

ATTACHMENT 3

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COLORADO DEPARTMENT OF STATE TITLE BOARD
2007-2008 #31

TRANSCRIPT OF HEARING
JUNE 20, 2007

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

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

Beth A. Milliken
Court Reporter

P R O C E E D I N G S

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 MR. HOBBS: Questions for Mr. Ramey.

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

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

21 MR. RAMEY: That means I lose.

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

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

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

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

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

25 And so the fact that it may be

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. HOBBS: Okay. Thank you.

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

20 MR. RAMEY: Okay.

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

25 MR. WESTFALL: Good afternoon,

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

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

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

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

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

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

1 forth in the enabling statutes in single subject.

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

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

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

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

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

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

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

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

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

3 MR. HOBBS: Okay.

4 MR. CARTIN: Thank you.

5 Mr. Westfall, I have a question.

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

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

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

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

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

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

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

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

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

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

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

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

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

19 MR. WESTFALL: I understand.

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

22 MR. WESTFALL: Okay.

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

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

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

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

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

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

8 MR. CARTIN: Thank you.

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

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

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

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

7 MR. HOBBS: Okay.

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

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

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

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

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

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

25 So, you know, in a quick read of