

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,

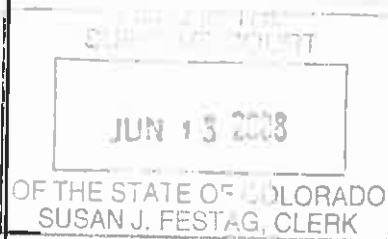
and

Title Board:

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Dominico

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Case Number: 08SA200

OPENING BRIEF OF THE RESPONDENT

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I. STATEMENT OF THE ISSUES

A. Proposed Ballot Initiative 2007-2008 No. 124 (“Initiative 124”) 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 124 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 124 prohibits conditioning employment on participation in organizations other than those regulated by the preempted measure. Is Initiative 124's preemption of another initiative a different subject than Initiative 124'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 124 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 124 violated the single subject requirement.

B. Proceedings Below

On May 21, 2008, the Title Board considered Initiative 124 and determined that it had jurisdiction to set a title, whereupon it set a title for the initiative. In doing so, it explicitly incorporated the entire discussion that had just occurred on Proposed Ballot Initiative No. 2007-2008 #123.¹ 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

¹ Tr. 2:8-22, May 21, 2008, **Exhibit B**.

question or comment; (2) that the initiative violated the single subject requirement; and (3) that the title for Initiative 124 was inaccurate and misleading. These same objections were made to Proposed Ballot Initiative 2007-2008 #123 (“Initiative 123”) which contained nearly identical language.

At the Motion for rehearing, the Title Board consolidated this matter with Initiative 123 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 124 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.”² In taking this unusual approach to defining the term “labor organization” the proponents had one

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

overriding goal – to preempt the definition of “labor organization” in Amendment 47, a measure that is currently qualified for the ballot. As the Proponents forthrightly admitted at the Motion for Rehearing, Initiative 124 “is obviously intended to have a preemptive effect as to the right to work initiative that's been certified for the ballot.”³

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 124 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 124 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

³ Initiative 123 Tr. 2:19-21, May 21, 2008, **Exhibit D**.

than prohibiting certain conditions of employment or defining exemptions to the term “labor organization.”

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 initiative’s 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 124 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 124.

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."⁴ The Court makes "all legitimate presumptions in favor of the propriety of the Board's actions."⁵

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

⁴ *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).

⁵ *In re Title, Ballot Title, & Submission Clause & Summary for Pet. Procedures*, 900 P.2d 104, 108 (Colo. 1995).

misrepresentation.”⁶ The Title Board is not required to draft the best possible titles, and titles must not contain every detail of the measure.⁷

B. Initiative 124 contains multiple subjects

1. Single subject standard

Under Colorado law, every proposed initiative must contain a single subject,⁸ and no initiative may contain “more than one subject, which shall be clearly expressed in its title.”⁹ 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.¹⁰

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

⁶ *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).

⁷ *In re Title, Ballot Title, Submission Clause & Summary for 2007-2008 No. 57*, No. 08SA91, Slip Op. at 10 (Colo. 2008).

⁸ Colo. Const. art. V, § 1(5.5).

⁹ Colo. Const. art. V, § 1(5.5).

¹⁰ *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.”¹¹ Consequently, themes that are “too general and too broad” cannot be applied to unite separate and discrete subjects into a single subject.¹² Themes such as “water,”¹³ “monetary impact,”¹⁴ “non-emergency government services,”¹⁵ “environmental conservation” and “conservation stewardship”¹⁶ 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.”¹⁷ That prohibition promotes the goal of barring “disconnected or incongruous measures” from passing in the same legislative act.¹⁸

¹¹ *In re Title, Ballot Title & Submission Clause for 2007-2008 No. 62*, No. 08SA90, 2008 WL 2081571, at *8 (Colo. 2008).

¹² *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).

¹³ *In re Title, Ballot Title, Submission Clause & Summary for “Pub. Rights in Waters II”*, 898 P.2d 1076, 1080 (Colo. 1995).

¹⁴ *In re House Bill No. 1353*, 738 P.2d 371, 373 (Colo. 1987), (interpreting the single subject requirement for bills).

¹⁵ *In re Title and Ballot Title & Submission Clause for 2005-2006 No. 55*, 138 P.3d 273, 282 (Colo. 2006).

¹⁶ *In re Title, Ballot Title & Submission Clause for 2007-2008, No. 17*, 172 P.3d 871, 875-76 (Colo. 2007).

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

¹⁸ *In re Title and Ballot Title & Submission Clause for 2005-2006, No. 55*, 138 P.3d 273, 278 (Colo. 2006).

2. Initiative 124 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 124 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. § 1-40-124, 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.”¹⁹ This second provision forms a separate subject.

The change to § 1-40-124 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 124, but also for other initiatives on the ballot that may conflict, but have different subjects than Initiative 124. No longer does Initiative 124 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

¹⁹ C.R.S. § 1-40-124 (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.²⁰ Likewise, Initiative 124 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 124'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.

²⁰ *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.²¹ 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.²² 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

²¹ Proposed Colo. Const. art. XVIII, § 17(2).

²² See, e.g. Colo. Const. art. XVIII, § 1 (homestead exemption laws).

124's broad override of the term "labor organization." Initiative 124's prevailing definition is not limited to statutory conflicts that are connected to conditions for employment. Rather, Initiative 124 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 124 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."²³

Initiative 124 preempts the existing ballot measure by exempting certain types of organizations from the definition of "labor organization." According to the proponents, Initiative 124 "was drafted to provide that the types of organizations that ought not -- membership in which or payment for which ought

²³ Initiative 123 Tr. 2:19-20, May 21, 2008.

not to be a condition of employment are those that really are ancillary to the employment relationship.”²⁴

Proponents may certainly choose to define exceptions to “labor organization” in a manner that conflicts with another initiative. But Initiative 124 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.”²⁵ 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 124 avoids defining what constitutes a “labor organization;” by 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.²⁶ In *In re 2005-2006 No. 55*, an initiative failed to define the terms “non-emergency” and “services.”²⁷ Because of that failure, this Court stated that it could not “discern

²⁴ Initiative 123 Tr. 3:10-15, May 21, 2008.

²⁵ Proposed Colo. Const. art. XVIII, § 17(1).

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

²⁷ *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.’²⁸

Likewise, it is impossible to discern how the General Assembly or courts may enforce Initiative 124, 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 124 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

²⁸ *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.²⁹ Although the Title Board is not expected to write a perfect title,³⁰ it endeavors to do the best it can in light of competing interests. This Court reviews a title for error – not to rewrite the title³¹ 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 124, 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 . . .”³² 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

²⁹ See C.R.S. § 1-40-107(2) (2007).

³⁰ *In re Title, Ballot Title, & Submission Clause for 2007-2008 No. 62*, No. 08SA90, 2008 WL 2081571 at *10 (Colo. 2008).

³¹ *Id.* at *13.

³² Initiative 123 Tr. 40:17-20, May 21, 2008.

rehearing we could improve it quite a bit.³³ 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 124 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

³³ Initiative 123 Tr. 41: 9-12, May 21, 2008.

situation where the Title Board did not consider title at a motion for rehearing.³⁴ 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 . . ."³⁵ In common language, the word "certain" means "known for sure; established beyond doubt" or "specific but not explicitly named or stated."³⁶ But the organizations affected by Initiative 124 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

³⁴ *In re Title, Ballot Title, & Submission Clause 2007-2008 No. 61*, No. 08SA89, 2008 WL 2081574 at *15-16 (Colo. 2008).

³⁵ Former ballot title and submission clause, **Exhibit C** (emphasis added).

³⁶ 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.³⁷ Accordingly, the voters should be informed that the subject of the provision is to preempt Amendment 47. Initiative 124 calls upon voters to make a clear policy

³⁷ Initiative 123 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 misled 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 . . .”³⁸ In common usage, the term “define” means “state or describe exactly the nature, scope, or meaning of.”³⁹ 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.

³⁸ Former ballot title, **Exhibit C**.

³⁹ Oxford Am. Coll. Dictionary, 359 (1st ed. 2002).

Although Initiative 124 uses the term “define” to identify the exemptions to the term “labor organization,” neither this Court nor the voters should be misled 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 124 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 124 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 124 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 124 changes the common definition of “labor organization.”

Finally, Initiative 124 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.”⁴⁰ 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.

⁴⁰ 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 124 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. . . .⁴¹

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

⁴¹ Amendment 47 Ballot Title, **Exhibit E**.

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.

By: 

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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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1 WHEREUPON, the following proceedings were
 2 taken.
 3 * * * * *
 4 MR. HOBBS: Good morning. Let's go ahead
 5 and get started. This is a meeting of the title
 6 setting review board pursuant to Article 40 of Title 1,
 7 Colorado Revised Statutes. The date is May 30, 2008.
 8 The time is 8:38 a.m. We're meeting in the Secretary
 9 of State's Blue Spruce conference room, 1700 Broadway,
 10 Suite 270, Denver, Colorado.
 11 The Title Setting Board today consists of
 12 the following: My name is Bill Hobbs. I'm deputy
 13 secretary of state, representing Secretary of State
 14 Mike Coffman. To my left is Dan Cartin, deputy
 15 director of the Office of Legislative Legal Services,
 16 who is the designee of the director of the Office of
 17 Legislative Legal Services Charlie Pike. To my right
 18 is Dan Domenico, solicitor general, who is the designee
 19 or the representative of Attorney General John Suthers.
 20 To my far left is Maurie Knaizer, deputy attorney
 21 general, who represents the Title Board. To my far
 22 right is Cesi Gomez of the Secretary of State's office.
 23 There are sign-up sheets for anybody who
 24 wishes to testify on the items today. The meeting is
 25 reported in broadcast over the Internet. We have two

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1 agenda items today, both of these before us on motions
 2 for rehearing, No. 123 and No. 124. If there's no
 3 objection, I'd like to take these together. They are
 4 alternative versions of -- I think it's basically the
 5 same proposal, the same proponents, essentially the
 6 same motion for rehearing.
 7 So with that, I will turn it over to
 8 Mr. Gessler to speak on behalf of the motion for
 9 rehearing.
 10 MR. GESSLER: Thank you, Mr. Hobbs. For
 11 the record, my name is Scott Gessler. I represent
 12 Mr. Cole, who's the protester in this matter, and we
 13 have no objection to consolidating 123 and 124 because
 14 I think the arguments are -- are identical.
 15 What I've handed out to the proponents as
 16 well as each member of the Title Board is a packet of
 17 information, and that contains a copy of the Review and
 18 Comment Memo for item No. 123, a copy of a transcript
 19 for the Review and Comment Hearing for No. 123, a copy
 20 of the transcript for the initial hearing before the
 21 board for 123. It contains a copy of the Review and
 22 Comment Memo for 124, the Review and Comment Memo -- or
 23 the Review and Comment Hearing transcript from 124, and
 24 the original Title Board hearing from 124.
 25 And then finally, because I'll be

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1 referencing it, a copy of the -- of the case in re --
 2 titled Ballot Title Submission Clause 2007/2008,
 3 No. 61, so I hope both the proponents and each member
 4 of the board actually do have all that information in
 5 that packet. And if there aren't any questions, I'll
 6 just proceed.
 7 MR. HOBBS: Go ahead.
 8 MR. GESSLER: My first argument and the
 9 first argument in the rehearing here has to do with the
 10 jurisdictional argument and basically the argument here
 11 is that the changes to the memorandum were not -- first
 12 of all, that they were substantive changes; and,
 13 secondly, they were not in response to a question or
 14 comment by Office of Legislative Legal Services or
 15 legislative counsel, and -- and basically just to go
 16 through exactly what it was, the original version of
 17 this initiative -- and this, I think, applies for 123
 18 and 124, but I'll use "initiative," singular,
 19 subsection 2 said, "This definition shall," the last
 20 sentence, "prevail over any conflict in definition of
 21 labor organization in Article XVIII of the" -- I'm
 22 sorry, it currently says, "in Article XVIII of this
 23 constitution." Originally it said "in Article XXVIII
 24 of this constitution," and then it says "including any
 25 provision adopted at the 2008 general election

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1 regardless of the number of votes received by this or
 2 any other such amendment."
 3 So, first of all, that is a substantive
 4 change, and I understand that the proponents
 5 characterize that as a typographical error, but if you
 6 look at Article XXVIII, it -- it directly discusses --
 7 it directly regulates labor organizations. It's the
 8 campaign finance and reform initiative that was adopted
 9 in 2002. So -- so the term "labor organization" has
 10 direct relevance to Article XXVIII; and, in fact, when
 11 we -- when we first looked at this -- and we were
 12 certainly taken aback by the approach that the
 13 proponents took but also the fact that this is a --
 14 that this changed the definition of labor organization
 15 in Article XXVIII and then exempted Article -- exempted
 16 or changed -- by changing the definitions, it
 17 effectively exempted certain types of organizations
 18 that traditionally would be considered labor
 19 organizations from campaign finance regulations, so
 20 that was a broad -- a broad change.
 21 And then in comparison, we looked at
 22 Article XVIII, and we ran a word search, and
 23 Article XVIII of the constitution is entitled
 24 Miscellaneous. It's sort of a catchall area, and the
 25 term "labor organization" does not show up there at

1 all, and so it was absolutely reasonable to look at how
 2 this affected Article XXVIII, because Article XXVIII
 3 has the term "labor organization," and Article XVIII
 4 doesn't use the term "labor organization" at all.
 5 So it only makes sense. So I think
 6 that -- and, plus, saying Article XXVIII versus
 7 Article XVIII is a big difference. It's not a matter
 8 of simply a -- a misspelled word or an improperly
 9 placed comma. This fundamentally changes the meaning
 10 of what this is, of what this provision is; and as a
 11 result, it's a substantive change. I mean, when you
 12 change the meaning of something, that's a substantive
 13 change. A typographical change is an error in typing
 14 that doesn't change, effectively change, the
 15 substantive meaning of something. I mean, I argue a
 16 substantive change changes the substance of what
 17 happens.
 18 MR. DOMENICO: Well, wait. A typo can
 19 certainly change the substance. It can be both, right?
 20 I mean, if you wrote a sentence that says -- that says,
 21 "The income tax rate shall be 50 percent," and you meant
 22 to hit 10 percent or 4 percent, I mean, that's both a
 23 typo and a substantive change, right? I mean, just
 24 because it changes the meaning of something doesn't
 25 mean it's not a typo.

1 reasoning here. First of all, the comments and
 2 questions are the written comments and questions that
 3 are presented to the proponents. They're not what
 4 happens verbally at the hearing. The hearing is to
 5 explain the comments and questions. The comments and
 6 questions are the written comments and questions, and I
 7 think that has to be the instance if you look at the
 8 grounding of the text of 1-40-105. Basically it says
 9 no later than -- and I'm looking at 1-40-105,
 10 subsection 1 in the middle of it.
 11 It says "no later than two weeks after the
 12 date of submission of the original draft unless it is
 13 withdrawn by the proponents, the directors of the
 14 legislative counsel and Office of Legislative Legal
 15 Services or their designees shall render their comments
 16 to the proponents of the petition concerning format or
 17 contents of the petition at a meeting open to the
 18 public. Where appropriate," and this is the key
 19 language, "such format or contents to the" -- "of the
 20 petition" -- I'm sorry. "Where appropriate, such
 21 comments shall also contain suggested editorial changes
 22 to promote compliance with the plain language provision
 23 of this section."
 24 I'm sorry. That's not the critical point.
 25 This is the critical point. "Except with the

1 MR. GESSLER: I would accept that
 2 characterization that a substantive change can also be
 3 a typographical error.
 4 MR. DOMENICO: Right.
 5 MR. GESSLER: And here it doesn't detract
 6 from the argument that here this is a substantive
 7 change. Whatever the cause of the substantive change,
 8 it's a substantive change. So I guess in -- under that
 9 reasoning, we wouldn't entirely disagree. So the first
 10 point is that this is a -- this is a substantive
 11 change.
 12 Now, the second point is it needs to be --
 13 under 1-40-105(2), it basically needs to be -- an
 14 amendment has to be in direct response to the comments
 15 of the directors of the legislative legal counsel and
 16 the Office of Legislative Legal Services. So basically
 17 that has a couple points to it. First of all, it has
 18 to be a direct response; and, secondly, it has to be in
 19 response to the comments.
 20 Now, if you look at the review and comment
 21 memo itself for item 123, this contains several
 22 sections. One is an introduction. Two is the
 23 recitation of the purposes. Three is clearly labeled
 24 Comments and Questions. These are the comments and
 25 questions, and there's sort of two components for the

1 permission of the proponents, the comments shall not be
 2 disclosed to any person other than the proponents prior
 3 to the public meeting with the proponents of the
 4 petition."
 5 So you have comments that are not
 6 disclosed until the public meeting and at the public
 7 meeting, the comments are disclosed. So the comments
 8 are something that can be given to the proponents in
 9 advance and not disclosed to the public. In other
 10 words, the comments are the written comments here
 11 and -- and so that's what -- that's what the comments
 12 are. It's not -- and I would submit from several
 13 points, not only the literal language but from a policy
 14 standpoint, it's not sort of a broad-reaching,
 15 analytical discussion during a hearing and whatever
 16 comes up during the hearing happens to be a comment.
 17 The comments are grounded in the writing because of the
 18 purposes behind this, the literal language that the
 19 comments are something that are rendered and are not
 20 disclosed in advance until the public hearing. So the
 21 public hearing is different than the comments.
 22 And thirdly, you know, it provides a very
 23 clear and clean basis for the -- to determine what this
 24 Title Board's jurisdiction is here. It's not a lasting
 25 definition, but it's a relatively solid one.

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1 MR. DOMENICO: Well, doesn't the – the
 2 policy reasoning behind the requirement that changes be
 3 made in response to comments actually cut against
 4 interpreting it in that way in that I would think that
 5 the only justification for requiring that comments –
 6 that changes are in response to comments is that it
 7 allows for, at the hearing, opponents or the public or
 8 other interested people to understand why changes are
 9 being made; and if the written comments are
 10 confidential and they aren't disclosed until the
 11 hearing, then why should -- how does that match up with
 12 the reasoning behind requiring comments to be --
 13 requiring changes to be related to something brought up
 14 by – during the process or in relation to comments or
 15 questions?
 16 MR. GESSLER: Well, because the comments,
 17 I think, have more than simply that purpose to provide
 18 notice to the public in the hearing. I think the
 19 comments also are – are the considered – and this is
 20 the purpose of the whole review and comment. It's the
 21 considered analysis that legislative legal services and
 22 legislative counsel believe needs to be taken into
 23 consideration in either revising or reviewing the
 24 statute. It's not a give-and-take back and forth,
 25 whatever the proponents choose to bring up and the

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1 legislative counsel says, Well, gee, that's a good
 2 comment, or something along those lines off the cuff,
 3 which is essentially what happened here.
 4 I mean, what this is is for someone to go
 5 back and study this and say, Okay, look, based upon
 6 this, these are the changes that we suggest or these
 7 are our comments based upon a well-considered analysis
 8 of this rather than sort of an off-the-cuff
 9 give-and-take. So there's really more – certainly the
 10 public needs to have notice of what's going on, but the
 11 actual purpose of the review and comment, I think, is
 12 to create a better initiative, not to allow proponents
 13 to sort of willy-nilly amend their initiative as things
 14 go forward, but only in direct response to a
 15 well-considered analysis here, and that's what the
 16 written review and comments are. So it's a
 17 well-considered analysis. That's the purpose for the
 18 review and comments.
 19 Certainly a secondary purpose is to
 20 provide the public notice. That's the purpose of the
 21 public hearing, but the purpose of the review and
 22 comments is to give the -- is to give the proponents
 23 input into what's going on. Otherwise, there is no
 24 need to even have a direct response to a comment. I
 25 mean, that simply removes – I think your argument

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1 removes it from the moorings of the purpose.
 2 Basically, under your reasoning, as long
 3 as the public has notice of why a change is being made,
 4 it doesn't matter, so why would it even be necessary to
 5 be in direct response? The reason it's necessary to be
 6 in direct response to a comment is because of this
 7 well-considered analytical approach, not merely for
 8 notice. Otherwise, there would be no need for it to be
 9 in response to a comment. It could be simply to
 10 provide notice to the public that we're going to be
 11 doing this rather than in response to a comment.
 12 MR. HOBBS: Mr. Gessler, I'm just not sure
 13 I'm entirely following you. It sounds like you're
 14 saying that the – the meeting itself is a mere
 15 formality, that the written comments have been
 16 delivered to the proponents. I'm not sure what you
 17 picture happening at the meeting. I mean, I guess the
 18 memo is disclosed publicly. The proponents may comment
 19 or – in response but are not required to. I – you
 20 know, and I think the practice might be that the staff
 21 might read the questions, but I'm not sure that there's
 22 a point because if that's the limit – and the memo
 23 kind of speaks for itself. If that's the limit of the
 24 discussion and there -- and that there cannot – I
 25 think I hear you saying there cannot be a dialogue

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1 based on those written comments that goes beyond –
 2 that leads beyond the comments on the paper. Is that
 3 correct?
 4 MR. GESSLER: Not entirely. What I would
 5 say is the review and comment session is not a mere
 6 formality. I mean, it certainly performs two important
 7 roles: one is to provide additional guidance or give
 8 and take to the extent a proponent doesn't understand a
 9 comment, okay? For example, you know, a comment may
 10 be – may say, You've not used the proper title
 11 structure in this particular instance, and the – and
 12 would you consider changing it along these lines, and
 13 maybe the "along the lines" is somewhat incomplete and
 14 a proponent may say, Well, no problem. I'll change it
 15 along those lines. Should I put my period here or my
 16 semicolon here. And, I mean, that draws from my
 17 personal experience.
 18 But if you look at the transcript on –
 19 I'm sorry. Let me finish that thought. The other
 20 purpose, obviously, is to provide the public notice of
 21 the comments. That's why they're -- that's why you
 22 have the public -- the public hearing, and that's when
 23 the review and comments are released, at the public
 24 hearing, so that that can be public. So it certainly
 25 fulfills those two purposes, okay?

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1 But the purpose of the public hearing is a
 2 little bit different than the purposes of the review
 3 and comments themselves. They're questions and
 4 comments. And if you look at page 2 of the transcript
 5 for the hearing, the initial hearing, towards the
 6 bottom, line 23, it says, "The purpose of the" -- and
 7 then this is read by all, LCS or OLC. It says, "The
 8 purpose of the review and comment requirement is to
 9 help proponents arrive at language that will accomplish
 10 their intent and to avail the public of knowledge of
 11 the consent of the proposal."
 12 So there's two purposes there, and I guess
 13 this goes back to my response to Mr. Domenico. One of
 14 the -- one of the purposes is to help the proponents
 15 arrive at language that accomplishes their intent, and
 16 that's based upon a well-considered analysis of the
 17 text itself, okay? Those are the review and comments.
 18 And then the hearing is -- in the next
 19 paragraph -- I'm sorry. If you continue in that same
 20 paragraph, line 4 on page 3, it says, "We hope that the
 21 statements and questions contained in this memorandum
 22 will provide a basis for discussion and understanding
 23 of your proposal." So it's the memorandum itself that
 24 forms the basis as to what needs to be directly
 25 responded to.

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1 MR. HOBBS: Well, it's a discussion,
 2 though, but it sounds like that discussion is kind of
 3 irrelevant if you go beyond the written comments of the
 4 staff.
 5 MR. GESSLER: That's correct. I think
 6 their -- I think -- well, I mean, the discussion may be
 7 relevant for certain other things, but I think the
 8 discussion, if it goes beyond these direct comments,
 9 the questions and comments in here, it's irrelevant for
 10 making changes to the initiative language to bring it
 11 before the Title Board.
 12 MR. HOBBS: Well, and you might be about
 13 to -- I'm not sure if we're going to get into the
 14 specifics here a little bit, but at least
 15 theoretically, it seems to me that it's just hard to
 16 draw a fine line here in that a comment might say, The
 17 form of your citation to Article XXVIII is we would
 18 suggest a standard form of citation. That could be the
 19 written comment. The proponents may come to the
 20 meeting saying, you know, We looked it up in
 21 response -- because you made the comment about the form
 22 of the citation, we discovered that that was a mistake,
 23 that we -- we should have said Article XVIII instead of
 24 Article XXVIII. So, you know, we're going to -- you
 25 know, we're going to correct that typographical error.

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1 Then the staff might say, Well, that raises other
 2 questions, but you're saying they can't raise other
 3 questions?
 4 MR. GESSLER: And I think your
 5 hypothetical explains exactly why my approach is
 6 correct. First of all, the language is "direct
 7 response." It's not a response. Now, I understand we
 8 can have arguments as to what's direct or not, but if
 9 they say, Look, the format is incorrect and the
 10 proponents turn around and say, Oh, you're right, the
 11 format is incorrect and, by the way, we used 10 rather
 12 than 5-0, that's not formatting. That goes to
 13 substance. That's not whether it should be spelled
 14 f-i-v-e versus the numeral 5, okay? So it has to be in
 15 direct response.
 16 And, secondly, I would argue that -- I
 17 mean, you prefaced your comments, Mr. Hobbs, by saying
 18 there has to be -- it's very difficult to draw a clear
 19 line here. No, it's not, and the reason why it's not
 20 difficult to draw a clear line is because we have a
 21 written memorandum that has a section that says
 22 questions and comments, and so we go based upon the
 23 written text, and -- and with respect to your approach,
 24 that's exactly why I think it's wrong.
 25 So we'll continue with your hypothetical.

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1 The proponents say no, it should be this article rather
 2 than that article, and then the discussion turns into a
 3 lot of substantive questions about Article XVIII versus
 4 Article XXVIII. Well, that sort of defeats the
 5 purpose. Yes, it's interesting to have that
 6 broad-ranging discussion, but these should be
 7 well-considered, researched, analyzed comments and
 8 questions to an initiative. They shouldn't be
 9 off-the-cuff discussions of what different policy
 10 options there are, and by the way, this brings up an
 11 idea here and perhaps you might want to do that.
 12 I mean, I think the purpose here is you
 13 give the OLLS two weeks to analyze this with X -- with
 14 subject matter experts who can look at it and render
 15 something in writing, because that's the way good laws
 16 are made, in writing and review comments, and that
 17 provides clarity, and it helps us have lines and
 18 boundaries and understand what we are and are not
 19 supposed to do. That's why there's a written text.
 20 So I -- I think your hypothetical actually
 21 illustrates the dangers of going down that road; and
 22 along those dangers, it certainly, and I know I've made
 23 this argument in the past before the board, opens it up
 24 to manipulation, and I'm certainly not alleging that
 25 here, but what I am saying is that it allows a -- a

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

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

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

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

25 Before I sit down, does anyone have

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

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

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

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

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

2 MR. HOBBS: Mr. Cartin?

3 MR. CARTIN: Well, I'll wait.

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

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

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

15 MR. GESSLER: That's fine.

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

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

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

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

12 So there was an inherent conflict where
 13 the -- the introduction talks about Article XVIII and
 14 then subsection 2 of Section 17 talks about
 15 Article XXVIII. So I think that was pretty clear.
 16 Nonetheless, there were two -- at least two times when
 17 this issue came up. In the transcript that Mr. Gessler
 18 provided you of the May 9 hearing, on page 4, there was
 19 a summary of purposes, and there was a reference to
 20 subsection 2 and Article XXVIII and I admitted that it
 21 was my typo because the intention was that it would be
 22 Article XVIII, and then I said, "Your memo accurately
 23 reflects that typographical error, but that's something
 24 we'd like to correct, obviously, since it would be
 25 inherently contradictory. So I'm assuming that you

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

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

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

14 MR. DOMENICO: Well, but, I mean, doesn't
 15 1-40-105 actually provide for that kind of give and
 16 take? But what it says is that if there's a
 17 substantial amendment made to the petition that's not
 18 in direct response to the comments, the way you have
 19 that give and take is, then, to resubmit it to the
 20 directors for comment, basically starting over.

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. HOBBS: Right.

20 MR. DOMENICO: Yet.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. GESSLER: Thank you.

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

1 "labor organization."

2 MR. DOMENICO: Right, but --

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

7 MR. DOMENICO: Right. I understand that.

8 But -- and that's why it makes sense to me what you
9 say, that it wouldn't be shocking and I actually don't
10 necessarily think that as it was originally written
11 the -- the intro necessarily conflicted with the text.

12 You could put in the miscellaneous section of the
13 constitution a definition that refers to another
14 section, it seems to me, and so it -- it's not -- I
15 don't quite agree that it's contradictory, as
16 Mr. Grueskin said, inherently contradictory, but what
17 it says is it'll prevail over any conflicting
18 definition of labor organization in whichever article,
19 and there's no definition in any article yet.

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

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

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

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

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

1 consider adding 'OF THIS CONSTITUTION' after
 2 'ARTICLE XXVIII,'" that question was raised and
 3 responded to in the transcript by Mr. Grueskin, where
 4 he again pointed out the typographical error, and I'd
 5 point out that staff, in Question 3(a), under the
 6 Technical Questions says, "With regard to the headnote
 7 on line 6 of the proposed initiative: The proponents
 8 are adding a new section 17 to Article XVIII of the
 9 Colorado constitution." And so, to me -- rather than
 10 XXVIII, which synchs up with the amending clause
 11 language that was submitted with the original proposal.
 12 So, to me, it's not a substantial change
 13 for those reasons. I -- that's a -- I hope I didn't --
 14 I think that's a very interesting argument, a very
 15 interesting question, but that's kind of where I'm at
 16 on it.
 17 MR. GESSLER: May I -- may I --
 18 MR. HOBBS: Go ahead.
 19 MR. GESSLER: -- make a few responses?
 20 I'm looking at the case that Mr. Hobbs cited and
 21 specifically the language that he looked at, and
 22 there's a preceding sentence that says -- is truly
 23 controlling. It says, "However, the adoption of
 24 language in a subsequent draft of a proposal that
 25 substantially alters the intent and meaning of central

1 said, how does this impact that definition, I think I
 2 would have more heartburn over the fact that the
 3 proponents would come and then change the section of
 4 the -- of the article of the constitution within which
 5 this provision is ultimately intended to be located
 6 than I do right now and may feel as though it were more
 7 of a substantial amendment than it is -- than it is,
 8 but the fact that the memo did not include any
 9 questions on that, at least for me, kind of proves up
 10 that it's not a substantial amendment.
 11 Secondly, I do think -- even if it is,
 12 that it's in response to the comments, and I look at
 13 the question under Purposes, No. 3, "To state that the
 14 definition of 'labor organization' shall prevail over
 15 any conflicting definition of 'labor organization' in
 16 Article XXVIII of the Colorado constitution," that
 17 was -- that was asked and answered as indicated on
 18 page 4 of the transcript, and the fact that this
 19 particular question popped up under Purposes rather
 20 than the comments and questions portion of the memo,
 21 I'm not inclined to read comments that narrowly.
 22 The second instance of question No. 4,
 23 under the Technical Questions, "On line 16, for proper
 24 citation format and to indicate that Article XXVIII is
 25 within the Colorado constitution, would the proponents

1 features of the initial proposal presents a
 2 difficult" -- "different situation," and then it goes
 3 on to characterize it. It says, "In that circumstance,
 4 the revised document in effect constitutes an entirely
 5 different proposal from the one previously reviewed by
 6 the legislative office."
 7 So it's -- the "entirely different
 8 proposal" is actually a characterization of the test
 9 that you use, and I think the test that should be used
 10 is, first of all, looking at the language. So I
 11 respectfully would disagree with Mr. Cartin's position
 12 that you don't -- you don't look at a contextual
 13 analysis of what staff may or may not have asked, and
 14 certainly I think everyone agrees that that's a
 15 somewhat speculative enterprise; but, more directly,
 16 that's not how you determine what's substantial and
 17 what's not; if they had asked a question, that
 18 indicates that it's substantial versus not asking a
 19 question.
 20 I think really what the test is, is you
 21 look -- I mean, you look at the language, and you say
 22 does the language substantially alter the intent and
 23 meaning of one of the central features, and one of the
 24 central features here is -- in fact, there's only about
 25 three features, four features in the whole thing, and

1 one of the central features is dealing with overriding
 2 another section of the constitution.
 3 So I think -- I think really the test is
 4 looking at the language and the technical versus the
 5 substantive questions. In the paragraph above, it
 6 says, "One purpose of the public meeting with the
 7 legislative offices as required by" -- the various
 8 sections -- "is to encourage linguistic refinement of
 9 drafts." So I think really a technical is a linguistic
 10 refinement. You know, maybe someone uses the term
 11 "alternative" instead of "alternate." That would be, I
 12 think, an appropriate technical change, you know, or --
 13 or adding a preposition where one should be used for
 14 proper idiomatic approach. So I think to look at
 15 substantial, you have to look at the intent and the
 16 meaning, whether it alters the intent or the meaning.
 17 And I will submit to the board that, you
 18 know, certainly when I initially looked at that, I
 19 was -- you know, I contacted quite a few clients to
 20 explain to them what this thing would mean, because
 21 it -- it altered Article -- well, it defined the
 22 current -- the current term "labor organization" in
 23 Article XXVIII, which has far-reaching consequences,
 24 and I think, you know, a percentage suggested -- said,
 25 Well, if we don't have this clarification, you know,

1 he said -- and then Mr. Grueskin goes on. He says,
 2 "Well, as I earlier indicated, we'll make it
 3 Article XVIII," not Article XXVIII. That is not a
 4 direct response to the question.
 5 There's a reason the word "direct" is in
 6 there, and that is to fairly respond to the question.
 7 The question here is, "would you consider adding 'OF
 8 THIS CONSTITUTION'" afterwards in order to indicate
 9 that we're talking about the Colorado constitution, in
 10 order to clarify. So, I mean, that was the question.
 11 So, I mean, there has to be a meaning to the word
 12 "direct." That's why the legislature used the word
 13 direct here. There has to be meaning to the term
 14 comment and question.
 15 And when you title a memorandum, your
 16 consideration has gone into the comments and questions.
 17 I mean, the language -- terms in the same way, in the
 18 same format and the same structure should be given the
 19 same meaning, and when you have something entitled
 20 "Comment," you say, Well, that's not just the comment,
 21 there is stuff that's beyond that, then I think that
 22 really violates the plain meaning, and ultimately what
 23 we do here should, if at all possible -- and here it's
 24 very possible -- ground things in the plain language of
 25 the statutes and ground things -- ground our analysis

1 just, you know, think about the problem if it doesn't
 2 get clarified.
 3 Well, the problem is that it has a really
 4 substantially, substantively -- I don't think there's
 5 any real difference between those two words -- meaning
 6 because it affects Article XXVIII versus Article XVIII,
 7 and there's real consequences to that.
 8 The second thing I'd point out, is it in
 9 direct response. Well, I mean, again, I guess I go
 10 back to the written language here. The review and
 11 comment memo has a section that says comments and
 12 questions. These are our comments, and these are our
 13 questions, and I understand we -- you know, I certainly
 14 have a disagreement, respectfully so, with Mr. Cartin
 15 as to the breadth of that, but to take that reasoning
 16 further, if someone says, well, is this what it means,
 17 no, this isn't what it means. Really, what it means is
 18 something radically different, and I can say, Well,
 19 that's now in response to a comment, and with respect
 20 to the technical question, Article XXVIII, where it
 21 says, would you -- and specifically the language says,
 22 "for proper citation format and to indicate that
 23 Article XXVIII is within the Colorado constitution,
 24 would the proponents consider adding 'OF THIS
 25 CONSTITUTION' after 'ARTICLE XXVIII,'" okay, and then

1 in the plain language of the -- of the memorandum,
 2 itself.
 3 I probably don't have much more to say, so
 4 I'll stop running at the mouth and --
 5 MR. DOMENICO: Are you ready to discuss
 6 this issue?
 7 MR. HOBBS: I think we -- yes. Let's go
 8 ahead and just discuss the issue. It's a close call.
 9 MR. GRUESKIN: Mr. Hobbs, can I make one
 10 comment?
 11 MR. HOBBS: Yes, Mr. Grueskin. Go ahead.
 12 MR. GRUESKIN: I -- I think you're about
 13 to walk down a really dangerous path. I really do. I
 14 think you're trying to figure out whether or not, in a
 15 statute that's supposed to be liberally construed to
 16 encourage the right of initiative, whether or not
 17 comment means comment and question or whether it
 18 includes purpose. Whether or not -- I mean, in the 57
 19 decision, one of the technical questions that they
 20 cited as the basis for a substantive change that was
 21 made was whether or not the right verb tense was used,
 22 but the fact is the provision came up.
 23 I think that you -- you have an
 24 extraordinarily weighty job because your work product
 25 projects to petition signers and voters the -- the

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

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

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

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

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

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

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

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

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

1 harder for me.

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

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

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1 should be read in such a way that it doesn't -- that in
 2 a close case like this, the tie goes to the petitioner
 3 or whomever we want to call it, so I think, on this
 4 one, I'm willing to go on.
 5 MR. HOBBS: Let me just ask the board
 6 procedurally how you want to handle each of the
 7 objections. I mean, we -- we -- we can just wait. If
 8 there is a motion, we can take a motion if someone
 9 wants to offer a motion -- offer a motion for rehearing
 10 on this issue or we can just keep going on, I mean,
 11 and, you know, we -- and it sounds like no one will
 12 offer that motion. I mean, I don't think I would
 13 second it. I don't think I would make that motion.
 14 So, do you, Mr. Domenico?
 15 MR. DOMENICO: No.
 16 MR. CARTIN: No.
 17 MR. HOBBS: Okay. So just procedurally
 18 I'm wondering if, you know, we -- if we come to one
 19 where someone wants to make a motion, we can. The
 20 question then will be what about the other grounds for
 21 the motion for rehearing, but maybe we can get to that
 22 when it comes up. I -- I just -- I raise that because
 23 I wonder, you know, what kind of record or -- or what
 24 state we want to leave this in if there's an appeal.
 25 At this point, maybe I'll just suggest

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1 that we go ahead to the other issues that Mr. Gessler
 2 has raised, and -- and if there's some support in the
 3 board for changing its prior action, then we consider
 4 at that point whether that boots out anything else that
 5 Mr. Gessler is raising. Is that okay?
 6 (No response.)
 7 MR. HOBBS: Okay. Mr. Grueskin, if you
 8 want to go on with your other objections.
 9 MR. GESSLER: Thank you, Mr. Hobbs.
 10 The next objection talks about the single
 11 subject issues, and I know there was a fair amount of
 12 discussion last time. I think what this -- this
 13 initiative does, and I'll talk about sort of the
 14 central features of the motion for rehearing first, and
 15 that is it -- it defines what a labor organization is
 16 not, and then it says what labor organizations -- that
 17 employers can't use labor organizations -- or
 18 participation in a labor organization as a condition
 19 for employment; but what it also does is it creates new
 20 rules for interpretation, and it creates not one but
 21 two new rules of interpretation.
 22 The first rule of interpretation is that
 23 it says it will supersede or it will control over all
 24 other definitions within purportedly but certainly as
 25 this board has decided, Article XVIII of the Colorado

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1 constitution, so that's one rule of -- sort of a
 2 conflict of law rule or rule of interpretation.
 3 It's -- it's not limited, when -- the use of that word
 4 "all" is not limited to conditions of labor employment
 5 or conditions of employment. It says "all." It can be
 6 any provision, okay, any conflicting definition of
 7 labor organization in Article XXVIII, so I mean, you
 8 can have definitions of labor organization in
 9 Article XXVIII that purport to conflict with this one
 10 or ones that don't purport to conflict with this one.
 11 You can have definitions in Article XXVIII of labor
 12 organization that deal with --
 13 MR. DOMENICO: XVIII, right?
 14 MR. GESSLER: I'm sorry, XVIII. I've got
 15 XXVIII on the mind.
 16 You can have definitions of labor
 17 organization in Article XVIII that -- that talk about
 18 conditions or related to conditions of labor employment
 19 or ones that aren't related to conditions of labor
 20 employment, so "any" is -- is a different approach and
 21 has rules of interpretation for this initiative versus
 22 another -- another provision within Article XVIII,
 23 whether or not it has anything to do with labor
 24 conditions.
 25 MR. DOMENICO: But there aren't any now,

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1 right?
 2 MR. GESSLER: That's correct.
 3 MR. DOMENICO: There aren't any other
 4 definitions.
 5 MR. GESSLER: So right now it's sort of a
 6 black hole, and I'd argue -- well, I think the court --
 7 you know, the -- you don't look at, you know, sort of
 8 the effects or consequences of it as much as looking at
 9 internally what it means. So conceivably there could
 10 never be anything else in Article XVIII or there could
 11 be a lot of different things in the future in
 12 Article XVIII because, again, the definition is -- or
 13 the topic of Article XVIII is miscellaneous.
 14 MR. DOMENICO: But if somebody wanted to
 15 avoid that problem, if they wanted to amend the
 16 constitution in such a way to deal with labor
 17 organizations but didn't want to use this definition,
 18 couldn't they just stick it in a different article and
 19 then -- and then there would be no problem?
 20 MR. GESSLER: Maybe. I don't know. I --
 21 I don't know, but that's a good question and I think
 22 sort of highlights the uncertainty of this.
 23 The other point, and this is the one that
 24 the board discussed, is that it creates rules of
 25 interpretation regarding "any other provision adopted

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

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

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

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

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

25 But as far as the legal signals as to why

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 troubles me at all, and it -- but it troubles me quite
 2 a bit, and I wonder if you have any -- any authority
 3 for the idea that this kind of change of a rule of
 4 interpretation can't be coupled with a -- the
 5 substantive measure.
 6 MR. GESSLER: Certainly Proposed
 7 Initiative 55. I'm just kidding on that.
 8 I think that there -- there is not much
 9 authority along those lines, and I know Mr. Grueskin
 10 used the -- the example, well, this is just sort of
 11 like the date of implementation. It's just like the
 12 date of implementation, it's no different than that;
 13 but I think it's much different than that, and I think
 14 the strongest argument there is, you know, there's a
 15 body of case law and specific statutory statements that
 16 are outside of labor conditions, that are outside of
 17 Article XVIII that basically say, look, this is how we
 18 interpret the will of the people: If there is two
 19 conflicting provisions, we interpret it as the one that
 20 gets the most votes, based on sort of the democratic
 21 process, and that's the way the initiative should work.
 22 That's an important thing.
 23 And to rejigger those rules when those
 24 rules -- when that rejiggering is not necessary to
 25 determine what's a labor organization, it's not

1 necessary to determine what's a condition -- a
 2 condition of labor employment, it's not connected to
 3 that, and it's done for admittedly the straight-up
 4 purpose, I mean -- and the proponents admit it. The
 5 purpose is to preempt No. 47, okay, or preempt any
 6 other one that comes up dealing with that. It's the
 7 preemption that is certainly -- it's a much, much
 8 different beast that we're talking about here as
 9 compared to labor conditions, and it's self-consciously
 10 trying to short-circuit the democratic rules of
 11 interpretation on this.
 12 So I -- I mean, I'll frankly admit that I
 13 think that's our strongest single subject argument, but
 14 I also think, in this instance it's -- it is a winner
 15 because it is a -- it's a serious problem, and the
 16 reason why I spent so much time on 61 is I thought you
 17 had been persuaded that 61 controlled in this
 18 instance -- or someone did. I think Mr. Domenico, but
 19 I may be mistaken.
 20 MR. DOMENICO: No.
 21 MR. GESSLER: But, I mean, that's why I
 22 provided the transcripts.
 23 MR. DOMENICO: I think it controls but on
 24 the other side. Mr. Hobbs was --
 25 MR. HOBBS: Yeah, that's right.

1 MR. GESSLER: So, anyway, that's -- that's
 2 the best I can answer that question.
 3 MR. HOBBS: Mr. Cartin? Is that -- or,
 4 Mr. Domenico, are you -- do you want to pursue that?
 5 MR. DOMENICO: Well, I don't have any more
 6 questions. I -- I -- and I don't know if Mr. Grueskin
 7 has anything to add to what he said last time. I --
 8 this is one I probably am going to offer a motion on.
 9 I mean, I don't know if you want to discuss it or if
 10 Mr. Grueskin wants to --
 11 MR. HOBBS: Well, I think Mr. Cartin has a
 12 couple of questions of Mr. Gessler.
 13 MR. GESSLER: Oh, certainly. I'm sorry.
 14 MR. CARTIN: Mr. Gessler, I want to focus
 15 on your argument that this -- that it -- kind of this
 16 preemptive clause is a separate subject and just ask a
 17 couple questions, one or more of which may be loaded.
 18 But the first clause of subsection 2 says,
 19 as used solely in this article and notwithstanding any
 20 other provision of the law. Would you agree that the
 21 clause "notwithstanding any other provision of the
 22 law," is one that's commonly found in a variety of
 23 statutes, if not perhaps -- and I don't know about the
 24 constitution. "Notwithstanding any provision of
 25 law" -- "notwithstanding any other provision of law."

1 Have you sometimes seen that in other statutes?
 2 MR. GESSLER: I think I have. Normally
 3 what I see -- and I'm not trying to weasel out of your
 4 assumptions here, but normally I think what I've seen
 5 is "notwithstanding any other provision within this
 6 subsection" or "notwithstanding any provision within
 7 this title," where it's very limited along those lines
 8 for -- for those, but I'm sure I'm going to simply
 9 assume that I've seen something similar to that.
 10 MR. CARTIN: Well, is it your argument
 11 that if -- if the second sentence of subsection 2 was
 12 not in the measure, that would -- that would alleviate
 13 your -- that would address, directly address your
 14 single subject argument or would remove the argument
 15 that you are making that the measure does not contain a
 16 single subject?
 17 MR. GESSLER: Yes.
 18 MR. DOMENICO: Yes.
 19 MR. CARTIN: Doesn't the "notwithstanding
 20 any other provision of the law" clause really have the
 21 same -- here is my lawyer question, okay? Doesn't it
 22 really have the same effect as the second sentence?
 23 From purely a textual standpoint or a drafting
 24 standpoint, can the argument be made that -- that "this
 25 definition shall prevail over any conflicting

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

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

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

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

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

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

25 Why can't you apply both of those in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. HOBBS: Mr. Domenico?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. DOMENICO: But you just said that the

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

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

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

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

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

10 MR. DOMENICO: Fair enough.

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

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

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

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

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

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

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

10 MR. GRUESKIN: That is the existing law.

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

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

15 MR. DOMENICO: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 rules; and, of course, as Mr. Hobbs said, it advances
 2 the purpose of the measure, but so would a 40 percent
 3 requirement advance it. And to me, suspending the
 4 rules of how a measure -- what a measure has to do to
 5 become a law, even if it only applies to that measure,
 6 is still a separate subject, and it's -- it's not
 7 necessary to the -- to anything else. All it does is
 8 says, Our opponents -- whatever they do doesn't matter
 9 as long as we get 50 percent plus more, and that is
 10 changing not just this measure but changing what
 11 another measure would normally have to do; and that, to
 12 me, is a single subject -- or is a separate subject.
 13 This obviously isn't necessary to the measure.
 14 Whereas I do think, in some cases, the
 15 "notwithstanding" language could be necessary to make
 16 clear what's going on, this is not the least bit
 17 necessary to the -- to accomplishing the goals, except
 18 in the sense of exempting the measure from the typical
 19 rules, and so I -- I'm afraid I think that's a single
 20 subject or a separate subject from the substantive --
 21 the other substantive subject of employer/employee
 22 relationship.
 23 So for different reasons, I guess I'm in
 24 agreement with Mr. Hobbs.
 25 MR. HOBBS: So it would be potentially

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1 possible for the board to adopt a motion for violating
 2 the single subject but for quite different reasons. I
 3 mean, Mr. Domenico and I really disagree on -- on that
 4 last point, but -- and, actually, it bothers me a
 5 little bit to end up with that result, but if that's
 6 the way it is --
 7 MR. DOMENICO: Me, too.
 8 MR. HOBBS: Mr. Cartin?
 9 MR. CARTIN: I just wanted to clarify.
 10 Mr. Domenico, does that reasoning apply to No. 124, as
 11 well?
 12 MR. DOMENICO: Yes, I think it does, even
 13 though that last sentence is slightly different in 124.
 14 MR. CARTIN: Because you don't have the
 15 lengthy --
 16 MR. DOMENICO: To the extent -- to the
 17 extent that that sentence is meant to have any effect,
 18 I think it can only really be interpreted to be
 19 intended to have the same effect, which is to exempt
 20 itself from the typical rules of interpretation. I
 21 mean, if the last sentence ended itself after
 22 Article XVIII, I might be okay with it and agree that
 23 it's simply a boots-and-suspenders type of thing, but
 24 if that sentence is meant to have any effect, it's
 25 meant to say that the Supreme Court -- if we get

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1 50 percent plus one and it doesn't matter what else
 2 anybody else does, which changes the rules of how
 3 initiatives become law, which is the second subject
 4 that I see.
 5 MR. HOBBS: And although I won't change
 6 Mr. Domenico's mind, I still -- I think I want to
 7 respond, for the record, on one thing that you said.
 8 I think if this measure said that this
 9 met -- you know, if either of these measures said that
 10 40 percent constitutes passage of this measure, I would
 11 not find a problem with that on single subject grounds.
 12 Again, I think that would fit quite well within the
 13 subject and the purpose of the proposal. I personally
 14 think it would be ineffective, but all --
 15 MR. DOMENICO: How could it be
 16 ineffective?
 17 MR. HOBBS: Because the measure -- that
 18 provision would never take effect because it -- because
 19 the rules in place right now are that -- the rules that
 20 would be applied to determine if that takes effect is
 21 whether or not a majority of the voters pass it; and if
 22 a majority of the voters don't pass it, that would
 23 never be effective.
 24 MR. DOMENICO: So does that analysis, do
 25 you think, apply to this in the sense that if they get

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1 fewer votes, that it won't go into effect?
 2 MR. HOBBS: No, because I think once -- if
 3 this measure -- we'll say 123 or 124 -- received the
 4 majority of the votes, it would go into effect. Now,
 5 and at least purportedly it would trump Amendment 47
 6 regardless of the number of votes that Amendment 47
 7 got, I mean, that this measure would be in effect. I
 8 don't know for sure whether it would work. I'm just
 9 saying at least the difference is that the voters would
 10 have approved a measure that says that it trumps a
 11 measure that gets more votes, but that wouldn't be the
 12 case if the measure said 40 percent, because the
 13 measure would never take effect.
 14 I'm not sure, but, I mean, there are other
 15 scenarios we discussed about single subject I'm not
 16 sure of, but my point being all of those things in my
 17 mind are the -- they're problems, but they're not
 18 single subject problems, but they are ways that
 19 proponents might think of how they can advance their
 20 cause and ensure that they get the result they want.
 21 MR. DOMENICO: Well, I just find that
 22 pretty remarkable that that's all that is required by
 23 the -- that as long as it advances their cause, that
 24 the single subject rule isn't implicated. I -- I mean,
 25 changing the rules of how something becomes a law is an

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

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

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

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

11 Mr. Knaizer.

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

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

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

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

12 MR. DOMENICO: I second that motion.

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

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

19 MR. DOMENICO: Aye.

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

21 MR. CARTIN: No.

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

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

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

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

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

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

15 MR. KNAIZER: Correct.

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

18 MR. KNAIZER: Correct.

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

25 MR. KNAIZER: That's correct.

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

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

24 MR. HOBBS: Mr. Grueskin?

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

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

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

12 MR. CARTIN: I agree with that.

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

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

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

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

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

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

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

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

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

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

23 MR. DOMENICO: Yes.

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

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

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

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REPORTER'S CERTIFICATE
STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

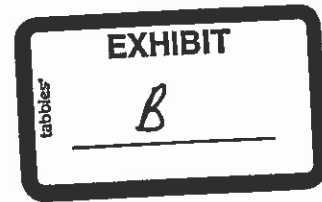
I, LORI A. MARTIN, Registered Merit
Reporter, Certified Realtime Reporter, and Notary
Public, State of Colorado, do hereby certify that the
within proceedings were taken in machine shorthand by
me at the time and place aforesaid and were thereafter
reduced to typewritten form; that the foregoing is a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

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

IN WITNESS WHEREOF, I have affixed my
signature this 9th day of June, 2008.
My commission expires June 2, 2012.

____ Reading and Signing was requested.
____ Reading and Signing was waived.
 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#124
Conditions of Employment

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

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PROCEEDINGS

(The proceedings commenced at 9:44 a.m.)

MR. HOBBS: Let's go then to #124.

And we had skipped over #2, but I'm going to come back to that after #124 if the proponents are present.

So, Mr. Grueskin, on #124.

MR. GRUESKIN: This is another opportunity for the Title Board to exercise its main phrase of an initiative draft. This one is different only in that the final clause in the measure that talks about notwithstanding the votes was deleted. So all of your thoughts and concerns are --

MR. DOMENICO: Can we all just then incorporate all of our thoughts and concerns on the last one?

MR. HOBBS: Sounds good to me. I don't want to repeat everything.

MR. CARTIN: Yes.

MR. HOBBS: I think we're all in agreement we can incorporate our remarks from #123.

MR. GRUESKIN: Okay.

MR. HOBBS: Is there anybody -- the first question then is the single-subject question. Is there anybody else who wishes to testify on the question of

MR. GESSLER: Basically, for #24 it changes -- obviously, I bring this up as being necessary for the motion for rehearing -- but it changes the -- it says, "This definition shall prevail over any conflicting definition of 'labor organization' in article XVIII." That's a change from the initial draft of article XXVIII. I do not believe that was in response to a comment from the review and comment. That's a substantive change that's not in the response.

MR. HOBBS: Mr. Grueskin, if you'd like to respond to that.

MR. GRUESKIN: I did not make copies of the transcripts on 123 and 124 for the Board. I apologize. But as an officer of the court, I'll represent to you and read to you the transcript on 123.

The staff went through the proposed purposes and asked, quote, Do these purposes accurately reflect the intent of the proponents?

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

Your memo accurately reflects that

single subject?

If not, is there a motion?

MR. DOMENICO: I move that we -- the Board find that #124 constitutes a single subject and move on to setting the title.

MR. CARTIN: Second.

MR. HOBBS: Any further discussion?

If not, all those in favor say aye.

MR. DOMENICO: Aye.

MR. CARTIN: Aye.

MR. HOBBS: All those opposed no.

No.

That motion carries 2-1.

Then let's turn to the staff draft.

MR. GESSLER: Um.

MR. HOBBS: Mr. Gessler.

MR. GESSLER: Mr. Hobbs, and I apologize. I do have a comment with respect, however, to the Board's jurisdiction that it is not a single subject.

MR. HOBBS: Okay.

MR. GESSLER: This may not be the appropriate time to do it.

MR. HOBBS: If there's other objections on jurisdiction, why don't you just go ahead and raise them before we get to the title setting.

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

MR. POUGE: (Nods head.)

MS. FORRESTAL: Agreed.

MR. POUGE: Agreed.

And then I raised it a couple more times as to #123. And in 124, they read the purposes again. The staff says, quote, Do these purposes accurately reflect the intent of the proponents?

MR. GRUESKIN: That's me. Except for the proponents' typographical error included in subsection (2) referencing article XXVIII and accurately repeated in your point no. 3, they do.

So Mr. Gessler wouldn't have had the benefit of these transcripts. Nonetheless, we made that point and the staff was accommodating and acknowledged that was an issue that could be addressed.

MR. HOBBS: Thank you.

Mr. Gessler.

MR. GESSLER: If I may make a comment. I'll ask Mr. Grueskin for a copy of that and probably reraise that issue in the motion for rehearing. I don't think it really makes sense for me to engage in

1 an extended argument right now. So hopefully we can
 2 exchange documents and then have some pointed arguments
 3 before you all on the motion for rehearing.
 4 MR. HOBBS: Okay. Thank you, Mr. Gessler.
 5 Then we'll go ahead and turn to staff draft.
 6 I wondering if it would make sense to start with the
 7 titles that we set for #123 and see if there's any
 8 changes to that.
 9 Does that make sense, Mr. Grueskin?
 10 MR. GRUESKIN: It does, Mr. Chair. If I
 11 could just provide you -- I think the only thing that
 12 you'll really care about is the very last clause. That
 13 last clause provides -- just makes it clear that it
 14 covers anything else considered at that election.
 15 MR. HOBBS: Okay. Ms. Gomez is displaying on
 16 the screen the title that we set for #123. And if
 17 we -- if we were to start with that --
 18 MR. GRUESKIN: What you would do,
 19 Mr. Chairman, is, in the last line, put a period after
 20 "2008 general election" and strike the clause
 21 "regardless of the number of votes each receives,"
 22 because that should be --
 23 MR. HOBBS: Hang on. I would suggest then
 24 let's go ahead and do that for discussion purposes.
 25 MR. DOMENICO: Too soon. After general

1 (The proceedings were concluded at 9:56 a.m.
 2 on the 21st day of May, 2008.)
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1 election. There's a period in there after 2008.
 2 MR. HOBBS: I guess I'll move -- I'll go
 3 ahead and move that change to the staff draft.
 4 MR. DOMENICO: Second.
 5 MR. HOBBS: Any further discussion?
 6 All those in favor say aye.
 7 Aye.
 8 MR. DOMENICO: Aye.
 9 MR. CARTIN: Aye.
 10 MR. HOBBS: All those opposed no.
 11 That motion carries 3-0.
 12 Are there further changes to the staff draft
 13 as amended?
 14 If not, is there a motion to adopt the staff
 15 draft -- staff draft as amended?
 16 MR. CARTIN: So moved.
 17 MR. DOMENICO: Second.
 18 MR. HOBBS: Any further discussion?
 19 If not, all those in favor say aye.
 20 Aye.
 21 MR. DOMENICO: Aye.
 22 MR. CARTIN: Aye.
 23 MR. HOBBS: All those opposed no.
 24 That motion carries 3-0.
 25 That concludes action on #124.

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



Ballot Title Setting Board

Proposed Initiative 2007-2008 #124¹

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.

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?

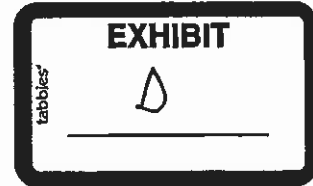
Hearing May 21, 2008:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 9:53 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.

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

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

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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

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

4 Any other questions?

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

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

9 MR. DOMENICO: Um-hum.

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

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

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

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

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

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

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

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

1 doing this sort of thing.

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

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

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

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

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

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

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

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

18 MR. HOBBS: Mr. Cartin.

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

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

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

9 MR. GRUESKIN: That's correct.

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

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

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

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

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

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

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

1 it was just a judgment call.

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

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

12 MR. CARTIN: Thank you.

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

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

20 MR. DOMENICO: 61?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 MR. HOBBS: Mr. Cartin.

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

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

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

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

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

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

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

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

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

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

1 subject?

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

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

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

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

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

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

10 The proponents say to themselves, you know,
11 #41 raises a good question, when should employers
12 require employees to belong to certain kinds of
13 organizations. That's a legitimate matter of public
14 policy. Our view -- our group of proponents thinks
15 that, you know, unions probably is a legitimate thing
16 for employers to require participation in, but other
17 things, you know, just generally employers ought not to
18 do that.

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

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

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

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

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

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

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

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

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

15 MR. HOBBS: Mr. Grueskin.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11 MR. CARTIN: Second.

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

14 MR. DOMENICO: Aye.

15 MR. CARTIN: Aye.

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

18 That motion carries 2-1.

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

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

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

25 I think the staff draft is largely just fine.

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

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

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

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

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

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

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

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

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

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

25 And so that leaves me in a very difficult

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 MR. HOBBS: Mr. Cartin.

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

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

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

25 MR. DOMENICO: Well, it seems more important

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

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

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

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

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

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

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

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

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

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

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

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

1 "other than" language.

2 Mr. Gessler.

3 MR. GESSLER: Mr. Hobbs, if I may speak. I
4 have not signed up.

5 MR. HOBBS: Right. If you'll identify
6 yourself and then sign up later for Cesi.

7 MR. GESSLER: Certainly. My name is Scott
8 Gessler, and I represent an organization called The
9 Better Colorado. I'd just like to make one comment on
10 this.

11 I think the appropriate way to solve that
12 particular issue is to basically flip the sequence of
13 explaining what this measure does. Because the truth
14 is that the majority of this measure is -- and the
15 major import of this measure is in the second half.

16 This definition of "labor organization,"
17 which is truly the opposite of any common understanding
18 of the term "labor organization" and is the opposite of
19 any understanding that the law has ever had -- well,
20 maybe I can't say "ever had," but certainly that I'm
21 aware of and I would assume most people are ever aware
22 of, this is -- this completely redefines "labor
23 organization" to mean the exact opposite of how it's
24 been used in language and in law.

25 And because that's so important, and I agree

1 with Mr. Domenico that the "other than" is really the
2 critical language here, I would start off with that. I
3 mean, the Title Board is not constrained to following
4 the same sequence of language that an initiative
5 drafter puts together. The Title Board is charged with
6 creating a fair and accurate title which fairly
7 expresses the meaning. And so the most important part
8 of this is the definition.

9 So I think the appropriate way to handle that
10 is to start off with saying, you know, concerning the
11 pro- -- well, actually, I would actually argue it
12 should be concerning the definition of "labor
13 organization" because that's truly the import of this
14 and the prohibition is secondary. And the most
15 important thing that people need to understand is this
16 radical departure from existing law and common
17 language.

18 I mean, we can sort of, after a while,
19 redefine the English language to mean whatever we want
20 legally. But if you're not going to mislead people, if
21 you're going to be fair and accurate, that should be
22 the first thing in this and then explaining what the --
23 the prohibition.

24 And I would also emphasize that, you know,
25 this specifically purports, and I'm sure we'll have

1 discussions about that on our motion for rehearing, but
2 this certainly purports to change "labor organization"
3 over any conflicting definition in article XVIII, so
4 it's a universal application, as well as any
5 conflicting other initiative that may occur.

6 So that's an extremely broad sweep that goes
7 beyond just this particular prohibition and this
8 particular initiative. So I think it should come
9 first, and I think the emphasis should be on what this
10 is really doing.

11 MR. HOBBS: Thank you. Oh, and, Mr. Gessler,
12 if you'll sign that.

13 MR. GESSLER: Certainly. May I do that
14 afterwards?

15 MR. HOBBS: Sure.

16 Further discussion?

17 MR. DOMENICO: I think those are actually
18 pretty good ideas. I think for now I'm -- I may want
19 to just wait to see a petition for rehearing that might
20 lay them out a little bit more concretely.

21 But I think Mr. Gessler makes a good point
22 that addresses somewhat Mr. Hobbs' difficulty with the
23 measure, which is just saying this deals with whatever
24 we were going to say, conditions of employment relating
25 to certain organizations, doesn't capture the

1 additional aspect of this, which is to change the
2 definition of "labor organization" in other measures.
3 Then Mr. Gessler's point about making -- which, I think
4 the proponents made pretty clear, is, in fact, the main
5 point of this. It could be a way to address that.

6 But as I said, it may make more sense --
7 because I think -- as I've said a number of times,
8 there are lots of ways that we can write a title that
9 complies with the law. For now, I'm willing to vote to
10 approve something along the lines we've been discussing
11 but with the idea that on a motion for rehearing we
12 could improve it quite a bit.

13 MR. HOBBS: I guess I'll -- I mean, I think I
14 like -- or I certainly don't have any problem with the
15 motion -- from Mr. Grueskin's suggestions. But maybe
16 just for the sake of moving forward and seeing what the
17 Board wants to do, I'll work off the staff draft and
18 see if there's support then for changing the expression
19 of the single subject along lines that I think
20 Mr. Cartin described.

21 I don't know. Let's see. I guess if I
22 recall this accurately, I'm not sure of the most
23 efficient way to get to this result, but maybe strike
24 everything beginning from where the cursor is on the
25 screen down to the end of line 2 before "certain."

1 Yeah. And then insert "participation in," and then in
 2 line 3, after "organizations," insert "as a condition
 3 of employment." So that the expression of the single
 4 subject would read: "concerning participation in
 5 certain organizations as a condition of employment."
 6 And to see if there's support, I'll go ahead
 7 and move that change.
 8 MR. CARTIN: Second.
 9 MR. HOBBS: Any discussion by the Board?
 10 All those in favor say aye.
 11 Aye.
 12 MR. DOMENICO: Aye.
 13 MR. CARTIN: Aye.
 14 MR. HOBBS: All those opposed no.
 15 That motion carries 3-0.
 16 I think I'd -- I guess I would like to go
 17 ahead and move then Mr. Domenico's suggestion about
 18 quotes. And I also want to be incorporating some of
 19 Mr. Grueskin's suggestions.
 20 Maybe in line 4, where it refers to,
 21 "requiring an employer to join," I would strike "an"
 22 and insert, quote, labor -- I'm sorry. I should say a.
 23 Before the quote mark, the article a, and then, quote,
 24 labor, and then after -- at the end of "organization"
 25 an end quote. So that clause would be -- would read:

1 "prohibiting an employer from requiring an employee to
 2 join a, quote, labor organization, end quote, or pay
 3 dues," comma, et cetera.
 4 Any -- I'll go ahead and move that change and
 5 see if there's support.
 6 MR. DOMENICO: I second it.
 7 MR. HOBBS: Any further discussion?
 8 All those in favor say aye.
 9 Aye.
 10 MR. DOMENICO: Aye.
 11 MR. CARTIN: Aye.
 12 MR. HOBBS: All those opposed no.
 13 That motion carries 3-0.
 14 Other changes to the staff draft? I'm just
 15 going to go through Mr. Grueskin's suggestions maybe to
 16 see which other -- what other ones we should just go
 17 ahead and incorporate.
 18 In the next line, I believe, it goes on to
 19 say, "Pay dues, assessments, or other charges to or for
 20 such an organization." Insert the word "such."
 21 Any opposition to that? Maybe I'll end up
 22 making this one motion, but just speak up if anybody
 23 opposes any of those changes.
 24 Then after the -- oh. Okay. And then where
 25 the cursor is put a semicolon and insert "defining,

1 quote, labor organization, end quote, as one," and then
 2 it picks up with the current language, "that exists
 3 solely or primarily," et cetera.
 4 Any opposition at this point?
 5 The next suggestion from Mr. Grueskin --
 6 Cesi, you're so far ahead of me. Maybe we
 7 should just go through this.
 8 So where the cursor is strike the comma and
 9 insert a semicolon, and then strike the word "stating"
 10 and insert "providing."
 11 And then after "Colorado constitution" in
 12 line 10, insert a comma and the phrase "including any
 13 other amendment adopted at the 2008 general election,"
 14 and then picking up the remainder.
 15 After "number of votes," insert -- we'll
 16 strike -- well, after "number of votes," insert "each
 17 receives" and strike the remainder of the title,
 18 keeping the period. Those are the suggestions that
 19 Mr. Grueskin has.
 20 We'll just go ahead and move those changes.
 21 MR. DOMENICO: Second.
 22 MR. HOBBS: Any further discussion?
 23 If not, all those in favor say aye.
 24 Aye.
 25 MR. DOMENICO: Aye.

1 MR. CARTIN: Aye.
 2 MR. HOBBS: All those opposed no.
 3 That motion carries 3-0.
 4 Further changes to the staff draft?
 5 Is there a motion adopt the staff draft as
 6 amended?
 7 MR. CARTIN: So moved.
 8 MR. DOMENICO: Second.
 9 MR. HOBBS: Move and seconded.
 10 Let me read into the record then how the
 11 staff draft -- or how the title would read if the
 12 motion as adopted. And Cesi's showing it on the screen
 13 with the changes incorporated.
 14 "An amendment to the Colorado constitution
 15 concerning participation in certain organizations as a
 16 condition of employment, comma, and, comma, in
 17 connection therewith, comma, prohibiting an employer
 18 from requiring an employee to join a, quote, labor
 19 organization, end quote, or to pay dues, comma,
 20 assessments, comma, or other charges to or for such an
 21 organization; semicolon, defining, quote, labor
 22 organization, end quote, as one that exists solely or
 23 primarily for a purpose other than dealing with
 24 employers -- employees concerning grievances, comma
 25 labor disputes, comma, wages, comma, rates of pay,

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

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

21 _____
 22 SHELLY R. LAWRENCE, RPR
 23 Notary Public, State of Colorado
 24
 25

1 (The proceedings concluded at 9:44 a.m. on
 2 the 21st day of May, 2008.)
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Ballot Title Setting Board

Proposed Initiative 2007-2008 #41¹

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.