATE OF COLORADO TITLE SETTING BOARD

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.

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WHEREUPON, the following proceedings were taken.

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

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

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

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

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

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

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

And then finally, because I'll be

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

MR. HOBBS: Go ahead.

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

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

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

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

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

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

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

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

MR. DOMENICO: Right.

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

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

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

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

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

I'm sorry. That's not the critical point. This is the critical point. "Except with the

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

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

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

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

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

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

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

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

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removes it from the moorings of the purpose.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

So we'll continue with your hypothetical.

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

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

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

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

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

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

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

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

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

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

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

Before I sit down, does anyone have

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questions on -- for -- for me on that?

MR. HOBBS: Mr. Cartin?

MR. CARTIN: Well, I'll wait.

MR. HOBBS: So are you going to -- I don't know, Mr. Gessler. I thought maybe you were just going to proceed with your other arguments, but I don't mind breaking them up one by one. It's up to the board.

MR. GESSLER: I'm sorry. Perhaps I left in a flourish of drama. Whatever the board prefers. I'm happy to move on or allow Mr. Grueskin to respond to the jurisdictional argument.

MR. HOBBS: We can do kind of a back-and-forth on each issue. It keeps it a little fresher. I --

MR. GESSLER: That's fine.

MR. HOBBS: Okay. Maybe Mr. Grueskin -- we'll hear from him on this particular issue.

MR. GRUESKIN: Thank you, members of the board. Mark Grueskin appearing for the proponents.

The argument about the jurisdictional issue, I think, can be addressed fairly quickly. The Supreme Court has said that in a case, the citation of which I don't recall, that the Administrative Procedures Act doesn't apply to the -- in this process, your process included, because these are public forums.

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They're more legislative, and I suppose we can argue whether or not legislation is well considered or not, but there's a lot of off-the-cuff activity in legislative hearing. Whether this was off the cuff or not, I suppose, is open to question; however, if you take a look at the final draft of the measure as submitted in the packet, Section 1 states, "Article XVIII of the constitution is amended by" blah, blah, blah, blah. That's how that always read. That particular reference was never Article XXVIII. The staff understood that.

So there was an inherent conflict where the -- the introduction talks about Article XVIII and then subsection 2 of Section 17 talks about Article XXVIII. So I think that was pretty clear. Nonetheless, there were two -- at least two times when this issue came up. In the transcript that Mr. Gessler provided you of the May 9 hearing, on page 4, there was a summary of purposes, and there was a reference to subsection 2 and Article XXVIII and I admitted that it was my typo because the intention was that it would be Article XVIII, and then I said, "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

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agree that would be a technical correction?

"MR. POGUE: (Nods head.)

"MS. FORRESTAL: Agreed.

"MR. POGUE: Agreed."

Then the issue does come up again on pages 6 and 7 of the transcript in response to one of the technical questions.

"MS. FORRESTAL:" on page 6, line 23, "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 XVIII'?

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

So it comes up in response to a question. If you take a look at the legislative staff memo, the staff wasn't confused. They didn't think this was a campaign finance measure. Campaign finance doesn't come up in the context here. As a matter of fact, they specifically raise, under their substantive question No. 4, whether or not this is an appropriate or permissible way in which to have ballot measures to interact with one another on the same ballot. Obviously that's the case here.

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So they understood that this wasn't about the issue, and, in fact, I think if you take a look at the transcripts, you'll find no reference to Article XXVIII at all other than that typographical error. There was no consideration of the issue raised.

Finally, these -- if you can't have give and take and if you can't clarify internal contradictions, you're necessarily limiting the ability of proponents who don't have the benefit of having two houses and two committee hearings and two floor debates, to have a give and take that leads to clarification, and that's what happened here.

MR. DOMENICO: Well, but, I mean, doesn't 1-40-105 actually provide for that kind of give and take? But what it says is that if there's a substantial amendment made to the petition that's not in direct response to the comments, the way you have that give and take is, then, to resubmit it to the directors for comment, basically starting over.

And so, to me, I mean, there is something, I think, to Mr. Gessler's point that the staff -- that there's a reason for this process. I mean, part of it is for the staff to be able to read it and provide comments and questions based on what it says, and the

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HOBBS: Right.

MR. DOMENICO: Yet.

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

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

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

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

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

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

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

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

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"labor organization."

MR. DOMENICO: Right, but –

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

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

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

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

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

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

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

MR. GESSLER: Thank you.

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

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

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

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

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

MR. HOBBS: Mr. Cartin?

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

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

Secondly, I do think -- even if it is, that it's in response to the comments, and I look at the question under Purposes, No. 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," that was -- that was asked and answered as indicated on page 4 of the transcript, and the fact that this particular question popped up under Purposes rather than the comments and questions portion of the memo, I'm not inclined to read comments that narrowly.

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

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

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

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

MR. HOBBS: Go ahead.

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

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

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

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

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

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

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

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

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

The second thing I'd point out, is it in direct response. Well, I mean, again, I guess I go back to the written language here. The review and comment memo has a section that says comments and questions. These are our comments, and these are our questions, and I understand we -- you know, I certainly have a disagreement, respectfully so, with Mr. Cartin as to the breadth of that, but to take that reasoning further, if someone says, well, is this what it means, no, this isn't what it means. Really, what it means is something radically different, and I can say, Well, that's now in response to a comment, and with respect to the technical question, Article XXVIII, where it says, would you -- and specifically the language says, "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,'" okay, and then

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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harder for me.

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

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

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

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

MR. DOMENICO: No.

MR. CARTIN: No.

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

At this point, maybe I'll just suggest

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

(No response.)

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

MR. GESSLER: Thank you, Mr. Hobbs.

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

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

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

MR. DOMENICO: XVIII, right?

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

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

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

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right?

MR. GESSLER: That's correct.

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

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

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

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

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

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

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

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

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

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

But as far as the legal signals as to why

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DOMENICO: No.

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

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

MR. HOBBS: Yeah, that's right.

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

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

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

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

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

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

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

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Have you sometimes seen that in other statutes?

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

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

MR. GESSLER: Yes.

MR. DOMENICO: Yes.

MR. CARTIN: Doesn't the "notwithstanding any other provision of the law" clause really have the same -- here is my lawyer question, okay? Doesn't it really have the same effect as the second sentence? From purely a textual standpoint or a drafting standpoint, can the argument be made that -- that "this definition shall prevail over any conflicting

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

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

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

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

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

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

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

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

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

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

Why can't you apply both of those in

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

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

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

MR. DOMENICO: No. That's fine.

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

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

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

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

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

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

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

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

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

MR. HOBBS: Mr. Domenico?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. DOMENICO: But you just said that the

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

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

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

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

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

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

MR. GRUESKIN: That is the existing law.

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

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

MR. DOMENICO: Right.

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

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

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

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

MR. DOMENICO: Fair enough.

MR. HOBBS: Further questions for Mr. Grueskin?

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

MR. GESSLER: No, I don't.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CARTIN: Real brief, going back to the

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

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

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

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

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

MR. HOBBS: Mr. Domenico?

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

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

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

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

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

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

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

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

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

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

MR. HOBBS: So it would be potentially

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

MR. DOMENICO: Me, too.

MR. HOBBS: Mr. Cartin?

MR. CARTIN: I just wanted to clarify. Mr. Domenico, does that reasoning apply to No. 124, as well?

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

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

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

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

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

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

MR. DOMENICO: How could it be ineffective?

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

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

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

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

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

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

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

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

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

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

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

MR. DOMENICO: I second that motion.

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

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

MR. DOMENICO: Aye.

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

MR. CARTIN: No.

MR. HOBBS: That motion carries two to one.

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

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

Mr. Knaizer.

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

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

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

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

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

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

MR. KNAIZER: Correct.

MR. HOBBS: But declined to make any changes?

MR. KNAIZER: Correct.

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

MR. KNAIZER: That's correct.

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

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

MR. HOBBS: Mr. Grueskin?

MR. GRUESKIN: Maybe I can -- not that

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

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

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

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

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

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

MR. CARTIN: I agree with that.

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

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

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

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

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

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

MR. DOMENICO: Yes.

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

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

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

* * * * *

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.

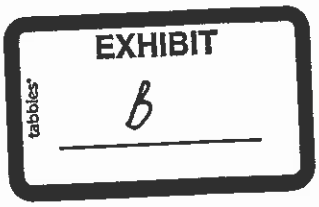
I further certify that I am not employed by, related to, nor of counsel for any of the parties herein, nor otherwise interested in the outcome of this litigation.

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.
__X__ Reading and Signing is not required.

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



2007-2008#123
Conditions of Employment

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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 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

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

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

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that you couldn't undertake that kind of drafting.
Now, how this ultimately gets applied, I guess, is a question for the Courts, but the intent was to reflect what voters will be voting on, which is the ballot title, and that ballot title in what is now Amendment 47 only speaks of labor organizations.
So, you know, I think you can set a title under either scenario. You could set a title under the sense that they are conflicting and one is intended to preempt, or that there may be some interpretation under which they are not conflicting. But in either event, I believe that you can set a ballot title.
MR. HOBBS: Well, isn't – okay. But isn't – doesn't this measure violate the single-subject rule? Under this theory then, the two different subjects of this measure, one – one would be to prohibit employers from requiring participation in organizations other than unions, in other words, like you said, credit – credit unions and get-well funds and things like that, but organizations other than traditional unions? The other subject, which seems, to me, quite different than that, is to nullify #41, which deals with that kind of a mirror image but a completely opposite type of organization. And how – aren't those two different subjects?

MR. GRUESKIN: I don't think so. I think that the purpose of this measure is to prohibit the conditioning of employment upon nonemployment-related organizations, that, you know, for whatever reason, qualify, as #41 provides, as a mutual aid society. I don't really know what those are, but I don't – the proponents don't believe that that ought to be part of the law. And so I don't think that it's a second subject.
I think even if you were concerned that it's a second subject, the fact that it uses "labor organization" and not "labor union" is cause to believe that there is the possibility that down the road the Court may say that I'm wrong and that the ballot title language isn't sufficient to bring #123 within the ambit of the preemption model that I've referenced. So I don't believe it is the second subject.
MR. HOBBS: And I may not be entirely following this, but let me take one more run at it. I mean, this measure mostly seems to be about prohibiting employers from requiring participation in organizations like get-well funds, things that don't involve collective bargaining and things like that.
MR. GRUESKIN: Right.
MR. HOBBS: I mean, I -- and in one of the

examples that I – I appreciate your examples. I mean, in my organization, you know, in state government, there's the Colorado State Managers Association that supervisors might belong to or the Colorado Information Managers Association, which is an association of IT people. So employers in state government could not require their IT people to belong to the IT association, those kinds of things.
But, again, those are all organizations that don't deal with labor disputes, wages, rates of pay, those kinds of things. So that seems to be basically what this measure does.
But because this measure also has language in it that says that the definition of "labor organization," which is – which excludes what I think most people would think of as being a labor organization, since that trumps #41, it seems like it has an entirely separate and distinct effect, which is to also prohibit employers from requiring participation in unions. And that is kind of a hidden – well, a hidden subject, but also a completely separate subject from the main -- the main effect of this measure.
I don't see how there's a single subject that incorporates both. You nullify another measure and substitute this one, but they're dealing with two

different types of organizations. You're saying it's okay to require participation in a labor union but not okay to require participation in any other kind of organization. I'm trying to find the unifying principle there.
MR. GRUESKIN: Well, the unifying principle is that there are – as the measure provides, there are limits on what sorts of conditions on employment an employer may set.
I absolutely agree, Mr. Hobbs. You know, I think that – I mean, to the extent that you're right, then we may be saddled with 41 which applies both to typical labor union types of setups and everything else. And maybe I overlooked raising that single-subject argument when 41 was before you. But it seems to me that, you know, it's – I'm not trying to equivocate about the purposes here.
MR. HOBBS: Um-hum.
MR. GRUESKIN: But it seems to me that if 41 was is single subject, this one – I believe it should be too. I understand your point.
MR. HOBBS: Okay. Well, of course we're still on the question answering stage, but we've kind of – I've kind of moved into the single-subject question. So if there's other members of the Board

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

Any other questions?

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

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

MR. DOMENICO: Um-hum.

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

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

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

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

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

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

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

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

doing this sort of thing.

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

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

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

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

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

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

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

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

MR. HOBBS: Mr. Cartin.

MR. CARTIN: Thank you, Mr. Chair.

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

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

MR. GRUESKIN: That's correct.

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

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

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

it was just a judgment call.

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

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

MR. CARTIN: Thank you.

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

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

MR. DOMENICO: 61?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HOBBS: Mr. Cartin.

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

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

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

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

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

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

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

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

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

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

things like that. I don't really see that those are connected or dependent upon one another. I think they're two separate purposes.

MR. CARTIN: Can I take one more minute to have a try?

MR. HOBBS: Okay. Go ahead. I'm sorry. My answer was way too long-winded anyway.

MR. CARTIN: No. It seems to me that an argument can be -- well, it seems what you have here, even though maybe the text of 123 contemplates the passage of both, is -- well, I think these could be viewed as competing measures. That's probably stating the obvious.

I guess my question is, is it -- and I'm just asking for your take on it. If you have a measure that clearly compete with -- competes with another measure that's on the ballot, it's been before the Title Board, has had a title set, where it's meant to supersede that measure should both of them pass, and, in addition, create some other substantive right or procedure or goes in a different direction than the, using our example here, the preceding measure, is there -- are there circumstances under which that type of second measure that does have a competing purpose, in your mind, would have a single subject, could have a single

subject?

MR. HOBBS: Yeah, I think so, if I understand your question. I mean, I think a measure that's -- whose purpose is to nullify or preempt another measure, that could have a single subject.

I mean, if this measure only included the language about the definition of "labor organization," you know, even perhaps including the -- well, the definition of "labor organization," together with the language that says this is -- this definition applies throughout the article, notwithstanding any provision of law and regardless of the numbers of votes received and that kind of thing, I mean, I think that would be an example of a measure that has a single subject, a single purpose. And there may be a more direct route to do that.

I mean, in this case, for example, the measure could simply say that -- I think, that an employer may require membership in all -- or participation in a labor organization as a condition of employment and this measure prevails over any other measure regardless of the number of votes that may be cast.

But, you know, my difficulty is that 123 then goes on to address the membership in -- granted in

other organizations but exactly opposite organizations. And so that's -- that's where I see the second purpose unconnected.

Granted, I mean, I guess I'll take a run at defending the measure from single subject, but just for the sake of putting this on the table, I mean, this is -- but it's also going through my mind, is that, you know, can proponents say to themselves is this a reasonable way of looking at this measure.

The proponents say to themselves, you know, #41 raises a good question, when should employers require employees to belong to certain kinds of organizations. That's a legitimate matter of public policy. Our view -- our group of proponents thinks that, you know, unions probably is a legitimate thing for employers to require participation in, but other things, you know, just generally employers ought not to do that.

And so perhaps as a matter of public policy, that is what a group of proponents may want to do, and therefore they've got two different things in their proposal, 123, that addresses the fact that, you know, requiring membership in labor unions should be okay, but other kinds of organizations it's not.

You know, I'm just trying to take a run at

can you -- could you, in a vacuum, come up with a public policy position that says that's what -- that's the right answer, and in order to achieve that result you have to both nullify -- nullify #41 and substitute a better public policy. I mean, I'm just not there yet.

MR. DOMENICO: Well, that's exactly the defense that the proponents of 61 put forward, was that, well, we agree with kind of the broad idea of the -- of the proponents of 31 or whatever it was, that the State should make a statement against discrimination based on race. And so that's why we used the exact same language they used. But we just want to make sure that everyone understands that it's a little bit different.

I mean, Mr. Grueskin will make -- will probably get an electronic copy of the brief filed by the proponents in 61 and change some of the wording around. It's the exact same argument here. We agree that there are certain things that employees shouldn't be required to do, that's why we're using this "labor organization" language.

And it's their fault for using this broad term when they could have been more precise, which is -- and so we're being more precise by defining

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

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

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

MR. HOBBS: Mr. Grueskin.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. CARTIN: Second.

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

MR. DOMENICO: Aye.

MR. CARTIN: Aye.

MR. HOBBS: All those opposed no.

No.

That motion carries 2-1.

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

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

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

I think the staff draft is largely just fine.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And so that leaves me in a very difficult

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

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

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

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

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

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

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

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

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

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

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

MR. HOBBS: Mr. Cartin.

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

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

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

MR. DOMENICO: Well, it seems more important

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

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

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

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

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

MR. HOBBS: Mr. Grueskin, any objection to

enclosing that reference to "labor organization" with quotes?

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

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

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

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

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

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

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

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

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

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

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

MR. CARTIN: Second.

MR. HOBBS: Any discussion by the Board?

All those in favor say aye.

Aye.

MR. DOMENICO: Aye.

MR. CARTIN: Aye.

MR. HOBBS: All those opposed no.

That motion carries 3-0.

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

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

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

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

MR. DOMENICO: I second it.

MR. HOBBS: Any further discussion?

All those in favor say aye.

Aye.

MR. DOMENICO: Aye.

MR. CARTIN: Aye.

MR. HOBBS: All those opposed no.

That motion carries 3-0.

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

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

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

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

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

Any opposition at this point?

The next suggestion from Mr. Grueskin --

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

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

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

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

We'll just go ahead and move those changes.

MR. DOMENICO: Second.

MR. HOBBS: Any further discussion?

If not, all those in favor say aye.

Aye.

MR. DOMENICO: Aye.

MR. CARTIN: Aye.

MR. HOBBS: All those opposed no.

That motion carries 3-0.

Further changes to the staff draft?

Is there a motion adopt the staff draft as amended?

MR. CARTIN: So moved.

MR. DOMENICO: Second.

MR. HOBBS: Move and seconded.

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

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

comma, employee benefits, comma, hours of employment, comma, or conditions of work; semicolon, and providing that the definition of, quote, labor organization, end quote, in this amendment shall provide – shall prevail over any other conflicting definition in article XXVIII of the Colorado constitution, comma, including any other amendment adopted at the 2008 general election regardless of the number of votes each receives," period, with the understanding that the same changes will be made in the ballot title and submission clause.

I'm sorry?

MR. CARTIN: XVIII.

MR. HOBBS: Oh, XVIII. I'm sorry. I read article XXVIII and I should have read article XVIII.

Thank you, Mr. Cartin.

Any other – is there any other discussion?

The motion is to adopt this as the title.

All those in favor say aye.

Aye.

MR. DOMENICO: Aye.

MR. CARTIN: Aye.

MR. HOBBS: All those opposed no.

That motion carries 3-0.

And that concludes action on #123.

The time is 9:44 a.m.

(The proceedings concluded at 9:44 a.m. on the 21st day of May, 2008.)

CERTIFICATE

STATE OF COLORADO)
)
COUNTY OF DENVER)

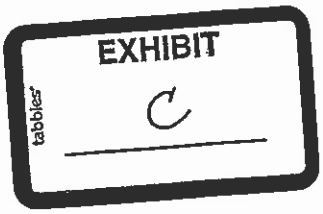
I, SHELLY R. LAWRENCE, Registered Professional Reporter and Notary Public within and for the State of Colorado, commissioned to administer oaths, do hereby state that the said proceedings were taken in stenotype by me at the time and place aforesaid and was hereafter reduced to typewritten form by me; and that the foregoing is a true and correct transcript of my stenotype notes thereof.

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

IN WITNESS THEREOF, I have affixed my signature and seal this 27th day of May, 2008.

My commission expires: 03/18/2009.

SHELLY R. LAWRENCE, RPR
Notary Public, State of Colorado



Ballot Title Setting Board

Proposed Initiative 2007-2008 #123[1]

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

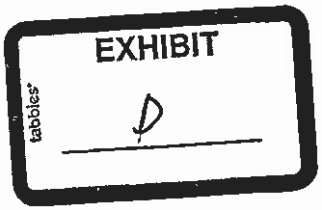
An amendment to the Colorado constitution concerning participation in certain organizations as a condition of employment, and, in connection therewith, prohibiting an employer from requiring an employee to join a "labor organization" or to pay dues, assessments, or other charges to or for such an organization; 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.

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



Ballot Title Setting Board

Proposed Initiative 2007-2008 #41[1]

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.

[1] 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.