

Colorado Supreme Court 2 East 14 th Avenue Denver, CO 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Original Proceeding Pursuant to § 1-40-107(2) C.R.S (2015) Appeal from the Ballot Title Board	
<p>In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2015-2016 #114 (Civil Unions and Marriages)</p> <p>Petitioner: D'Arcy Straub</p> <p>v.</p> <p>Respondents: Laura C. Reinsch</p> <p>and</p> <p>Title Board: Suzanne Staiert, Frederick Yarger, and Jason Gelandner.</p>	<p>Supreme Court Case No: 2016SA150</p> <p style="text-align: center;">FILED IN THE SUPREME COURT</p> <p style="text-align: center;">MAY 19 2016</p> <p style="text-align: center;">OF THE STATE OF COLORADO Christopher T. Ryan, Clerk</p>
<p>Attorney for Petitioner: None, petitioner is proceeding <i>pro se</i>.</p> <p>D'Arcy Straub 6772 W. Ida Dr. #327 Littleton, CO 80123 303-794-4109</p>	
PETITIONER'S OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules.

Specifically, the undersigned certifies that:

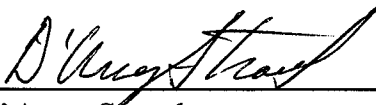
The brief complies with the applicable word limits set forth in C.A.R. 28(g).

X The entire document contains 5248 words, which does not exceed the limit of 9500 words imposed by C.A.R. 28(g) for a principal brief.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

X For the party raising the issue, it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.



D'Arcy Straub
Petitioner, pro se

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Title Board erred in determining that the Proposed Initiative contains more than a single subject.
2. Whether this Court dismissing with prejudice Respondent Reinsch's Motion for Rehearing is consistent with the rights of the parties in view of the Title Board having previously set a title that fairly expresses the meaning and intent of the Proposed Initiative.

STATEMENT OF THE CASE

I. Nature of the Measure

Proposed Initiative #114 possesses two objectives: 1) protect the fundamental right of same-sex couples to marry as guaranteed under the Equal Protection and Due Process Clauses, *see Obergefell v. Hodges*, 135 S. Ct. 2071 (U.S. 2015); and 2) preclude the government, in view of the Establishment Clause, from defining marriage in either support or opposition to any particular religious belief, including those faiths that support same-sex marriage and those faiths that oppose same sex-marriage. *See* Initiative § 31, §§ 14-16-102(2), -103(1), attached as Exhibit A. Under the Proposed Initiative, the individual is afforded the liberty to define marriage according one's individual beliefs, whether secular

or religious. *See* Initiative §§ 14-16-102(4), -103(1), attached as Exhibit A.

If passed, a major consequence of the Proposed Initiative is that only civil union licenses and certificates could be issued in Colorado, and same-sex and opposite-sex couples would be left with the individual liberty to define their union as one involving marriage or not. Naturally, some couples would participate in a marriage ceremony at a church to further define their union, and such ceremonies are available to same-sex couples, as some faiths support same-sex marriage.

A further objective of the Proposed initiative is to thwart religious intolerance. *See* Initiative § 14-16-102(3), attached as Exhibit A. When the government takes a position on a religious issue, the danger exists that the government is acting to either endorse or disapprove of religion as prohibited under the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668, 692 (1984). After the Supreme Court's *Obergefell* decision that implicates various religious beliefs on marriage, citizens with opposing beliefs are now subject to attacks that implicitly have the support of the federal government.¹ History

¹ Lest Petitioner be associated with such groups as the Westboro Baptist Church (who maintain the domain name "godhatesfags.com"), Petitioner's beliefs on marriage are primarily based upon children being a gift from God. The belief begins with the premise that the best gifts are those that have a lasting and beneficial effect on one's life. Children, in contrast to nearly every other species

includes many examples of individuals that faced persecution after a government established laws that opposed a particular faith, such as the Nuremberg Laws in Germany in the 1930's.

II. Nature of the Case, Course of Proceedings, and Disposition Below

D'Arcy Straub, Petitioner, and Gene Straub² filed Proposed Initiative #114 with the Office of the Legislative Council on March 4, 2016,³ and the review and comment meeting was held on March 18, 2016. Proponents submitted a final version of the Proposed Initiative to the Secretary of State on or about April 8, 2016 for purposes of having the Title Board set title. The Title Board considered

in the animal kingdom, take an extraordinarily lengthy amount of time to mature. Most animals mature rapidly because natural selection dictates that animals who cannot protect and provide for themselves rapidly after birth are less likely to survive. Yet humans require years to mature, and Petitioner believes that a lengthy childhood is consistent with the belief that a child born to a couple is a gift from God. Naturally, only opposite-sex couples can fully share this gift of childbirth between themselves. This belief also suggests how people of faith should view same-sex couples. A person that can receive a gift that another cannot should view the less fortunate with sympathy, and not hatred.

² Pursuant to C.R.S. § 1-40-107(2), “any person” – or one person – can petition the Court for court review. D'Arcy Straub proceeds as a single petitioner to simplify signature requirements and service of briefs.

³ Earlier versions of Proposed Initiative #114, Proposed Initiatives 2015-2016 #25 and 2015-2016 #41, were filed with the Office of the Legislative Council on July 2, 2015 and September 10, 2015, respectively.

and set the title for Proposed Initiative #114 at its April 20, 2016 meeting. *See* Title, attached as Exhibit B.

On April 27, 2016 Respondent Reinsch timely filed a Motion for Rehearing alleging that: 1) the Proposed Initiative violated the single-subject requirement contained within the Colo. Const. art. V., § 1(5.5) and C.R.S. § 1-40-106.5; and 2) the Proposed Initiative's title was misleading and inaccurate pursuant to C.R.S. §§ 1-40-106, -107. *See* Motion for Rehearing, attached as Exhibit C. The Title Board considered Respondent Reinsch's motion at its April 28, 2016 meeting. The Title Board determined the Proposed Initiative violated the single-subject requirement and granted Respondent Reinsch's motion. *See* Title Board Minutes, attached as Exhibit D. Accordingly, Title Board withdrew the title as set on April 20, 2016 and did not consider whether the title previously set was misleading and inaccurate as alleged by Respondent Reinsch.

Petitioner filed a Petition for Review by the Court on May 4, 2016, and the Court granted the Petition on May 5, 2016.

SUMMARY OF THE ARGUMENT

Petitioner maintains the Proposed Initiative possesses a single subject that prevents the state and all other local governments from implicitly or explicitly

defining marriage that would either support or oppose various religious beliefs on marriage. The Title Board determined that the Proposed Initiative would prevent any married couple from filing a joint federal income tax return, and the Title Board determined that this alleged effect is a second subject “coiled in the folds” of the measure that could lead to “voter surprise and fraud.” In arriving at this conclusion, the Title Board inappropriately considered future applications of the Proposed Initiative, the Title Board could not identify the language in the measure that would implement the purpose of the alleged second subject, the Title Board misapplied the “voter surprise and fraud” doctrine, and the Title Board’s statutory construction of the Proposed Initiative was erroneous.

Petitioner illustrates below that the title set by the Title Board at its April 20, 2016 meeting is a fair expression of the meaning and intent of the Proposed Initiative. Respondent Reinsch in the Motion for Rehearing argues that the title set is misleading and inaccurate, but such contentions have no legitimate legal basis. Petitioner argues that consistent with the rights of the parties, Respondent Reinsch’s Motion for Rehearing should be dismissed with prejudice upon the case being remanded to the Title Board.

ARGUMENT

I. Preventing the Government from Implicitly or Explicitly Defining Marriage in Support or Opposition to Various Religious Beliefs Is a Single Subject

A. Standard of Review and Preservation

1. Standard of Review for the Single-Subject Requirement

The Single-Subject Requirement: The Colorado Constitution requires that a citizen-initiated measure contain only a single subject, which shall be clearly expressed in its title. Colo. Const. art. V., § 1(5.5); *see also* C.R.S. § 1-40-106.5.

Characteristics of a Proper, Single-Subject Initiative: A proper, single-subject initiative that “tends to effect or carry out one general objective or purpose presents only one subject.” *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000* #25, 974 P.2d 458, 463 (Colo.1999). The “provisions necessary to effectuate the purpose of the measure are properly included within its text.” *In re Title, Ballot Title & Submission Clause, & Summary for 1999–2000* #256, 12 P.3d 246, 253 (Colo.2000). Accordingly, an initiative’s subject matter “must be necessarily and properly connected rather than disconnected or incongruous.” *Matter of Title, Ballot Title, & Submission Clause for 2013-2014* #76, 333 P.3d 76, 79 (Colo. 2014).

Characteristics of a Multiple-Subject Initiative: 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.” *In re Title, Ballot Title & Submission Clause for 2007–2008* #61, 184 P.3d 747, 750 (Colo.2008).

Characteristics of a multiple-subject initiative include grouping distinct purposes under a broad theme to circumvent the single-subject requirement, and hiding purposes unrelated to the initiative's central theme to gain passage of a hidden provision. *See In re Title & Ballot Title & Submission Clause for 2005–2006* #55, 138 P.3d 273, 277-78 (Colo.2006).

Purpose of the Single-Subject Requirement: This single-subject requirement serves two purposes to prevent improper, multiple-subject initiatives: (1) it ensures that the initiative “depends upon its own merits for passage”; and (2) it “protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex bill.” *Id.* at 277.

Criteria for Conducting a Single-Subject Analysis: The Court does not (and implicitly the Title Board should not)⁴ consider the initiative’s efficacy,

⁴ If it were otherwise, the Title Board would possess a power outside the purview of the Colorado Supreme Court on appeal, which makes little sense.

construction, or future application. *In re Title, Ballot Title, Submission Clause for 2009-2010 #45*, 234 P.3d 642, 645 (Colo. 2010). When necessary, however, the Court “will characterize the proposal sufficiently to enable review of the Title Board’s action.” *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). When construing an initiative, the Court applies the general rules of statutory construction. *In re Title, Ballot Title & Submission Clause, for 2007-2008, #17*, 172 P.3d 871, 873 (Colo. 2007). In conducting the analysis, the Court must liberally construe the single-subject requirement to avoid unduly restricting the initiative process. *In re Title, Ballot Title & Submission Clause for 2009-2010 #24*, 218 P.3d 350, 353 (Colo.2009).

Presumption Afforded the Title Board on Review: When reviewing a challenge to the Title Board’s single-subject determination, the Court assumes legitimate presumptions in favor of the propriety of the Board’s actions. *In re #45*, 234 P.3d at 645.

2. Preservation of the Issue

Preservation of the issue arises under C.R.S. § 1-40-107(2). Petitioner was a person who presented an initiative at the Rehearing of April 28, 2016, and to

perfect the Petition for Review under C.R.S. § 1-40-107(2), Petitioner filed the requisite certified documents obtained from the secretary with the clerk of the Court on May 4, 2016, which is within seven days of April 28, 2016.

B. The Title Board Inappropriately Applied Single-Subject Precedent

1. The Proposed Initiative Possesses a Single Subject

The single subject of the Proposed Initiative is the empowerment of the individual – and not the government – to define marriage according to each individual’s personal beliefs. This single subject is essentially captured in § 14-16-103(1) of the Proposed Initiative, attached as Exhibit A. The future application of the Proposed Initiative is extensive, as it affects every branch of government. Accordingly, directives at how the various branches and agencies are to act under § 14-16-103(1) are provided in §§ 14-16-103(2), -103(3) of the Proposed Initiative.

The remainder of the Proposed Initiative serves to establish “legislative history” to ensure the Proposed Initiative is not misinterpreted. For example, in the event some people believe this measure is to attack the rights of same-sex couples, Section 31 of the Proposed Initiative states the Equal Protection and Due

Process Clauses of the U.S. Constitution shall be respected (as established by *Obergefell*), and § 14-16-104 of the Proposed Initiative states that the Proposed Initiative shall not be interpreted to affect a legal right, protection, obligation, or benefit of a party, such as those individuals within the Lesbian, Gay, Bisexual, and Transgender community.

The Proposed Initiative “tends to effect or carry out one general objective or purpose” – to provide citizens with the liberty to define marriage according to their own belief that is not disparaged by an opposing view of the government. *See In re #25*, 974 P.2d at 463. The provisions necessary to effectuate the purpose, which include the directives of §§ 14-16-103(2), (3) and the numerous provisions provided to aid interpretation, are properly included within the Proposed Initiative *See In re #256*, 12 P.3d at 253.

2. The Title Board Inappropriately Considered a Potential Future Application of the Proposed Initiative in Their Analysis

At the April 28 Rehearing, the Title Board determined a potential effect or potential future application of the Proposed Initiative when it determined that couples would be unable to file a joint federal income tax return. Transcript 11:8-14, attached as Exhibit E. In setting the title, it is impermissible to consider the

initiative's "efficacy, construction, or future application." *See In re #45*, 234 P.3d at 645. The Title Board's consideration of the Proposed Initiative's potential future application and subsequently disguising it as a second subject is impermissible.

3. The Title Board Could Not Identify the Language in the Initiative to Implement the Purpose of a Second Subject

Petitioner at the April 28 Rehearing asked the Title Board to identify the second subject, and the Title Board responded as follows: "I would say – well, it could be something like denial of the right of currently married Coloradans to joint file income taxes." *Id.* at 21:9-17, attached as Exhibit E. Petitioner then asked the Title Board to identify the language within the Proposed Initiative that is associated with the second subject, and the Title Board responded as follows: "Where is that language within the initiative? In the language that says, no, there is no longer marriage. For people married in Colorado are no longer married, that's where." *Id.* at 21:18-23, attached as Exhibit E.

Aside from the incorrect statutory construction of the Proposed Initiative, which will be addressed below, the Proposed Initiative does not include any language that indicates a *purpose* of the Proposed Initiative is to eliminate the

ability of married couples to file federal joint income tax returns. A proper, single-subject initiative carries out one purpose. *See In re #25*, 974 P.2d at 463. The existence of a purpose suggests a subject, and the existence of a subject suggests a purpose. It is somewhat absurd to suggest that the Proponents advanced the Proposed Initiative with the purpose of eliminating the filing of federal joint income tax returns. Consequently, absent the identification of a legitimate purpose of the Proponents – as opposed to a potential unintended consequence – the Title Board’s conclusion that a second subject exists in the Proposed Initiative is erroneous.

4. The Title Board Inappropriately Applied the Single-Subject Doctrine of “Voter Surprise and Fraud”

At the April 28 Rehearing, the Title Board relied upon the single-subject doctrine of “voter surprise and fraud” to support their finding of a second subject. *See* Transcript 23:9-20, attached as Exhibit E. As noted above, a purpose of the single-subject requirement is to “protect[] against fraud *and* surprise occasioned by the inadvertent passage of a surreptitious provision ‘coiled up in the folds’ of a complex bill.” *In re #55*, 138 P.3d at 277 (emphasis added). This precedent is based upon statute that states the single-subject requirement is “[t]o 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.” C.R.S. § 1-40-106.5(1)(e)(II) (emphasis added).

To correctly apply the doctrine of “surprise and fraud,” both surprise *and* fraud are required – not just one *or* the other. The Title Board maintains that voters might be surprised to learn that passage of this measure might lead to the inability of couples to file federal joint tax returns, but this potential unintended consequence does not comprise an effort of the Proponents to nestle a surreptitious provision within the Proposed Initiative. A potential unintended consequence is not commensurate with an attempt to fool the voters.

Petitioner notes that the substantive provisions of the Proposed Initiative are enacted as statutory provisions. *See* Initiative, Section 2, attached as Exhibit A. Additionally, the effective date of the Proposed Initiative is July 1, 2017, which is after the General Assembly session of 2017. *See* Initiative, Section 3, attached as Exhibit A. Accordingly, if the Proposed Initiative passes at the November 2016 general election, the General Assembly will have an opportunity to amend or repeal any provision that is later discovered to comprise voter surprise. When proponents implement an initiative as statute and the effective date is after at least

one session of the General Assembly, the application of the surprise and fraud doctrine is rebutted.

5. The Title Board Erroneously Interprets the Proposed Initiative to Eliminate Marriage in Colorado

In their single-subject analysis, the Title Board concluded, “In the language that says, no, there is no longer marriage. For people married in Colorado are no longer married” And this is an incorrect statutory construction of the Proposed Initiative.

The Proposed Initiative states, “The individual liberty to define a marriage according to a person’s individual beliefs shall not be abridged by the state or a local government prescribing or recognizing any law that implicitly or explicitly defines the word “marriage.” Initiative § 14-16-103(1), attached as Exhibit A.

In view of *Obergefell*, which guarantees the fundamental right to marry, and in view of § 14-16-103(1) of the Proposed Initiative, which allows individuals to determine if their own union comprises a marriage, marriage in Colorado would still exist if the Proposed Initiative passed. Perhaps to memorialize marriages for federal and interstate purposes, civil union licenses could ask couples if they wish to exercise their fundamental right to marry and individual liberty to define their

state-sanctioned civil union as a marriage. For those couples answering in the affirmative, the civil union certificate could record their desire accordingly.

But regardless of how a marriage is recorded for evidentiary purposes outside of the legal confines of the State of Colorado, the Title Board's statutory interpretation that the Proposed Initiative eliminates marriage is incorrect. This is but one of the several errors that led to several inconsistent legal conclusions in the application of the single-subject requirement by the Title Board.

II. Respondent Reinsch's Motion for Rehearing Should Be Dismissed with Prejudice Upon Remand to the Title Board

A. Standard of Review and Preservation

1. Statutory Standard to Promptly Resolve Title Issues Consistent with the Rights of the Parties

Upon a Petition for Review being properly filed with the Court, "the matter shall be disposed of promptly, consistent with the rights of the parties, either affirming the action of the title board or reversing it, in which latter case the court shall remand it with instructions, pointing out where the title board is in error."

C.R.S. § 1-40-107(2).

2. Standard of Review for Setting a Title

When reviewing a challenge to the Title Board's decision to set title, the

Court does not consider whether the Title Board set the best possible title, stating “our duty is to ensure that the title fairly reflects the proposed initiative so that petition signers and voters will not be misled into support for or against a proposition by reason of the words employed by the Board.” *Matter of Title, Ballot Title, & Submission Clause for 2007-2008* #62, 184 P.3d 52, 58 (Colo. 2008). In reviewing the language set by the Title Board, the Court grants “great deference to the board’s broad discretion in the exercise of its drafting authority.” *In re* # 256, 12 P.3d at 255. Unless clearly misleading, the Court should not interfere with the Title Board’s choice of language. *Id.* When reviewing a challenge to the Title Board’s decision to set title, the Court employs “all legitimate presumptions in favor of the propriety of the Title Board’s actions.” *Matter of Title, Ballot Title, & Submission Clause for 2013-2014* #89, 328 P.3d 172, 176 (Colo. 2014).

3. Preservation of the Issue

Preservation of the issue arises under C.R.S. § 1-40-107(2). Petitioner was a person who presented an initiative at the Rehearing of April 28, 2016, and to perfect the Petition for Review under C.R.S. § 1-40-107(2), Petitioner filed the requisite certified documents obtained from the secretary with the clerk of the

Court on May 4, 2016, which is within seven days of April 28, 2016.

B. The Title Set by the Title Board Fairly Expresses the Intent and Meaning of the Proposed Initiative

1. Background of the Proceedings Below

In this case before the Court, the Title Board at the April 28 Rehearing found the Proposed Initiative included a second subject. Consequently, the Title Board did not consider Respondent Reinsch's arguments within the Motion for Rehearing, attached as Exhibit C, that argued the previously set title on April 20, attached as Exhibit B, is misleading and inaccurate and contrary to C.R.S. § 1-40-106, -107. Petitioner now seeks the Court to review Respondent Reinsch's arguments in view of the title set on April 20.

2. The Title Set by the Title Board Is Clear and Fair

Petitioner maintains that the title set is clear and fairly describes each of the relatively small number of substantive provisions of the Proposed Initiative. A concise review of the title is as follows:

- The statement in the title concerning the Establishment, Equal Protection, and Due Process Clauses mirrors the language of Section 31 of the Proposed Initiative, attached as Exhibit A.

- The statement in the title, “enacting new statutes that prohibit the state or a local government from enacting or recognizing any law that defines marriage” is mirrored by the language of § 14-16-103(1), -103(2)(a) of the Proposed Initiative.
- The statement in the title, “require recognition of all out-of-state marriages and previously established Colorado marriages as civil unions” is mirrored by the language of § 14-16-103(3) of the Proposed Initiative.
- The statement in the title, “authorize laws and rules governing civil unions, and require the amendment or repeal of all existing inconsistent laws or rules” is mirrored by the language of § 14-16-103(2)(b) of the Proposed Initiative.

3. Respondent Reinsch’s Arguments Are Erroneous or of No Consequence

Although the title has a close correspondence to each of the substantive provisions of the Proposed Initiative, Respondent Reinsch presents six points in the Motion for Rehearing, attached as Exhibit C, to argue that the title is misleading and inaccurate. These are briefly address below:

Point 1) Respondent Reinsch argues the Title Board didn’t understand the initiative, but the analysis of the title above illustrates the Title Board adequately and fairly describes the Proposed Initiative in the title.

Point 2) Respondent Reinsch argues the initiative prevents recognition of state-sanctioned marriages, but this is merely the opposite way of saying only civil unions are recognized. There is nothing misleading about the current language selected by the Title Board.

Point 3) Respondent Reinsch believes the Proposed Initiative repeals the fundamental right to marry, but as previously explained, the Proposed Initiative requires the state to respect the Due Process and Equal Protection Clauses as interpreted in *Obergefell*.

Point 4) Respondent Reinsch argues greater specifics about the enactment of laws and rules by the various governmental entities should be given with greater specificity in the title. The specifics that Respondent Reinsch would not affect a voter's opinion on the matter, and consequently the lack of specifics are not materially misleading.

Point 5) Respondent Reinsch argues the title should state that state-sanctioned marriages would be prohibited in Colorado, but the title does not state that citizens are afforded the liberty to define marriage according their own beliefs, which is the benefit of eliminating state-sanctioned marriages. The title simply states the government cannot “enact[] or recogniz[e] any law that defines marriage,” which

is a fair and unbiased expression of the meaning and intent of the Proposed Initiative.

4. Consistent with the Rights of the Parties, Respondent Reinsch's Motion for Rehearing Should Be Dismissed with Prejudice

Petitioner believes that Respondent Reinsch has little interest in setting a fair title pursuant to C.R.S. § 1-40-106(3), but rather is employing tactics to keep a ballot issue from reaching the general election. Indeed, Respondent Reinsch did not appear at the April 20 Title Board meeting to comment on the initiative and express any concern about an unclear title; rather, Respondent Reinsch only filed a Motion for Rehearing to argue the title was misleading and inaccurate.

In assessing whether Respondent Reinsch's Motion for Rehearing should be dismissed "consistent with the rights of the parties," *see* C.R.S. § 1-40-107(2), the Court should consider the following:

- 1) Respondent Reinsch's tactics are more than likely to be politically motivated and are not consistent with the objective of C.R.S. § 1-40-106(3) to set a fair title to enable the voters to vote intelligently on a ballot issue;
- 2) None of the legal arguments in Respondent Reinsch's Motion for Rehearing have a legitimate basis and are erroneous or not relevant;

- 3) Respondent Reinsch states in the Motion for Rehearing, “Because the measure is vague and incomprehensible” Motion for Rehearing, p. 2, attached as Exhibit C. When Respondent Reinsch admits to not understanding the measure, little value should be afforded Respondent Reinsch’s contention that the title does not fairly express the intent and meaning of the measure;
- 4) Respondent Reinsch failed to submit any briefs in this case before the Court;
- 5) The title set by the Title Board is a fair expression of the meaning and intent of the Proposed Initiative; and
- 6) Absent the Court dismissing Respondent Reinsch’s Motion for Rehearing with prejudice, the Proponents are subjected to the risk of Respondent Reinsch abusing the legal system by appealing a future adverse ruling by the Title Board to the Court.


Consistent with the rights of the parties, which are commensurate with the factors presented above, Respondent Reinsch’s Motion for Rehearing should be dismissed with prejudice to *promptly* dispose of the issues involving the Proposed Initiative. *See* C.R.S. § 1-40-107(2).

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests the Court to:

1) find the Title Board erred in finding a second subject and remand this matter to the Title Board with the instruction to reset the title as previously set; and 2) dismiss Respondent Reinsch's Motion for Rehearing with prejudice.

Respectfully submitted this 19th day of May 2016.



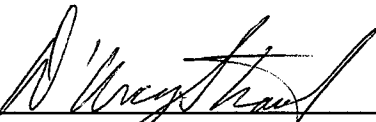
D'Arcy Straub
6772 W. Ida Dr. #327
Littleton, CO 80123
303-794-4109

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2016 a true and correct copy of the foregoing Petitioner's Opening Brief was served by hand delivery to the Respondents' Counsel and delivered to:

Mark Grueskin
1600 Stout St., Suite 1000
Denver, CO 80202
Attorney for Respondent Reinsch

Lee Ann Morrill
Office of the Attorney General
1300 Broadway, 6th Floor
Denver, CO 80203
Attorney for the Title Board



D'Arcy Straub

Exhibit A

RECEIVED

S. WARD

APR 07 2016

11:24 P.M.

Final Typewritten Draft of Initiative #114

Colorado Secretary of State

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

SECTION 1. In the constitution of the state of Colorado, **amend** section 31 of article II as follows:

Section 31. Civil Unions and Marriages. ~~Only a union of one man and one woman shall be valid or recognized as a marriage in this state.~~ THE STATE OF COLORADO SHALL RESPECT THE ESTABLISHMENT, EQUAL PROTECTION, AND DUE PROCESS CLAUSES OF THE U.S. CONSTITUTION FOR ISSUES CONCERNING CIVIL UNIONS AND MARRIAGES.

SECTION 2. In Colorado Revised Statutes, **add** article 16 to title 14 as follows:

14-16-101. Short title. THE SHORT TITLE OF THIS ARTICLE IS THE "MARRIAGE AND ESTABLISHMENT CLAUSE ACT".

14-16-102. Purpose and findings.

(1) Applicability of the equal protection and due process clauses of the U.S. Constitution to ensure equality for all couples. THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT A SAME-SEX COUPLE AND AN OPPOSITE-SEX COUPLE ARE ENTITLED TO THE SAME RIGHTS, PROTECTIONS, AND BENEFITS UNDER THE LAW THAT ARE SECURED BY THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE U.S. CONSTITUTION.

(2) Relevance of marriage to religious authorities and beliefs. THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT THE WORD "MARRIAGE" OCCURS WITHIN VARIOUS RELIGIOUS AUTHORITIES AND THAT MANY CITIZENS HOLD VIEWS ON MARRIAGE THAT INVOLVE THEIR PERSONAL RELIGIOUS BELIEFS, INCLUDING THOSE RELIGIOUS BELIEFS THAT SUPPORT A SAME-SEX MARRIAGE AND THOSE RELIGIOUS BELIEFS THAT OPPOSE A SAME-SEX MARRIAGE.

(3) Applicability of the establishment clause of the U.S. Constitution to thwart religious intolerance. THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT RELIGIOUS INTOLERANCE AND THE HOSTILITY IT FOSTERS IS A DESTRUCTIVE FORCE IN SOCIETY, AND THE DANGER OF RELIGIOUS INTOLERANCE OCCURS WHEN A GOVERNMENT FAVORS OR DISFAVORS AN ISSUE INVOLVING RELIGIOUS BELIEFS. THE PEOPLE OF THE STATE OF COLORADO FURTHER FIND AND DECLARE THAT THE STATE AND ANY LOCAL GOVERNMENT, INCLUDING A COUNTY, A MUNICIPALITY, AND A CITY AND COUNTY, COMPLY WITH THE ESTABLISHMENT CLAUSE OF THE U.S. CONSTITUTION BY MAINTAINING A POSITION OF NEUTRALITY ON THE DEFINITION OF MARRIAGE.

(4) The individual liberty associated with the institution of marriage. THE PEOPLE OF THE STATE OF COLORADO FIND AND DECLARE THAT THE INSTITUTION OF MARRIAGE INVOLVES A FORM OF INDIVIDUAL EXPRESSION, WHETHER SECULAR OR RELIGIOUS, AND A

GOVERNMENT WITHIN A FREE SOCIETY PRINCIPALLY AFFORDS ITS CITIZENS THE LIBERTY TO FREELY EXPRESS THEMSELVES ACCORDING TO THEIR OWN BELIEFS.

14-16-103. The authority granted to the state or a local government to govern a union of a couple.

(1) **Protecting individual liberty by limiting government authority.** THE INDIVIDUAL LIBERTY TO DEFINE A MARRIAGE ACCORDING TO A PERSON'S INDIVIDUAL BELIEFS SHALL NOT BE ABRIDGED BY THE STATE OR A LOCAL GOVERNMENT PRESCRIBING OR RECOGNIZING ANY LAW THAT IMPLICITLY OR EXPLICITLY DEFINES THE WORD "MARRIAGE."

(2) **Legislative and administrative authority.** (a) THE LEGISLATURE AND ANY ADMINISTRATIVE AGENCY OF THE STATE OR A LOCAL GOVERNMENT MAY PRESCRIBE ANY LAW OR RULE THAT GOVERNS A CIVIL UNION BETWEEN A SAME-SEX COUPLE OR BETWEEN AN OPPOSITE-SEX COUPLE.

(b) ALL LAWS OR RULES INCONSISTENT WITH THIS ARTICLE OR SECTION 31 OF ARTICLE II OF THE COLORADO CONSTITUTION SHALL BE AMENDED OR REPEALED TO REMEDY ANY INCONSISTENCY.

(3) **Judicial, executive, and other governmental authority.** THE JUDICIARY, THE EXECUTIVE, AND ANY OTHER GOVERNMENTAL AUTHORITY OF THE STATE OR A LOCAL GOVERNMENT SHALL RECOGNIZE A MARRIAGE ESTABLISHED IN THE STATE OF COLORADO BEFORE THE EFFECTIVE DATE OF THIS ARTICLE OR A MARRIAGE ESTABLISHED OUTSIDE THE STATE OF COLORADO AS A CIVIL UNION.

14-16-104. The effect of this article on a legal right, protection, benefit, or obligation. (1) OTHER THAN SECURING FOR THE PEOPLE THE INDIVIDUAL LIBERTY TO DEFINE A MARRIAGE ACCORDING TO THEIR OWN BELIEFS, NOTHING WITHIN THIS ARTICLE SHALL BE CONSTRUED TO:

(a) INCREASE OR DECREASE A LEGAL RIGHT, PROTECTION, OR BENEFIT OWED TO AN INDIVIDUAL THROUGH AN OPERATION OF THE LAW; OR

(b) INCREASE OR DECREASE A LEGAL OBLIGATION OWED BY AN INDIVIDUAL, THE STATE, A LOCAL GOVERNMENT, OR ANY OTHER ENTITY THROUGH AN OPERATION OF THE LAW.

14-16-105. Severability. IF ANY PROVISION OF THIS ARTICLE OR THE APPLICATION OF THIS ARTICLE TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID, SUCH INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THIS ARTICLE THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION, AND TO THIS END THE PROVISIONS OF THIS ARTICLE ARE DECLARED TO BE SEVERABLE.

SECTION 3. Effective date. These voter enacted provisions shall take effect on July 1, 2017.

Exhibit B

Ballot Title Setting Board

Proposed Initiative 2015-2016 #114¹

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

An amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning marriage, and, in connection therewith, replacing the statement in the Colorado constitution that only a union of one man and one woman is valid or recognized as a marriage with a statement requiring the state of Colorado to respect the Establishment, Equal Protection, and Due Process Clauses of the United States constitution for issues concerning civil unions and marriages and enacting new statutes that prohibit the state or a local government from enacting or recognizing any law that defines marriage, require recognition of all out-of-state marriages and previously established Colorado marriages as civil unions, authorize laws and rules governing civil unions, and require the amendment or repeal of all existing inconsistent laws or rules.

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

Shall there be an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning marriage, and, in connection therewith, replacing the statement in the Colorado constitution that only a union of one man and one woman is valid or recognized as a marriage with a statement requiring the state of Colorado to respect the Establishment, Equal Protection, and Due Process Clauses of the United States constitution for issues concerning civil unions and marriages and enacting new statutes that prohibit the state or a local government from enacting or recognizing any law that defines marriage, require recognition of all out-of-state marriages and previously established Colorado marriages as civil unions, authorize laws and rules governing civil unions, and require the amendment or repeal of all existing inconsistent laws or rules?

Hearing April 20, 2016:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 4:05 p.m.

¹ Unofficially captioned “Civil Unions and Marriages” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Exhibit C

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APR 27 2016

S. WARD

1:38 P.M.

BEFORE THE COLORADO BALLOT TITLE SETTING BOARD

Colorado Secretary of State

Laura C. Reinsch, Objector

vs.

D'Arcy Straub and Gene Straub, Proponents.

**MOTION FOR REHEARING ON INITIATIVE 2015-2016 #114
("Civil Unions and Marriage")**

Laura C. Reinsch, a registered elector of the State of Colorado, through legal counsel, Recht Kornfeld P.C., objects to the Title Board's title and ballot title and submission clause set for Initiative 2015-16 #114 ("Civil Unions and Marriage").

A. The Title Board set a title for Initiative 2015-16 #114 on April 20, 2016.

At the hearing held in connection with this proposed initiative, the Board designated and fixed the following ballot title and submission clause:

Shall there be an amendment to the Colorado constitution and a change to the Colorado Revised Statutes concerning marriage, and, in connection therewith, replacing the statement in the Colorado constitution that only a union of one man and one woman is valid or recognized as a marriage with a statement requiring the state of Colorado to respect the Establishment, Equal Protection, and Due Process Clauses of the United States constitution for issues concerning civil unions and marriages and enacting new statutes that prohibit the state or a local government from enacting or recognizing any law that defines marriage, require recognition of all out-of-state marriages and previously established Colorado marriages as civil unions, authorize laws and rules governing civil unions, and require the amendment or repeal of all existing inconsistent laws or rules?

B. Initiative #114 contains multiple subjects, contrary to Colo. Const., art. V, sec. 1(5.5).

1. This measure cannot be encapsulated within a single subject.

The single subject of the proposed initiative – "concerning marriage" – is really an umbrella label for a measure that the proponents have not adequately defined and that the Title Board admits defies clear explanation. *In re Title, Ballot Title, and Submission Clause and Summary for Proposed Initiative for 1997-1998 # 64*, 960 P.2d 1192, 1200 (Colo. 1998) ("If the entire judicial branch were regarded as a single subject, incongruous and disconnected provisions

could be contained in a single initiative and the very practices the single subject requirement was intended to prevent would be facilitated.”). In the original hearing on this measure, members of the Board were candid about the confusion that is inherent to this measure due to the wording used. Because the measure is vague and incomprehensible, the Board cannot set a title because it cannot identify the confines of the measure itself.

[T]he Board's uncertainty as to whether the instant initiatives contained multiple subjects necessarily leads us to the conclusion that the title does not satisfy the long-standing requirement that it “clearly” state the single subject proposed by the initiatives. Before a clear title can be written, the Board must reach a definitive conclusion as to whether the initiatives encompass multiple subjects. Absent a resolution of whether the initiatives contain a single subject, it is axiomatic that the title cannot clearly express a single subject.

In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 25, 974 P.2d 458, 468-69 (Colo. 1999).

2. This measure vaguely addresses constitutional rights under the U.S. Constitution by amending one provision of the State Constitution and also prospectively eliminates the fundamental right of marriage.

In addition to acknowledging the applicability of certain constitutional precepts under the U.S. Constitution, the initiative also abolishes state-sanctioned marriage – a fundamental constitutional right – and codifies civil unions, thus altering certain statutory rights of persons who may seek the benefits of marriage but do not seek or are philosophically opposed to a religious marriage. *In re Title, Ballot Title, and Submission Clause for Proposed Initiative 2001-2002 No. 43*, 46 P.3d 438, 448 (Colo. 2002) (measure that altered petition rights and fundamental constitutional right of personal property ownership violated the single subject requirement). The right to marry is a fundamental constitutional right, and no couple may be deprived of that right. *Obergefell v. Hodges*, 135 S.Ct. 2584, 2605 (2015). The prospective abolition of a fundamental constitutional right is a separate subject.

3. This measure vaguely addresses constitutional rights under the U.S. Constitution by amending one provision of the State Constitution and also retroactively eliminates the fundamental right of marriage.

In addition to acknowledging the applicability of certain constitutional precepts under the U.S. Constitution and prospectively abolishing the fundamental right of state-sanctioned marriage, the initiative also retroactively abolishes the fundamental right of state-sanctioned marriage and converts any Colorado married couple's legal status from marriage to a civil union. *In re Proposed Petition to Add Section 2 of Article VII to the Colorado Constitution*, 900 P.2d 104, 109 (Colo.1995) (creation of retroactive fundamental rights was a second subject in a measure that addressed petition procedures). That retroactive deprivation of a fundamental constitutional right is a separate subject.

4. This measure vaguely addresses constitutional rights under the U.S. Constitution by amending one provision of the State Constitution and also adopts civil unions as the sole form of state-sanctioned union.

The obvious needs restating here: a civil union is not a marriage. Colorado statute recognizes this fact. C.R.S. §§14-15-102 (“the general assembly, in the exercise of its plenary power, has the authority to define other arrangements, such as a civil union between two **unmarried persons** regardless of their gender”); -118 (Colorado Civil Union Act “**shall not be construed to create a marriage** between the parties to a civil union...”)(emphasis added). The courts also recognize this fact. *See, e.g., Bishop v. Oklahoma ex rel. Edmondson*, 447 F.Supp. 2d 1239, 1247 (2006); *Burns v. Burns*, 560 S.E.2d 47, 48 (Ga. App. 2002). “Civil unions” thus does not fit within the alleged single subject of “concerning marriage.”

Accordingly, Initiative #114’s repeal of the right to state-sanctioned marriage is its own subject. The adoption of a comprehensive system of civil unions (prospective and retroactive) is “separate and unconnected” as a subject of this measure. *See #64, supra*, 960 P.2d at 1200.

5. This measure also authorizes the enactment of restrictive or conflicting laws and rules about civil unions, including by “any administrative agency of the state or a local government.”

The measure also empowers the General Assembly “and any administrative agency of the state or a local government” to “prescribe any law or rule that governs a civil union between a same-sex couple or between an opposite-sex couple.” This is the measure’s “Kim Davis” provision, authorizing any local official to erect impediments to civil unions as she might see fit. Not only does this initiative seek to eliminate a fundamental right, prospectively and retroactively, this specific provision surreptitiously authorizes local agencies to undercut the remaining “right” of a civil union. This is precisely the type of provision that is “coiled in the folds” of a complex measure that will surprise voters and thus violate the single subject requirement. *In re Proposed Initiative for 2009–2010 # 91*, 235 P.3d 1071, 1079-80 (Colo. 2010).

6. The Title Board lacks jurisdiction to set a title for a measure that is patently unconstitutional.

The Title Board is a constitutionally authorized body. The elected and appointed officials who are its members, or their designees, have no power to act contrary to the United States Constitution. An initiative that deprives Coloradans of a recognized fundamental right is, by definition, contrary to the Constitution. In order to uphold their oaths of office, no appointee to the Board or a designee acting for a statutory appointee may establish a ballot title for this initiative. Initiative #114 is clearly unconstitutional and clearly unlawful, a matter that is now settled law, and because it cannot be given effect, should not be placed on the ballot.

C. Initiative #114's title is misleading and inaccurate, contrary to C.R.S. §§ 1-40-106, -107.

1. An initiative that cannot be fully explained and understood by the Board cannot be accurately described by the Board in a ballot title.

2. The phrase "require recognition of all out-of-state marriages and previously established Colorado marriages as civil unions" is misleading when the measure "prevents recognition" of all state-sanctioned marriages.

3. The title fails to clearly and specifically state that the initiative proposes to repeal the fundamental to marry, both prospectively and retroactively.

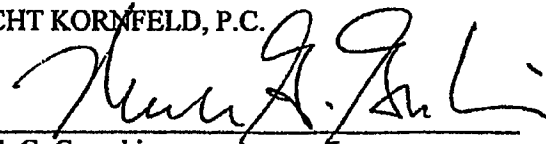
4. The phrase "authorize laws and rules governing civil unions" fails to describe the fact that such provisions can: (a) be adopted at the state or the local levels; (b) emanate from administrative agencies at either level; and (c) either impose or remove requirements related to civil unions.

5. The phrase "prohibit the state or local government from enacting or recognizing any law that defines marriage" fails to succinctly describe what the initiative does: "prohibit state-sanctioned marriage in Colorado."

WHEREFORE, the titles set April 20, 2016 should be reversed, due to the single subject violations and the Board's lack of jurisdiction, as addressed herein, or in the alternative, be reworded to account for the misleading and inaccurate representation of the initiative.

RESPECTFULLY SUBMITTED this 27th day of April, 2016.

RECHT KORMFELD, P.C.



Mark G. Grueskin
Heather R. Hanneman
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Objector's Address:

Laura Carolyn Reinsch
1661 Cook St., Apt 204
Denver, CO 80206

Exhibit D

Ballot Title Setting Board

Proposed Initiative 2015-2016 #114¹

Hearing April 20, 2016:

Single subject approved; staff draft amended; titles set.

Hearing adjourned 4:05 p.m.

Rehearing April 28, 2016:

Motion for Rehearing granted; title setting denied on the basis that the initiative does not constitute a single subject.

Hearing adjourned 1:07 p.m.

¹ Unofficially captioned “Civil Unions and Marriages” by legislative staff for tracking purposes. This caption is not part of the titles set by the Board.

Exhibit E

TITLE SETTING BOARD

April 28, 2016

Proposed Initiative 2015-2016 #114 "Civil
Unions and Marriages"

THE BOARD

Suzanne Staiert, Chair, Deputy Secretary of State
Jason Gelender, Office of Legislative Legal Services
David Blake, Chief Deputy Attorney General

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

2 MS. STAIERT: All right. We are back
3 on the record with Proposed Initiative 2015-2016
4 #114.

5 And if the proponents could come
6 forward and let us know you're here and...

7 MR. D'ARCY STRAUB: I'm D'Arcy Straub.

8 MR. GENE STRAUB: I'm Gene Straub,
9 cosponsor.

10 MS. STAIERT: Okay. And we have a
11 Motion for Rehearing that was filed by Mr. Grueskin.

12 MR. BLAKE: Two of them.

13 MS. STAIERT: Oh, and we have another
14 Motion for Rehearing.

15 MR. BLAKE: Right?

16 MS. STAIERT: No. No.

17 MR. GELENDER: I think we just have one
18 on this one.

19 MS. STAIERT: Just one. Okay. Just
20 Mr. Grueskin.

21 MR. BLAKE: Wait. No. Wait.

22 MR. GRUESKIN: Thank you, Madam Chair.

23 MS. STAIERT: It was in your packet.

24 MR. BLAKE: Walker 127; right?

25 MS. STAIERT: Yeah.

1 MR. BLAKE: And then Jason Dunn has Don
2 Childears, 127.

3 MS. STAIERT: We're on 114.

4 MR. BLAKE: Sorry.

5 MR. GRUESKIN: So do we have one or
6 two?

7 MS. STAIERT: We have one.

8 MR. BLAKE: One.

9 MR. GRUESKIN: Oh, okay.

10 MS. STAIERT: We have two on 127.

11 MR. GRUESKIN: All right. Well, my
12 name is Mark Grueskin, and I represent Laura Reinsch,
13 the objector here. We've set forth jurisdictional
14 grounds; we've set forth your title grounds.

15 And let me just say as a preliminary
16 matter, I know that ground No. 6 is one that the
17 Board would typically not address in terms of whether
18 or not this is so patently unconstitutional that you
19 can't address it. And I appreciate that, and I --
20 and I believe I could argue to the Board that there
21 is ample precedent, but it is not other jurisdictions
22 in terms of the ability of the courts to take on the
23 right of constitutional preclearance. We are raising
24 it now knowing that you probably can't get to that
25 issue but reserving the right to raise that in front

1 of the Colorado Supreme Court should you not agree
2 with us on one of the other grounds that this is the
3 multi-subject initiative.

4 I'm happy to go through our motion, but
5 I also know the Board has gone through it, and I'm
6 just as happy to take questions.

7 MS. STAIERT: All right. Does anyone
8 have any -- let's start with the single subject. So
9 any questions on that?

10 MR. GELENDER: I do.

11 Going through the various case law and
12 you've cited quite a few talking about the right to
13 marriage being a fundamental right. Do any of those
14 cases -- the issue is while it's true and that they
15 say that, they all -- as far as I can tell, they all
16 say it in the context of it being denied to some
17 people and not to others and that it's a fundamental
18 right that's assumed. Are you aware of any case
19 where it says, well, we're not going to discriminate
20 about it; we're just saying no cake for anybody, so
21 to speak? You know, I mean, is it fundamental in the
22 case that it cannot be equally denied?

23 MR. GRUESKIN: It -- it -- so let's
24 talk about what this initiative does. It abolishes
25 marriage. It creates and substitutes civil unions.

1 It reserves the right for anyone who wants to go
2 through a religious ceremony to go through that
3 religious ceremony, which they can call marriage.
4 They simply can't call it a state-sanctioned
5 marriage.

6 The problem is if you don't believe in
7 a religion and you don't have a religious affiliation
8 and there is no one who will marry you who has that
9 religious affiliation, you cannot be married. And in
10 any event, the notion of marriage in Obergefell and
11 the cases it relies upon is the fact that there is a
12 state-sanctioned status that is given to couples that
13 cannot be denied. And this measure inherently denies
14 that state-sanctioned status. And you can -- you can
15 quibble over whether it denies it to everyone or it
16 denies it to everyone who is atheist or agnostic or
17 just PO'd at religion and has no religious
18 affiliation. But it denies marriage. Make no
19 mistake about it.

20 But to your question, has anyone tried
21 to deny marriage outright in this manner? No. I
22 don't think the fact that this is broader gives it
23 any defense there.

24 MR. GELENDER: Well, when the cases all
25 have, you know, a significant equal protection

1 component, they might. I'm not necessarily sure one
2 way or the other, just looking for clarification.

3 MS. STAIERT: Any questions?

4 Do the proponents want to respond at
5 all on the single subject?

6 MR. D'ARCY STRAUB: Well, I think
7 Mr. Grueskin misleads the Title Board a little bit
8 when he attempts to talk about state-sanctioned
9 marriages using Obergefell. If you do a quick word
10 search of that opinion, the Supreme Court never
11 explicitly uses the term "state-sanctioned marriage."
12 They talk about marriage. And this proposal does not
13 go ahead and eliminate marriage or the rights
14 attached to marriage. Obergefell can be interpreted
15 to go ahead and give same sex couples the rights that
16 are associated with marriage, and that's what really
17 is important with Obergefell. It's not so much
18 marriage, but it's the rights associated with
19 marriage. And under that, same sex couples and
20 opposite sex couples are the same and, you know,
21 whether or not you want to call it a state-sanctioned
22 marriage that's not really important. What's
23 important is that same sex couples and opposite sex
24 couples under this proponent (sic) are treated equal.
25 And, actually, I'm not certain exactly

1 how you want to do this, point by point 1 through 6.
2 My general comments are that so far it's single
3 subject here. Mr. Grueskin admits because the
4 measure is vague and incomprehensible and if he
5 doesn't understand it, how can he walk in here and
6 say there is more than one subject. To actually say
7 there is more than one subject, you actually have to
8 understand the measure.

9 Last week when you identified a
10 single subject, it took all of about 30 seconds to a
11 minute to decide that. I -- if you go through the
12 measure, the single subject is encompassed at
13 14-16-103 where essentially the single subject is is
14 that the government cannot implicitly or explicitly
15 define marriage. And of the remaining provisions
16 within 14-16-103, they are consequences or effect
17 of -- effect of that, the single subject. So if you
18 have something that says that the government can't go
19 ahead and define marriage, that means that statutes
20 are going to have to be changed. The consequence of
21 that is that the General Assembly is going to have to
22 amend laws as well as administrative agencies. So
23 far as the judicial effects and executive and other
24 governmental authorities, if the government can't go
25 ahead and define marriage, that means that the courts

1 are going to be affected. And that's all that
2 14-16-103 says. I could have actually left two and
3 three out and people would have gone, well, what does
4 the -- what is required under one? And I just simply
5 fleshed that out and explained what will naturally
6 occur.

7 So as far as there is more than one
8 subject, I don't think that's the case. I think the
9 Title Board took a minute to resolve this issue that
10 there is a single subject, and I don't think there's
11 an issue about that.

12 I think Mr. Grueskin is also attempting
13 to use this proceeding and have the Title Board act
14 as a court, and you can't go ahead and make
15 determinations about unconstitutionality here. If
16 something -- if a measure passes and violates the
17 law, that's what the court system is for. It's not
18 for the Title Board to go ahead and make a decision
19 here about -- about how this might take effect and
20 how it could be unconstitutional. I mean, if
21 there -- if an initiative is in violation of the law,
22 then Amendment 64 never would have seen the day of
23 light (sic) because there are federal laws that go
24 ahead and prohibit the use of marijuana, but
25 marijuana was passed.

1 So it's not within the purview of the
2 Board to go ahead and delve into what's
3 constitutional and what isn't unconstitutional. Just
4 because Mr. Grueskin comes in here and says it's
5 unconstitutional, you can't make a determination
6 giving merit to his claims.

7 MR. GELENDER: Do you believe that this
8 measure substantively affects any right, either, you
9 know, granted by government, either state or federal,
10 that changing, say, for example, I'm married, my
11 status to that of a civil union affects me in any way
12 under current law?

13 MR. D'ARCY STRAUB: Right. The -- what
14 is it? 14-16-104 goes ahead and states that legal
15 rights are not to be affected.

16 MR. GELENDER: And I think that can
17 work for Colorado. But if the measure affects, say,
18 a federal right, I don't know that that's effective,
19 and I think it's problematic to have an initiative
20 that says one thing, and it can't necessarily be the
21 case.

22 MR. D'ARCY STRAUB: Right. But, again,
23 this goes to the effect of the measure; right? And
24 you aren't supposed to go ahead and make an
25 evaluation upon how this might be effectively

1 applied. That's not really the role of the Title
2 Board. Your role here is to determine whether or not
3 there's a single subject, and you did that within a
4 minute last week, and now you're supposed to set a
5 title.

6 MR. GELENDER: Yeah, and -- well, I'll
7 let anyone else. No?

8 MS. STAIERT: I don't have any
9 questions.

10 MR. GELENDER: All right. Well, I
11 think this is one that notwithstanding the relatively
12 short amount of time we spent setting a single
13 subject that I think I have a change of mind on that
14 and actually not specifically for any of the reasons
15 that are in the Motion for Rehearing but because that
16 triggered me thinking about some other things. And
17 mostly it's the case before Obergefell, which is
18 United States v Windsor, and what that case did was
19 essentially struck down part of the Federal Defensive
20 Marriage Act, essentially saying that the federal
21 government and other states had to treat a same sex
22 couple that was married in a state where same sex
23 marriage was then legal, as married for purposes of
24 their statutes if they do the same for traditional
25 marriages.

1 As a consequence what followed that is
2 the IRS issued a revenue ruling, 2013 No. 17, which
3 said that for federal income tax filing purposes if
4 you were in a civil union, you're not allowed to file
5 a joint federal tax return. But if you're a married
6 couple, whether same sex or opposite sex, you have
7 that choice.

8 So my problem is what I think that this
9 measure has the effect of doing, notwithstanding its
10 protestations to the contrary, and directly -- I
11 don't think it's a speculative effect -- is it takes
12 any couple, whether now same sex or opposite sex, who
13 is married in the state of Colorado, unable to file a
14 joint federal income tax return.

15 And I think that effect is significant.
16 I think it's surprising because I don't -- well,
17 let's put it this way. If I didn't think of it the
18 first time around, then I doubt the average voter
19 will. And to me that is not a speculative effect of
20 the nature we can't consider but something that under
21 existing laws is sort of a clear and direct
22 consequence. And I think it's sufficiently coiled in
23 the folds that I'm inclined to find that it's the
24 second subject.

25 MR. D'ARCY STRAUB: If I may respond to

1 that. If this initiative passes, the effective date
2 is July 1, 2017. So the General Assembly would
3 actually have one legislative session to address your
4 concerns. So there are remedies out there to go
5 ahead and address arguments such as yours. So if the
6 General Assembly -- this is statutory; it's not
7 constitutional. It's statutory. So if your argument
8 about how this is to be effectively applied is
9 legitimate, then the General Assembly can go ahead
10 and address that concern. So, I mean, I don't think
11 that this is naturally --

12 MR. BLAKE: Well, wait. Before, when
13 you were answering Mr. Grueskin, you were talking we
14 couldn't consider interpretations and speculate on
15 what courts and -- we can't, I don't think, consider
16 anymore so what the General Assembly might do either;
17 right? They may do it; they may not do it.

18 MR. D'ARCY STRAUB: That's true.

19 MR. BLAKE: If they may not do it, then
20 wouldn't that make Mr. Gelender's conclusion true?
21 And even if they did, do they get to override a
22 federal IRS ruling? You're just saying they would
23 repeal your initiative?

24 MR. D'ARCY STRAUB: Right. This is the
25 problem with going ahead and looking at an initiative

1 and speculating about how it might be applied. The
2 Title Board can't do this.

3 MR. BLAKE: Right. But you're asking
4 us to speculate that if that's correct, they'll fix
5 it.

6 MR. D'ARCY STRAUB: Right. And this is
7 the problem with it. I mean, he's saying this is how
8 it could be effectively applied, and I'm going back
9 and saying, well, this is what might happen if it is
10 applied.

11 MR. BLAKE: Yeah. But what he's saying
12 is it's -- it actually occurs if this is adopted that
13 it modifies the rights of every married couple in the
14 state who can no longer file jointly and that there
15 is nothing in here which makes this a problem for all
16 of those people because they will not understand
17 that, yet it will modify a right of theirs, if I
18 understand your argument.

19 MR. GELENDER: Yeah. Just to clarify
20 it, only if you're actually married in Colorado.
21 Because I think if you're married out of state, the
22 feds would still give that state -- you know, if you
23 were married in Ohio or some place consider you
24 married in Ohio, and I don't think this would affect
25 the feds here. But I think once Colorado denies

1 that -- say, my wife and I who were married in
2 Colorado aren't married anymore, then it hits us.

3 MR. BLAKE: You can file jointly in
4 Colorado?

5 MR. GELENDER: What's that?

6 MR. BLAKE: Under a civil union?

7 MR. GELENDER: It's very interesting.
8 What the Colorado statute says -- there was a bill in
9 2014, and it actually says -- if the feds let you
10 file -- you have to file the same way you do with the
11 feds.

12 MR. BLAKE: Right.

13 MR. GELENDER: So the feds -- if the
14 feds let you file jointly because you're married at
15 the time -- now it probably doesn't matter. At the
16 time, say, if you were married in New York and
17 allowed same sex marriage, Colorado didn't recognize
18 that, so you had civil union status in Colorado, you
19 could still file a joint state return if you could
20 file federally based on your New York marriage, if
21 that makes sense.

22 MR. D'ARCY STRAUB: Right. And if I
23 may address your argument, basically what this does
24 is it says -- it leaves the decision -- if you want
25 to consider yourself married, this allows you to

1 consider yourself to be married; right?

2 MR. GELENDER: But it doesn't let the
3 federal government consider you to be married if your
4 marriage occurred in Colorado. That's the rub.

5 MR. D'ARCY STRAUB: Well, yes, but you
6 see the thing is is that this statute, one, it says
7 that your legal rights are not to be affected; right.
8 So you're actually interpreting this incorrectly.

9 MS. STAIERT: But the state doesn't
10 have the ability to tell any other state or the
11 federal government or international or anything else
12 that you don't -- you know, we don't get to tell them
13 how to interpret it. So, I mean, beyond just the IRS
14 implication, I mean, there could be all kinds -- you
15 know, if we wrote it, we'd have to write something
16 that said -- and, you know, any -- any other right
17 you may have that includes the requirement to be
18 married would potentially be null and void in any
19 other --

20 MR. D'ARCY STRAUB: Yeah, well, in a
21 way it's actually easier to pass yourself off as
22 being married under this statute because it's left as
23 an individual liberty.

24 MS. STAIERT: No, it's not because you
25 get no documentation from the government. What do

1 you mean pass yourself off? I mean, the federal
2 government doesn't care what you call and tell them
3 you are. I mean, they care what documents you have
4 to prove something or another. And that's going to
5 be true if you go to another state and try to obtain
6 a divorce or there's a custody issue or any other
7 number of things that are predicated on a marriage
8 occurring. So, I mean, to say it's easy to...

9 MR. D'ARCY STRAUB: Right. Well, I
10 basically disagree with some provisions of this and
11 how it could be effectively applied.

12 You're not a court of law. You're a
13 Title Board. You're supposed to determine if there's
14 a single subject. And if there's a title. And
15 you're supposed to leave it to the voters to
16 determine whether or not they wish to adopt this.
17 There is a degree of flexibility built into this
18 measure, so that if somebody says, oh, this could be
19 problematic, the General Assembly has one legislative
20 session to go ahead and address those issues and, you
21 know, if they -- they could repeal the whole thing if
22 it's...

23 MR. GELENDER: Right. The objection
24 isn't to the substance. It's to the fact that this
25 has a legal effect, and not a speculative legal

1 effect, but, I think, a direct. I mean, we do have
2 to, to some extent, figure out what the measure does,
3 and the effect I've described is something I believe
4 the measure directly does, not something that might
5 happen that a court might read it one way or another
6 or that there's room for interpretation. It's what
7 this does. And we have to reflect that in a title,
8 and in this case you've got a measure that explicitly
9 says, well, that's not what it does, and that
10 conflict to me is, at a minimum, a second subject. I
11 think it's misleading the voters, and I think it's
12 pretty darn well buried in here.

13 MR. D'ARCY STRAUB: It's -- pardon?

14 MS. STAIERT: Buried.

15 MR. GELENDER: Coiled in the folds, as
16 they say. That's a court directive to us. Something
17 that a reasonable voter would not reasonably
18 anticipate seeing. And that's -- you know -- when --
19 and to be fair, I mean, I understand that it's very
20 frustrating, I think to a proponent, when a member of
21 the Title Board changes their mind on something,
22 especially when they've set the first time around,
23 and the reasoning is while this measure has been, you
24 know, somewhat challenging to get a good grip on, it
25 is -- at last week's hearing I believed in looking at

1 this, that for all language ultimately it didn't
2 really have -- you know, it ended up being basically
3 a matter of semantics, okay, we're not going to call
4 marriage marriage anymore and it applies to
5 everybody, and it doesn't really affect rights.

6 And now I've found, essentially, a real
7 world -- example of a real world legal effect that
8 supposedly this measure is not supposed to have, and
9 it was pretty darn hard to find, which is why I
10 didn't find it the first time, and I think that's
11 problematic based on our single subject case law.

12 MR. D'ARCY STRAUB: Well, I'm going to
13 say this one last time. You're not allowed to assess
14 how this can be effectively applied.

15 MS. STAIERT: All right. Let's hear
16 from Mr. Grueskin.

17 MR. GRUESKIN: I would only incorporate
18 the comments made by Mr. Gelender. I think that
19 they're more specific perhaps than where we went. I
20 would remind the board that the Court has time and
21 time again said that in order to conduct a single
22 subject analysis, you need to interpret the measure,
23 and you need to apply the measure, and you need to
24 figure out whether it was initiative #55 or some of
25 the other ones, you had to -- you had to pick it

1 apart and engage in the analysis that Mr. Gelender
2 has undertaken. We think that the arguments raised
3 are correct and proper, and to Mr. Gelender's point,
4 it is not something that people would know. They
5 would not know -- no married couple would readily
6 understand what they were passing here because of the
7 nature of the vague language and the substitution of
8 the status of civil union which -- which they would
9 need to know and which because it's not explicit
10 renders this measure multi subject, and we would ask
11 that you return it to the proponents so that they may
12 correct it for the future.

13 MS. STAIERT: All right. Discussion?

14 MR. BLAKE: You go.

15 MS. STAIERT: Well, Jason kind of went.

16 MR. BLAKE: I'm still looking.

17 MS. STAIERT: I mean, when I initially
18 read the -- I mean, I know we set a pretty simple
19 title, but I think maybe the reason we set a simple
20 single subject was because it was pretty overarching
21 and broad, and I think that's where the vagueness
22 comes in. Sometimes when we can't really understand
23 the direct impact of the measure, we set a broader
24 title and then attempt to explain underneath what it
25 does. I think in this case I'm

1 probably inclined to agree with Mr. Gelender that we
2 can't understand the impacts because of the vagueness
3 of it and that's what's leading to our inability to
4 set a clear question that could possibly advise
5 voters of -- of what the consequences are, and I
6 think we do have a responsibility to set something
7 that's clear so that there's not a -- there's not
8 issues that are folded in the coils.

9 And so on its face it looks like we're
10 just making everybody equal by taking marriage out
11 and transferring marriage to a religious statement or
12 something that doesn't have a legal effect, but by
13 doing that the consequences are something that we
14 really can't capture. And I'm not sure we can set a
15 question like that.

16 You want to take a break?

17 MR. BLAKE: Just give me a couple of
18 minutes. Yeah, you want to give me five minutes?

19 MS. STAIERT: Okay. We're going to
20 take a five-minute recess.

21 (Recess taken.)

22 MS. STAIERT: All right. We are back
23 on the record on 2015-2016 #114, and we were about
24 to -- well, I think we need a motion probably.

25 MR. D'ARCY STRAUB: Could I have --

1 MR. GELENDER: I think David was going
2 to make his comments.

3 MS. STAIERT: Oh, David was going to
4 make his comments. Okay.

5 MR. GELENDER: And I think Mr. Straub
6 wants to comment as well.

7 MS. STAIERT: All right.
8 Go ahead.

9 MR. D'ARCY STRAUB: I have an
10 additional question. I went ahead and stated that
11 the single subject or first subject is the government
12 cannot implicitly or explicitly define marriage.
13 That's one subject. What is the second subject?

14 MR. GELENDER: I would say -- well, it
15 could be something like denial of the right of
16 currently married Coloradans to joint file income
17 taxes, perhaps.

18 MR. D'ARCY STRAUB: And where is that
19 language within the initiative?

20 MR. GELENDER: Where is that language
21 within the initiative? In the language that says,
22 no, there is no longer marriage. For people married
23 in Colorado are no longer married, that's where.

24 MR. D'ARCY STRAUB: But that's not what
25 it is.

1 MS. STAIERT: Okay. We're not going to
2 have a debate about it.

3 MR. BLAKE: And let me -- maybe I can
4 add a little bit to it. So I just want to make sure
5 the record is clear, particularly since we're
6 switching, and I actually am persuaded by
7 Mr. Gelender.

8 So I'll cite two cases, one of which is
9 the intent of the subject -- of the single subject
10 requirement is to prevent voters from being confused
11 or misled, which is where I think this comes in as
12 a -- as a single subject jurisdictional question, and
13 to ensure that each proposal is considered on its own
14 merits." And that's 962 P 2nd 927.

15 And then I just wanted to make sure,
16 the other case that we referred to was In Re Title
17 No. 3 274 P 3rd 562. And I'll read that into the
18 record. "We have previously explained that the
19 single subject rule prevents two, quote, dangers
20 associated with omnibus initiatives. And it was at
21 least argued by opponents that marriage was an
22 umbrella subject. First, combining subjects with no
23 necessary or proper connection for the purpose of
24 garnering support for the initiative from various
25 factions that may have different or even conflicting

1 interests could lead to the enactment of measures
2 that would fail on their own merits."

3 I think the relevance there is that if
4 this -- if it was clear that this would undermine
5 anyone who's married from filing jointly both state
6 and federally, that that would be significant, and it
7 may well fail on its own merits if that were part of
8 the measure.

9 Second, the single subject rule helps
10 avoid, quote, voter surprise and fraud occasioned by
11 the inadvertent passage of a surreptitious provision
12 coiled up in the folds of a complex initiative."

13 As we talked about before, I found this
14 to be a complex initiative, and I do agree that it
15 would be voter surprise to learn that if it were to
16 pass and if they voted for it that they would not be
17 able to file jointly by operation of law.

18 So there's my explanation for why I
19 would support a motion that the Title Board lacks
20 jurisdiction to set a title.

21 MS. STAIERT: You want to make a
22 motion?

23 MR. GELENDER: Yes.

24 MR. BLAKE: But I don't know what the
25 title is or the motion is. I want to defer to you on

1 that one.

2 MR. GELENDER: I move that we grant the
3 Motion for Rehearing and find that Proposed
4 Initiative 2015-'16 #114 does not have a single
5 subject and that we lack jurisdiction to set a title.

6 MR. BLAKE: Second.

7 MS. STAIERT: All those in favor?

8 Aye.

9 MR. BLAKE: Aye.

10 MR. GELENDER: Aye.

11 (Ended at 1:07 p.m.)

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REPORTER'S CERTIFICATE

STATE OF COLORADO)
COUNTY OF DENVER) ss.

I, Jennifer W. Hulac, Registered Professional Reporter and Notary Public within and for the State of Colorado, do hereby certify that the foregoing constitutes a true and correct transcript.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

IN WITNESS WHEREOF, I have affixed my signature and seal this 11th day of May, 2016.

JENNIFER W. HULAC
Registered Professional Reporter