

CERTIFICATION OF WORD COUNT: 2,967

<p>SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue Denver, Colorado 80203</p>	
<p>ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2006) Appeal from the Ballot Title Setting Board IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2005-2006 #109 Petitioners: Jean Dubofsky and Patrick Steadman, Objectors, v. Respondents: Kevin Lundberg and Will Perkins, Proponents, and Title Board: WILLIAM A. HOBBS, JASON DUNN, and SHARON EUBANKS</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Attorneys for Petitioners: Mark G. Grueskin, #14621 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: 303-292-5656 Fax Number: 303-292-3152 E-mail: mgrueskin@ir-law.com</p>	<p>Case No.: 06 SA 172</p>
<p>PETITIONERS' OPENING BRIEF</p>	

TABLE OF CONTENTS

ISSUES PRESENTED	1
STATEMENT OF THE FACTS	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
LEGAL ARGUMENT	3
I. The Proposed Initiative does not reflect a single subject.....	3
A. Single subject standards	3
B. "Similar to marriage" is an exceedingly broad phrase that will govern public treatment of diverse types of relationships	4
II. The ballot title is misleading.....	10
A. Statutory requirements for an accurate, fair title	10
B. "Legal status similar to marriage" is an obscure phrase that blocks	11
CONCLUSION.....	13

TABLE OF AUTHORITIES

Cases

<i>Citizens for Equal Protection, Inc. v. Bruning</i> , 368 F.Supp.2d 980 (D.Neb. 2005).....	5, 6, 9
<i>In re Breene</i> , 24 P. 3 (Colo. 1890).....	8, 10
<i>In re Proposed Initiative for "Public Rights in Waters II"</i> , 898 P.2d 1076 (Colo. 1995).....	3
<i>In the Matter of the Title, Ballot Title and Submission Clause and Summary for 1999-2000 #25</i> , 974 P.2d 458 (Colo. 1998).....	4, 8
<i>In the Matter of the Title, Ballot Title and Submission Clause for 2003-2004 #32 & #33</i> , 76 P.3d 460 (Colo. 2003).....	3
<i>In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2005-06 #55</i> , Case No. 06SA20 (June 12, 2006).....	13
<i>In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2005-06 #74</i> , Case No. 06SA041 (May 30, 2006).....	3
<i>In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 1997-98 #30</i> , 959 P.2d 822 (Colo. 1998).....	4
<i>In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43</i> , 46 P.3d 438 (Colo. 2002).....	4
<i>In the Matter of the Title, Ballot Title and Submission Clause, and Summary for a Proposed Initiative on Water Rights</i> , 877 P.2d 321 (Colo. 1994).....	12
<i>In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29</i> , 972 P.2d 257 (Colo. 1999).....	12, 13
<i>In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Proposed Election Reform Amendment</i> , 852 P.2d 28, 33 (Colo. 1993).....	11

<i>Salzman v. Bachrach</i> , 996 P.2d 1263 (Colo. 2000).....	6, 9
---	------

Statutes

Colorado Revised Statutes Section 1-40-106(1).....	10
Colorado Revised Statutes Section 1-40-106(2).....	10, 11
Colorado Revised Statutes Section 1-40-106(3)(b).....	12
Colorado Revised Statutes Section 1-40-106.5(1)(e)(II).....	4
Colorado Revised Statutes Section 1-40-107(2).....	2, 11

Other Authorities

G. Blumberg, <u>Legal Recognition of Same-Sex Conjugal Relationships: the 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective</u> , Symposium: <u>Integration, Difference, & Citizenship: Celebrating 40 years of the UCLA Law Review</u> , 51 UCLA L.Rev. 1551 (2004)	6
--	---

Constitutional Provisions

Colorado Constitution, Article II	1
Colorado Constitution, Article V, § 1(5.5)	4, 7

ISSUES PRESENTED

1. Whether the ballot title set for Initiative #109 violates the single subject requirement because its central phrase, "similar to marriage," is inherently ambiguous, such that voters may enact a measure that changes the law in ways they could not anticipate.
2. Whether the ballot title's repetition of a purposefully obscure phrase prevents voters from understanding the effect of a "yes" or "no" vote and is thus misleading under Colorado law.

STATEMENT OF THE FACTS

Kevin Lundberg and Wilfred Perkins ("Proponents") are the two registered electors who have proposed Initiative 2005-06 #109 ("#109") which amends Article II of the Colorado Constitution to add yet another element to the current gay marriage/domestic partnership debate in this state. It provides:

Neither the state nor any of its political subdivisions may create or recognize a legal status similar to that of marriage, as described in sections 14-2-101 through 14-2-104, Colorado Revised Statutes (2005), from the "Uniform Marriage Act".

The title set by the Title Board for #109 reads as follows:

An amendment to the Colorado constitution prohibiting the creation or recognition by the state or its political subdivisions of a legal status similar to that of marriage, as described in the "Uniform Marriage Act" in the 2005 version of the Colorado Revised Statutes.

The ballot title and submission clause contains the same language, except that it is preceded by the words, "Shall there be," and the punctuation at the end of the title is changed to a question mark.

STATEMENT OF THE CASE

The Title Board met on May 17, 2006 and set a title for this measure. On May 24, 2006, Jean Dubofsky and Patrick Steadman submitted a Motion for Rehearing, which was heard at the Board's May 25 meeting. The Board denied the Motion for Rehearing. A timely appeal of that decision was filed with the Court, pursuant to § 1-40-107(2), C.R.S.

SUMMARY OF ARGUMENT

This ballot measure prohibits the creation or recognition of any "legal status similar to that of marriage." Even after three hearings – one before legislative staff and two before the Title Board – this phrase remains a mystery. Where an initiative defies explanation, it also violates the single subject requirement and reflects an initiative for which no clear title can be set.

The measure should be returned to its authors because it fails to comply with the single subject requirement and because the title set by the Board fails to inform voters about the true meaning of the measure.

LEGAL ARGUMENT

I. The Proposed Initiative does not reflect a single subject.

A. Single subject standards

The Court needs no introduction to the notion of the single subject requirement for initiated ballot measures. By this stage in the election cycle, the issue has been raised multiple times. And while its novelty may have worn off, its relevance has not. *See In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2005-06 #74*, Case No. 06SA041 (decided May 30, 2006), slip op. at 15 (recent holding that proposal that set a ten-year cap on all measures enacted under TABOR violated the single subject requirement).

An initiative violates the single subject requirement when it "relate[s] to more than one subject" and has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *In the Matter of the Title, Ballot Title and Submission Clause for 2003-2004 #32 & #33*, 76 P.3d 460, 461 (Colo. 2003). The subject matter of an initiative must be "necessarily and properly connected" by something more than a broad "common characteristic." *In re Proposed Initiative for "Public Rights in Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995). Neither the Title Board nor this Court may address the relative merits of a proposal, but they may both evaluate the substance of an initiative to determine

whether it complies with the single subject requirement. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 1997-98 #30*, 959 P.2d 822, 825 (Colo. 1998).

The acknowledged purpose of the single subject requirement is to forbid "the joining of incongruous subjects in the same measure thereby ensuring that each proposal depends on its own merits for passage." *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 441 (Colo. 2002) (*internal quotations omitted*). The prevention of surreptitious measures and voter surprise goes to the very heart of the single subject requirement. § 1-40-106.5(1)(e)(II), C.R.S.

The Title Board's jurisdiction is dependent upon finding that a proposed initiative contains a single subject. "If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set." COLO.CONST., art. V, § 1(5.5). Thus, where a measure contains more than one subject, the Title Board may not proceed as if the measure warranted a ballot title. *In the Matter of the Title, Ballot Title and Submission Clause and Summary for 1999-2000 #25*, 974 P.2d 458, 467 (Colo. 1998).

- B. "Similar to marriage" is an exceedingly broad phrase that will govern public treatment of diverse types of relationships.

If the single subject requirement is meant to allow voters to know what it is they are asked to enact, this measure fails the test. Its key phrase – "legal status similar to that of marriage" – is a cipher, but voters are not given the decoder ring. As a result, different voters will necessarily look at this phrase quite differently and, after they cast their ballots, they will be surprised at the breadth and nature of the very different relationships that are prohibited by this measure.

As a matter of law, the one court that has looked at this issue has agreed with the Petitioner here. What is "similar to" marriage? It is not limited to relationships between same-sex partners. *Citizens for Equal Protection, Inc. v. Bruning*, 368 F.Supp.2d 980, 995 (D.Neb. 2005). In fact, it would apply to "numerous relationships or living arrangements" including "roommates, co-tenants, foster parents, and related people who share living arrangements, expenses, custody of children, or ownership of property." *Id.* As such, it is not particularly surprising that the court held such a prohibition to be "both exceedingly vague and overly broad." *Id.*, n. 11.

In Colorado, the measure could apply to various, quite distinct relationships. For instance, the proponents are quite convinced that their measure addresses domestic partnerships between same-sex couples. They provided a written response to legislative staff at their review and comment hearing, and in answer to

the question about what effect it would have on a referred measure to authorize domestic partnerships, they stated: "Should the initiative be adopted by the people of the State of Colorado, any legislation that would create domestic partnerships or civil unions for same sex couples and would, as a result, extend official or legal recognition to or otherwise recognize such relationships would be unconstitutional." See attachment to Letter from Michael Norton to Kirk Mlinek (April 25, 2006) at p. 2 (answer to Comment 5) (attached hereto as **Exhibit A**).

Given the language used, that cannot be the complete list of relationships addressed by this initiative. The question, though, is what other ones are affected? Certainly, #109 would prohibit the legal status that is recognized in Colorado between cohabiting adults in sexually intimate relationships who contract with one another. *Salzman v. Bachrach*, 996 P.2d 1263, 1268-69 (Colo. 2000). Likewise, #109 would likewise prohibit the recognition of civil unions, whether or not they are between same-sex couples or heterosexual couples.¹ And the *Bruning* court's observation of other legal relationships that are directly affected underscores a key

¹ Several countries recognize non-marital civil unions between opposite-sex as well as same-sex couples: France, Canada, Hungary, Israel, parts of Australia, Croatia, Norway, New Zealand and Portugal. G. Blumberg, Legal Recognition of Same-Sex Conjugal Relationships: the 2003 California Domestic Partner Rights and Responsibilities Act in Comparative Civil Rights and Family Law Perspective, Symposium: Integration, Difference, & Citizenship: Celebrating 40 years of the UCLA Law Review, 51 UCLA L.Rev. 1551, 1571-75 (2004).

point: we have only gotten a glimpse of the many marriage-like associations that will be affected by #109.

Yet, to the ordinary voter, there is no obvious link between these relationships – or others – as falling within the general rubric of "similar to marriage." In fact, this measure is exactly what an initiative should not be: a Rorschach test for voters. Each voter will consider the phrase "similar to marriage" using his or her own life experience and reference points. Such a phrase, already judicially acknowledged to be "overly broad and exceedingly vague," will not be viewed by any two voters in exactly the same way. And for this reason, the measure cannot be deemed to be a single subject.

The Constitution requires that an initiative's single subject "be clearly expressed in its title." Colo. Const., art. V, sec. 1(5.5). The mandate that there be a "clear" single subject is not to be lightly taken.

It will not do to say that the general subject of legislation may be gathered from the body of the act, for, to sustain the legislation at all, it must be expressed in the title. Moreover, **we are bound to assume that the word "clearly" was not incorporated into the constitutional provision under consideration by mistake.** It appears in but few of the corresponding provisions of other state constitutions; a fact that could hardly have been unobserved by the convention.

That this word was advisedly used, and was intended to affect the manner of expressing the subject, we cannot doubt. **The matter covered by legislation is to be "clearly," not "dubiously" or "obscurely," indicated by the title.** Its relation to the subject must not rest upon a merely possible

or doubtful inference. The connection must be so obvious as that ingenious reasoning, aided by superior rhetoric, will not be necessary to reveal it. **Such connection should be within the comprehension of the ordinary intellect, as well as the trained legal mind.**

#25, 974 P.2d at 462, *citing In re Breene*, 24 P. 3, 4 (Colo. 1890). Where the Board is uncertain about the reach or precise meaning of the measure, it cannot constitute a single subject. #25, 974 P.2d at 467 (Colo. 1999) (Title Board must be able to discern the consequences of a measure in order for it to find that the measure reflects a single subject).

The extent of this vagueness is best demonstrated by the confusion shown by the Proponents about the scope of their own measure. Before the legislative staff in the review and comment hearing, the Proponents stated that the measure would not prohibit the creation or authorization of contractual relationships that extend certain rights or benefits to persons in same-sex relationships. *See* attachment to Letter from Michael Norton to Kirk Mlinek (April 25, 2006) at p. 2 (answer to Comment 5) (attached hereto as **Exhibit A**). At the rehearing, they submitted a pleading that stated just the opposite. *See* Proponents' Response to Motion for Rehearing at 2, 7 (attached hereto as **Exhibit B**). The conflict led the Title Board chairman to comment, "I'm just having trouble reconciling all of that in my mind." May 25, 2006 Transcript ("Tr.") 21:18-19 (attached as **Exhibit C**). Even after the Proponents explained what they were intended to do, the chair still found the two

sets of comments "a little inconsistent." Tr. 24: 16-19. Only after the Solicitor General explained to the Proponents that their measure could be interpreted to prohibit the creation of a legal status "creating a shortcut to those benefits" associated with marriage, Tr. 28:5-21, were the Proponents grapple with the language that heretofore no one in the room had been able to understand.

The Proponents' only consistent statement throughout these proceedings was that "similar to marriage" is purely a question of sexual intimacy. This phrase, they informed the legislative staff, "applies to all intimate relationships of unmarried persons who are unrelated by blood or adoption. A non-sexual relationship would not be similar to marriage." *See* attachment to Letter from Michael Norton to Kirk Mlinek (April 25, 2006) at p. 5 (answer to Comment 6(b)). Yet, marriage has never been characterized solely or even predominately by sex. "Marriage cannot be identified or defined solely by sexual, procreational, or financial aspects." *Bruning*, 368 F.Supp.2d at 995; *cf. Salzman*, 996 P.2d at 1267 ("norms and behaviors have changed to such an extent that we now join the majority of courts in other states in holding that nonmarried cohabitating couples may legally contract with each other so long as sexual relations are merely incidental to the agreement").

Given the inherent ambiguity of "similar to marriage" and the confusion of the Proponents, the people of Colorado could well end up living with the "evils to be guarded against" by the single subject requirement: "the passage of unknown and alien subjects, which might be coiled up in the folds" of a measure. *In re Breene*, 24 P. at 3-4. As such, the Court should return the title to the Board for its failure to satisfy the constitutional single subject requirement for initiatives.

II. The ballot title is misleading.

A. Statutory requirements for an accurate, fair title

A measure's ballot title need not address every detail of an initiative. It must, however, be:

- fair, § 1-40-106(1), C.R.S.;
- not misleading, § 1-40-106(2), C.R.S.;
- stated so that the meaning of a "yes" or "no" vote is apparent to voters, *id.*;
- set forth so that it clearly expresses the true intent and meaning of an initiative, *id.*;
- brief, *id.*;
- not in conflict with any other title set by the board, *id.*; and

- unambiguous in stating the principle of the provision sought to be added, amended, or repealed. *Id.*

Ballot titles that fail to meet these standards must be returned to and corrected by the Board. § 1-40-107(2), C.R.S.

The Court has often noted that it is not its job to set a perfect title. But it is its responsibility to ensure that voters are not misled or confused about what a ballot measure proposes to achieve after reading the measure's title on a petition or a ballot. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Proposed Election Reform Amendment*, 852 P.2d 28, 33 (Colo. 1993). And in this regard, the Court is inclined to defer to the Board's decision unless there are concerns that voter understanding of a proposed measure is threatened by the language in the title. *Id.* at 32.

B. "Legal status similar to marriage" is an obscure phrase that blocks voter understanding about the nature of this measure.

As noted above, Initiative #109 is centered around a purposefully obscure phrase, "similar to marriage." The ballot title merely repeats this phrase and is thus not at all informative to voters.

Fundamentally, voters should be able to discern from the ballot title what they are being asked to do as a matter of law. But as to this measure, no voter can know what legal changes flow from adoption of this initiative. The phrase "similar

to marriage" is intended to connote a prohibition of governmental approval of same-sex relationships that result in benefits or rights to the persons in such a relationship. But the ballot title does not communicate that fact, because the measure was worded to avoid it. Instead, the measure is cloaked in broad terms, and the resulting ballot title will confuse voters. It cannot be said in such instances that the measure or the title enable voters to understand the "effect of a 'yes' or 'no' vote". § 1-40-106(3)(b), C.R.S.

It is true that a measure can contain vague phrases, even if they are intended to be judicially interpreted after the election. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for a Proposed Initiative on Water Rights*, 877 P.2d 321, 327 (Colo. 1994). But the Proponents cannot build a measure that contains a "material ambiguity or concealed intent" in connection with one of its central provisions. *See In the Matter of the Title, Ballot Title and Submission Clause, and Summary for Initiative 1999-2000 #29*, 972 P.2d 257, 268 (Colo. 1999). Here, even the proponents did not understand how ambiguous their own initiative was until the Petitioners pointed out, and the Title Board helped clarify, their inconsistent position on a key element of the measure. Faced with an initiative that contains a material ambiguity that is merely repeated in the ballot title, the Board erred by setting a title.

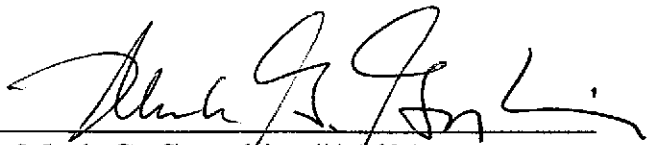
It should be noted that the Petitioners are not arguing that the Board should have attempted to define "similar to marriage" in the title. Of course, that is something the Board cannot do where the measure itself provides no such guidance. It is maintained, though, that the Board should not set a title where the scope of a measure is so uncertain, owing to a material ambiguity in the measure that its confines are unknown. *Id.* Proponents should not be permitted to write, and the Board should not be permitted to title, measures that are so open-ended as to be indecipherable. *See In the Matter of the Title, Ballot Title and Submission Clause for Initiative 2005-06 #55*, Case No. 06SA20 (decided June 12, 2006) slip. op. at 23-24. As it has done in previous matters, the Court should apply this principle here and return this measure to its authors for another attempt at writing a measure that voters can understand and the Board can appropriately summarize.

CONCLUSION

For the reasons set forth herein, the Board erred by setting a title, and its actions should be reversed until such time as the Proponents draft a measure without material ambiguities that block voter understanding.

Respectfully submitted this 12th day of June, 2006.

ISAACSON ROSENBAUM P.C.

By: 
Mark G. Grueskin, #14621

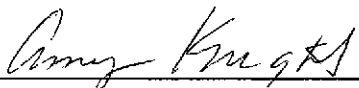
ATTORNEY FOR PETITIONERS

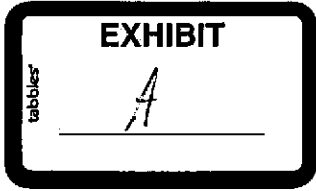
CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of June, 2006, a true and correct copy of the foregoing **PETITIONERS' OPENING BRIEF** was served via hand delivery or over night delivery, to the following:

Michael J. Norton, Esq.
Burns, Figa & Will
6400 S. Fiddler's Green Circle,
Suite 1030
Englewood, Colorado 80111

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203







MICHAEL J. NORTON
mjnorton@bfw-law.com

April 25, 2006

Via Hand-Delivery

Kirk Mlinek
Director, Legislative Council Staff
Room 029
State Capitol Building
Denver, CO 80203

RE: Proposed Initiative 2005-2006 #109
Our File No. 1913.58

Dear Mr. Mlinek:

As you will recall, I represent the proponents of the above-entitled proposed initiative, to wit:

Representative Kevin Lundberg
P. O. Box 378
Berthoud, CO 80413
email: replundberg@mac.com
(H) 970-532-3070

Wilfred G. Perkins
2508 Pine Bluff Road
Colorado Springs, CO 80909
email: willperk@adelphia.net
(H) 719-632-9547

The proponents are pleased to respond to the comments of the Legislative Council Staff and the Office of Legislative Legal Services contained in the April 21, 2006, memorandum ("Staff Memorandum") relating to this proposed initiative.

First, with regard to the technical comments in the Staff Memorandum, the proponents accept technical comments 1, 2, 3, 5, and 6, and will incorporate those technical comments into a revised proposed initiative which will be submitted to the Title Setting Review Board following this Review and Comment hearing.

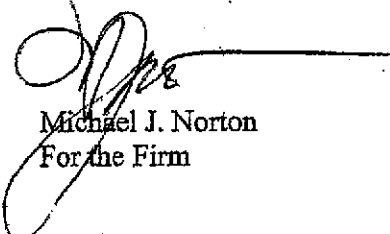
With regard to the Staff Memorandum's technical comments, 4, 7, and 8, the proponents observe the following:

1. With regard to technical comment number 4, the proponents have reviewed a number of proposed constitutional initiatives which have included proposed Section 2. The proponents are willing to accept this technical comment and will delete proposed Section 2 if the Legislative Council Staff and the Office of Legislative Legal Services assures the proponents that this section is not necessary to the validity of the initiative should it be passed by the people of the State of Colorado.
2. With regard to technical comment number 7, the proponents believe that sections 14-2-101 through 14-2-104, C.R.S. (2005), the "Uniform Marriage Act," do, indeed, provide a definition of marriage as, among other things, "only between one man and one woman." See section 14-2-104(1)(b), C.R.S. (2005). Therefore, the proponents do not accept this technical comment and will not change the word "definition" in the proposed initiative.
3. With regard to technical comment number 8, the proponents believe that it is necessary to include the reference to the year, i.e., 2005, in the statutory citation in the proposed initiative due to the potential that some or all of these statutory sections may be altered or amended by a future legislature. As a result of this potential, it is necessary to include not only the specific statutory sections, but the effective year thereof, in the proposed initiative. Therefore, the proponents will not accept this technical comment and will retain the citation of the year, i.e., 2005, in the proposed initiative.

With regard to the Staff Memorandum's substantive comments, the proponents submit the enclosed responses to these substantive comments and request that this written submittal, including these responses, be made a part of the record of proceedings on this proposed initiative.

Thank you for your courtesy.

Sincerely,



Michael J. Norton
For the Firm

Enclosure