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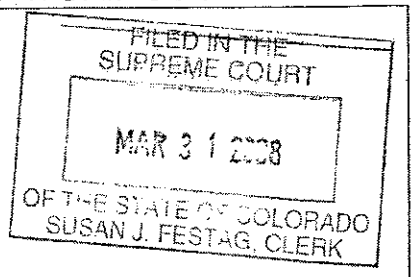
SUPREME COURT, STATE OF COLORADO Two East 14th Avenue Denver, CO 80203 Original Proceedings Pursuant To § 1-40-107(2) C.R.S. (2006) Appeal from the Ballot Title Board	 ▲COURT USE ONLY▲
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2007-2008, #61 **Petitioners:** MARY PHILLIPS, CLARA NEVAREZ, ANDREW PAREDES, proponents, v. **Respondent:** JESSICA PECK CORRY, objector. and **Title Board:** WILLIAM A. HOBBS, DANIEL L. CARTON, and DANIEL DOMENCIO.	Case Number: 08SA89
Attorneys for Respondent: Richard A. Westfall, No. 15295 Aaron Solomon, No. 38659 Hale Friesen, LLP 1430 Wynkoop St., Suite 300 Denver, CO 80202 Telephone: (720) 904-6000 Fax: (720) 904-6006 E-mail: rwestfall@halefriesen.com asolomon@halefriesen.com	

OPENING BRIEF OF RESPONDENT JESSICA PECK CORRY

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INTRODUCTION

The Ballot Title Setting Board ("Title Board") properly refused to set a title for Proposed Ballot Initiative 2007-2008 #61 (the "Initiative"). One of the critical roles of the Title Board is "[t]o prevent surreptitious measures and apprise the people of the subject of each measure by title, that is, to prevent surprise and fraud being practiced upon voters." C.R.S. § 1-40-106.5(e)(II). The Initiative is designed to trick voters into believing that they are voting to limit the power of the State to engage in discrimination and preferential treatment when in fact they would be voting for a measure that allows the State to engage in all discrimination and preferential treatment allowed under the United States Constitution. To accomplish this deception, the Initiative contains two distinct initiatives wrapped up in one: a purported ban on discrimination and preferential treatment (the first sentence) and the intended preservation of such treatment (the second sentence). The Title Board properly found that this deception violates Colorado's single subject prohibitions.

STATEMENT OF ISSUES

Proponents present two issues for review. Objector objects to the second issue for review to the extent it suggests that the Court should order the Title Board to adopt a particular title in the first instance.

STATEMENT OF THE CASE

This is an appeal from a decision of the Title Board. On January 14, 2008 the Proponents filed the Initiative to amend the Colorado Constitution. The substantive portion of the Initiative provided that:

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting. Nothing in this section shall be interpreted as limiting the State's authority to act consistently with standards set under the United States Constitution, as interpreted by the United States Supreme Court, in public employment, public education, or public contracting.

On February 20, 2008, the Title Board set the ballot title for the Initiative. The Objector sought and received a rehearing. On March 5, 2008 the Title Board unanimously found that the Initiative did not compromise a single subject and accordingly struck the previously set title. (Hearing Tr. 88, attached as Ex. A) The Proponents subsequently filed this appeal.

SUMMARY OF ARGUMENT

The Initiative fails to comply with C.R.S. § 1-40-106.5 because it contains a deceptive opening sentence that disguises the true effect of the Initiative. In addition, the Initiative fails to comply with C.R.S. § 1-40-106.5 because it purports to both prohibit yet preserve the power of the State to engage in certain forms of discrimination and preferential treatment and thus contains multiple subjects.

The ballot title urged by the Petitioners should be rejected because it is the role of the Title Board to set a ballot title in the first instance and the proposed title is misleading because it failed to clearly inform voters that the Initiative will allow, and was intended to allow, the State to engage in all discrimination and preferential treatment allowable under the United States Constitution.

STANDARD OF REVIEW

The standard of review for the issues presented by the Proponents is highly deferential. E.g., In re Petition on Campaign and Political Finance, 877 P.2d 311, 313 (Colo. 1994) ("we indulge all legitimate presumptions in favor of the propriety of the Board's action, and only in clear cases will we invalidate the title, ballot title and submission clause, or summary prepared by the Board"). In reviewing the actions of the Title Board, the Court "may not address the merits of a proposed

initiative or suggest how an initiative might be applied if enacted." In re Proposed Initiative for 1999-2000 #29, 972 P.2d 257, 260 (Colo. 1999) (internal quotation omitted). However, the court will "sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated." Id (internal quotation omitted).

ARGUMENT

I. The Measure Contains a Deceptive Opening Sentence Disguising the True Effect of the Initiative

One of the critical roles of the Title Board is "**[t]o prevent surreptitious measures and apprise the people of the subject of each measure by title, that is, to prevent surprise and fraud being practiced upon voters.**" C.R.S. § 1-40-106.5(e)(II) (emphasis added); In re Proposed Initiative 1997-1998 #74, 962 P.2d 927, 928 (Colo. 1998) (holding that "[t]he single-subject requirement is intended to prevent voters from being confused or misled . . ."); In re Proposed Initiative on Parental Choice in Educ., 917 P.2d 292, 294 (Colo. 1996) (holding that the "single-subject requirement is designed to protect the voters from fraud and surprise . . ."); In re Proposed Initiative 1997-98 #84, 961 P.2d 456, 458 (Colo. 1998) (holding that "the single subject requirement is intended to protect voters against surprise and fraud").

C.R.S. § 1-40-106.5(e) provides:

> The practices intended by the general assembly to be inhibited by section 1(5.5) of article V and section 2(3) of article XIX are as follows:
>
> (I) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits;
>
> (II) To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.
>
> (2) It is the intent of the general assembly that section 1(5.5) of article V and section 2(3) of article XIX be liberally construed, so as to avert the practices against which they are aimed and, at the same time, to preserve and protect the right of initiative and referendum.

The substance of the Initiative consists of two sentences. The first sentence provides that "[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." The second sentence provides that "[n]othing in this section shall be interpreted as limiting the State's authority to act consistently with the standards set under the United States Constitution, as interpreted by the United States Supreme Court, in public employment, public education, or public contracting."

The second sentence of the Initiative provides that Colorado may take any action in the area of public employment, public education, or public contracting that the United States Supreme Court has not ruled unconstitutional. The measure expressly permits legislation or other governmental action that supports programs that may have a discriminatory effect. E.g., Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (allowing the "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body"). This purpose is unquestionably disguised by the addition of a superfluous opening sentence.[1]

At the rehearing before the Title Board, Proponents' counsel stated that the Initiative would constitutionally protect the "modest equal opportunity programs" allowed by the United States Supreme Court. (Hearing Tr. 34:14-34:19) Rather than simply stating this purpose, however, the Initiative cloaks it as an exception to a seemingly broad prohibition on discrimination. The Initiative's first sentence is rendered virtually inoperative by the second sentence, which allows the State to act in any manner consistent with current Supreme Court interpretation. In fact, the

[1] As discussed more fully below, the opening sentence of the Initiative also appears to have been designed to "track" the opening sentence of 2007-2008 Ballot Initiative #31. (See 2007-2008 Ballot Initiative #31, attached as Ex. B)

only programs which would be prohibited by the Initiative are ones that have already been deemed unconstitutional.

The use of this "exception that swallows the rule" is inherently deceptive. The second sentence of the proposed initiative literally swallows the first, rendering it meaningless. The use of complex exceptions to a purported general rule is "the epitome of a surreptitious measure". In re Proposed Initiative 2001-02 #43, 46 P.3d 438, 447 (Colo. 2002) (holding that "[t]hose voters in favor of repealing TABOR may vote for this initiative believing that it will permit just this. Only later will they discover that an obscure line in the initiative for which they voted exempts TABOR from the provision apparently permitting its repeal"). "A voter of average intelligence would be quite surprised to find out that" a ballot initiative that purported to prohibit discrimination and preferential treatment, was craftily drafted to allow the State to engage in discrimination and preferential treatment to the full extent allowed under the United States Constitution. Id. at 446.

The Title Board agreed with this analysis. Mr. Domenico stated that "there's no doubt to me that the second sentence [of the Initiative] makes the first sentence essentially irrelevant . . .". (Hearing Tr. 60:4-60:6) He concluded that "the average voter would be, at best, confused by this and, at worst, misled." (Id.

61:8-61:10) Ms. Eubanks stated that the Initiative language might mislead voters or cause them to not understand what they were voting for. (Id. 84:3-84:11) Mr. Hobbs stated that "it still seems to me that voters . . . seeing a measure that says it prohibits discrimination, would be surprised to find that, in fact, it permits preferential treatment to the extent allowed by the U[nited] S[tates] Supreme Court." (Id. 87:14-87:19)

The Initiative is a surreptitious measure that would practice surprise and fraud on Colorado voters, and, thus, violates C.R.S. § 1-40-106.5(e)(II). The Title Board properly determined that the Initiative violates single subject on this basis.

II. The Measure Does Not Constitute a Single Subject Because It Purports to Both Prohibit Yet Preserve the Power of the State to Engage in Certain Forms of Discrimination and Preferential Treatment

It is well-established that any proposed ballot initiative is limited to a single subject. C.R.S. § 1-40-106.5(e)(I). The Initiative, however, contains two subjects. On the one hand, it purports to prohibit the State from engaging in certain types of discrimination and preferential treatment. On the other, it purports to allow the State to engage in precisely the same activity to the full extent allowed under the United States Constitution. The joinder of these two distinct measures constitutes fraud on Colorado's voters and violates C.R.S. § 1-40-106.5(e)(I).

The single subject requirement is to be liberally construed to prevent abuse of the initiative process. C.R.S. § 1-40-106.5(2). "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 dependent upon or connected with each other." In re 2005-2006 #55, 138 P.3d 273, 277 (Colo. 2006). Thus, "an initiative may neither hide purposes unrelated to its central theme nor group distinct purposes under a broad theme." Id. "This limitation . . . protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex bill." Id (internal quotation omitted). Thus initiatives which "bury[] unrelated revenue and spending increases within tax cut language" or "contain[] mandatory reductions in state spending on state programs, which was a purpose both hidden and unrelated to the central theme of effecting tax cuts" violate the single subject rule. Id.

In this case, the Initiative purports to involve both the preservation of "equal opportunity" programs and the elimination of discrimination and preferential treatment in public education, contracting, and employment. Thus, to the extent the Initiative is not one in which a single subject is wrapped in misleading and inoperative language, it is necessarily one that relates to more than one subject and

has two independent—indeed contradictory—purposes. The Title Board thus properly determined that the Initiative violates C.R.S. § 1-40-106.5(e)(I).

III. The Ballot Title Should Be Set by the Title Board in the First Instance

It is the role of the Title Board to set a title in the first instance. C.R.S. § 1-40-106; In re Proposed Initiative 1999-2000 #227 and #228, 3 P.3d 1, 5 (Colo. 2000) ("the Title Board must prepare a clear, concise summary of the proposed law or constitutional amendment") (emphasis added). On review, the role of the Court is simply to "reject the Board's language when it is inaccurate or misleading with respect to the meaning and intent of the initiative." In re Proposed Initiative for an Amendment to Article XVI, Section 6, Colorado Constitution, Entitled "W.A.T.E.R.", 875 P.2d 861, 864 (Colo. 1994). In this case, because the Initiative was determined by the Title Board to violate the single subject requirement, no title has been set. Rather than ordering the Title Board to adopt a particular title, the Court should, at most, remand the Initiative to the Board to exercise its responsibility to consider and set a title.

IV. The Title Urged by Petitioners Is Misleading Because It Fails To Clearly Inform Voters That The Initiative Will Allow—Indeed Is Intended to Allow— the State to Engage in All Discrimination and Preferential Treatment Allowable Under the United States Constitution

The title urged by the Petitioners is misleading. In setting the title for a proposed initiative, the Title Board is required to "correctly and fairly express the true intent and meaning" of a proposed initiative. C.R.S. § 1-40-106(3)(b). Only by setting a fair title does the Title Board serve its purpose of "enabling informed voter choice." In re Proposed Initiative for 1999-2000 #37, 977 P.2d 845, 846 (Colo. 1999). In this case, any title set by the Board must clearly inform voters that the intended effect of the Initiative is to allow the State to engage in all discrimination and preferential treatment allowable under the United States Constitution in the areas of public employment, public contracting, and public education.

The title which the proponents urge the Court to order the Title Board to adopt fails to meet this standard. Because the Initiative will not prohibit any discrimination or preferential treatment, the title set by the Title Board should not refer to such a prohibition. Rather than tracking the deceptive language of the Initiative, the title set by the Title Board should be clear that the purpose and true subject matter of the Initiative is to preserve discrimination and preferential

treatment programs in Colorado to the extent allowed by the United States Constitution.

The only reference in the title urged by the Proponents to the fact that the Initiative would place no new limits on the power of the State to engage in discrimination or preferential treatment is the clause which notes that the Initiative preserves the State's authority to take actions regarding public employment, public education, and public contracting that are consistent with the United States constitution as interpreted by the United States Supreme Court. While the import of this clause might be apparent to a careful lawyer, lay voters should not be expected to understand and consider the interplay between the Federal and State constitutions or the equal protection jurisprudence of the United States Supreme Court in order to make an informed choice regarding the Initiative. See Dye v. Baker, 354 P.2d 498, 500 (Colo. 1960) (holding that a submission clause employing "legalistic language" had the potential to mislead voters).

In addition, it is impossible to consider the proposed title without also considering Initiative 2007-2008 #31, which contains very similar language barring discrimination and preferential treatment, but without the "exception" contained in the second sentence of the Initiative. The Title Board must set a title that allows voters to clearly distinguish between the two very different initiatives.

C.R.S. § 1-40-106(3)(b) ("ballot titles . . . shall not conflict with those selected for any petition previously filed for the same election...."); In re Proposed Initiated Constitutional Amendment Concerning Fair Treatment II, 877 P.2d 329, 332 (Colo. 1994) ("What is prohibited are conflicting ballot titles **which fail to distinguish** between overlapping **or conflicting** proposals") (emphasis added). Initiative 31 is dramatically different in purpose from the Initiative, yet both initiatives contain identical opening sentences.

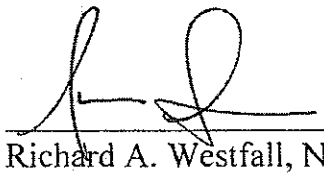
In short, any title should omit reference to the opening sentence of the Initiative because it is both of no effect and will cause voter confusion. Accordingly, in the event that the Court determines that that the Title Board erred in determining that the Initiative violated the single subject requirement, it should remand to the Title Board to consider and set an appropriate title rather than ordering the Title Board to adopt the title urged by Petitioners.

CONCLUSION

The Initiative is designed and intended to enshrine protection for "modest equal opportunity programs" in the Colorado Constitution. However, the Initiative appears to have been intentionally crafted to obscure this purpose behind misleading prohibitory language. The Court should affirm the decision of the Title Board to refuse to set a title for the Initiative.

Respectfully submitted March 31, 2008

HALE FRIESEN, LLP



Richard A. Westfall, No. 15295
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CERTIFICATE OF SERVICE

I certify that on this 31st day of March, 2008, the foregoing **OPENING BRIEF OF RESPONDENT JESSICA PECK CORRY** was served on all parties via overnight delivery service, postage pre-paid, addressed to the following:

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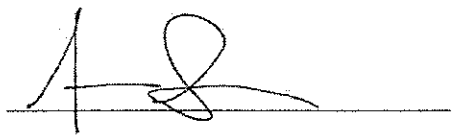

Initiative Title Setting Review Board
Wednesday, March 5, 2008, 9:00 a.m.
Secretary of State's Blue Spruce Conference Room
1700 Broadway, Suite 270
Denver, Colorado
Proposed Initiative 2007-2008#61
Rehearing

REPORTER'S TRANSCRIPT

Board Members:
William Hobbs
Dan Domenico
Sharon Eubanks

Also Present:

Cesi Gomez

Diane M. Overstreet
Registered Professional Reporter
Certified Realtime Reporter

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PROCEEDINGS

MR. HOBBS: Good morning. Let's go ahead and get started.

This is a meeting of the title setting board in accordance with Article 40 of Title 1, Colorado Revised Statutes. The date is March 5, 2008. The time is 9:00 a.m. We're meeting in the Secretary of State's Blue Spruce conference room, 1700 Broadway, Suite 270, Denver, Colorado.

The title setting board today consists of the following: My name is Bill Hobbs, I'm deputy Secretary of State, and I'm here on behalf of Secretary of State Mike Coffman. To my right is Dan Domenico, Solicitor General, who is here on behalf of Attorney General John Suthers. And to my left is Sharon Eubanks, deputy director of the Office of Legislative Legal Services, who is the designee of the director of the Office of Legislative Legal Services Charlie Pike.

Ms. Eubanks will be sitting as the director's designee for the first agenda item, and then for the remaining two agenda items the director's designee will be Dan Cartin, who is also deputy director of the Office of Legislative Legal

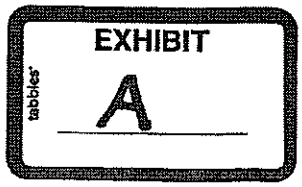
Services.

To my far right is Cesi Gomez from the Secretary of State's office.

There are sign-up sheets on the table by the door in the back for anybody who wishes to testify. When you testify, please identify yourself and who you represent, if anyone. The hearing is broadcast over the Internet from the Secretary of State's web site. All of the agenda items today are before us on motions for rehearing for measures that we have heard previously. And I'll go ahead and begin with the first agenda item, which is 2007-2008 No. 61, Federal Standards for Discrimination/Preferential Treatment by Colorado Governments.

The motion for rehearing was submitted by Richard Westfall on behalf of Jessica Peck Corey. So I think we should hear from Mr. Westfall first, I believe.

If you'd like to come forward and identify yourself, and if you have any -- we have the benefit of your written brief, which we very much appreciate, but if you'd like to highlight that, we'll give you a few minutes to do that as well.



MR. WESTFALL: Thank you very much, Mr. Hobbs, and thank you very much, members of the title setting board.

I don't want to go back over the ground of the brief. I think we covered that. I think what I would like to do is I would like to stress just how fundamental this violates -- the particular measure that's before you violates single subject under the plain standards as articulated by the general assembly in 106.5 and also, then, how fundamentally unfair and confusing the title is, if we get that far.

Again, under the plain language that's set forth in the statute that -- the direction from the general assembly to this title setting board as to how you're to do your job in both determining whether something satisfies single subject in setting a fair and accurate title.

Turning to 106.5. In 106.5(e) -- I'll start with (2). (e) says, "The practices intended by the general assembly to be inhibited by the single-subject amendment to the Colorado Constitution are to -- are as follows." And I'll go to No. (2) first because that essentially tracks the organization that we did in our brief.

This board is -- in making its determination on single subject, this board will look to determine -- to, one, prevent surreptitious measures and apprise the people of the subject of each measure by the title that is to prevent surprise and fraud from being practiced upon the voters.

I respectfully submit to all of you that this is the quintessential surprise-and-fraud measure that comes foursquare within this prohibition that the general assembly has laid out for you in making your determination on single subject. What is this designed to do? This is a measure that's specifically intended to swim in the wake of Amendment 31 and to say, guess what, if the voters vote for 31 and prohibit, as a state constitutional matter, discrimination and preferential treatment, then they also approve 61, which is couched in exactly the same language in the first sentence, then we're going to go back and we're going to -- what you're going to do is you're going to protect certain kinds of discrimination and certain kinds of preferential treatment. And it's designed to sort of swim in the wake. It's designed to very much elicit -- to constitute that very surprising fraud.

I call the Court's attention to -- I think the one that, really, the case may be the most apposite is the 2001-2002 No. 43 measure, because there -- that's where the proponents, in the guise of, you know, petitions, generally, and petition procedures, specifically, would allow a single -- a single subject to be determined by this board so long as you put it all in one section. And there was a colloquy that was discussed by the Colorado Supreme Court between Charlie Pike, Director Pike, and the proponents of that measure. He said, "Is that what you're really trying to do, is you're trying to say so long as something is in one measure you can satisfy single subject?" And that's what the proponents agreed to.

And then the Colorado Supreme Court goes on to say, "But there's other provisions in that measure that were specifically designed to exempt TABOR."

So for all of same measure folks -- and at least two of you were around at the time that the folks that hated TABOR during the mid 1990s were trying to come up with a measure that would globally repeal TABOR -- for those folks that

tried and failed because it necessarily violated single subject under that whole line of cases during the 1990s, for those folks, they could say, "Aha, here's is our provision. This is the one that finally allows us to say as long as we have the repeal section in Article 10, Section 20.1, then we're good to go, we can repeal TABOR." And they said, "Aha, not so fast. There's a trick here." Because buried in the folds was an exemption for TABOR. So that you could think that you were voting to repeal a measure that would allow another measure to repeal TABOR globally, but guess what, TABOR was exempted. And that, the Colorado Supreme Court found in No. 43, to be violative of single subject because it practiced a fraud and surprise on the voters.

The measure that we're talking about here does virtually the exact same thing. In the guise of saying, "Look, we're going to have the same prohibition of discrimination and preferential treatment, and that's what this measure is all about." But what you're really going to be voting for is to preserve the very preferential treatment and discrimination that 31 is specifically designed to prevent. So under Article -- excuse me --

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140 -- 106.5(e)(2), this clearly -- this particular measure clearly violates single subject because it purports (sic) on the people of the state of Colorado surprise and fraud. And for that reason it should be stricken on single subject.

Let's turn to (e)(1). (e)(1) talks about forbidding the treatment of incongruous subjects in the same measure and thus securing the enactment of measures that could not be carried upon their merits. And that's something that this title board is also to prevent from happening.

What does incongruous mean? As I'm preparing for this, I went back and actually looked up incongruous. I thought I knew what it meant. But it means, among other things, inconsistent. That's one of the principal definitions.

I respectfully submit to you that a measure that's specifically intended, its very purpose to preserve and protect preferential treatment and discrimination in certain contexts. That is inherently inconsistent, patently inconsistent with the first sentence of the measure, which specifically says it's -- you know, that essentially tracks 31, you know, prohibit discrimination and preferential treatment.

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And I would respectfully submit further that this measure was very cleverly calculated and designed the way it was to sort of, again, swim in the wake of 31 and the overall general -- if there's an overall voter sentiment for prohibiting preferential treatment and discrimination, that that's -- that's what they want to hook their wagon to. That's what they want to make sure that they can be part of so that when the voters say, "Oh, yeah, this is a variation on the theme, this is just another kind of prohibiting discrimination, preferential treatment, I'll vote for that one too. I want to vote for that one, I'll vote for 31. Great." But that's getting -- that's something that -- that's securing the enactment of 61 that could not be carried on its own merits.

I respectfully submit that if they want to go ahead and have a competing measure that says, "We want a measure that will specifically protect whatever government programs are out there that the United States Supreme Court would say are constitutional but constitute preferential treatment and discrimination that would otherwise be prohibited by 31," great. Articulate it, submit a measure. One subject. Say, "That's the vote we

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want," and submit it to the voters up or down on that one. But don't hide it. Don't put it cleverly behind a measure that's designed to track 31 but then do something exactly the opposite.

And so for that reason, both under just simple (e)(1) and (e)(2), we respectfully submit that this particular measure violates single subject and would request that the board reverse its decision and refuse to set a title on that basis. And I would like to stop on that, maybe get on with whether the title is fair and accurate.

MR. HOBBS: Mr. Domenico?

MR. DOMENICO: Does your argument, then, depend on the relation of this measure to 31? I mean, if there were no 31, would you think that this measure, as written, satisfies the single-subject requirement, or is your argument dependent on the confusion created by the relationship of the two measures?

MR. WESTFALL: The latter. I think it's greatly exacerbated by the fact that it's being done specifically to, you know, deal with 31 from the proponents of 61's perspective. But that's an exacerbation. Clearly the way -- this is a trick. 61 is a design trick. It violates 106.5,

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you know, (e)(1) and (e)(2) on its face irrespective of 31's existence. I just think 31 grossly exacerbates the situation.

MR. DOMENICO: So your argument that does -- to the extent your argument does depend on 31 -- well, maybe -- I guess that answers part of my question. But to the extent that your argument does depend on how this relates to 31, I think you got into this a little bit, but you're not arguing, are you, that simply because 31 got here first, that then, basically, the people who disagree with 31 are kind of forbidden from submitting a measure that would counteract it or counteract part of it, are you?

MR. WESTFALL: Not at all. It's the fraud-and-surprise aspect. It's the misleading aspect. It's the putting two measures, you know, one sort of -- that mirrors 31 but then one that is directly opposite, which would violate (e)(1), and then hitching its wagon to the same concept. That violates (e)(1) irrespective of 31's existence.

MR. DOMENICO: I think that's all I have.

MR. HOBBS: Ms. Eubanks?

MS. EUBANKS: Mr. Westfall, although

you weren't explicit in your motion for rehearing, when I'm looking at the test that the Supreme Court has established in terms of the single-subject requirement, that it says that basically one subject and then not more, you can't have two or more purposes unrelated or unconnected. It seems like both of the arguments that you're making sort of relate more to the second prong of the test. Would you say it's fair to characterize your argument that both the first and the second sentences of the measure before us, No. 61, relate to a single subject, that being -- I don't know how you want to couch it, whether it's discrimination or preferential treatment on the basis of certain characteristics, that the two sentences relate to that general subject, but in terms of your arguments of relating to voter fraud being misleading, that those arguments go primarily to the second prong of the test?

MR. WESTFALL: I'm not sure I would agree with you, Ms. Eubanks, and here is the reason why. Because I really do think this is a situation very much analogous to -- I think, in answer to your question, I turn back to the -- in the -- was it '97-'98 -- it was the No. 84 case, I think it

was '97-'98, and that was the Douglas Bruce tax cut, you know, let's keep reducing local taxes, and to the point where, in actuality, there's a separate purpose. It's all under the same context. I'm trying to analogize it to where I think your question is coming from, Ms. Eubanks. It's all under the context of tax policy, of reducing local, you know, local tax revenue. But there was a necessary subject in effect or separate purpose, if you will, that the Colorado Supreme Court looked to and struck it down on that basis, because it was also going to end up cutting State programs, because the State had to backfill that and it was going to -- cause less revenues. It was going to cause less revenue by the State, potential cutting of programs by the State.

All of that still comes within the general rubric, as I think I'm understanding your question correctly, with sort of the tax policy and revenues generally at the state and local level. And so that's certainly a general subject.

But getting back to this particular situation that we're dealing here with, this particular measure, what we have is we have something that's designed to preserve preferences

and discrimination and in the same measure that -- something that's designed to prohibit. And so the fact that it's under the general rubric of discrimination and preferential treatment doesn't protect two completely separate purposes. And I think the Colorado Supreme Court is clear on that, when one purpose is to preserve certain programs and the second sentence -- and the first sentence is designed to ostensibly -- and I stress that word "ostensibly" -- prohibit those same discrimination and preferential treatment measures.

MS. EUBANKS: If I could, I do have a couple of questions relating to the case you cited, the No. 43, dealing with the -- sort of the elimination of the single-subject requirement but still preserving sort of single-subject requirement for certain types of measures, TABOR, as well as anything else that the Court may have found to previously constitute multiple subjects.

And although this case was a completely different situation because you had a very lengthy measure that had a lot of different components to it in contrast to this measure, which is much simpler, at least in terms of length --

MR. WESTFALL: Complexity is not

necessarily defined, Ms. Eubanks, by the number of words.

MS. EUBANKS: I understand that. But in terms of this measure, at least on its face, doesn't seem to have as many components as what was at issue in 43.

MR. WESTFALL: You may be right on its face but, again, I'm not sure I'm going to buy your assumption. Because I think when you get into what does the deferring to the United States Supreme Court's interpretation of the United States Constitution mean in this context, that's very complex and it's very sophisticated and it has -- while it may be -- while that concept may be articulated in a very relatively few number of words in the measure, I would submit that it's equally as complex and equally as comprehen- -- you know, equally as broad and all-encompassing, if you will, as analogous to what was at issue in 43.

MS. EUBANKS: And I don't disagree with you in that regard. I think the difference -- you know, especially when the Court talks about voter fraud and surprise, they talk about it in the context of something being hidden because of the length or complexity. And I think in 43, part of

the issue there was the length, as well as complexity, whereas in 61, perhaps it's more complexity than based on length itself.

MR. WESTFALL: I would agree with that.

MS. EUBANKS: Okay. But going to the discussion in 43, specifically about the elimination of the single-subject requirement and then the preservation of single-subject requirement for certain types of measures, I found it interesting that what was at issue there in a way is very similar to how -- one manner in which I characterized 61 at our last meeting in terms of a prohibition, in a sense, and an exception, that that's sort of the way 43, that issue, was placed. It basically was eliminating the single-subject requirement but making an exception to the elimination of that requirement in terms of preserving that requirement in terms of certain measures.

And I would be interested in, you know, the Court talked about the effect of preserving the single-subject requirement in 43 in the context since the Court had previously held certain types of measures, including TABOR,

constituting multiple subjects, and that the language of 43 would preserve that.

They talked about it in terms of constitutionalizing that precedent, that judicial -- that although it wasn't changing anything in regard to the rule of law that the Court had previously established through various decisions, that they viewed that that was being -- constitutionalizing that judicial interpretation. Would you say that in 61, because of the nature of the second sentence, that it's dependent on the interpretation of the United States Supreme Court's interpretation of the U.S. Constitution, would you say that the second sentence perhaps has that same effect of constitutionalizing whatever has been judicially allowed in terms of equal opportunity, preferential treatment, similar types of programs?

MR. WESTFALL: I think, if I understand your question correctly, the answer is yes. And here's why. Because it's constitutionalizing, it's putting in our state constitution, essentially, a delegation to -- it's saying whatever constitutional limitation either we're doing in 61 or, again, coming back to 31, that prohibits discrimination and preferential

treatment, then what we're doing is we're going to constitutionalize, we're going to reach out and say whatever the United States Supreme Court interprets with respect to the United States Constitution, that's now going to be a matter of state constitutional law. And that's really what it does. And I -- I think it's -- if I'm understanding your question correctly with regard to No. 43, I think that's exactly analogous.

MS. EUBANKS: And then my last question is in regard to how you view that second sentence of 61, that if you have a program or service that's provided that does not meet the standards as established by the U.S. Supreme Court in interpreting the U.S. Constitution, that it's held to violate the Constitution. Tell me what you think happens to that type of program or service if it's found to be invalid.

MR. WESTFALL: If the United States Supreme Court interpreted a particular arguably preferential treatment program and said that that was unconstitutional, then I think, if I'm reading this measure correctly, then that would also be, quote, unconstitutional under our state constitution.

MS. EUBANKS: So in your opinion --

MR. WESTFALL: I think if it's under the Constitution, in the United States Constitution, because of the supremacy clause, it's unconstitutional under our state constitution. So I think it's almost illusory. But...

MS. EUBANKS: So would it be fair to say that, in your opinion, that you think that if a program or a service doesn't meet the standards that are referred to in the second sentence of 61, then they don't exist?

MR. WESTFALL: If it doesn't meet the standard that's set forth in the United States Constitution equal protection clause or other, you know, similar measures, and as interpreted by the United States Constitution, it doesn't satisfy the second. That's how comprehensive and global the second sentence is. It really is a complete delegation to the United States Constitution as interpreted by the United States Supreme Court. Sort of makes a state constitutional amendment almost illusory.

MS. EUBANKS: Thank you.

MR. HOBBS: Any other questions for Mr. Westfall? If not, thank you.

I'd like to next hear from Melissa Hart on behalf of the proponents.

And Ms. Hart, I'm sure you're prepared to respond to the arguments in the motion for rehearing.

MS. HART: Well, Mr. Hobbs, I hope I'm prepared to respond to the arguments in the motion for rehearing.

I guess I want to start by acknowledging, as I think it will be apparent, that I'm very nervous. And the reason I'm very nervous -- there are two reasons. One is I haven't done a lot of these matters before. The other is because I was struck this morning, thinking about this argument, by the enormous power that this title setting board has at this time. You have the power to end the effort of those proponents of Initiative 61 and the work that they've done effectively for this election cycle. And that's an enormous amount of power. And I think that's why the general assembly and the people of the state of Colorado and the Supreme Court ask you to exercise that power with some respect for the initiative process that exists in our system and with a liberal hand that will permit initiatives to be put

to the voters so that voters can consider the issues raised in them, except when they clearly violate provisions of the Constitution or the law. And again, that's supposed to be done with a deference to permitting initiatives on the ballot.

Not surprisingly, I take issue with Mr. Westfall's characterization of the goals of the proponents of Initiative 61 and with the effects of the Initiative 61.

Framing it, as he did, in terms of 106.5 and the requirements of 106.5 first, I just -- I think we obviously don't disagree on what 106.5 says. Your job is to be sure that initiatives put forward do not -- do not constitute surprise or fraud, that they are not surreptitious measures, as Mr. Westfall said, and there is not inconsistency or incongruity in the measures. All of that we agree with. That's clearly the law. We disagree pretty strongly on how the Supreme Court has interpreted these terms and on what Initiative 61 does in terms of those requirements.

Mr. Westfall mentions the matter of Proposed Initiatives 43 and 45 as being most closely related to this dispute. And I think that it may be the most closely related but it's a very

distant parallel. That case dealt with an initiative that was, as Ms. Eubanks just said, four or five paragraphs long, extremely complicated in its wording, had sort of put itself under the global heading of protecting the political rights of citizens of Colorado as its subject but then had provisions that dealt with the single-subject issue, preserving the single-subject issue for other things, how voting would occur. It was so complicated and so difficult to even understand what it was doing in its multifaceted series of subjects that it was really not in any way similar to the two-sentence Initiative 61 that quite clearly states its goals.

And that's the same -- the same is true with all of the cases cited by Mr. Westfall in his brief. The standard is only where the language is clearly misleading is this -- is this board -- is this board supposed to not set a title. That's -- the cases from the Supreme Court say that repeatedly.

In, for example, the matter of parental choice, in that case -- although, again, there was this global parental choice as the idea. It was a very long, very complicated ballot

initiative with several different approaches to the same general goal. And that actually was found to be a single subject, because the same general goal of parental choice was what was at issue in that case.

In the title for No. 25, which Mr. Westfall referred to, the tax cut scheme at issue that had the $25 for each of these different tax bills over some number of years and reduction in programming, again, not found to be a single subject. It was a complicated, multipart, economic formula whose effect was very unclear and very different from the initiative at issue here. I just think the case law from the Colorado Supreme Court does not support the notion that there is not a single subject in this bill. The kinds of things that have been found to be fraudulent and surprising are nothing like Initiative 61. So if we were just going on the Colorado Supreme Court's case law, I think it's clear that there's no reason to reverse your decision of two weeks ago and eliminate the title.

Moreover, even if there were no case law, even if all we were doing was looking at the language of 106.5 and talking about the need to

prevent fraud and surprise, I simply disagree that there is fraud or surprise in this initiative, and certainly -- at all, and certainly nothing that would constitute multiple subjects.

What this initiative is designed to do is to present an approach to nondiscrimination by the State. This initiative is designed to present voters with one way of looking at the problem that, it happens, Initiative 31 is also designed to do.

And I think one of the things that was hard in Mr. Westfall's conversation and in the questions that were asked is it is hard to talk about Initiative 61 without talking about Initiative 31. It's important to, because Initiative 61 stands on its own. It's its own separate measure. And its approach is simply a different one from Initiative 31's. But it is also -- you know, it would be deceptive of me, at this moment, not to say that Initiative 61 came up in part as a response to the setting of the title for Initiative 31.

And I want to talk about that because I want to say something about deception. I think it's important to get it on the record and to

be clear about what the proponents of Initiative 61 are seeking to do with this initiative and are seeking to offer to Colorado voters.

Initiative 31 came to this board last year. You considered, in both the hearing and a motion for rehearing, whether to set a title for that initiative and ultimately decided to. I've read the materials from that process, obviously. And it really was because of that process that proponents of Initiative 61 decided it was important that some alternative be given to the voters of Colorado.

Initiative -- the Initiative 31, excuse me, was found not to be deceptive by this board. I submit that Initiative 31 is deceptive. It's deceptively simple. It says the State shall not discriminate or grant preferential treatment. And in the conversation, the colloquy you had with Mr. Westfall, in that process, when he was representing the proponents of that initiative, there was a general -- there was a lot of discussion about what preferential treatment meant. And Mr. Westfall was extremely careful not to define preferential treatment. He was asked repeatedly by Ed Ramey, who was the lawyer for the

opponents in that context, whether certain kinds of programs would constitute preferential treatment. He was asked whether posting a job notice in Spanish would constitute preferential treatment, whether women's health clinics would constitute preferential treatment, whether minority outreach would constitute preferential treatment. He refused to answer the question with regard to any of those measures. He said preferential treatment is absolutely clear, the definition of preferential treatment is clear. We all know what preferential treatment means.

And the decision was made by this board to set a title for that initiative on that understanding. I'm not here, obviously, to relitigate that question. But what I will say is that Initiative 31 is identical to measures that have been passed in three other states in which that same approach was taken, the idea that preferential treatment is clear, we know what it is, everybody knows what it is. The consequences of the cookie cutter Initiative 31 and what it's called in other states have been very different from what I think the voters of Colorado would understand preferential treatment to be. Among the

consequences: Initiatives designed to encourage the number of women to pursue fields where they have traditionally been underrepresented, such as math and science; no longer permitted in California. The California Summer Science and Technology Academy, which targets female and minority high school students who are underrepresented in those fields; no longer permitted. The American Indian Early Childhood Education program, which is directed at school districts where more than 10 percent of students are American Indian -- this is an elementary school program -- no longer permitted. Student Opportunity and Access Program, which is a minority outreach and information network; no longer permitted.

In Colorado, we have a number of programs that are like that, retention, training, outreach programs that many people would not think are preferential treatment and that will be challenged and are likely to fall under Initiative 31 because of the failure to be clear about what preferential treatment means. That happened here, and it continued -- it continues today in the signature collection process for

Initiative 31 in which deceptive practices are rampant. They are being reported to the Secretary of State's office. People are being deceived by the proponents of Initiative 31 about the meaning of preferential treatment. They think they're voting for something that would eliminate one thing: race preferencing. In fact, they're voting for something that is going to eliminate a host of important programs that offer fairness and opportunity to the citizens of Colorado.

Looking at that field, looking at what's happened in other states, looking at what stands to happen in Colorado and what we, as citizens of Colorado, stand to lose because of this initiative being brought into our state, proponents of Initiative 61 said, "We need to offer the voters something else. We need to offer the voters an opportunity to say we don't like preferential treatment. But we don't think preferential treatment includes the equal opportunity programs that the Supreme Court has said are constitutional. We don't think that in the state of Colorado, the summer camp that CU offers to women and minorities and other underrepresented populations considering engineering should be eliminated. We don't think

that outreach programs that target minority schools to ensure that they have a full sense of the information of what you need to do to get ready for college, of what you need to do to prepare yourself to succeed in the world should be eliminated. We don't accept that definition of preferential treatment, and for that reason we will come up with an initiative, a different alternative approach to the same problem, which is the problem of discrimination by the State and how to provide equal opportunity and fairness from the State to its citizens. One subject, a single subject.

We are not being deceptive, we are offering an alternative that seeks to address deception that we feel is going on, not, we feel, that clearly is going on with Initiative 31. We want the voters of Colorado to have that opportunity to vote for something that represents more what we believe in, that represents more of a support for programs like outreach, retention, recruitment, equal opportunity programs but that will not eliminate those problems -- those programs in the way that they have been eliminated in other states. We don't want this cookie cutter initiative to come in and destroy a lot of what

Colorado has done. So yes, this is a response to Initiative 31.

On the other hand, to say that you have to think about Initiative 31 only as -- in the context of Initiative 31 -- Initiative 61 in the context of Initiative 31, is simply incorrect. Initiative 61 is internally coherent, it's internally consistent. The only way it's inconsistent is if you accept the definition of the proponents of 31 of preferential treatment, which is a broadly global definition that eliminates everything. That is not what 61 is trying to do. We are saying -- we constitutionally want to say in our state's constitution no preferential treatment, but yes to the limited programs that have been found constitutional by the United States Supreme Court and that do not constitute preferential treatment, they constitute equal opportunity programs, and we do not want them destroyed in this state.

I feel strongly about this.

MR. HOBBS: Thank you.

Questions for Ms. Hart?

MS. EUBANKS: If I could, Ms. Hart, I'd like to ask you the same question that I asked

Mr. Westfall. In terms of sort of what I perceive perhaps as a similarity between 61 and what was presented in 43, at least in regard to the single-subject requirement being eliminated but yet preserved for certain measures that previously had been held to constitute multiple subjects and whether or not you think it's a fair characterization of the second sentence of 61, that it would -- could be viewed as constitutionalizing the U.S. Supreme Court's interpretation under the U.S. Constitution in regard to these types of programs.

MS. HART: I guess -- I quickly tried to look through the case on 43. My recollection is that the part where the Court talked about constitutionalizing was when it discussed the issue of putting at the state constitutional level matters that have traditionally been local. That is the property rights and zoning? Is that correct?

MS. EUBANKS: No, it was specific on -- and I don't know if you have the case in front of you.

MS. HART: I do. Yes, I do.

MS. EUBANKS: Let's see. Of course,

mine is printed out on Lexis-Nexis so we'll see if I can get the page right.

MS. HART: Mine is Westlaw. Incompatible printer formats.

MS. EUBANKS: That's right.

MS. HART: So one of the things I guess I would say about the difference between 43 and what we're dealing with here is that 43 was an initiative that was designed to fundamentally change the process for voting on initiatives, and so partly that makes it -- it puts it well outside of most people's experience and I think makes it inherently more confusing. People -- as a teacher of civil procedure, I can say that people don't have intuitions about procedural things. And so when you put in front of them procedural measures, the potential for confusion is, sadly, much higher than when you put in front of them substantive measures. And I think this issue of constitutionalizing procedural modifications is more what the Court was concerned about in that regard in this case. Again, my memory had been with the property thing.

MS. EUBANKS: I refer you to footnote 11, which I believe appears on page 447.

MS. HART: I see. Okay. Again, I think the issue here is that constitutionalizing these procedure rules is a significant change from what the state law was at that time. To the extent that -- and I think I understand -- so I don't think it's the same as what's going on here. I do think that -- again, what Initiative 31 seeks to do is to enact, as a matter of state constitutional law, a lower bar across the board on preferential treatment, equal opportunity, et cetera, than is set by the federal Supreme Court. And what Initiative 61 seeks to do is to say no preferential treatment.

But we accept the Supreme Court's bar with regard to equal opportunity programs. We think that the kinds of modest equal opportunity programs that the Supreme Court has allowed -- and it's a very limited set of programs -- is fine under our state constitution. And I don't think that's a delegation of authority, as Mr. Westfall said, to the federal constitution -- or the Federal Supreme Court at all, the U.S. Supreme Court at all. In fact, it's a statement of affirmation by the Colorado voters that we accept that limited approach, again, defining preferential treatment,

not to eliminate those limited programs.

So it is constitutionalizing, saying, obviously, it would be a constitutional amendment. But I don't think it's -- I think the parallel with 43 is not quite there because, again, just as Mr. Westfall's -- or Mr. Connerly's initiative would constitutionalize a particular approach to nondiscrimination, ours would also constitutionalize a particular approach to nondiscrimination. That's what a constitutional amendment is supposed to do.

MS. EUBANKS: But it would constitutionalize it based on judicial interpretation?

MS. HART: Of the U.S. Constitution.

And just to be really clear, the reason that the proponents for Initiative 61 put it that way was we wanted to be clear that this was -- that what we were endorsing was that modest interpretation of U.S. Constitutional law, the very limited amount of equal opportunity programming that the U.S. Supreme Court's interpretation permits, that it says is not illegal, preferential treatment. So we were -- we were seeking to constitutionalize that limited set of programs,

yes.

MS. EUBANKS: And then in terms of your response and getting into what the U.S. Supreme Court has allowed in terms of equal opportunity-type programs and services, that takes me to the other question I that asked Mr. Westfall, and that's in regard to if a particular program or service that is based on race, based on national origin, one of those bases, and it's found not to meet the standards of the U.S. Constitution by the U.S. Supreme Court, is that program permissible?

MS. HART: No, not under this initiative. This initiative says --

MS. EUBANKS: Now, I'm just saying --

MS. HART: Oh, is it currently permissible?

MS. EUBANKS: Yes. Would such a program that doesn't currently meet the standards, whatever they may be, as established by the U.S. Supreme Court be permissible?

MS. HART: No. And so -- let me say something about that, because one of the criticisms that has come out, at least in the newspaper, of both the proponents of Initiative 61 and me myself,

is that somehow the deceit that we're seeking to engage in -- and I'm tired of being called deceitful -- but the deceit that we're seeking to engage in is something about not first saying we're going to eliminate preferential treatment but then saying we're going to keep it, and also not admitting that somehow this is all about the status quo. What I would say about that is that it is often the case that laws will be passed that largely parallel the status quo.

A constitutional amendment in our state constitution does a number of other things, though. First, it is an affirmative statement of commitment. Second, it creates a Constitutional standard that has the benefit of making a firm and committed statement by the people of Colorado about where we stand on this, which means that we don't -- we don't debate this anymore, right? We're not going to come back and argue again about whether we're going to eliminate equal opportunity programs. We've made a commitment to it.

And third -- and I think this is really important and is, again, related to the deceit that's being practiced by the proponents of No. 31. Third, it makes an affirmative statement

of commitment to -- of commitment to end a confusion that a lot of people have, a lot of people have, and that is, people in this state and people all over the country misunderstand what is allowed and misunderstand what happens. People continue to believe, contrary to all information, that quota systems are in place in universities, that -- someone asked me recently, "Oh, well, so would this end the thing where African-American applicants can have a way lower SAT score than white applicants? There's a lower cut-off for them?" CU doesn't do that. People don't do that. But there is this misunderstanding out there which is being manipulated to encourage voting for Initiative 31 that needs to be clarified, that needs to be affirmed by the voters of Colorado. We do not accept that, even if it's not happening now. Or to the extent that it is happening -- and again, I don't think it is happening, but to the extent that it is, we want to make clear that it is not okay. It is not okay under the federal constitution, it is not okay under the state constitution.

And the proponents of 61 -- it's not -- again, this comes back to, I think,

Mr. Westfall's incorrect arguments about our goals. Our goal is not all-encompassed in the second sentence of Initiative 61. One of -- we have two -- two goals with regard to nondiscrimination here. They are consistent and congruent goals. But there are two goals. And one is expressed in the first sentence of Initiative 61, which is to say preferential treatment's not okay, discrimination is not okay. And the second is to say this is not -- when we are talking about preferential treatment, we will define what they will not define. When we are talking about preferential treatment, what we mean does not encompass these programs.

MS. EUBANKS: One last question, which actually relates to the language of your measure. And I'm just curious, in terms of the language that you used in the first sentence of subsection 1, where you make reference to race, sex, color, national origin, those types of descriptors, you don't have those types of descriptors in your second sentence. And -- although you relate it to the public employment, public education, and public contracting. And so I'm just curious, and this is basically because I'm

no expert on the U.S. Constitution or this particular area of law, as to whether or not the second sentence is relating to the standards that may exist. Do those relate only to those descriptors in the first sentence, or are we talking about other types of standards?

MS. HART: For purposes of this amendment -- this initiative is only referring to those descriptors. So we only intend to be referring to the standards set under the U.S. Supreme Court with regard to those descriptors. And so, for example, you'll notice that age is not included in the first sentence. This initiative doesn't address discrimination on the basis of age and the standards that exist with regard to age discrimination. It's just not encompassed in this initiative.

MS. EUBANKS: Okay. Thank you.

MR. HOBBS: Mr. Domenico? Questions?

MR. DOMENICO: I don't think so. I think Ms. Hart and I had our discussion last time.

MR. HOBBS: I would like to ask some questions. And I am still struggling with this. And my questions may be somewhat repetitious, and

I'm sorry. I'm really struggling to understand the measure. You know, I do agree with something you said, I think, at the very beginning, that I think the board, you know, needs to be careful about blocking the door, basically. And that's why last time I voted in favor of setting a title for the measure, although I expressed concerns about it. But I wanted to err on the side of Petitioner's rights, basically. But I'm still really struggling with this.

And part of it is although we've talked about this a lot and I may be the only one who's still having trouble understanding the measure, I really don't think I understand it. And I do know that the Supreme Court has said that the board has a duty to understand the measure.

And I see that the measure prohibits preferential treatment programs, and then -- in the first sentence, and then in the second sentence, I think I understand that the second sentence permits some preferential treatment programs, but I'm really not clear on the difference.

MS. HART: So again, I think -- here's what -- I want to be accorded the same permission that Mr. Westfall was accorded with

Initiative 31. Not to say here's a Colorado program I think is this or that. I am the attorney representing the proponents of Initiative 61 at this initial stage. I don't -- I have not sat down and said, "Here's a list of programs I think pass muster, here is a list of programs I don't." And I don't want to have to do that. And again, Mr. Westfall didn't do that with Initiative 31.

What I will say is I think that the kinds of things that I mentioned that were -- that have been found -- that have been found to fall under what was Prop 209 in California and what I think would fall -- or I fear would fall under Initiative 31 in Colorado, if it passes, are things like recruiting programs designed to encourage the number of women pursuing fields in -- pursuing math and science studies. I don't think recruiting programs are preferential treatment. So you're saying your understanding of our initiative is that it eliminates preferential treatment but then allows some preferential treatment.

And I think that's part of what's hard about -- part of what's hard about the definition in Initiative 31 as well is that there is dispute about what preferential treatment is.

And that's a huge political question, definitely.

MR. HOBBS: If you don't mind, I'm sorry for interrupting.

MS. HART: No, that's fine.

MR. HOBBS: I do want to be fair about it --

MS. HART: No, I know.

MR. HOBBS: -- but it seems like with No. 31 we didn't have to figure out what preferential treatment programs meant because it simply prohibited them. Here what I'm struggling with is that it prohibits them and then it allows them. So it calls into question, does the second sentence take away everything in the first sentence or nothing from the first sentence?

MS. HART: Again, I guess I don't think it prohibits them or allows them. I think it prohibits discrimination and preferential treatment and then provides, in the second sentence, to define certain things as not preferential treatment. And those are the programs that have passed muster on the U.S. Supreme Court.

So I didn't bring, unfortunately, the Court's cases with me. But for example, in Parents Involved, the Supreme Court's case from

last term, Justice Kennedy talks about programs like recruiting and training, building schools in certain neighborhoods in order to encourage participation by minority communities. So it's -- there's an understanding that the State has an obligation to its minority citizens who are being underserved but not through quotas or race preferencing; instead, through other measures, again, recruiting and training and outreach, education. Those are the kinds of programs that can be very effectively used to reach underserved populations but that are not race preferencing, they are not preferential treatment in the way that we have defined preferential treatment in Initiative 61. That is what we are trying to do is to provide the definition that will not see those programs fall in the way that they will under Initiative 31, that will not see minority outreach programs fall but that will say, yes, we do not think quotas are okay.

We are constitutionalizing, in the state constitution, an affirmation that quotas, race preferencing, that preferential treatment is not okay, but we are ensuring that preferential treatment is not defined so broadly that the kinds

of programs that no one out there actually thinks are preferential treatment, when they vote for Initiative 31, they don't think they're voting. Some people do. But lots of people don't think they're voting for what they turn out to be voting for. And we are trying to provide an alternative, to say that you can vote for something different. You can vote to eliminate preferential treatment but still to preserve the programs we know you want to preserve.

And those programs, again, we are -- we define -- the initiative defines them as not being preferential treatment. It's not an inconsistency, it's a definition.

MR. HOBBS: But if they're not preferential treatment, then they're not prohibited by the first sentence.

MS. HART: And this is where it's hard to talk about 61 without talking about 31.

Experience teaches us that in other states where Initiative 31's equivalent has passed, those programs are falling. And it is because we want an alternative to that wholesale wasting of the fairness and equal opportunity measures that other states had passed and are now losing that the

proponents felt Initiative 61 is important.

MR. HOBBS: One possibility that I think I might be hearing you say is that the measure would prohibit preferential treatment programs in the form of quotas but allow preferential treatment programs in the form of targeted recruitment.

MS. HART: Again, I'm resistant to the notion that targeted recruitment is preferential treatment, but yes, I think that is correct.

MR. HOBBS: Okay. And I think -- you know, for me to try to understand what the measure does, I mean, that's helpful. I'm also trying to weigh in my mind the discussion that you've had with Ms. Eubanks, that even if it doesn't actually change anything, perhaps it's constitutionalizing something. And I think you were agreeing with that. I mean, constitutionalizing the status quo.

MS. HART: A commitment, yes.

MR. HOBBS: Well, as currently interpreted by the U.S. Supreme Court or as may be interpreted in the future.

MS. HART: Yes.

MR. HOBBS: Okay. Let me shift gears just a little bit. One of the things -- if we find that the measure has a single subject, then we're required to clearly express that single subject in the title. And I don't think our title does that. It says, "concerning a prohibition against discrimination in the state." That's the current -- that's the title that we set. That's the expression of the single subject. It doesn't seem like that is a fair or accurate expression of the single subject based on the discussion that I think I'm hearing. I mean, what I think the measure is about is preferential treatment programs, first of all. And I'm not sure how to express the single subject. But would you have -- are you happy with that expression of single subject, or would you suggest another one?

MS. HART: I guess I think that it does concern a prohibition against discrimination by the State. Again, this is -- the single subject of Initiative 31 and the single subject of Initiative 61, as you decided it two weeks ago, start in the same way, an amendment to the Colorado Constitution concerning a prohibition against discrimination by the State. And I actually think,

as I started by saying, that pretty accurately reflects what's going on here. These are two different approaches to a prohibition against discrimination by the State.

The voters will have to decide which they prefer. And it will be the job of the proponents of the two initiatives to educate the voters about the two approaches. But, in fact, they both are addressing discrimination by the State.

You know, so I think that is a fair statement of what Initiative 61 is seeking to do. It is to address prohibition against discrimination by the state.

And connected to that, just, again, to be clear about the second sentence, what the second sentence is seeking to make clear, is seeking to do, is to say these things aren't discrimination. The proponents of 61 look at recruiting and training and outreach programs as not being discrimination. That's not -- the kinds of preferential treatment that constitute discriminatory preferential treatment are outlawed by Initiative 61. That's clear in the first sentence.

And then in the second sentence it's made clear that that does not include this broad -- a broad reach to these other programs that are being struck down in other states. We don't want that imported here. We want a different model of equality.

MR. HOBBS: Well, I'm still just having trouble seeing this measure as being about prohibition against discrimination.

And with respect to No. 31, I could. Now, to me, the discussion there that we struggled with, and it was a struggle, was that there were different points of view about what discrimination is, what the term means. And there was a point of view that discrimination means discrimination against as opposed to discrimination in favor.

And from the proponents' point of view, I think discrimination meant included, discrimination in favor. But it all -- but clearly to me the measure was about discrimination.

Here I'm not so sure that that's the case directly, that it's quite so clear that it's just about prohibiting discrimination, depending on how you define it.

Well, one thing -- let me just

say -- I think one thing that is fairly persuasive to me in the brief for the motion for rehearing at the bottom of page 3, partially quoting a Supreme Court decision. Mr. Westfall says, "A voter of average intelligence would be surprised to find out that a ballot initiative that purported to prohibit discrimination and preferential treatment was" -- and I'll skip some of the hyperbole, perhaps, but -- "was instead allowing the State to engage in discrimination and preferential treatment to the full extent allowed under the United States Constitution."

And that seems like that's a fair statement of the measure.

MS. HART: Well, again, I guess I think that there is -- even taking "craftily" out, there's is rhetoric there. There is an assumption that what the Supreme Court permits is discrimination. That's an area of disagreement between us. And I think it is an area of disagreement that is used to cause voters to believe that what they're voting for is an anti-quota bill when, in fact, that's not what they're voting for for Initiative 31.

So part of the goal in Initiative 61

is to provide an alternative that forces a fair and open discussion about what the differences are. They're both against quotas. We're all against quotas. So we're all against the discriminatory preferential treatment. This is a different issue.

But let me say -- I don't want to really fight with you about the title. Because the most important thing, obviously, to the proponents of Initiative 61 is that they not be shut down when they have here an initiative that clearly has a single subject. That subject is how to deal with equal treatment of citizens by the State and what the best approach to that is. This is a single subject. We want the opportunity to collect signatures, to have this on the ballot, to present this alternative to the people of the state of Colorado. And if I afforded that by bickering about the language of the title, then I would have disserved my clients.

So the most important thing to the proponents of Initiative 61, obviously, is to have the chance to present this alternative to the people of the state, not what the specific wording of the title is.

At the same time, I do think the

title, as currently set, is accurate. But again, do what you will, just don't kick us out.

MR. HOBBS: Well, let me ask, I think, maybe just one more question.

It kind of goes to the discussion about whether the measure is misleading or not. Although maybe we could approach this by expressing a different single subject. We're dealing with a measure that starts out by saying discrimination is prohibited. And that -- I mean, that's -- that seems to lend itself to the argument that this is -- it's not really about prohibiting discrimination, it's really about -- as I said, it's more about continuing to allow certain forms of preferential treatment programs allowed by the Supreme Court, depending on what they are. That's more what it's about.

But I guess my question is why not -- normally I don't ask about why the proponents draft the measures the way they do. But here it seems like there is a more direct path that the drafting could have taken. And I don't know the exact words, and maybe that's why it's not done that way, but if the idea is to constitutionalize preferential treatment programs that are permitted

by the U.S. Supreme Court, it could have been drafted that way. And by starting out as an anti-discrimination measure, that's what makes it seem like it's a little misleading.

MS. HART: Right. And again, I think that -- I can't agree with what you're saying because I disagree with your characterization of the programs allowed by the Supreme Court as being preferential treatment programs. And I think that what this is is an expression and affirmation of a particular vision of discrimination, nondiscrimination, and the goal of nondiscrimination, that clearly prohibits discriminatory preferential treatment but preserves what I don't think are preferential treatment programs permit by the Supreme Court. So we're talking across each other because we see them differently. And so I'm not trying to be obstreperous.

I'm trying to think about -- I guess I'm now going back to two weeks ago and thinking about the staff draft of the title which says a program -- and Ms. Eubanks and I had a discussion about whether it should say "concerning the preservation of equal opportunity" or "concerning a

prohibition against the denial of equal opportunity." That may have been a better characterization of the goals of the proponent.

I think Mr. Domenico pointed out that "equal opportunity" was then a debatable phrase. And I think, again, one of the things that's very hard in this area -- and this was true with 31 and it's true with 61, I acknowledge the difficulty of this -- is the language in this area of discussing discrimination and preferential treatment and equal opportunity and all of these kinds of programs, the language is so fraught. And coming up with the best way to characterize these things that fully explores what the proponents are trying to do is hard. And the proponents of Initiative 61 really struggled in coming up with the best way to draft their language, with what would be the best way to meet their -- their total goal with regard to nondiscrimination -- their total goal with regard to nondiscrimination was both to make a strong statement against preferential treatment and to be clear that the definition of preferential treatment didn't include what was already there.

So it was not a question of, you

know, oh, let's just get rid of the first sentence. The first sentence does something important and the second sentence, too, does something important. They are both very important to the vision of the proponents of Initiative 61 and the vision that they would like to offer as an alternative to the people of Colorado.

MR. DOMENICO: I do have to ask a question now about that. What does the first sentence do, then? If there's something very important about it, what types of things is the State doing that the first sentence is intended to change? I mean, because that's what these are -- I mean, that's what we're supposed to be able to understand.

MS. HART: Right. I don't -- again, I am not going to get into specific programs and say this is a thing the State is doing -- that is in fact doing that it can no longer do. What I will say is it seems very clear to me that there are lots of things that people in Colorado believe the state is doing, they don't want the State to do it. So many people believe that quota hiring is happening or that quota admissions to educational opportunities are happening. And it was in order

to address that belief, not because we think that that's happening all over the state, but because people do seem to think it's happening all over the state. And so we understand, and we agree that there should be a clear statement by the people of Colorado that we don't want -- I don't want quota hiring. I don't want quota admissions. It is not acceptable, under our constitution, to do that.

So I don't need to say, "Here's the thing that's happening that will change." I can say, "Here's the thing that people don't want to have happening and we don't either. And we want to make it clear that it's not allowed." And I think it's important to do that, because I think it's important to clear up a huge misunderstanding that's out there to make -- to allow people to say, "If this is happening" -- to the extent it's happening anywhere, and I don't actually think it is, but people think it is -- "to the extent this is happening anywhere, no, this is not okay."

But again, we are not defining this to eliminate the kinds of things that are being eliminated in other states, the kinds of outreach and recruiting and training programs that have been successful in providing equal opportunity in

Colorado.

MR. DOMENICO: Well, then, the question I have about that is a lot of your argument about – about what 31 would do and how you think it would be -- it's deceptive, really, to me, suggests that if you're right about that, you'll have a very strong argument when 31 is challenged in front of the Supreme Court that it should be interpreted in the way you argue it should, that it shouldn't apply to these because, of course, the Court is supposed to interpret measures in a way that the -- that it thinks the average voter intended it to be interpreted. And so if you're right about that, if you're right about what people generally interpret these phrases to mean, then you don't really have anything to worry about. As long as you can convince a court of that, right? Or the Supreme Court.

MS. HART: Right. And I have two things to say about that. First of all, I'll return the favor and say that Mr. Westfall has quite craftily refused to respond to questions about what preferential treatment includes. And so the legislative history on Amendment 31 gives nothing for argument. That was nicely done. But

there's nothing there for argument to the Supreme Court or to any court about what it means, A.

B, the chilling effect of -- and understanding of what's happening in other jurisdictions and what's likely to be challenged in Colorado under a program that eliminates preferential treatment but doesn't -- doesn't define it and then appears to be being interpreted very broadly in other jurisdictions will be significant in terms of its impact on programs in Colorado and whether there's still funding available for them or support for them. So totally independent of what's directly prohibited, the impact will be huge.

And that is all -- I think you quite rightly say that is all part of what I'm sure will be -- this is sort of not my bailiwick, but I'm sure there are going to be people out there who are doing, you know, a "No on 31" campaign or whatever the yard signs will read. That's one thing I'm sure will happen.

The proponents of 61 wanted to do something different from that and are entitled to do something different from that, which is to offer a different alternative to the citizens of

Colorado, not just "No on 31," but let's make a statement about what we believe nondiscrimination in the state of Colorado means. Let's make a statement about what we will tolerate and what we will accept and what we stand for in the state of Colorado. And that's a different thing from a "No on 31" campaign. And I think that's what the proponents of 61 are trying to do. So you may disagree with their approach, but you may think, we'll just do a "No on 31" campaign. But they wanted the opportunity to participate in the initiative process that our state permits to offer this alternative to the citizens of Colorado.

MR. DOMENICO: Well, and I certainly think they're entitled to do that, and I think the debate you suggest the people of Colorado should have would be terrific. I really do think that a debate on what sorts of -- what preferential treatment on the basis of race and sex and these things is and what should be allowed and what shouldn't would be valuable. But this measure doesn't do that, is the problem I have. I mean -- and you may be right that 31 doesn't do it either, but I'm not sure that two wrongs make a right is the sort of thing to base our decision on. I mean,

the problem I have here is that this makes one blanket statement using terms that I certainly agree are debatable about their definition.

But the second sentence, there's no doubt to me that the second sentence makes the first sentence essentially irrelevant, because the State already can do what -- whatever is allowed under the standards set by the U.S. Constitution. And I don't have a problem with, as you say, constitutionalizing the status quo, especially when there's a threat to the status quo from this other measure. And so I don't have a problem with your attempt to do that.

But when you essentially, in the first sentence, say, "We are making a change to the status quo" and then the second sentence completely eviscerates the first sentence, which I don't think there's much doubt, at least, it eviscerates it in many, many important ways that would appear important to the average reader. And obviously, you know, we -- we're in a tough spot. You and I probably disagree about what the average person interpreting these terms understands, and I don't know that there's a way for us to come to an agreement on that. I mean, that's just one of the

difficulties of the role we're put in here.

But I really -- it seems to me that -- I do wish that the proponents had taken another angle at this, because I think this simply -- and I don't -- not because you or the proponents are intentionally set out to deceive people. My understanding of this doesn't turn at all on your subjective motivations. I just think that the average voter would be, at best, confused by this and, at worst, misled. So that's not really a question, obviously. But feel free to respond.

MS. HART: Again, I mean, as you said, you and I disagree about this. And I guess I just, obviously, feel strongly about it. So saying I feel strongly is sort of irrelevant, but this a two-sentence initiative that presents to the citizens a prohibition on discrimination. And I appreciate your saying that you don't mind our constitutionalizing the status quo.

I guess when I think about this, I think, you know, if we didn't have a due process clause and then people said, you know, "We should have a due process clause, not because we specifically -- not because there is actually a rampant problem with violation of due process but

because it's worth expressing that we stand for due process," I think that that would be something that would be a good thing to do. And particularly good to the extent that there are people in the world who believe that there is not due process.

And so I think this is the same kind of thing. I don't think that -- as I've said before, I don't think that there's quota hiring going on or that there's quota admissions at CU's educational system or CSU's or any of the educational systems. I don't think that the K-12 programs in Denver -- and again, one of the things to keep in mind is that this is all education. I don't think that the K-12 programs in Colorado are engaged in quota hiring, but some people do. And I think it's important for us to be able to say we don't want that. But I think -- to say that the definition provided in the second sentence, the definition of preferential treatment is inconsistent with preferential treatment is because you have accepted a definition of preferential treatment. It's because you think preferential treatment means a particular thing.

This is an interpretive question. It's a question for debate and dialogue and

education by the proponents of the initiative to the people, but it's not multiple subjects. It's a single subject, and that single subject is discrimination and preferential treatment, how we define it and our desire to prohibit it. And I guess this truly -- again, I would hope that the alternative you would consider, if you feel that you have to change what I think is a perfectly clear, again, short and clear title that you set two weeks ago, I hope that what you would consider is rewording it in some way and not simply eliminating these proponents' right to get on the ballot and to have this discussion with the citizens of this state.

MR. HOBBS: Any further questions for Ms. Hart? Thank you.

I do have one other person signed up to testify. Lou Ellingson?

MR. CORRADA: I'm not Lou Ellingson. I would like to testify, even though I put I wouldn't on the sheet.

MR. HOBBS: Would you come forward and identify yourself, if you will, please.

MR. CORRADA: My name is Roberto Corrada. I rise in support of Proposition 61 or

Initiative 61.

I just really want to preserve one argument for appeal, and that is the argument wasn't made -- Proposition 31, I do think it's unfortunate that a lot of this discussion has been one viewed against the other, because I do think that those in favor of Initiative 61 should be able to come in and argue 61 on its own merits. And I think a lot of the argumentation, really, even though it's tried not to center around 31, exists because 31 is in the picture. And I think that's unfortunate.

In terms of the language here, I think, Mr. Hobbs, that if it said "an amendment to the Colorado Constitution concerning a blanket prohibition against discrimination," you might rightfully have a concern. But it doesn't say that.

Initiative 31 also has number of exceptions to the general statement that there shall be no preferential treatment. One huge one is allowing federal programs that allow preferential treatment to continue to exist.

Now, under the Constitution in supremacy, those would be allowed to exist anyway.

But the truth is, when this type of proposition came up in various state legislatures without that exception, people voted against it because they feared that not having the prohibition would cause those federal programs to go away. So that was put in for very strategic reasons.

That exception is an exception that people could drive a truck through. It includes not only Title VII but, arguably, programs under Title VI, which could include a variety -- I mean almost all preferential treatment programs that you could think of. Huge exception. I don't -- I was here for the hearing on 31, I don't recall a lot of questioning about the exceptions and the nature of exception to 31.

Another huge exception to 31 that was made in oral argument by Ed Ramey at the time was that 31 has an exception for bona fide qualifications. People don't understand bona fide occupational qualification. I teach the subject, and it's hard enough for very sophisticated law students to understand it. But the BFOQ allows express discrimination, express preferential treatment. What a BFOQ does, if you prove a BFOQ, is that you can have an ad in the paper that says

"Men only need apply for this job." The 31 creates not just a BFOQ but a bona fide qualification that applies to public contracting as well as education. That sort of preferential treatment exists in no law. It's a preferential treatment category that's expressed, that's created by 31 and no other law. 61 doesn't create it. So arguably, there's a preferential treatment that's created that doesn't exist by 31 even though it starts out saying there shall be no preferential treatment.

There are a number of other exceptions in 31. I don't think you're saying that initiatives have to be absolute and that they have to be blanket. You can have exceptions. But the only difference between 61 and 31 is where we draw the line on exceptions. We allow more types of programs that 31, arguably, does not allow. I say "arguably" because in the 31 hearing. a lot of time was spent asking the proponents of 31 to identify what preferential treatment was. And they refused to answer it. I even testified then, and I said, "Does it mean you can't put a postage stamp on a recruitment letter aimed at somebody you know is black or a woman?" They refused even to allow that.

This is why 61 was crafted, because we thought 31 was deceptive in that preferential treatment was understood by people that to mean certain things. It can mean a number of things. It's not a self-defining term. We wanted to put forward a debate on the issue of what preferential treatment is.

Now, Mr. Domenico, you might like that debate to take place, but the truth is the best way for that debate to take place -- and it's already happening -- is for an alternative initiative to be on the ballot that makes somebody say, "Geez, what's this doing that this one is not doing?" And already there have been editorials in the paper that are distinguishing the two and are causing that debate to happen.

Those kinds of debates did not happen in California or Washington state or Michigan. They're happening here. And we think that's the best thing for Colorado because it means that the people will be more educated about the choices they have to make on the ballot in November.

MR. HOBBS: Questions? Thank you.

Is there anybody else who wishes to

testify? And I'll give you a chance, Mr. Westfall, in just a moment.

I don't see anybody else who wishes to testify. So, Mr. Westfall, final arguments?

MR. WESTFALL: Mr. Hobbs, if I could just have three minutes to go out, because Ms. Corey, of the movement, would also like to speak. I think there's over an hour's worth of colloquy. There's a number of things that I could spend time disagreeing on. I don't want to burden the board with a full 30-minute, point-by-point rebuttal of the things that we've heard. And I think if you will just afford me about three minutes, we can if go out in the hallway and I can try to be very structured and very focused on closing comments if you would allow me.

MR. HOBBS: Okay. We'll take a three-minute recess.

MR. WESTFALL: Thank you very much.

(A recess was taken from 10:21 a.m. to 10:27 a.m.)

MR. HOBBS: Okay. Let's resume after a recess. The time is now 10:28.

Mr. Westfall?

MR. WESTFALL: I'd like to make a

few comments and then Ms. Corey would like to just make a few comments. And I think this will be relatively short. Again, I thank you for the opportunity to go on and sort of go through all my notes as to -- again, to try to avoid the temptation of trying to make a point-by-point rebuttal.

I greatly respect Ms. Hart's passion and desire to want to propose some sort of alternative, but the alternative needs to be clearly expressed to the voters. If what they want is something that preserves certain preferences and preferential treatment, then they've got to put that on the ballot. Time and time again, through the hour colloquy, I heard virtually nothing talking about discrimination. I heard talking about the kinds of programs that they want to preserve. It is -- it should be abundantly clear to the three of you that that's the purpose of this measure. And if they want to have it to be a dueling 61 versus 31 and saying, "This is our vision, this is what we're preserving," then articulate it. Don't have it be concerning a prohibition against discrimination. Don't -- put the second sentence out as its own measure.

I can't imagine that -- maybe I'm wrong, but we'll see what they come up with. But something that did what she's saying they want to do is easily draftable. We've got plenty of time. We're early March. They've got plenty of time to go back to the drawing board. But I strongly urge the title board to send them back to the drawing board. Make them come up with a title, or excuse me, a measure that you can draw -- you can do an amendment to the Colorado constitution concerning fill in that blank, whatever it is, whether it's maintenance of certain preferential treatment programs or certain -- defining discrimination to mean such-and-such a thing. Make them fill in the blank on the measure itself as to after the word "concerning" so the single subject is clear to the voters and not misleading. That's all we ask. And I won't -- I won't belabor it. Again, did I lose my --

MR. HOBBS: I have a question for you.

MR. WESTFALL: I should have let her go first. My mistake.

MR. HOBBS: Something that Mr. Corrada said struck me. And I'll probably

mischaracterize this quite a bit. But it seemed like there's a point of view, maybe, that No. 31 and No. 61 are really very similar. They both are prohibiting discrimination. The only thing that's different is the exceptions.

MR. WESTFALL: I have to say that's incredibly clever of Mr. Corrada, but I fundamentally disagree with his mischaracterization. One is designed to preserve certain preferential treatment. That is the very purpose. I understand, you know, his argument, and I think it's a very clever argument. I just fundamentally disagree with it. They're not just different in type, they're different in the very structure of what they're trying to accomplish. And the voters need to understand that if they're going to be dueling measures on the ballot. Don't hide behind concerning the prohibition of discrimination. That's not what 61 is about at all. I fundamentally disagree with that.

MR. HOBBS: Okay. Any other questions for Mr. Westfall? I don't know whether you're going to take over child care duties now or. ..

MR. WESTFALL: I think Ms. Corey has

a few remarks.

MS. COREY: Very few, to be sure.

Thank you so much, members of the board. My name is Jessica Peck Corey, and maybe you didn't know, but it's Take Your Daughter to Work Day. So I have my three-month old, Caroline, here with me. Thank you for being so gracious in allowing her here in the room.

I come here today as a citizen and one who is a strong supporter of the initiative process and also a strong supporter of equal opportunity in this country.

I decided to seek the guidance of Mr. Westfall on this issue because I believe that the language of 61 is fraudulent. And we don't need to go over the specifics of that. But I strongly believe that if we went out and rounded up ten voters on the street right outside here on Broadway, the vast majority of them would not understand what this initiative is attempting to do.

This is a sentiment articulated yesterday in "The Rocky Mountain News" editorial pages, and it's a reasonable one. Like Mr. Westfall said, we aren't here in an effort to

kill the active dialogue. We're here to get it started, and we're here to get it started on honest terms. The proponents of 61 have plenty of time to go back and to create language that allows for that genuine debate.

The last thing that I want to talk about is that we hear from the proponents of 61 continuously that 31 would kill all valid -- or at least a substantial number of valid equal opportunity programs, targeted recruitment, that sort of thing. As a member of The Blue Ribbon Commission on Diversity at the University of Colorado, appointed by Hank Brown, I have to strenuously disagree with that and say that every race-neutral program that is perpetuated by the University of Colorado or any university in the state will be allowed to go forward and flourish. And if that at all -- whether or not those programs are allowed or disallowed factors into your decision, please know that after spending 16 months analyzing these programs, I believe they will not be affected.

Thank you so much for your time and consideration. If you have any questions, I'm happy to answer them.

MR. HOBBS: Any questions? Okay. Thank you very much.

MS. COREY: Thank you.

MR. HOBBS: I don't have anybody else signed up to testify. Is there somebody else? Yes, sir?

MR. PAREDES: I'm Andrew Paredes, one of the proponents of 61.

MR. HOBBS: Come forward. Please identify yourself for the record and who you represent.

MR. PAREDES: Okay. My name is Andrew Paredes, and I'm one of the proponents of Proposed Initiative 61. And I'm nervous.

MR. HOBBS: Would you spell your last name, please.

MR. PAREDES: It is P-a-r-e-d-e-s.

Just for the record, I am not an attorney, don't study law. I am a voter, and so I -- and a proponent. And so I think I can maybe speak accurately to what an average voter who is not an expert in the law might think. And it was ours, my proponents' and my intention to file this amendment to give a competing way of looking at the prohibition of discrimination and preferential

treatment. So at issue is the fact that there should be no discrimination. And there may be five, two, six, 14 different ways of going about doing that.

We have thoughts -- we are trying to articulate a way and put on the ballot a way to go about doing that that we think is the best way to do it. And that is the purpose of the initiative and -- and we may have, in this discussion, spent a lot of time talking about, you know, the particular second sentence, because there is not much discussion needed, you know, about the first sentence. That seems to be hashed out and that seems to be fairly self-evident. So our intention with this is to put on the ballot a way to deal with discrimination but the way that we think would be the best way to go about doing that. And hopefully, it will be set and up to the voters to hash it all out and make their decision. And that's fine.

MR. HOBBS: Thank you very much. Questions? Thank you.

And Ms. Hart, I'll give you one more minute if you need it. We have got two other measures we want to get to. But if you would like

the time, I want to give you a fair chance.

MS. HART: No, I feel like I've said what I need to say.

MR. HOBBS: Okay. Thank you.

Then I'll turn to board discussion. Any discussion by the board.

MR. DOMENICO: Well, I'll start.

I mean, I think I was pretty clear last time that I had real problems with this. And I'm -- as I say, I appreciate what the proponents are trying to do. I don't -- I don't agree or even really care what -- whether they intend to be misleading or deceptive. I don't want to characterize their efforts that way. I think this is a good-faith effort. I just -- it's clearer to me than ever that this really is the kind of thing that the prohibition against confusing or deceptive, in the sense of not of intentionally deceptive but of measures that contain things that the average voter would not -- would be surprised and confused by.

It's quite clear to me that that's what is -- would happen here. And I mean, the Supreme Court has very clearly said that certain at least racial preferences are constitutional. They

use that language. So it doesn't require, really, any speculation on our part that the second sentence does something that the first sentence purports to -- the second sentence allows something that the first sentence purports to prohibit.

Now, the proponents, I think, would like to -- for State constitutional purposes, what I'm hearing is they would like to say that what the Supreme Court is upholding do not amount to racial preferences. And they could do that and, as I say, I think it's a valuable exercise to have the debate over what are proper forms of preferences because, frankly, I think there's a lot less disagreement about that than there seems to be about these broader terms.

And so I encourage them, if the board agrees with me and we vote down this measure, to come back with something that more clearly defines -- seeks to define those terms.

But this doesn't do that. And I think it is just exactly the type of measure that the deceptive or surreptitious language that the Supreme Court has given us.

And I know Ms. Eubanks said that there was a standard that the Supreme Court has

given for single subject, which if she's been able to find one standard, I'd like to hear it. There seem to be many standards. But part of the analysis is definitely that a measure can't contain things that typical voters would be misled by. And I think that including a blanket prohibition and then essentially a blanket unprohibition in the second sentence, which is what this seems to do, is misleading and will be confusing.

And I don't think the second sentence really can be properly viewed as just exceptions the way that Amendment 31 contained exceptions. It really is kind of a complete flip of the first sentence.

And I certainly hope that the proponents don't think that this should prevent them from coming back with something else. I agree with Mr. Corrada, as I think I said, that this is a valuable debate, and it may be the best -- that the best way to have the debate is to have competing propositions. I just think that this particular measure is misleading in a way that we can't set a title for it, as I think the efforts to set a title so far show that it's essentially impossible to set a clear title. And the reason for that is because

the measure itself is essentially self-contradictory and confusing.

MR. HOBBS: Ms. Eubanks?

MS. EUBANKS: So many things, so little time.

I think where I want to start is the discussion that we had at our last meeting. And at least the position that I advocated at that point in time in terms of, one, the title board not getting into the business of trying to determine the effect of the measure. And I think the Court has generally been clear that that is not our role and something that we should not do.

But in terms of the arguments that have been made both by Mr. Westfall as well as other members of this board, I had to go back to the case law to try to get a little bit more guidance or see if we could find any guidance in terms of where do we draw the line between trying to -- being able to determine what a measure does in a manner sufficient to determine whether it constitutes a single subject without crossing that line of the determination of what its impact or effect may be.

And I did find some very helpful

language in a fairly recent decision of the Supreme Court, and that is the decision on No. 55. And that measure was the one that involved the restrictions on nonemergency services in which the Court struck down the measures containing more than one subject.

And it was very helpful because they had a very detailed discussion, again emphasizing the fact that we should not be, as the title board, making a determination as to the effect of a measure but that we definitely have to analyze a measure to fulfill our duty to determine whether a single subject exists.

And so in light of that, in trying to balance what the Court has told us in that regard, that gets me to some of the issues that I've been asking questions about. Things like the language of the second sentence in subsection 1 of No. 61, what it may or may not apply to, what it is effective in terms of at least is it constitutionalizing, perhaps, current as well as future Supreme Court decisions in this area.

And perhaps one way of characterizing this measure is where I started out at the last meeting, which is a prohibition with an

exception, whether, as Mr. Westfall would characterize it, the exception swallows the prohibition, whether, as Ms. Hart explains it in terms of ensuring that certain types of programs which she characterizes as equal opportunity programs are preserved, whether it's characterized, perhaps, as -- more appropriately as preserving the status quo. And I base that on some of the responses to my questions about if you have a program or service that, for example, is based on race and it doesn't meet the standards that have been set forth by the U.S. Supreme Court, what happens? It doesn't continue to exist.

That perhaps this measure is constitutionalizing the status quo in terms of what currently isn't allowed as well as those types of programs, however you may characterize them, that are allowed under the U.S. Constitution.

And that's -- in terms of that constitutionalizing that case law, both supporting certain types of programs and striking down certain programs.

So I think that there's different ways of characterizing and trying to understand this measure for purposes of single subject

analysis.

Now, in terms of those different options, I don't know that I'm in the same place that I was two weeks ago. And it's interesting, because in my discussion with Ms. Hart we talked about the fact that other cases dealing with voter surprise, voter fraud, were -- tended to be lengthy. Things were very hidden. Those were the concerns that the Court had.

As Mr. Westfall said, you know, this measure obviously is not lengthy but is complex. And I think that the fact that even what was at issue in No. 55 was a very short initiative. It contained three sentences. And yet the Court found that because it was vague on its face, that it included purposes that would surprise the voters if they voted on that measure and then found out that it had this purpose and application.

And so I don't know that -- obviously, 61 is different than most of the cases dealing with voter surprise and fraud, but I do think that 55 is very helpful in understanding that even a short measure can be complex and may be worded in a way that does not allow voters from knowing what they're voting on.

It's a very tough call. I don't know if, for folks that aren't attorneys, whether or not they will know what the language in that second sentence of subsection 1 will mean and whether or not you have sort of the log-rolling threat because they think they understand the first sentence and perhaps don't understand the -- what the second sentence may mean in terms of an exception or preservation of certain types of programs, they may vote for this and then find out, just like in 43, the Court's discussion of they think they're getting rid of the single-subject requirements and yet they find out that for certain measures they weren't getting rid of the single-subject requirement. I think there is that potential with this measure.

I think in terms of voters knowing from the language of the measure the effect of a yes or no vote may be questionable based on the language of the measure itself.

I agree, I think, with Mr. Hobbs' comment that if we were to find that this measure constitutes a single subject, I'm not sure that the title that we set at the meeting two weeks ago contains a statement of that single subject. I

think that that would have to be revisited if we get that far.

But for the -- for the time being, in terms of the single-subject issue, I think that the vagueness of the measure -- I mean, looking at the difficulty that this board has had in trying to ascertain and understand the meaning of that language I think is indicative of the problems that it may cause to the voters in terms of being misleading or being fraudulent in terms of them not understanding what it is that they're voting on.

I don't make these comments lightly. I think that this board has always been very aware of the importance of our decisions, and we take that responsibility very seriously. I just feel, especially in light of the guidance that the Court has given us, especially in No. 43 and No. 55, that at this point, that the measure doesn't meet the single-subject requirements, multiple as they may be. And I think I was referring specifically to the test that the Court has set forth. And I agree that the Court has -- has given us very many differing concepts to take into consideration when determining whether a measure has a single subject.

And I think primarily because of the

vagueness of the language of the second sentence, that the measure does not constitute a single subject.

MR. DOMENICO: Just to highlight your difficulty with that second sentence, and it does seem simple, but I've got in front of me -- but the second sentence pulls within it, basically, all of the Supreme Court's jurisprudence on this point. And I've got two of the more recent cases in front of me, the Parents Involved case, which Ms. Hart cited, and Grutter, which I cited. And Parents Involved is 104 pages long and Grutter is 89 pages in the report. So it's -- I think that highlights the sort of, I hesitate to say, deceptive simplicity of the length of the measure. It's really quite complex and difficult to understand.

MR. HOBBS: Well, I agree with the comments made by Mr. Domenico and Ms. Eubanks and reluctantly agree with their conclusions. I said reluctantly because I do think it's important that the board be very cautious about being an obstacle to petitioners, except that here we really do have some obligations under the statute in the constitution and the -- what the Court has told us.

And, you know, I'm going to try to avoid repeating the comments of Mr. Domenico and Ms. Eubanks. But I really think this is a very difficult measure for the board to understand. And the Supreme Court has said that if we cannot understand it well enough to set a title, then we cannot set a title. And I don't know how to set a title for this measure, a fair title that expresses a single subject.

I think it really is different than No. 31. And No. 31 was a struggle. And I think it was a struggle for me personally and, I think, for the board and, I think, for the Court. But to me it was at least a struggle that was understandable. And it had to do with, you know, what is discrimination. And at least I think it was understandable. Here I think because of the uncertainty about the meaning of the second sentence, it's a different situation. And I don't -- again, I don't know how to express in the titles what the measure is doing. You know, we could go with what the titles we set, but I don't think a voter can understand what the measure does reading the titles that we set. And I think that the reason is because of the uncertainties about what the second sentence means.

I really did try to look at this as maybe -- as just a question of two measures, No. 31 and No. 61, that each prohibit discrimination and each have their own approach to what exceptions there should be. But No. 31, I think the exceptions were actually clear in that case, and I think we expressed them in the title, and I don't think that was the struggle that we had. Here we really are struggling with what is permitted in light of the first sentence's prohibition on discrimination.

And I go back to -- well, really, a question that I raised earlier in this discussion, and that is, that it still seems to me that voters would, you know, seeing a measure that says it prohibits discrimination, would be surprised to find that, in fact, it permits preferential treatment to the extent permitted by the U.S. Supreme Court. And that's the way I understand the measure. And I think that kind of goes back to -- well, supports the discussions about the measure being misleading. And again, I agree with Mr. Domenico. I don't want to characterize people's motives. I don't think that's relevant here. But I think the measure is inherently

misleading because of the way it's drafted. And so I think I would also be a no vote on finding that the measure is a single subject.

If there is no other discussion, I think a motion would be in order.

I think -- I'm not sure what the proper motion is, but I'll take a stab at it. I think I'll move that the board grant the motion for rehearing and find that the measure does not comprise a single subject and strike the titles that were set at the last hearing.

MR. DOMENICO: I'll second that motion.

MR. HOBBS: Is there any further discussion? If not, all those in favor say "Aye."

MR. DOMENICO: Aye.

MS. EUBANKS: Aye.

MR. HOBBS: Aye.

All those opposed, say "No."

That motion carries three to zero.

That concludes No. 61. The time is 10:57 a.m. Thank you.

(The proceedings adjourned at 10:57 a.m.)

CERTIFICATE

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

I, Diane M. Overstreet, Certified Realtime Reporter and Notary Public in and for the State of Colorado, duly appointed to take the aforementioned proceedings, certify that the proceedings were taken in shorthand by me at the time and place aforesaid and were thereafter reduced to typewritten form by me and processed under my supervision, the same consisting of 89 pages, and that the same is a full, true, and complete transcription of my machine shorthand notes. 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 HEREOF, I have affixed my notarial seal this 16th day of March, 2007. My commission expires July 6, 2008.

_____
Diane M. Overstreet
Certified Realtime Reporter

Final #31

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

Article II of the constitution of the state of Colorado is amended by the addition of the following section:

SECTION 31: NONDISCRIMINATION BY THE STATE

(1) THE STATE SHALL NOT DISCRIMINATE AGAINST, OR GRANT PREFERENTIAL TREATMENT TO, ANY INDIVIDUAL OR GROUP ON THE BASIS OF RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN IN THE OPERATION OF PUBLIC EMPLOYMENT, PUBLIC EDUCATION, OR PUBLIC CONTRACTING.

(2) THIS SECTION SHALL APPLY ONLY TO ACTION TAKEN AFTER THE SECTION'S EFFECTIVE DATE.

(3) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS PROHIBITING BONA FIDE QUALIFICATIONS BASED ON SEX THAT ARE REASONABLY NECESSARY TO THE NORMAL OPERATION OF PUBLIC EMPLOYMENT, PUBLIC EDUCATION, OR PUBLIC CONTRACTING.

(4) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS INVALIDATING ANY COURT ORDER OR CONSENT DECREE THAT IS IN FORCE AS OF THE EFFECTIVE DATE OF THIS SECTION.

(5) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS PROHIBITING ACTION THAT MUST BE TAKEN TO ESTABLISH OR MAINTAIN ELIGIBILITY FOR ANY FEDERAL PROGRAM, IF INELIGIBILITY WOULD RESULT IN A LOSS OF FEDERAL FUNDS TO THE STATE.

(6) FOR THE PURPOSES OF THIS SECTION, "STATE" SHALL INCLUDE, BUT NOT NECESSARILY BE LIMITED TO, THE STATE OF COLORADO, ANY AGENCY OR DEPARTMENT OF THE STATE, ANY PUBLIC INSTITUTION OF HIGHER EDUCATION, ANY POLITICAL SUBDIVISION, OR ANY GOVERNMENTAL INSTRUMENTALITY OF OR WITHIN THE STATE.

(7) THE REMEDIES AVAILABLE FOR VIOLATIONS OF THIS SECTION SHALL BE THE SAME, REGARDLESS OF THE INJURED PARTY'S RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN, AS ARE OTHERWISE AVAILABLE FOR VIOLATIONS OF THEN-EXISTING COLORADO ANTI-DISCRIMINATION LAW.

(8) THIS SECTION SHALL BE SELF-EXECUTING. IF ANY PART OF THIS SECTION IS FOUND TO BE IN CONFLICT WITH FEDERAL LAW OR THE UNITED STATES CONSTITUTION, THE SECTION SHALL BE IMPLEMENTED TO THE MAXIMUM EXTENT THAT FEDERAL LAW AND THE UNITED STATES CONSTITUTION PERMIT. ANY PROVISION HELD INVALID SHALL BE SEVERABLE FROM THE REMAINING PORTIONS OF THIS SECTION.

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