

ATTACHMENT 3

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COLORADO DEPARTMENT OF STATE TITLE BOARD
2007-2008 #31

TRANSCRIPT OF HEARING
JUNE 20, 2007

PROPOSED INITIATIVE MEASURE 2007-2008
#31, CONCERNING NONDISCRIMINATION BY THE STATE

The hearing in this matter commenced on June 20, 2007, before the Title Board. This is a transcript of the hearing, transcribed from a CD-ROM by Beth A. Milliken, Court Reporter and Notary Public in and for the State of Colorado.

Beth A. Milliken
Court Reporter

P R O C E E D I N G S

1
2 MR. HOBBS: Good afternoon. Let's
3 go ahead and get started. This is a meeting of the
4 title setting board pursuant to article 40 of title
5 1, Colorado Revised Statutes. The time is
6 2:02 p.m. The date is June 20th, 2007. We're
7 meeting in the Secretary of State's Blue Spruce
8 conference room, 1700 Broadway, Suite 270, Denver,
9 Colorado.

10 The title setting board today
11 consists of the following: My name is Bill Hobbs,
12 I'm the Deputy Secretary of State, and I'm here on
13 behalf of Secretary of State, Mike Hoffman. To my
14 left is Dan Cartin, Deputy Director of the Office
15 of Legislative Legal Services, who is the designee
16 of the Director of the Office of Legislative Legal
17 Services, Charlie Pike.

18 We do not have a representative from
19 the Attorney General's Office here today. To my
20 far left, though, we do have the board's attorney,
21 Maurice Knaizer, Deputy Attorney General, who
22 represents the Title Board. And to my far right
23 Cesium Gomez from the Secretary of State's Office.

24 For anybody who wishes to testify,
25 there are sign up sheets on the table by the back

1 door. So please do sign up, if you would like to
2 testify.

3 With that, then let me turn to
4 today's agenda. We have motions for rehearing on
5 two proposed initiatives for which the title
6 setting board set titles at its last meeting on
7 June 6th.

8 MR. HOBBS: I think we'll keep on
9 going to the next agenda item then. The next
10 agenda item is 2007/2008 number 31. Prohibition on
11 Discrimination and Preferential Treatment by
12 Colorado Governments. This is before the board on
13 a motion for rehearing.

14 I believe this is submitted on
15 behalf of Polly Baca, Kristy Schloss, and Ron
16 Montoya. And, Mr. Ramey, I think you're here on
17 behalf of the petitioners. If you'd like to
18 identify yourself and give us your arguments,
19 please.

20 MR. RAMEY: Thank you, Mr. Chairman.
21 Edward Ramey representing the objectors, whatever
22 we are in this context. And I've taken an oath to
23 be shorter than I was last time. So my promise to
24 the board and to Mr. Westfall.

25 What I'd like to do, similar to what

1 Ms. Josephs did, just go to the single subjects
 2 first. And then very, very briefly, address
 3 misleading aspects of the title. The single
 4 subject issues -- and I'm not going to beat to
 5 death what we spent about two-and-a-half,
 6 two-and-three-quarters hours on last time.

7 And I'm also putting in writing, and
 8 I'm sure the board has had an opportunity to review
 9 that. But let me go over a couple of them very
 10 briefly. And, again, just maybe, primarily, for my
 11 own mind set, to just to make sure that I'm being
 12 clear to the board about where our concerns on the
 13 single subject issues are.

14 I'm also going to ask the board to
 15 help me a little bit in clarifying with the
 16 proponents what the basis of some of our concerns
 17 are, and whether they're real or not. One of the
 18 difficulties that we've had is we have not been
 19 able to get that clarity. And this is really the
 20 moment when I think that clarity has to come
 21 forward, absent which it makes the job of this
 22 board very, very difficult in terms of setting a
 23 title.

24 But let me go, I guess, initially to
 25 our first concern with single subject, and probably

1 spent most of the time on this last time, and that
2 is that this measure, in the context of one
3 measure, seeks to prohibit both discrimination and
4 preferential treatment. Last time this measure
5 came before us was sort of an informal caption
6 attached to it as a measure to prohibit
7 discrimination. This time that's been broadened, I
8 noticed, to prohibit discrimination and
9 preferential treatment.

10 I think, in terms of the informal
11 caption, that's correct. These are two different
12 concepts. And whatever preferential treatment
13 means, let me take for the moment -- I want to go
14 back to the problem of what those words mean. Let
15 me take a look, for the sake of argument, to begin
16 with the narrowest construct that I can put on
17 those terms "preferential treatment" prohibited by
18 this measure. And by that I mean, something that
19 would have a discriminatory or reverse
20 discriminatory effect.

21 As you'll see in a moment, I'm not
22 sure that's all that this term means. I have no
23 reason to believe it is. But let's assume that
24 that's the case. And I think much of the
25 discussion last time with the board was somewhat

1 based on that presumption. That what we're really
2 talking about here is prohibiting discrimination
3 and a form of preferential treatment that we might
4 put under a moniker of reverse discrimination,
5 something that disadvantages a group. Perhaps for
6 a good purpose, but nevertheless disadvantages some
7 other identifiable group.

8 Taking that narrower construct, the
9 principal point that I was inartfully trying, at
10 length, trying to submit last time, is those are
11 somewhat antithetical and may be incongruous
12 concepts. In that, even discriminatory forms of
13 preferential treatment are frequently used as a
14 remedy for discrimination.

15 And it is not uncommon for members
16 of the public, certainly the three people that I
17 represent and myself included, to very likely be in
18 favor of one aspect of this measure, prohibit
19 discrimination, but not want to prohibit all forms
20 of preferential treatment remedies that are
21 directed and addressed precisely to remedying and
22 curing discrimination.

23 It puts us in a box where to vote on
24 a measure that we favor in one respect, we're being
25 forced to vote simultaneously in favor of something

1 that we oppose. And that's the log rolling, sort
 2 of hook issue that we spoke about at some length
 3 last time. And we sort of broke down last time.
 4 And the board has done it again today in connection
 5 with the measure that we just heard, you know, what
 6 single subject means, and are these really
 7 unconnected? Is this all discrimination can refer
 8 to this under the general topic of discrimination,
 9 and eliminate discrimination in all categories
 10 whether -- whether remedial or not.

11 Whether any -- some sort of an
 12 existing form of discrimination that might already
 13 be prohibited by law versus a remedy that a court
 14 would put into effect. One aspect, and I'm going
 15 to submit to the board a primary aspect of, I
 16 believe, the single subject requirement, is to
 17 avoid putting proposals in this kind of
 18 a conundrum, this kind of a log rolling situation
 19 where a measure, which I presume the proponents
 20 suspect, at least, rightly or wrongly, would not be
 21 able to pass in this state on its own merits.

22 That is a measure that would
 23 prohibit preferential treatment. They are going to
 24 attempt to get it passed by hooking it to something
 25 that everybody, viscerally and otherwise, favors.

1 I hope it's almost everybody. And that is,
2 prohibition of discrimination. That is one primary
3 purpose of the single subject requirement. So we
4 spent an hour or so last time, and I'm not going to
5 continue to beat that to death, but that is a very
6 real concern from our perspective.

7 Now the problem's worse in this
8 particular case. And here's where I am going to
9 ask the board to respectfully -- to help me with
10 this. Is I don't know what preferential treatment,
11 as intended by the proponents of this initiative,
12 really means. I assume it means remedial measures
13 that may have a discriminatory effect to them,
14 themselves. But it may also mean something a whole
15 lot broader.

16 And I posed some examples last time,
17 and let me pose a couple more very quickly, is the
18 posting of official notices in a language other
19 than English, mainly Spanish. Is that preferential
20 treatment to an ethnic or racial group? I don't
21 know. It may or may not be.

22 The question, and not quite with
23 that amount of specificity, but the question has
24 certainly been asked of the proponents at the
25 review and comment hearing with the Office of

1 Legislative Legal Services and Legislative Counsel,
2 would you help us define what you mean by
3 preferential treatment? The response to date has
4 been, the term needs no further elaboration. And
5 I'm taking the comment, really, from review and
6 comment hearing. So it may cover something like
7 that. Posting of official notices in another
8 language.

9 It would be a stretch, I think, to
10 view that as discriminatory; in that, I speak
11 English perfectly well, I wouldn't say I speak
12 English perfectly well, but I speak it well enough
13 that I'm not benefited by having a notice also in
14 Spanish. But there is no practical way that I feel
15 disadvantaged because that notice is in Spanish.

16 A couple other examples of primary
17 ones, diversity recruitment programs. If a
18 government office of public -- a state university
19 decides to go out into a community for the purpose
20 of enhancing diversity on their campus, simply
21 making they're programs known within a racially or
22 ethnically or even gender-specific community where
23 otherwise those programs might not be known. Is
24 that preferential treatment or not? There's
25 nothing discriminatory about it. I'm not attaching

1 quotas or seats or points or anything of that
2 nature that might bring in a discriminatory aspect,
3 I don't know.

4 And if preferential treatment is
5 intended to include such things as diversity
6 recruitment programs, that is -- eliminating that
7 is a different subject. I don't know if
8 antithetical is the word, but it's certainly a
9 different topic from dealing with discrimination
10 one way or another.

11 There are, in schools, I am told,
12 programs, for example, that honor the achievements
13 of particular students in ethnic and racial groups
14 based upon they're membership in that group. And
15 it's simply honoring an achievement that a -- that
16 a student group or a numbers of students have
17 achieved. Nobody's disadvantaged by that. That's
18 not discriminatory.

19 I don't know if preferential
20 treatment, as defined by these proponents, is
21 intended to cover that. There are programs in
22 schools that, I understand, that work with teenage
23 mothers. Unless -- those are as gender specific as
24 you can get. Is it discriminatory? I don't think
25 so. I don't think the public would view it that

1 way. Is it preferential treatment? I don't know.

2 So where -- what I would ask the
3 board's insistence with is -- is the proponents
4 need to tell us what they mean. Because if they
5 are limiting their definition of the term
6 "preferential treatment" to something that is
7 indisputably discriminatory, the second point that
8 I'm making goes away in terms of the single subject
9 concern.

10 Now, my first point is they're still
11 hooking, you know, two somewhat antithetical
12 concepts doesn't go away, that many people favor
13 prohibiting discrimination, but not prohibiting
14 even a discriminatory remedy. That would still
15 stand. It doesn't go away.

16 But at least my second point would
17 go away. If they're not willing to say that,
18 however, what that tells me is that, yes, they do
19 intend to cover those sorts of things (inaudible)
20 items, programs that are patently
21 non-discriminatory in nature, but could be viewed
22 as preferential treatment of some sort or another.

23 They do intend that to be within the
24 scope of this measure. That is the legislative
25 history they wish to establish. In which case, I

1 would respectfully submit to the board, there is a
2 huge single subject problem here, to say nothing of
3 the misleading nature of this initiative and what
4 is attempting -- what is being attempted to be won
5 by unaware voters.

6 So I'm, frankly, going to ask the
7 board to ask the proponents what the devil they
8 mean by this term. And if they're not willing to
9 answer it, I would respectfully submit that they
10 should not receive the title based upon the single
11 subject grounds.

12 A third area, and I'm going to hold
13 to my promise to be short on this, is this issue --
14 and I'm not going to go into the three areas of
15 employment, contracting, and education. I think we
16 laid that out on our motion. But the third area is
17 one that went right over my head when I first read
18 the initiative. And that is this exception in
19 section (3) on the initiative for bona fide
20 qualifications based on sex.

21 When I first read that measure, what
22 it read to me was that existing law concerning bona
23 fide qualifications based on sex, and the prison
24 guard situation as we cited in the answers -- or in
25 the response to our motion is a perfect example of

1 this, is what they meant by that. And they were
2 simply trying to create an exception to a
3 prohibition on discrimination.

4 I spoke to a University of Denver
5 law professor, Professor Corrada (phonetic),
6 actually he's here today to make sure that I
7 continue to understand the concepts. And, you
8 know, they're saying something very different here.
9 And he's absolutely right.

10 What's been recognized under federal
11 law, title 7 law, is the concept called, "Bona Fide
12 Occupational Qualifications Based Upon Sex." What
13 they call BFOQ. That type of qualification, which
14 includes the prison guard situation, is addressed
15 on the Johnson Controls (phonetic) case, which we
16 cited in our motion, applies in one area that is
17 covered by this initiative, and one area alone.
18 And that is employment. Period. That's where it
19 stops.

20 It has never been recognized in any
21 other area, certainly not contracting, and
22 certainly not education. There are no existing
23 recognized bona fide qualifications based on sex in
24 the areas of contracting and education. Now what
25 this measure does is create that. So it

1 legitimizes, it legalizes, in this state it
2 constitutionalizes, a brand new form of
3 discrimination. And says it is okay to
4 discriminate on the bases of whatever bona fide
5 qualifications, based on sex may exist in these
6 other areas, such as education. It's okay to do
7 that, of course subject to federal -- the federal
8 law, but it's okay to do that as a constitutional
9 matter in the state in the context of an initiative
10 that proports, and in fact does, bias words
11 prohibit discrimination.

12 So we've got a measure that within
13 one breath is -- is prohibiting discrimination, and
14 perhaps more, as we discussed a moment ago, across
15 the board. At the same time, it is creating,
16 sanctioning, authorizing, and constitutionalizing,
17 a whole new form of activity that is patently
18 discrimination.

19 I mean, that is -- I don't know if
20 that was intended by the proponents. I have no
21 idea. Now if -- I was wanting to ask the board to
22 help me and ask them that question, too. Do they
23 intend to extend this concept into the education
24 and contracting areas? But, frankly, whether they
25 intend to or not at this point, it's almost

1 irrelevant because they've done it in the measure.
2 That's the effect of this measure. If it's not
3 their intent, then they ought to go back and start
4 over.

5 Now, there is no reason in the world
6 why these proponents, if they want to impose
7 preferential treatment, whatever that is, if they
8 want to create and sanction new forms of
9 discrimination, whatever they may be, cannot come
10 before the voters of this state and try to do that.

11 My visceral position on that, I
12 mean, the board can imagine, but they certainly
13 have a right to do that. They certainly have a
14 right to have their measure appropriately titled by
15 this board and sent forward and put on the ballot
16 -- to do that. But I would submit they don't have
17 a right to connect these discord concepts, whether
18 they intend to or not.

19 They don't have a right to keep
20 their intentions, their (inaudible) intentions,
21 which are key to whether or not a single subject
22 exists or not, quiet and hidden from this board so
23 that you can't properly do your duties to determine
24 whether or not you have jurisdiction to set a
25 title.

1 Those are basically our concerns on
2 the single subject issues. And I'm going to stop
3 at that point. I do have a few comments I would
4 like to make if the board decides that there is a
5 single subject. (Inaudible) my quandary as to how
6 you can. But if you so decide, there are a few
7 additional comments that I would want to make on
8 the -- whether or not this measure is misleading.

9 MR. HOBBS: Questions for Mr. Ramey.

10 I have one. I mean, you've raised
11 some questions that I expect Mr. Westfall to
12 address about the measure that I would have asked,
13 but I think I'll leave that, at least, to see what
14 exchange there is when Mr. Westfall presents his
15 arguments.

16 But I guess the main question I'd
17 like to ask about is your argument about log
18 rolling because -- it sounds like you're
19 understanding about log rolling is different than
20 mine.

21 MR. RAMEY: That means I lose.

22 MR. HOBBS: Well, no. You may be
23 right.

24 MR. RAMEY: Judge (inaudible) has
25 said that to me before, too.

1 MR. HOBBS: It sounded like you're
2 saying, basically, log rolling is where there's two
3 different things in a measure. One is there to,
4 you know, achieve support where it otherwise could
5 not, you know, in order to get the other one
6 passed, basically.

7 And it seems to me there's more to
8 the definition than that. It's -- and it's two
9 unrelated things. And I'm really referring to
10 1-40-106.5, which talks about it. And basically
11 tends to, in my mind, define it as being two things
12 that have no necessary or proper connection for the
13 purpose of enlisting support, you know, one for the
14 other and so forth.

15 And it seems like it's normal for
16 voters to look at a measure and say, I like this
17 but I don't like that. But as long as everything
18 in the measure, you know, has a necessary and
19 proper connection, that's not a single subject
20 problem. And it seems to me that apart from
21 whether preferential treatment is, you know, to
22 what extent it may be different concept than
23 discrimination, it still seems like it has a
24 necessary and proper connection.

25 And so the fact that it may be

1 something different than discrimination by itself,
2 doesn't make it log rolling, it seems to me.

3 MR. RAMEY: Well, let me provide, I
4 guess, a couple of answers to that. First off, and
5 most basically, not knowing -- well, let me go to
6 my second point that I made first, and then come in
7 to the first one. Not knowing what preferential
8 treatment means, I can't intelligently answer your
9 question.

10 If preferential treatment includes
11 non-discriminatory programs, such as the ones that
12 I mentioned, diversity recruitment would be a prime
13 example. I don't think there is any necessary
14 connection, I'll take the word, I don't think
15 there's any connection at all between diversity
16 recruitment programs and prohibiting
17 discrimination. Those are different things.

18 Now I do take your point, Mr. Chair,
19 that the -- that reverse discrimination has a
20 connection to discrimination. So that kind of
21 preferential treatment would fit, I think, well
22 into the proposition that you just proposed. But
23 if you move outside of that, into broader areas
24 that do not have a discriminatory effect, I don't
25 think there's any connection at all.

1 Telling University of Colorado that
2 they cannot discriminate, and at the same time
3 saying, by the way, if you'd like to increase
4 diversity on your campus simply by making the
5 availability of your programs known in
6 ethnically-specific community, you can't do that.
7 To me those are two different things.

8 And the proponents have every right
9 to put both of them on the ballot at the same time,
10 but not together. Not within one measure. Now,
11 going to where I think you were really getting, if
12 we take the narrower definition of preferential
13 treatment, and I'm pulling definitions out of the
14 air because I don't know what they mean.

15 But if we take the narrower
16 definition that necessarily has discriminatory
17 component to it, and I define that as some group
18 can perceive themselves as being disadvantaged by
19 the program then, Mr. Chair, I think your points
20 well taken. Specifically based upon the language
21 of 106.5.

22 I would suggest to the panel,
23 however, that there's a limitation to that. When
24 you have two concepts that, yeah, a voter may favor
25 this point and not like this one, but they'll take

1 the package together. When you have the second
2 component, even in a purely discriminatory context,
3 preferential treatment is purely discriminatory
4 context, that exists for basically one reason only.
5 And that is to remedy what the evil on the other
6 which is discrimination. That's why it exists. It
7 isn't some other concept that's just floating
8 around out there.

9 Discriminatory preferential
10 treatment exists to remedy passed an existing
11 discrimination. That becomes antithetical. To
12 force me to vote to prohibit something and prohibit
13 the remedy for it at the same time, or a remedy for
14 it at the same time. Those aren't just, you know,
15 somewhat disjointed items, they are directly
16 opposed. They're putting me in a direct conflict.
17 I'm being asked to vote against the remedy for the
18 very thing I'm being asked to vote to prohibit.

19 And we can -- I don't know if I've
20 answered your question well. But, I mean, this
21 rises to a level that's different from -- I didn't
22 understand a word of the last initiative on this
23 board before. But there was something about
24 creating a new board to do something. And there be
25 some aspect of that, I wish you wouldn't give them

1 this power, but I'm okay with you giving them that
2 power. There's nothing really directly opposed to
3 those two concepts. But I may decide, well, I'm
4 going to vote for this anyway, even though I don't
5 like this particular piece of it.

6 This is different. I'm being asked
7 to vote against the remedy for the very thing I'm
8 being asked to vote to prohibit. So even in its
9 discriminatory fashion, and again I'll take the
10 board back, I don't know if it's limited that way.

11 I have every reason to believe the
12 term is not so limited because they won't tell me
13 that it's so limited. And they won't tell this
14 board and they wouldn't tell legislative counsel in
15 the review and comment hearing. And maybe they'll
16 tell you today, if you ask them. I'm kidding.

17 MR. HOBBS: Okay. Thank you.

18 So let's -- they answered it. Thank
19 you.

20 MR. RAMEY: Okay.

21 MR. HOBBS: Mr. Westfall, would you
22 like to address the question of single subject
23 compliance? And we do have your written response,
24 as well. So for the record, please.

25 MR. WESTFALL: Good afternoon,

1 Mr. Hobbs. Richard Westfall, law firm of Hale
2 Freisen, appearing here today on behalf of the
3 proponents.

4 I don't really have a lot to add to
5 what we've already filed, and what we've -- in our
6 response to the motion for rehearing, and also to
7 the -- I think we covered virtually all of this
8 ground two weeks ago. And I don't think it does
9 much to re-hash old ground.

10 And I think that for all the reasons
11 that were articulated two weeks ago by this board,
12 by you, Mr. Hobbs, and Mr. Domenico, and
13 Mr. Cartin, it clearly satisfies single subject. I
14 don't think it's closed question. The only thing I
15 would like to address is what I think I'm sensing,
16 and what I think I'm going to be seeing in the
17 Colorado Supreme Court brief, is the idea that
18 somehow or another because the proponents do not
19 want to get in there and start defining for you all
20 the ways in which we think -- all the situations or
21 all the details as to the applicability or the
22 application or the implementation of the concept of
23 preferential treatment. That by somehow or another
24 by not doing, that we're engaging in sort of what
25 would be the flip side. They're going to say,

1 well, now we're being surreptitious, and now we're
2 hiding the ball. And that's going to be used as an
3 argument against the proponents. I would like to
4 sort of lay that out on the table. I think that's
5 what's being done here in this situation. And I
6 think we, on behalf of the proponents, we just
7 fundamentally reject that.

8 It's not our task as a proponent of
9 a basic simple constitutional principle to then
10 engage in all the "what ifs" that all the people
11 who may have objections to this constitutional
12 principle may want to gin up as far as, well, if
13 you apply it in this context, it could do this.
14 And then if you apply it in this context, it could
15 do this. And, therefore, this and, boy, all these
16 other potential objects or effects, or, gee whiz,
17 and let's engage in a debate on that.

18 And at any given point along the way
19 in that debate, either one of two things occurs.
20 Either we sort of suggest to something, ah-ha,
21 that's another subject. Or we get into something
22 where it's, like, hum, that would suggest that
23 maybe you're really intending to do something else.
24 And, therefore, we trigger this surreptitious
25 aspect, which is one of the two prongs that's set

1 forth in the enabling statutes in single subject.

2 And I just want, in our brief
3 comments here, just fundamentally reject that
4 paragon. It's not or task. We have a very simple
5 measure. It has a very simple effect on the
6 constitution. It specifies very clearly what we're
7 trying to do. It's all very much connected to one
8 another. There's no issue of incongruity, and
9 there's no issue of hiding the ball.

10 The measure is very clear about what
11 we're trying to accomplish in this measure. So
12 it's single subject. And I would like to leave it
13 at that. And I would be happy to answer any
14 questions you have.

15 MR. HOBBS: Let me ask a couple of
16 questions related to what you just said. I guess,
17 I tend to agree that the term "preferential
18 treatment" is a general term. And that it's really
19 not possible, reasonable to define every instance
20 what it may mean right now, and how it may be
21 applied.

22 And, in my mind, it's about as
23 general a term as the term "discrimination." And
24 there's probably a lot of case law and even
25 statutory law, that tries to define what that is.

1 But that's probably a work in progress, even still,
2 I'm assuming. It doesn't bother me at this point
3 that the term "preferential treatment" may be
4 general. And it may not be a perfectly knowable
5 right now. That doesn't bother me exactly.

6 But I do think Mr. Ramey raises a
7 good question. And that is, does the term
8 "preferential treatment" go beyond a form of
9 discrimination? And I think that is something I
10 want to be clear on because if there's something
11 more -- I mean I've tended to view as I articulated
12 last time, that preferential treatment is simply a
13 form of discrimination.

14 You know, when one person or group
15 is preferred, then another person or group is
16 disadvantaged. And I think your response includes
17 a statement on page 3, "government sponsored
18 preferential treatment is discrimination." So I
19 think you're confirming my view, but I just want to
20 be clear, is there something intended by the term
21 "preferential treatment" that goes beyond
22 discrimination?

23 MR. WESTFALL: No. I think the way
24 we set it out in the brief, and I think the way
25 you're understanding it is -- that's where we're

1 coming from. That's what the intent of the measure
2 is. The way it's been drafted.

3 MR. HOBBS: Okay.

4 MR. CARTIN: Thank you.

5 Mr. Westfall, I have a question.

6 And I was going to ask this question before
7 Mr. Ramey made his pitch today. And it goes to
8 something he brought up. And it kind of arose in
9 my mind in reading his motion and reading your
10 response, and particularly this statement that
11 Mr. Hobbs just referenced in, "government's
12 response to preferential treatment is
13 discrimination."

14 Mr. Ramey says in his motion, "There
15 are many forms of preferential treatment that
16 neither confer nor deny privileges," as that term
17 is commonly understood, "to any class. Each need
18 diversity recruitment programs, gender-specific
19 health care programs, provision of official notices
20 in language other than English. Prohibiting
21 preferential treatment of this nature is a distinct
22 and separate subject from prohibiting
23 discrimination."

24 So I guess I have a -- kind of a two
25 part question. And my first question is, the items

1 that are referenced there, diversity recruitment
2 programs, gender-specific health care programs,
3 provisions of official notices in languages other
4 than English, would the provisions of the measure
5 prohibit those programs?

6 MR. WESTFALL: I don't really want
7 to get into an interpretation on an application on
8 a program-by-program basis. All I can respond by
9 saying is the intent of the measure is to just
10 restate what we've looked at and our response and
11 the key language and that is government sponsored
12 preferential treatment is discrimination.

13 So to the extent to which you have
14 government sponsored preferential treatment in the
15 defined areas based upon defined categories, the
16 measure covers that. As far as, I mean, it's not
17 so simple because we can go on all day about, well,
18 what aspects of this? It's all fine and good for
19 them to throw out a concept because they can
20 have -- they can say these aspects of a program
21 like this are clearly not related to either the
22 three subject -- you know, the three areas or don't
23 relate to the categories or don't constitute
24 government sponsored -- really preferential
25 treatment as the measure is designed to address.

1 And then if I say something, you
2 know, off the top of my head without really looking
3 at it and thinking through all the nuances. Then
4 all of a sudden they go back, and they look at some
5 case, and it's cited in the Colorado Supreme Court
6 brief that says, ah-ha, there's some purpose.

7 That's the danger about engaging in
8 this level of interpretation of the measure. That
9 they're asking this board to do. And I really do
10 think this is the situation it really counts is
11 getting back to Principles 101, as far as your job
12 is to interpret the measure only insofar as is
13 necessary to determine what are the central
14 purposes of this measure. What is it trying to
15 accomplish?

16 And as far as -- these are all
17 levels of implementation and effects, and all the
18 things they want to argue about that they want to
19 try to create a separate subject on a movement.
20 But at the end of the day, that really does take
21 this board beyond its charge, which is to simply
22 drill down enough to take a look at what are we
23 trying to accomplish. And I think you hit the nail
24 on the head two weeks ago, I think we're, you
25 know -- there's no disagreement about that aspect

1 of it, you know, among the board as I understand
2 it.

3 And I really would like to resist,
4 you know, getting into the program-by-program
5 implementation issues because that really becomes a
6 slippery slope as to -- well, somewhere down the
7 road, does that lead us into, ah-ha, there's
8 something that's hidden. Or, ah-ha, that's
9 something that now creates a single subject issue.

10 I think the basic principles of what
11 this board should be doing. I think we counseled
12 against getting into that kind of level of
13 interpretation with this measure.

14 MR. CARTIN: And, you know, that, as
15 always, I greatly appreciate that. And I'm very
16 respectful of your position on that, but I want to
17 assure you that I asked that question because I am
18 trying to do my job here --

19 MR. WESTFALL: I understand.

20 MR. CARTIN: -- and that's part of
21 my job. So I'm going to ask you one more question.

22 MR. WESTFALL: Okay.

23 MR. CARTIN: And I understand where
24 you're coming from, but assuming -- assuming for
25 the sake of argument, for the sake of trying to

1 determine, in my mind, resolve kind of some of the
2 issues I have with Mr. Ramey's argument. Assuming
3 that one of those three, or another of the three
4 programs that are referenced in that program -- in
5 that paragraph, were some other type of government-
6 sponsored preferential treatment, would be
7 prohibited by the measure.

8 So let's just say, for example, to
9 give some concreteness to this, assuming that
10 diversity recruitment programs would be prohibited
11 by the measure, the next sentence says,
12 "prohibiting preferential treatment of this nature
13 is distinct and separate -- is a distinct and
14 separate subject from prohibiting discrimination.
15 Prohibiting preferential treatment of this nature
16 is a distinct and separate subject from prohibiting
17 discrimination." What's your response to that
18 statement, to that argument?

19 MR. WESTFALL: I just get back to
20 the basic principles of the measure. I mean, as we
21 cited in our -- you know, citing the American
22 Heritage. The different definitions of
23 preferential means of, related to, or giving an
24 advantage or preference of preferential treatment.
25 And, again, to the extent which anything is

1 government sponsored and equates to essentially
2 discrimination by granting preferential treatment.

3 On the plain language of the
4 measure, it seemed to be implicated. Exactly how
5 that's going to effectuate on a program-by- program
6 basis, I don't think that's where we should be at
7 today in discussing the measure.

8 MR. CARTIN: Thank you.

9 MR. HOBBS: Mr. Westfall, I want to
10 bring up a case that -- Florida case, that
11 Mr. Knaizer brought to my attention where the
12 Florida Supreme Court held that a similar measure
13 violated Florida's single subject requirement. And
14 I don't think it's dispositive of the matter before
15 us today, but I want to bring it up.

16 This is advisory opinion to the
17 attorney general regarding an amendment to bar
18 government from treating people differently based
19 on race and public education. This is a 2000 case,
20 778 Southern 2nd 888. And before the Florida
21 Supreme Court was a request from the attorney
22 general to look at the single subject question with
23 respect to four proposed initiatives that were
24 almost identical -- and almost identical to the
25 measure before us today, almost word for word.

1 And the Florida Supreme Court held
2 that the measures violated the single subject
3 requirement in Florida. And -- actually, maybe I
4 should pause there. Are you aware of the case?

5 MR. WESTFALL: I have heard of it.
6 I have not studied it.

7 MR. HOBBS: Okay.

8 MR. WESTFALL: (Inaudible) I have
9 not studied the rational of it or even read the
10 opinion.

11 MR. HOBBS: And I've only looked at
12 it very superficially. I have not had a chance to
13 look at it really very carefully. It's my
14 understanding, and I'm essentially probably going
15 to make an argument for you here, and also provide
16 Mr. Ramey an opportunity, if he wishes, to address
17 this as well.

18 It's always been my understanding
19 that Florida has a more restrictive view of single
20 subject than Colorado does. And I think it's
21 reflected in the court's decision here. And in
22 some of the test -- some of the case law that the
23 Florida Supreme Court applies, and let me see if I
24 can find an example, but it -- the flavor of the
25 court's opinion in the Florida case seems to be

1 that, you know, basically a measure could prohibit
2 disfair treatment, generally, but not on the
3 basis of -- or not with respect to particular
4 classifications. That once a measure classifies
5 how it applies, you know, what forms of
6 discrimination or preferential treatment it may
7 apply to, and so forth, then those become multiple
8 subjects.

9 And I hope I'm not distorting the
10 court's rational too much. But again maybe to give
11 a clear example where I think the Florida case law
12 is more restrictive, there's discussion in the
13 Florida case that apparently means that in Florida,
14 proponents have to identify every provision in the
15 constitution that is effected by a proposed
16 amendment to the constitution.

17 I mean, I just see one of the quotes
18 here, nevertheless it is imperative that an
19 initiative identify the provision in the
20 constitution substantially effected by the proposed
21 amendment in order for the public to fully
22 comprehend the changes, and so forth. And that's
23 viewed as a violation of single subject, if that's
24 not done.

25 So, you know, in a quick read of

1 this it looks like a more restrictive
2 interpretation of the single subject requirement.
3 But I am troubled, and that's why I'm bringing it
4 up. That here is a -- the measure before us today
5 is almost identical to the measure that was before
6 the Florida Supreme Court in 2000. And that is,
7 perhaps, going to be problematic.

8 But it doesn't change my view,
9 simply because I do believe the Florida Supreme
10 Court has a more restrictive view of single
11 subject.

12 MR. WESTFALL: I understand. What
13 two -- three other states have single subject where
14 it come down to single subject. I'm going to do a
15 nose count. I'm out of heads. I do think there
16 are other states you can look to that have found
17 single subject, number 1, would be my first
18 response.

19 And second, I would agree, I mean,
20 with your assessment. It's my understanding based
21 upon what I read about the Florida Supreme Court
22 opinion, not reading it itself. That's always
23 dangerous for people who are lawyers. We're
24 supposed to go back and look at the cases. So, in
25 fact, it was -- it was applying a burdensome

1 standard for state to satisfy single subject. It's
2 not close to what we have here in Colorado.

3 MR. HOBBS: Okay. Any other
4 questions for Mr. Westfall?

5 Thank you. Is there anybody else
6 who -- we're on the single subject question right
7 now. I don't think I have anybody else signed up
8 to testify. Is there anybody else who wishes to
9 address this? Mr. Ramey.

10 MR. RAMEY: Would you like me to
11 respond?

12 MR. HOBBS: Yes. Actually I would
13 like for you to if you want to --

14 MR. RAMEY: Of course.

15 MR. HOBBS: -- I just wanted to find
16 out if anybody else is here, as well. Why don't
17 you come forward, Mr. Ramey.

18 MR. RAMEY: I'm not going to find
19 myself here. I haven't read that case either. So
20 I have no idea what it says, and I'll be honest
21 about it. And, also, I do want to say with regard
22 to this initiative has been seen in virtually the
23 same form in other states around the country. And
24 I, frankly, don't know the extent, if at all, to
25 which it has been challenged on the single subject

1 grounds in other states or even if that issue
2 exists there.

3 I don't want to make any
4 representations to the board, one way or the other,
5 about that. From what, Mr. Hobbs, you just read,
6 it sure sounds to me like the Florida requirement
7 is a little stricter, and a little different than
8 Colorado's single subject requirement. But it
9 sounds to me, and I'm taking this solely,
10 Mr. Hobbs, from what I think I just heard -- heard
11 you read. I'm not familiar with this case.

12 It sounds like an issue more akin to
13 the old (inaudible) rights initiative -- issue that
14 we had here and that is, can you take a concept
15 saying, prohibit discrimination, and apply it in
16 multiple areas. Or every time you come into a
17 different area, do you have -- do you have a
18 different subject?

19 If what I heard -- what I think I
20 heard you read out of the Florida opinion or the
21 case in Colorado, I think the most apt objection
22 that we have made would be the factors being
23 applied here with contracting, employment and
24 education.

25 In Florida, it probably fails single

1 subject grounds -- if I'm understanding what you
2 read, for that reason. Here in -- this is Colorado
3 and we have the (inaudible) rights initiative.
4 That's a little more subtle of an issue when we
5 start to get into, well, does this mean different
6 things in those different areas? But -- well
7 that's about all I can see of the case.

8 My concern is a little different,
9 though. And following up on what Mr. Westfall just
10 said, and I don't mean to put Mr. Westfall on the
11 spot, and I did that. And I apologize to
12 Mr. Westfall for that, and he'll get even with me
13 for that, I'm sure before the year's out.

14 But the unwillingness -- it's not
15 Mr. Westfall's, but the unwillingness and inability
16 to respond as to the scope of that term
17 "preferential treatment" is key. And I think
18 Mr. Cartin's question went right to the heart of
19 it. Were not -- I'm not objecting on the basis of
20 trying to predict all the different ways in which
21 this could be applied.

22 What I'm suggesting to the board is
23 that if preferential treatment is -- can reasonably
24 mean, within the context of this initiative,
25 something totally different from discrimination, it

1 doesn't belong in an anti-discrimination measure.
2 And I just heard that it well can. Diversity
3 recruitment (inaudible) the question that
4 Mr. Cartin just asked is a perfect example. There
5 is no rational way that can be deemed
6 discrimination.

7 I've just heard that that kind of
8 program might be within the context of preferential
9 treatment. That gives us to two different
10 subjects. They can do that. They can define
11 preferential treatment as broadly as they want
12 within a single measure. But to hook it to
13 discrimination, it has to have some connection,
14 rationally, some congruity with the broadest
15 concept of what discrimination can mean.

16 And that term here, I just heard is
17 broader than. I think you've got two subjects.
18 And, respectfully, I don't think the board can set
19 a title on this initiative as presently proposed.

20 MR. HOBBS: Well, why -- let me just
21 go to your last point, at the risk of belaboring
22 this a little bit. I don't understand why
23 diversity recruitment is not discriminatory. It
24 seems like if an institution of higher education is
25 recruiting my group, aggressively recruiting my

1 group to the exclusion of some other group, it
2 seems like that is discrimination against the other
3 group.

4 MR. RAMEY: Well, if it were -- if
5 it were excluding another group -- I'm going to
6 suggest, Mr. Hobbs, and I think we have a
7 Blackwell's Dictionary in our motion for this
8 purpose. Discrimination suggests somebody is being
9 disadvantaged. Maybe by intent, maybe by effect.

10 But somebody is being disadvantaged
11 in the sense that they are not receiving a
12 privilege that they would have otherwise been
13 entitled to. Even if it's just somebody is putting
14 they're thumb on the scale in favor of another
15 group. That disadvantages the group that is not
16 benefiting by having the thumb on the scale.

17 These examples that I'm suggesting,
18 I would respectfully submit to the board, nobody is
19 being disadvantaged. Just because the availability
20 of a program is being communicated to what happens
21 to be an ethnically focused group that would not
22 otherwise be aware of that information, does not
23 disadvantage anybody else who is applying for the
24 program than would otherwise be aware of it.

25 I have no reasonable expectation to

1 keep the pool of applicants down. Now, I may have
2 an expectation not to have the thumb on the scale,
3 quotas, or any form of reverse discrimination
4 points (inaudible). But simply making the
5 availability of a program known to one group does
6 not disadvantage another group who's already aware.
7 Now, the other examples I give that fit into that
8 common effect -- that sort of concept as well, if
9 there's a program in the school that benefits
10 teenage mothers, and I understand there are such
11 programs, I'm hearing that this measure could
12 prohibit that.

13 How in the world is anybody
14 disadvantaged because anybody because who's not a
15 teenage mother (inaudible) disadvantaged by the
16 existence of that program? If there's a program in
17 the school to honor black men as they become men,
18 how is anybody disadvantaged by the existence of
19 that program? That is not discriminatory. There
20 is no loss of benefit, privilege, or anything.

21 If there's a Spanish language notice
22 on the voting issue, how is anybody disadvantaged
23 by that? And the question I was trying to get
24 asked is, if you don't mean that, tell us that.
25 And then I understand we've got discriminatory and

1 reverse discriminatory issues here and, Mr. Hobbs,
2 your point has been very clear that it's all
3 discrimination, and they should have the ability to
4 address that in one measure.

5 But I'm hearing the trumpets that
6 well, we're not really -- don't really -- don't
7 want to answer that question. And I don't want to
8 pin this on Mr. Westfall because I don't think he
9 can answer your question. I don't think he's been
10 given the ability to do that. And I certainly
11 don't want to pull an answer out of him if that
12 isn't what the proponents intend.

13 But these kinds of things are
14 different things. They aren't discriminatory, and
15 the public would not view them as involving
16 discriminatory, however broadly you (inaudible). I
17 hope I'm making sense. I hope I'm being at all
18 clear. Perhaps, I mean, the best example would be
19 (inaudible) this program does nothing but confer
20 and honor or recognition or a piece of information
21 upon a group that either by intent or just happens
22 to be racially or ethically or gender or partially
23 specific. With no disadvantage to anybody else.
24 No detriment to anybody else under any conceivable
25 analysis.

1 How do you prohibit that the same --
2 in the context of the measure that prohibits
3 discrimination? I would respectfully suggest
4 (inaudible). They can do it but not in the same
5 (inaudible).

6 MR. HOBBS: Okay. Thank you.

7 Anybody else wish to testify on the
8 question of single subject compliance?

9 Yes, sir. If you'll identify
10 yourself for the record, please.

11 MR. CORRADA: Yeah. My name's
12 Roberto Corrada. I'm a professor of law at the
13 University of Denver College of Law. And I'm hear
14 just, I guess, on the side of the objectors. I
15 just -- I'm just here to answer your last question.
16 Which is what very commonly happens with
17 universities, for example, I know this at the
18 University of Denver College of Law is true. Is we
19 mostly advertise our programs in, you know, the
20 major newspapers, for example.

21 So CU might advertise in the Denver
22 Post, Rocky Mountain News. And, in fact, the vast
23 majority of the white community would understand
24 things about CU or DU through those media. But if
25 CU decided that they wanted to increase they're

1 recruitment pool among blacks or Latinos by then
2 also placing ads in local black newspapers, black
3 community newspapers, or Spanish language
4 newspapers, that would not disadvantage the white
5 community at all.

6 In fact, probably not that many
7 people from the white community would pay attention
8 to those newspapers. And they're getting plenty of
9 information about these schools in the regular
10 newspapers, Rocky Mountain News and the Denver
11 Post. Another example, a lot of the colleges and
12 universities locally recruit from other colleges
13 and university or high schools in the area, for
14 example.

15 The CU law school might recruit
16 heavily from CSU, for example. Well, CSU may have
17 a large white population, and so they may get a lot
18 of white applicants as a result of that
19 recruitment. If they wanted to increase the number
20 of people who applied who were from different
21 ethnic communities, they might send somebody to a
22 historically black college and university, for
23 example, to do their recruitment there.

24 That would not, again, disadvantage
25 folks from the white community. And, in fact, my

1 guess is CU, I can't speak for CU, but they
2 probably recruit outside of the state, as well.
3 And probably do that mostly at universities and
4 colleges that are majority white universities and
5 colleges. But if they wanted to add a historically
6 black college or university or, a college and
7 university in the largely Hispanic area, they could
8 do that. That would not be a discrimination or
9 disadvantaging anybody from the white community.
10 So that's a direct response to your question.

11 MR. HOBBS: I guess I'm still
12 troubled that because I -- it sounds like what
13 you're describing is recruitment across multiple
14 markets that -- that under that description might
15 even be equal recruitment of different groups,
16 minority and majority. But I guess I'm, you know,
17 in a more extreme case, I can see that recruitment
18 exclusively of a particular group could be
19 discriminatory.

20 You know, where an educational
21 institution says to a particular group, here are
22 the programs we have for you. Here's how can you
23 apply, here's how, you know, here's the forms,
24 here's who you talk to. You know, to the exclusion
25 of another group, it seems like that is

1 discriminatory.

2 MR. CORRADA: Yeah. I would say
3 that is. But that's not -- that's not typically
4 what happens.

5 MR. HOBBS: Right.

6 MR. CORRADA: You have the same
7 recruitment people. They're saying the same thing.
8 They're just trying to reach out to a group that's
9 not covered in their general recruitment practices.
10 And it doesn't disadvantage anybody in anyway. It
11 doesn't discriminate against anybody in anyway.
12 Certainly none of that goes to the bottom line of
13 the seat in the class.

14 You know, so it's fairly benign
15 kinds of things. Could somebody put a postage
16 stamp on the letter that they know is going to a
17 black applicant, right? What if a black alumni's
18 letter to all the black applicants who have applied
19 to CU, can CU have postage for those folks? That
20 does not discriminate against anybody else.

21 And yet, under -- undefined
22 preferential treatment term, broad definition of
23 preferential treatment, the proponents don't seek
24 to limit it in anyway. Those sorts of things can
25 happen. And my guess is the vast majority of the

1 electorate would not think that's what they're
2 voting for.

3 MR. HOBBS: Okay. Thank you.

4 MR. CORRADA: Thanks.

5 MR. HOBBS: I don't know whether
6 there's a motion -- I guess, frankly, I'm not
7 convinced that the measure violates the single
8 subject requirement. But I don't, Mr. Cartin, open
9 to discussion.

10 MR. CARTIN: Just very briefly. I'd
11 agree with that. And, you know, I just, again,
12 Mr. Ramey's argument is a strong one. I am in --
13 and well thought out. And I thought a lot about
14 it. And I think it's articulated well in his
15 motion, but it just comes down to the fact that I
16 disagree.

17 It is going to the statement in the
18 motion where the objector pauses that there are
19 many forms of preferential treatment that neither
20 confer nor deny privileges. And it lists some
21 examples of those programs. And it's followed by
22 the statement, prohibiting preferential treatment
23 of this nature is a distinct and separate subject
24 from prohibiting discrimination. And I just
25 respectfully disagree with that.

1 I think that discrimination is the
 2 connector. I think that discrimination is what
 3 makes -- gives the measure congruity between the
 4 purpose -- the purposes of the measure. I think it
 5 has a single subject. Mr. Ramey said, preferential
 6 treatment exists to remedy post -- past and
 7 existing discrimination. And that that's
 8 antithetical to prohibiting preferential treatment.
 9 And I hope I'm stating that right.

10 And, again, I just -- for the
 11 purposes of this measure and the single subject
 12 requirement, and, again, without stating it all the
 13 relevant provision -- the statutory and
 14 constitutional provisions and judicial precedence,
 15 I just, I'm of the same position as I was two weeks
 16 ago. And while the arguments are persuasive, I'm
 17 not completely persuaded. And I'm in the same spot
 18 I was as far as being inclined to deny the motion
 19 on the single subject grounds.

20 The other thing that I wanted to
 21 address very briefly, Mr. Chairman, was -- is the
 22 argument about subsection (3) in the measure. And
 23 this is the provision that Mr. Ramey has argued,
 24 it's creating, authorizing, sanctioning, and
 25 constitutionalizing this type of discrimination.

1 And, again, I just strongly -- I strongly disagree
2 that this is kind of the outcome this particular
3 provision.

4 And whether its appropriate or not,
5 it's up to the Chair. Mr. Ramey, you may want to
6 respond to this, but I think that this particular
7 provision with the prefatory language, nothing in
8 this section shall be interpreted as prohibiting
9 bona fide qualifications based on sex that are
10 reasonably necessary to the normal operation of
11 public employment, public education, or public
12 contracting.

13 Again, notwithstanding Mr. Ramey's
14 forceful argument here, to me this particular
15 provision is not necessarily an affirmative
16 directive that creates, authorizes, sanctions, or
17 constitutionalizes the described action here. You
18 know, and I'm not trying to be cute, but it seems
19 to me this is more of like an instruction on
20 construction.

21 At least, it's not the type of
22 affirmative provision that creates a separate
23 subject, creates a separate purpose. I'm not even
24 sure it amounts to an exception necessarily. It
25 says -- it gives direction on specifically what the

1 provision is not to be interpreted to do, or as
2 interpreted to prohibit. And I think in that
3 regard, it leaves the door open where it
4 acknowledges there may be other provisions out
5 there that are relevant to that particular
6 prohibition.

7 And so I did want to respond to
8 that -- to that particular point because I just --
9 again, I didn't think that, and I think
10 specifically the argument there was -- again this
11 was another separate subject or separate purpose
12 that was unrelated to the subject. And these are
13 incongruous effects surreptitious in nature that
14 will indisputably surprise and mislead the voters.
15 The motion says the initiative continues a
16 provision legalizing a form of discrimination. And
17 thereby creating and sanctioning a new form of
18 discrimination within a measure that purports to
19 prohibit discrimination.

20 Again, I know it's not the boards
21 job to go to the merits of the measure or to kind
22 of construe the measure, but I just -- for purposes
23 of the single subject discussion here, I disagree
24 with that particular position.

25 MR. HOBBS: And I agree, Mr. Cartin.

1 I actually appreciate you bringing that up. For
2 the record, I -- we didn't have much -- well today
3 we didn't have discussion about subsection (3).
4 And I just tend to agree with your interpretation
5 of that. And I don't know that I have anything
6 else to add on the single subject.

7 I do view the measure as prohibiting
8 preferential treatment that is discriminatory in
9 nature. And that's kind of an important to my
10 resolution of the single subject requirement
11 because it leads to my conclusion why I don't think
12 there's log rolling here, for example, because I
13 think there is a necessary and proper connection
14 between the prohibition on discrimination and the
15 prohibition on preferential treatment. I just
16 don't see two separate subjects having no necessary
17 or proper connection.

18 And, you know, and I don't know. So
19 that's probably more than I need to say. It sounds
20 like there's not a change of heart on the part of
21 the board on the issue of single subject question.
22 So let's move to the adequacy of the titles.

23 And, Mr. Ramey, I don't know, did
24 you want to address that now? You said -- I think
25 you said you would briefly address that if we got

1 to it.

2 MR. RAMEY: Yeah. I was brief for
3 this time, Mr. Chair.

4 MR. WESTFALL: (Inaudible).

5 MR. RAMEY: Thank you, Mr. Westfall.

6 I do want -- and I'm not going to go
7 through -- I think we've identified our primary
8 concerns in our written motion for rehearing. I'm
9 not going to go through those. There's one
10 additional one I want to raise. I didn't
11 (inaudible) hearing I think I get to do that with
12 the boards concern. But I want to make sure it's
13 on the record. And then there's one in there I
14 want to focus on.

15 The additional one is this, and it's
16 an incongruity between paragraphs four and
17 paragraph seven of the initiative. In that one
18 paragraph four says, nothing in this section shall
19 be interpreted as invalidating any court order or
20 consent decree that is in force as of the effective
21 date of this issue. Presumably, unless there is a
22 court order or consent decree in force as of the
23 effective date of this section, a court order or
24 consent decree in the future would otherwise fall
25 within the prohibitions of this measure. That's

1 the natural reading of that paragraph.

2 And yet you go down to paragraph
3 seven and it says, the remedies available for
4 violations of this section shall be the same,
5 regardless of all those things as are otherwise
6 available for violation of then existing Colorado
7 anti-discrimination law.

8 Well, that is changing the law
9 because the remedies do show court orders and
10 consent decrees will be a difference from what will
11 exist as of, I presume, the effective date of this
12 measure, or the minute before the effective date of
13 this measure under Colorado anti-discrimination
14 law.

15 Now, how the dickens you express
16 that -- I think I could come up with a suggestion,
17 but I haven't really thought it through. I think
18 that needs to be in the title because this does
19 change the remedies that will be available. My
20 second point is one that we did address in our
21 measure, and that is coming back to this point that
22 Mr. Cartin just disagreed with me on. But there is
23 also a disclosure issue.

24 By the way, Mr. Cartin, I do respect
25 your analysis. I have no response to that because

1 I certainly understand it, and it's difficult --
2 it's a difficult question to wrestle with. This
3 bona fide qualifications based on sex. The law's
4 being changed here. The law's being changed
5 remarkably in that a form of discrimination and,
6 Mr. Cartin, and I understand this respectfully
7 takes exception with my viewing this as sort of
8 throning a new form of discrimination. I think it
9 does that. But I think it does it in the context
10 of a measure that purports to prohibit
11 discrimination.

12 But from a disclosure perspective,
13 putting single subject aside, from a pure
14 disclosure perspective, I think it is very
15 important the voters of this state realize that
16 while they are (inaudible) prohibiting
17 discrimination, they are taking out of that
18 prohibition. And, therefore, allowing a form of
19 discrimination which has never been recognized in
20 this state before.

21 Discrimination based on a bona fide
22 qualifications based on sex outside of the
23 employment area. That doesn't exist in this state
24 right now. And it will exist, at least with regard
25 to the construct of this constitutional measure, by

1 being excised out of the prohibition on
2 discrimination. And I would respectfully
3 (inaudible) advised of that (inaudible) laws I
4 think (inaudible) recite the old (inaudible) case
5 where they were redefining when life began.
6 (Inaudible) albeit almost 18 years ago now.
7 Seventeen years ago was that if the voters are
8 going to make a significant change to the law of
9 the state within the context of a measure that the
10 principal focus of which is on -- I wouldn't say a
11 different topic, but a broader, more focused topic.
12 They should be apprised of that change of that law
13 clearly in the title.

14 Otherwise there are other points
15 that are fairly well set forth. I think they
16 belong in front of the, and in connection with, and
17 not behind it. (Inaudible) Very important. Very
18 basic (inaudible).

19 MR. HOBBS: I know you're doing your
20 best. There is something you didn't address, but
21 it's in your written motion, I -- that I do want to
22 have some discussion about. You point out that the
23 titles say at the beginning that it prohibits the
24 state from discriminating. And then it's much
25 later in the titles that you learn state means not

1 just state government, but it means, political
2 subdivision or governmental instrumentality of or
3 within the state. And I am wondering about, I
4 mean, I can defend that. I think that's what the
5 measure does. It prohibits, you know, the state
6 from discriminating against or prohibiting or
7 granting preferential treatment.

8 And then it defines state very
9 broadly to be basically I think state and local
10 government. And so it's all there, but it does
11 bother me a little bit to say, prohibiting the
12 state from discriminating. And I just don't -- I
13 am in my own mind still trying to think that
14 through. Would it be better in your mind to fix
15 that deficiency that you brought up if we said,
16 prohibiting state and local governments from
17 discriminating against or granting preferential
18 treatment.

19 And then possibly deleting the
20 clause that defines state. Would that be a better
21 approach, something like that?

22 MR. RAMEY: Its, Mr. Hobbs, I think
23 it's moving in the right direction. My concern,
24 and I think you ought to put it all in there. And
25 I'm not just saying that because I want to gum up

1 proponents title.

2 But this prohibits East High School,
3 I don't want to go back into the realm of
4 preferential treatment again, but it prohibits East
5 High School from having a program for pregnant or
6 for teenage mothers -- as I read this initiative.
7 It's part of the Denver public school system. I
8 don't think a voter, when they see state or even
9 state and local government, being fairly apprised
10 of that.

11 The best I can do -- I'd probably go
12 to much greater length than acceptable to the
13 advisory board or the proponents. But I think, at
14 minimum, we have to use the language from the
15 definition. There are all kinds of stuff, not just
16 states and cities and counties, but school
17 districts, the RTD. Heaven knows what else,
18 special districts.

19 MR. HOBBS: Okay.

20 MR. RAMEY: Universities.

21 MR. RAMEY: Okay. Thank you.

22 Mr. Westfall, would you like to
23 respond to the motion for rehearing on the question
24 of the efficiency of the titles?

25 MR. WESTFALL: I believe the title

1 is clear, Mr. Hobbs and Mr. Cartin, and we just
2 urge that the board reaffirm what the title was set
3 two weeks ago.

4 MR. HOBBS: Would you -- how do you
5 feel about in the end of the second line instead of
6 saying, prohibiting the state from discriminating
7 against or granting preferential treatment, et
8 cetera. Saying something like, prohibiting state
9 and local governments from discriminating against
10 or granting preferential treatment. Would that be
11 better or worse in your view?

12 MR. WESTFALL: I think in that
13 situation I'd almost believe that the (inaudible)
14 would be worse than the -- I think the
15 suggestion -- I think the language that's in the
16 title itself, making it clear down in the title, it
17 says, making -- defining state to include the state
18 of Colorado, agencies or departments of the state,
19 public institutions of higher education, legal
20 subdivisions, or government instrumentalities. I
21 just think that that's -- I think that's accurate.

22 I mean, and that's in the title
23 that's been set. And I think the fact that that's
24 down a few more lines in the title, in no way makes
25 this title in anyway misleading. And I just think

1 that's -- I mean, they're looking for an argument
2 to try to say that the title is misleading. I
3 don't think there's anything misleading about it at
4 all. I think anybody, once they take just a few
5 moments and inform the reader, the voter, informs
6 him or herself as to what we're talking about here,
7 a quick peruse of it will immediately grasp that
8 fact as they look down towards the title.

9 I think the staff did a wonderful
10 job on balancing out, you know, clarity and
11 simplicity. And they did quite a good job. And I
12 would prefer and urge that they just that the title
13 board sustain what it did two weeks ago.

14 MR. HOBBS: Thank you. Any
15 questions for Mr. Westfall? Thanks.

16 Anybody else wish to testify on the
17 sufficiency of the titles? Hearing none, then I'll
18 turn to board discussion of the titles. The
19 discussion.

20 I guess I'm not -- I'm not inclined
21 to suggest any amendments to the titles. As I
22 indicated I am a little concerned about the
23 reference to the state in the second line. But I
24 tend to agree with Mr. Westfall, I think -- I think
25 that the titles balance several considerations.

1 And I can see -- I believe I can understand why the
2 measure's drafted the way it is as far as
3 prohibiting discrimination and preferential
4 treatment by the state. And meaning that -- to
5 mean basically, the state in it's political
6 subdivisions of the state and instrumentalities of
7 the state.

8 And, you know, it seems like we've
9 dealt with it well enough with the clause that
10 explains what state includes. So I don't think I
11 have a desire at this point to make changes to the
12 titles as previously set by the board.

13 MR. CARTIN: And I concur with
14 that, Mr. Chairman.

15 MR. HOBBS: Then a motion, I guess,
16 I'll move that the board deny the motion for
17 rehearing.

18 MR. CARTIN: Second.

19 MR. HOBBS: No other discussion.

20 All those in favor say, aye.

21 MR. CARTIN: Aye.

22 MR. HOBBS: All those opposed, no.
23 That motion carries 2 to 0. That concludes action
24 on number 31. For the record, the time is
25 4:09 p.m. And that concludes our agenda for the

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day.

Thank you, very much.

(Hearing concluded.)

TRANSCRIPT OF HEARING

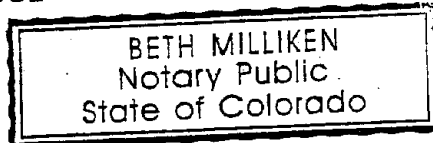
STATE OF COLORADO)
) ss.
COUNTY OF LARIMER)

I, BETH A. MILLIKEN, Court Reporter and Notary Public in and for the State of Colorado, certify that the above and foregoing is a complete and accurate transcription of the hearing to the best of my ability to transcribe the CD-ROM, the same consisting of 60 pages. I further certify that I am not related to, employed by, nor counsel to any of the parties herein, nor otherwise interested in the events of the within cause.

IN WITNESS WHEREOF, I have affixed my notarial seal on July 10, 2007. My commission expires May 31, 2011.



BETH A. MILLIKEN
Court Reporter



My Commission Expires May 31, 2011

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