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BEFORE THE STATE OF OHIO BALLOT BOARD

- - -

Wednesday Afternoon Session,
August 3, 2011.

- - -

In Re the Matter of :
: State Issue 1 :
: State Issue 2 :
: State Issue 3 :

- - -

Senate Finance Hearing Room
Senate Building
One Capitol Square
Columbus, Ohio

- - -

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IN ATTENDANCE:

- Jon Husted, Chair, Secretary of State
- Senator Keith Faber
- Mr. Mark Griffin
- Mr. William N. Morgan
- Mr. Fredrick W. Strahorn
- Ms. Betsy Luper Schuster, Secretary

- - -

1 Wednesday Afternoon Session,
2 August 3, 2011.

3 - - -

4 SECRETARY HUSTED: Call the meeting of
5 the Ohio Ballot Board to order.

6 Good morning, all. My name is Jon
7 Husted, and I'm the Chairperson of the Ballot Board,
8 as well as being the Secretary of State.

9 And first item that I want to consider
10 today without objection from the Board members, my
11 chief elections counsel, Betsy Schuster, will serve
12 as the secretary of the Ballot Board this morning.

13 Are there any objections to that?

14 MR. GRIFFIN: No objection.

15 SECRETARY HUSTED: Without objection,
16 Betsy, welcome.

17 MS. SCHUSTER: Thank you.

18 SECRETARY HUSTED: And also for the
19 record, the proceedings today will be transcribed by
20 a court reporter from Armstrong & Okey, and the Ohio
21 Channel is streaming this meeting live on their
22 website, where it will be archived.

23 At First Chair we have a new member of
24 the Board. There was a resignation from Rebecca
25 Egelhoff, and in accordance with the Revised Code

1 Section 3505.061, the House Majority Leader has
2 appointed Mark Griffin to fill the vacancy, and at
3 this time, Mr. Griffin, I need to administer an oath
4 to you.

5 (Oath administered.)

6 SECRETARY HUSTED: Now, Secretary
7 Schuster, if you could please take the role.

8 MS. SCHUSTER: Senator Faber.

9 SENATOR FABER: Yes.

10 MS. SCHUSTER: Mr. Griffin.

11 MR. GRIFFIN: Yes.

12 MS. SCHUSTER: Mr. Morgan.

13 MR. MORGAN: Yes.

14 MS. SCHUSTER: Mr. Strahorn.

15 MR. STRAHORN: Here.

16 MS. SCHUSTER: Secretary Husted.

17 SECRETARY HUSTED: Here.

18 We now move to section 4, which is
19 consideration of the rules. Revised Code Section
20 3505.061 provides that at the first meeting of the
21 Ballot Board they shall adopt rules and procedures.

22 The Board members received the draft
23 rules prior to this meeting. A copy is also included
24 in the Board members' binders at the front table.

25 Everyone has had a chance to review this

1 and I move to adopt the rules as the governing
2 procedure of this Board. Do I have a second?

3 SENATOR FABER: Second.

4 SECRETARY HUSTED: Senator Faber seconds.
5 It's been moved and seconded. Is there any further
6 discussion?

7 (No response.)

8 SECRETARY HUSTED: Secretary Schuster,
9 will you please call the roll?

10 MS. SCHUSTER: Senator Faber.

11 SENATOR FABER: Yes.

12 MS. SCHUSTER: Mr. Griffin.

13 MR. GRIFFIN: Yes.

14 MS. SCHUSTER: Mr. Morgan.

15 MR. MORGAN: Yes.

16 MS. SCHUSTER: Mr. Strahorn.

17 MR. STRAHORN: Yes.

18 MS. SCHUSTER: And Secretary Husted.

19 SECRETARY HUSTED: Yes.

20 At this time we'll move to the election
21 of Vice Chair. Vice Chair from one of the four
22 appointed Board members is established under the same
23 sanction of the Revised Code that we'd previously
24 discussed. The Vice Chair will serve for a two-year
25 term.

1 At this time I would like to nominate
2 Senator Strahorn, former Senator Strahorn as the Vice
3 Chair. Is there a second?

4 SENATOR FABER: Second.

5 SECRETARY HUSTED: We have a motion and
6 second. Is there any further discussion?

7 (No response.)

8 SECRETARY HUSTED: Then, Secretary
9 Schuster, will you please call the role?

10 MS. SCHUSTER: Senator Faber.

11 SENATOR FABER: Yes.

12 MS. SCHUSTER: Mr. Griffin.

13 MR. GRIFFIN: Yes.

14 MS. SCHUSTER: Mr. Morgan.

15 MR. MORGAN: Yes.

16 MS. SCHUSTER: Mr. Strahorn.

17 MR. STRAHORN: Yes.

18 MS. SCHUSTER: Secretary Husted.

19 SECRETARY HUSTED: Yes.

20 Let's move to the purpose of the
21 discussion of the Ballot Board. The Ballot Board was
22 established to prescribe and certify the ballot
23 language and in some instances explanations for
24 statewide issues, and to direct the means by which
25 information about those issue is disseminated to

1 voters.

2 I'm going to ask the Secretary of the
3 Board to discuss the Board's roll in this today.

4 Secretary Schuster.

5 MS. SCHUSTER: The purpose of today's
6 meeting is, first, to certify the ballot language and
7 explanation for the Judicial Age Limit Increased
8 Constitutional Amendment proposed by the General
9 Assembly; to certify the ballot language for the
10 health care freedom constitutional amendment proposed
11 by initiative; and to certify the ballot language for
12 the Senate Bill 5 referendum.

13 All three of those issues will be
14 submitted to the electors at the November 8, 2011,
15 general election.

16 In order to prepare for today's meeting,
17 the Secretary's staff met with interested parties and
18 reviewed ballot language that was submitted to us.
19 Based on those meetings and the language submitted,
20 we have prepared draft language solely as a starting
21 point.

22 The members received copies of that draft
23 language before the meeting. The drafts are also
24 included in the members' binders and are available at
25 the front table.

1 A couple of things to note. First, under
2 the Revised Code Section 3519.21, the Secretary of
3 State determines the order of the ballot issues. The
4 Secretary has already determined that and announced
5 it.

6 Issue 1 is the Judicial Age Limit
7 Increase Constitutional Amendment proposed by the
8 General Assembly in HJR-1. Issue 2 is the Senate
9 Bill 5 referendum. Issue 3 is the Health Care
10 Freedom Constitutional Amendment proposed by
11 initiative petition.

12 In addition, the Secretary is the one who
13 determines the title for each issue. Even though the
14 Secretary is the one who determines that, those draft
15 titles have been provided, they're the boxed text at
16 the top of the draft ballot language.

17 The Secretary's interested in receiving
18 comments on those today as well, so those can be as
19 clear as possible for the voters.

20 So what is at the front table and in the
21 members' binders are the drafts, as I mentioned. The
22 first issue on the agenda is the Judicial Age Limit
23 Increased Constitutional Amendment.

24 Revised Code 3505.062 requires the Ballot
25 Board to prescribe both the ballot language and the

1 explanation for any constitutional amendment proposed
2 by the General Assembly.

3 So for the Judicial Age Limit Increase
4 you'll see both draft ballot language and a draft
5 explanation. Unlike constitutional amendments
6 proposed by the General Assembly, constitutional
7 amendments proposed by initiative and referendums are
8 only -- the Ballot Board only prescribes the ballot
9 language and does not prepare the arguments or
10 explanations unless others fail to do so by the
11 statutory deadline.

12 So we will not be discussing arguments
13 and explanations for Issue 2 or Issue 3 today.

14 The Health Care Freedom Amendment is the
15 second issue on the agenda. It's Issue 3. The draft
16 ballot language that you'll see mirrors the language
17 of the summary that was actually provided on the
18 Health Care Freedom Amendment petition.

19 The final item on the agenda, Issue 2, is
20 the Senate Bill 5 Referendum. The draft ballot
21 language is brief that we've prepared as a starting
22 point. The summary in the LSC analysis and on the
23 petition are lengthy, and the goal was to attempt to
24 clearly identify the substance of the proposal.

25 Thank you, Mr. Chairman.

1 SECRETARY HUSTED: Thank you,
2 Ms. Schuster.

3 At this point in time I would like to
4 discuss the invitation and the instructions to
5 witnesses.

6 If anyone here wishes to address the
7 Board today regarding the ballot language and
8 explanation of the Judicial Age Limit Increase, the
9 constitutional amendment proposed by the General
10 Assembly, or the ballot language of any of the two
11 other statewide issues, please sign in on the
12 appropriate sign-in sheet that is located in the
13 front.

14 There is a separate sign-in sheet over
15 there for each issue, so please make sure that you
16 sign the appropriate sheet.

17 I want to emphasize this and emphasize
18 this strenuously. We are here to debate -- we are
19 not here to debate the merits of these issues. We
20 are here to discuss the ballot language.

21 Anyone who addresses the Board today is
22 asked to limit their comments to matters related to
23 the ballot language and the explanation.

24 Next item on our agenda is the
25 certification of the ballot language and the

1 explanation of the Judicial Age Limit Increase and
2 ballot language.

3 This will be the first item, as I
4 mentioned, that we will address today. This will
5 appear as Issue 1 on the ballot. And at this point,
6 you, the members, have a draft language that's been
7 proposed. Without objection we'll proceed with
8 public comment as it relates to the draft language.

9 We do not have anyone here to testify on
10 the language for Issue 1 under the public comment.
11 Is there a -- we have no proponents, no opponents,
12 and so we'll move to Board discussion of HJR-1,
13 Judicial Age Limit language.

14 Board members, are there any comments or
15 questions?

16 MR. GRIFFIN: Mr. Secretary, I do have
17 some questions.

18 SECRETARY HUSTED: Okay.

19 MR. GRIFFIN: In reviewing the
20 explanation in the proposed ballot language, it looks
21 as though in the explanation it indicates that on the
22 last of the third points that the Governor appoints a
23 five-member Supreme Court Commission, but the
24 language in the ballot says it's the General
25 Assembly's authority to appoint members. And I was

1 wondering whether that needs to be consolidated or
2 made consistent between those points.

3 SECRETARY HUSTED: Any other Board member
4 comment or consideration?

5 MR. GRIFFIN: I have a second point but I
6 don't know whether we want to have discussion.

7 SECRETARY HUSTED: So you're looking at
8 your first one, your first issue is?

9 MR. GRIFFIN: We should just have
10 clarity, because the ballot says we're eliminating
11 the authority of the General Assembly to appoint a
12 Supreme Court Commission.

13 The explanation says it's the Governor
14 who appoints the five-member Supreme Court
15 Commission.

16 And whichever is the more accurate
17 statement of the law we should have. But there
18 shouldn't be an inconsistency between the explanation
19 and the ballot language.

20 MS. SCHUSTER: Mr. Chairman, it is the
21 Governor, so we can make that correction in the
22 ballot language itself.

23 MR. GRIFFIN: The second issue is I think
24 pretty much a typo in the heading. It says to
25 reappoint a Supreme Court Commission, and I think the

1 language is a little broader than it's appoint
2 generally. So I would ask that we strike the
3 "reappoint" in the heading of the proposed
4 constitutional amendment.

5 MS. SCHUSTER: In the title?

6 MR. GRIFFIN: Yeah, the title.

7 SECRETARY HUSTED: So the amendment that
8 we're working on, this is to point -- is to scratch
9 on item 3 "General Assembly" and insert "Governor."

10 MR. GRIFFIN: That's correct.

11 SECRETARY HUSTED: Correct?

12 Okay. Any other additional comments from
13 Board members?

14 (No response.)

15 SECRETARY HUSTED: We have the draft
16 language. We're working on that over here.

17 All right. Back to my . . .

18 We have -- the changes are being made,
19 and are the Board members clear about the change
20 being made and the issue for consideration before the
21 body at this time?

22 With that I move that the amended version
23 be accepted. Is there a second?

24 MR. STRAHORN: Second.

25 SECRETARY HUSTED: We have a second.

1 MR. GRIFFIN: Mr. Secretary, just for a
2 point of clarification, it was replacing the language
3 of the General Assembly but also eliminating the
4 "reappoint" and replacing it with "appoint."

5 SECRETARY HUSTED: The title is not a
6 matter for the Board, but I have noted that and we
7 will make that change separate from this action
8 today.

9 MR. GRIFFIN: Thank you, Mr. Secretary.

10 SECRETARY HUSTED: We have a motion and a
11 second.

12 Secretary, will you call the roll?

13 MS. SCHUSTER: Senator Faber.

14 SENATOR FABER: Yes.

15 MS. SCHUSTER: Mr. Griffin.

16 MR. GRIFFIN: Yes.

17 MS. SCHUSTER: Mr. Morgan.

18 MR. MORGAN: Yes.

19 MS. SCHUSTER: Mr. Strahorn.

20 MR. STRAHORN: Yes.

21 MS. SCHUSTER: Secretary Husted.

22 SECRETARY HUSTED: Yes.

23 We have a majority of the Board to
24 supporting it and therefore it's adopted.

25 We'll move next in order of our agenda to

1 Issue 3, which is Health Care Freedom Amendment
2 ballot language.

3 You have, the Board, the members of the
4 Board have the language before them. The language
5 before them is exactly as submitted for the amendment
6 by the petitioners, and what we will do is accept
7 that without objection as a working document and then
8 we will take public testimony, have a conversation
9 with the Board, and provide the Board an opportunity
10 for amendment.

11 MR. STRAHORN: Mr. Chair, just have a
12 question and clarification with regard to the title.

13 Is it the case that that is the Chair's
14 discretion for us not to deal with the title
15 language, or is that always the case that we just
16 accept the title language?

17 SECRETARY HUSTED: The Secretary has the
18 authority to establish the title language
19 unilaterally. I placed it in here because I wanted
20 to have your comments, Board members and the public
21 comment.

22 MR. STRAHORN: Is that something we can
23 discuss?

24 SECRETARY HUSTED: Yes, it certainly is.
25 And that's why it's there. I put it in there today

1 so that we would have the opportunity from the public
2 to provide input and for the members of the Board.

3 MR. STRAHORN: Thank you, Mr. Chair.

4 SECRETARY HUSTED: Without objection, we
5 will move to the public comment period.

6 First on the list is Don McTigue for
7 Progress Ohio. And he is an opponent.

8 MR. McTIGUE: Thank you, Mr. Chairman,
9 members of the Ballot Board.

10 Mr. Chairman, as I said, I'm Donald
11 McTigue appearing on behalf of Progress Ohio as an
12 opponent of the issue. Our comments are solely with
13 respect to the ballot title. So for the Chairman or
14 the Secretary's consideration.

15 If I could approach to distribute
16 alternative language that we are suggesting.

17 SECRETARY HUSTED: Please make sure that
18 is disseminated to the Board members and that there's
19 a copy placed into the record.

20 MR. McTIGUE: While that's being
21 distributed, I would indicate only that the Ohio
22 Supreme Court has said in the past that ballot
23 language and ballot titles must be accurate,
24 non-misleading, and non-argumentative.

25 In that context of being

1 non-argumentative, not contain language that is
2 persuasive or that would have tendencies towards
3 being persuasive one way or the other "yes" or "no."

4 So keeping that in mind, we believe that
5 the title is -- does not meet that standard in that
6 it contains language which could be considered to be
7 favorable, more favorable to one side than the other,
8 and that more neutral language should be chosen.

9 In particular, the language that is in
10 the Secretary's title right now where it talks about
11 freedom of Ohio's -- it's preserving freedom --
12 freedom of Ohioans, that in and of itself is not
13 accurate in the sense that, for example, you do not
14 have a choice if you're an employee -- if you're
15 employed somewhere or if you're self-employed you
16 don't have a choice to not participate in the
17 Medicare program. So it's an overstatement and
18 untrue statement.

19 Also where it goes on to say to choose
20 their health care and health care coverage is not I
21 think entirely true in terms of what this does, and
22 it's somewhat misleading in that it makes it appear
23 that what the amendment does is preserve some option
24 of citizens to choose between health care providers
25 or health care plans.

1 Actually what is being proposed in the
2 amendment is that no laws or rules can be enacted
3 which mandate or make it mandatory that citizens
4 procure insurance.

5 That's a very different concept from the
6 concept of saying that the amendment preserves a
7 choice between or among providers. And I think the
8 way it's written right now, I think it could be very
9 easily read that way, which would be incorrect.

10 Not to mention the fact that when we use
11 titles, phrases like "preserve our freedoms" or
12 "preserve the freedoms of Ohioans," that in itself is
13 essentially an argumentative or persuasive statement.

14 I have suggested on behalf of the
15 Progress Ohio what I believe is very neutral language
16 that follows or sums up, if you will, what is being
17 proposed here in the actual text and the substance of
18 the proposal, which is, quote, to prohibit enactment
19 of laws or rules requiring mandatory participation in
20 health care coverage.

21 I think if you read the text of the
22 actual amendment, that is what's being proposed.
23 That's the core essence of what's being proposed
24 there.

25 So we would respectfully request that the

1 Secretary consider changing the title to make it
2 more, I think, reflective of the actual language that
3 is in the proposed amendment. And to eliminate any
4 persuasive effects from the language in the current
5 version of the title.

6 Be happy to try to answer any questions.

7 SECRETARY HUSTED: Any members have
8 questions for the witness?

9 MR. STRAHORN: Just one, Mr. Chair.

10 SECRETARY HUSTED: Senator Strahorn.

11 MR. STRAHORN: Mr. McTigue, just in your
12 experience, I don't know if you have an example of
13 where you've seen some language in a ballot in this
14 process similar to this where we did change, make a
15 change with regard to trying and make it a little
16 less prejudicial language involved and make it a
17 little bit more consistent with what's in the actual
18 ballot or what the ballot intuitive actually does.

19 MR. MCTIGUE: Well, Mr. Chairman, Mr. --
20 Senator Strahorn, in the past the Secretary has
21 pretty much been -- not this Board, been the one
22 who's determined the ballot title.

23 I think Secretary Brunner I think broke
24 with that practice, but other than that, I believe
25 the previous Secretaries of State have developed it

1 so the Ballot Board itself, I don't have any examples
2 of the Ballot Board changing the title.

3 Certainly there have been many times
4 where the Ballot Board has changed draft language
5 which it felt was persuasive in character or
6 argumentive, and I think that we actually, I actually
7 have a, for Issue 2 I have a handout that goes back
8 and shows all the ballot language and titles for
9 referendum back to 1919. So you would be able to
10 look at that and see what the titles were there.

11 But I can't recall really getting into
12 any discussions in my previous appearances here.
13 Can't recall being involved in discussions related to
14 the ballot title itself.

15 MR. STRAHORN: Just follow up?

16 SECRETARY HUSTED: Senator Strahorn.

17 MR. STRAHORN: Mr. McTigue, in your
18 recollection of recent memory, have you -- can you
19 recall a situation where in your opinion a ballot
20 title was this far away from what you felt was
21 actually in the ballot initiative?

22 MR. MCTIGUE: I will be, Mr. Chairman,
23 Senator Strahorn, to be frank, I didn't go back and
24 look. And it doesn't come immediately to mind in
25 terms of the ballot title.

1 I suppose when I -- we of course received
2 this ballot title just late yesterday, late
3 afternoon, and so we didn't do research on ballot
4 titles going back further than that. Or going back
5 into the previous version -- previous state issues.

6 So nothing came to my mind, so I don't
7 think I can answer that. But it did, when I read it
8 it immediately --

9 MR. STRAHORN: Jumped out at you.

10 MR. McTIGUE: Jumped out at me as being a
11 somewhat argumentative. I mean if I was an Ohioan
12 somewhat maybe not real informed about what the issue
13 was and I read the title, yeah, heck yeah, I want to
14 preserve my freedom to choose my doctor, okay? I
15 mean that's of course not really what the amendment
16 says. It's not about freedom to choose your doctor
17 or preserve that option.

18 MR. STRAHORN: Thank you, Mr. Chair.

19 SECRETARY HUSTED: And let me just
20 explain to the Board that we have until August 30th
21 to make this decision. And we put forward exactly
22 what the advocates for the amendment had put in their
23 actual petition.

24 And the purpose of this discussion today
25 is to have folks with a variety of points of view on

1 the issue to have their voice heard and we will take
2 the collective wisdom of those comments and
3 incorporate them into something that we believe will
4 be fair.

5 MR. MCTIGUE: Thank you, Mr. Chairman.

6 SECRETARY HUSTED: The next witness on
7 Issue 3 is Maurice Thompson with The Ohio Project.
8 And he is a proponent of the legislation. Welcome.

9 MR. THOMPSON: Thank you, Mr. Secretary.

10 The language that we have here almost
11 mirrors what we submitted to the Ohio Secretary of
12 State, so effectively we're respectfully requesting
13 that any motions to amend the proposed language or
14 the starting language be denied pursuant to 3505.061.

15 And of course this hearing is for a
16 limited purpose. Just as a preface I want to take a
17 few moments to discuss the standards you are to apply
18 here, and then move to why we believe that the
19 proposed language clearly fits those standards.

20 This matter is governed by Section 1,
21 Article XVI of the Ohio Constitution. States the
22 ballot language will properly identify the substance
23 of the proposal to be voted on, and that's it.

24 As to the ballot title, 3505.05D requires
25 a brief title, descriptive of the question or issue

1 below it.

2 Meanwhile the 3519.21 states: In
3 preparing such ballot title, the Secretary of State
4 shall give a true and impartial statement of the
5 measure in such language that the ballot title should
6 not be likely to create prejudice for or against the
7 measure.

8 The principle behind those rules seems
9 fairly clear: The Ballot Board is to use the title
10 to describe the measure. In other words, to describe
11 the text of the proposed constitutional amendment,
12 not one particular viewpoint of it or another, and
13 clearly not to describe the affects of the amendment
14 or an argument for or against.

15 In fact, the Section 1g, Article II, of
16 the Ohio Constitution, specifically allows for an
17 explanation of the measure for discussion of purposes
18 elsewhere.

19 So what we're really trying to describe
20 with the title is the language used in the four
21 corners of the amendment itself here.

22 The governing Supreme Court of Ohio
23 precedent on the matter, generally speaking, is
24 *Jurgeson v. Cuyahoga County Board of Elections*, 1988,
25 the ballot title shall be a clear, concise statement,

1 without argument, descriptive of the substance of
2 such proposed amendment.

3 And then Bailey v. Celebrezze has a
4 three-part test to describe that proposed amendment
5 in the ballot language, the test to determine the
6 validity of the proposed language according to Bailey
7 is whether the language adopted by the Ballot Board
8 properly describes the proposed amendment.

9 So again, what we're looking for with the
10 title here is whether it properly describes the
11 language below. In this case the summary, which I
12 think we all can stipulate is a fair and accurate
13 summary of the actual text of the amendment.

14 So assuming that there's no issue with
15 the summary, and I'll be glad to answer any questions
16 as to the extent that there are, let's go ahead and
17 discuss the ballot title.

18 First off I want to note this title
19 reflects the constitutional amendment itself because
20 it is what will actually appear in the Ohio
21 Constitution, were Ohio voters to actually vote for
22 this.

23 In other words, the title of Section 21,
24 Article I, of the Ohio Constitution, will state:
25 Preservation of freedom to choose health care and

1 health care coverage.

2 So if you're looking for language that
3 accurately describes the text of the amendment, what
4 better language to use than the text of the amendment
5 itself.

6 For the Ballot Board to substitute any
7 kind of alternative language for the actual text
8 would seem to be describing the ballot measure less
9 well than just using the text itself, which we think
10 is very clear. And I'll get to Mr. McTigue's
11 comments on that momentarily.

12 Secondly, we note that in March of 2010,
13 Attorney General Richard Cordray did certify that the
14 language of this ballot, including the title, were,
15 in his opinion, a fair and truthful statement of the
16 proposed law or constitutional amendment.

17 So an argument that is not a fair and
18 truthful statement is in direct conflict with the
19 opinion reached by the Ohio Attorney General, and
20 this is not -- obviously this is then-Attorney
21 General Cordray, not a partisan Attorney General who
22 is making an argument.

23 The ballot language issue here is
24 identical to the summary language that Attorney
25 General Cordray approved.

1 Third, and perhaps most importantly here,
2 the Ohio Supreme Court has already stated that this
3 title is accurate. We about a year ago had to file a
4 lawsuit against this very Ballot Board on this same
5 amendment on the separate vote requirement, and it
6 was found in that case that this Board abused its
7 discretion in mischaracterizing the measure.

8 And in its holding, the Ohio Supreme
9 Court specifically stated all of the sections
10 contained in the Ohio Health Care Freedom Amendment
11 bear some reasonable relationship to the single
12 general purpose of preserving Ohioans' freedom to
13 choose their health care and health care coverage.

14 That is exactly what the title says. The
15 Ohio Supreme Court has said that everything in the
16 amendment bears a rational relationship to that,
17 rendering it a very effective title already approved
18 by the Ohio Supreme Court under applicable standards.

19 Fourthly, we note that if you're looking
20 for an example outside of Ohio, you have a very good
21 one. The Colorado Supreme Court has also considered
22 their version of the Health Care Freedom Amendment
23 and approved the title Right to Health Care Choice.

24 Certainly from an opponent's perspective,
25 that's every bit as normative as terms like

1 "freedom." When you're talking about right to health
2 care choice, the Court there held that the title was
3 clear and it enabled the electorate to determine
4 intelligently whether to support or oppose the
5 matter, and the title fairly reflects the proposed
6 initiative so the petition signers and voters will
7 not be misled.

8 I should note, the Colorado also uses a
9 ballot board that operates under similar rules of
10 order, rules of law as this Ballot Board. So if the
11 Ohio Supreme Court's own determination on this exact
12 issue isn't enough, you have other state Supreme
13 Courts essentially saying the same thing.

14 Turning to some of Mr. McTigue's
15 arguments on behalf of Progress Ohio, there is
16 alternative language here. The alternative language
17 I think first and foremost only addresses Division A
18 of the amendment. His language states: To prohibit
19 enactment of laws or rules requiring mandatory
20 participation in health care coverage.

21 First of all, that's inaccurate even as
22 description of Division A because Division A also
23 prohibits mandatory participation in health care, not
24 just health care coverage. So it's not a full and
25 accurate description of Division A.

1 And it utterly ignores Division B, which
2 preserves the rights of Ohians to buy and sell health
3 care and health care coverage. Utterly ignores
4 Division C, which forbids the penalization of those
5 who exercised their freedom to choose health care and
6 health care coverage.

7 So this enactment is not as fully
8 descriptive of the languages as what we have here in
9 front of us.

10 Again, the standard is correct that he
11 cites that the language has to be accurate, shouldn't
12 be misleading or argumentative. But it's perfectly
13 accurate, precise, and non-argumentative to use a
14 ballot title that absolutely mimics the actual text
15 of the Constitution and what will go into the
16 Constitution.

17 So if you're looking for some neutral
18 principle to grab onto, what better neutral principle
19 than to use the actual language that would appear in
20 the Constitution.

21 After all, the purpose of the title is to
22 explain to voters what they're voting on, what the
23 measure says, not what the measure does. That's the
24 purpose under Article II, Section 1g, of the affects,
25 the purpose and affects of the explanation.

1 So we have a different constitutional
2 tool for dealing with some of the concerns that some
3 of the opposition has.

4 And finally, the notion that freedom is
5 not accurate or betrays a certain viewpoint in our
6 view is no more than a difference in political
7 philosophies. We view freedom as a neutral principle
8 that we can describe and articulate the same with the
9 right to choice.

10 I can tell you what that is. Another
11 person may give you a different description of what
12 that is. And of course the way to solve this problem
13 is the curative language in the summary itself.

14 The ballot title is a title to the
15 language, so you look below as to exactly what the
16 summary of the language is, as to what it does, and
17 you cure any kind of difference of opinion as to what
18 constitutes freedom of choice.

19 And on this front I would note that if
20 you look through, if you peruse the Ohio
21 Constitution, if you peruse the Federal Constitution,
22 you will find all kinds of far more loaded titles
23 describing constitutional amendments that are far
24 more absolutist and they may or may not be as
25 absolutely applied by the courts.

1 Every freedom of one kind or another
2 tends to be subject to some sort of amelioration
3 whether it's the freedom of speech that's -- can't
4 yell "fire" in a crowded theater, nevertheless.

5 Or a property that shall be held
6 inviolate under Section 19 of the Ohio Constitution.
7 We know that there are encroachments on property
8 rights all the time.

9 And the best example probably for this
10 Board to follow is the last time that Ohio's Bill of
11 Rights Article I of the Ohio Constitution was
12 amended, which was Section 19b, added in 2008.
13 That's the groundwater property rights amendment,
14 which title of that is To Amend the Constitution to
15 Protect the Private Property Rights in Groundwater,
16 Lakes, and Other Watercourses.

17 Now, again, that has sort of an
18 absolutist tenor. We're protecting all these
19 property rights and then you move down to the summary
20 and you see what the law affects, what it doesn't
21 affect, and all kinds of clarifications and
22 crystallizations of the title.

23 So if you're looking for a model within
24 this Ballot Board to use, Section 19b of Article I,
25 is the last time that Article I of the Ohio

1 Constitution has been amended.

2 And finally, on the topic of freedom of
3 choice or liberty, the Ohio Supreme Court has defined
4 that term. When speaking of the word "freedom" or
5 "liberty," the Court said, and says in Palmer v.
6 Tingle, the Court doesn't view this as an amorphous
7 or arbitrary concept at all.

8 Says the words "freedom" or "liberty" as
9 used in the first section of the Bill of Rights of
10 the Ohio Constitution, do not mean a mere freedom
11 from physical restraint or a state of slavery, but
12 are deemed to embrace the rights of man to be free in
13 the enjoyment of the faculties with which he has been
14 endowed by his Creator, subject only to the
15 restraints as are necessary for the common welfare.

16 So the notion that freedom or liberty are
17 an amorphous concept, we just can't get ahold of here
18 is also rejected by our own Supreme Court.

19 And I think that addresses all the
20 concerns. Member Strahorn indicated, made a
21 reference to language is less prejudicial, and again
22 I would simply reiterate, I don't know of any less
23 prejudicial way to frame a title than to use the
24 exact language what Ohians are voting on.

25 So your concern may be that the language

1 of the Constitution itself is vague or in some ways
2 deceptive, however again, you make the argument with
3 almost any section of the Constitution. There are a
4 number of rights in the Ohio Constitution that I hold
5 dear that the Courts interpret differently than I may
6 like all the time.

7 When this Ballot Board decides on a title
8 for that language, it is confined to viewing the four
9 corners of the language, not how the Court may
10 interpret it, how it may be viewed as to vagaries.
11 So it looks to the actual measure itself.

12 I'm pleased to answer any questions at
13 this time, and also if there is some level of debate
14 or discussion where it becomes appropriate for me to
15 again chime in afterwards, I would be very pleased
16 and eager to do so.

17 SECRETARY HUSTED: Thank you.

18 Members of the Board, are there any
19 questions for the witness?

20 Senator Strahorn.

21 MR. STRAHORN: Thank you, Mr. Chair.

22 Again, would you restate your name? I
23 didn't catch it earlier.

24 MR. THOMPSON: My name is Maurice
25 Thompson. I represent the proponents of the Measure

1 the Ohio Project, and I'm from the 1851 Center.

2 MR. STRAHORN: Thank you, Mr. Thompson.

3 I just have a couple questions for clarification.

4 First of all, with regard to the allusion
5 to the Supreme Court ruling, was that ruling on the
6 title or was that ruling on whether the initiative
7 would be separated into multiple parts? ****

8 MR. THOMPSON: The ruling was on this
9 Board's decision or attempt to separate the measure
10 into multiple parts.

11 In reaching that decision what the Court
12 found was that in fact there was one unified purpose
13 behind the Ohio Health Care Freedom Amendment, and
14 that that one unified purpose was to preserve the
15 freedom of Ohians to choose their health care and
16 health care coverage.

17 MR. STRAHORN: Just follow-up to that,
18 Mr. Chair.

19 SECRETARY HUSTED: Senator Strahorn.

20 MR. STRAHORN: Mr. Thompson, was the
21 title at any point, had the title actually been
22 challenged by anybody?

23 Was that a question that had been brought
24 up to the Supreme Court or was that just a
25 perfunctory sort of commentary with regard to the

1 separation issue?

2 MR. THOMPSON: The title was relevant to
3 the adjudication insofar as, Member Strahorn, you and
4 several other members of the Ballot Board had argued
5 that several provisions of the Ohio Health Care
6 Freedom Amendment did not fit the purpose of
7 preserving the freedom of Ohians to choose their
8 health care and health care coverage, and i was on
9 that front that the Ohio Supreme Court indicated it
10 did in fact meet that purpose and that this
11 description was in fact an accurate overarching
12 title.

13 MR. STRAHORN: Another question, Mr.
14 Chair.

15 SECRETARY HUSTED: Senator Strahorn.

16 MR. STRAHORN: With regard to the
17 Attorney General's opinion, fair and truthful
18 statement of what the ballot does.

19 Again, was the title in question or was
20 the Attorney General gesturing opinion about whether
21 the what was contained in the ballot was a fair and
22 truthful statement of what was trying to occur?

23 MR. THOMPSON: Member Strahorn, the
24 answer to your question is "yes." There is a title
25 on the cover page to the initiative petitions that

1 were circulated, and that title is identical to the
2 title presented here today. And the Ohio Attorney
3 General certified that that title was a fair and
4 truthful description of a title for this measure.

5 MR. STRAHORN: Another question, Mr.
6 Chair.

7 SECRETARY HUSTED: Senator Strahorn.

8 MR. STRAHORN: And I think the point,
9 Mr. Thompson, I think the point that Attorney McTigue
10 was making, and while -- I'll just be honest -- the
11 "to preserve the freedom" phrase does sort of strike
12 me as potential for a little bit prejudicial in the
13 sense that I think a lot of people don't really read
14 the whole initiative or very far through it, and when
15 you see things like that, I think it does prejudice
16 people in one way or another when they see that in a
17 way that could be misleading.

18 But I think his greater point might have
19 been -- I don't want to put words in his mouth --
20 might have been not just that that as sort of a tag
21 is kind of leading for people, but where it's leading
22 you to is not necessarily what the initiative does in
23 terms of what real -- what your choice is.

24 The freedom that you're exercising isn't
25 really which health care or health care coverage you

1 get. The freedom that you might be acting on is
2 whether you have to get coverage or not in that that
3 is, one, I believe that that language upfront is
4 probably a little leading, and two, that it's leading
5 people to a false conclusion.

6 And I just would like for you to speak to
7 do you really believe that this is about Ohians
8 choosing health coverage or whether this is Ohians
9 choosing whether they should be compelled to seek
10 health coverage?

11 MR. THOMPSON: Thank you for your
12 questions. I've four separate questions that you
13 asked in the course of that question.

14 The first is whether people actually read
15 the amendments that they vote on. I believe it's
16 incumbent upon this Ballot Board to assume that Ohio
17 voters do read what they vote upon.

18 There are references in Article II,
19 Sections 1a through g, that basically the Board can't
20 take measures that are paternalistic in order to
21 decide for voters.

22 You are, of course, it is incumbent upon
23 you to make sure that things are clear so an
24 intelligent vote can be formed. But to assume that
25 the voters won't read the actual language what they

1 voted on I think is a mistaken assumption upon which
2 to embark.

3 Once voters do read, I think that it's
4 very clear the amendment's short, it's broken down in
5 numbered sections that are easily digestible. We
6 talk about preservation of health care freedom.

7 Of course, it's as of March 19, 2010,
8 that's the very first numbered item under the
9 proposed amendment would not -- I assume that most
10 individuals would read that.

11 Secondly, you asked about the affects of
12 the amendment, and again, I want to stress that the
13 purpose of crafting the ballot language is a separate
14 purpose from crafting the language on the purpose and
15 the affects of the amendment.

16 In other words, the concern that you're
17 raising, I don't believe that the ballot language is
18 an appropriate tool to resolve your concerns. I do
19 believe that you have a tool to resolve those
20 concerns and that we'll probably have greater debate
21 on that when we discuss language on the purpose and
22 affects and the arguments for and against the
23 measure.

24 So I believe that that is the
25 constitutionally prescribed tool for the concern that

1 you articulate over the affects.

2 The third question that you posit regards
3 whether or not this actually allows you to choose
4 which health care coverage that you get. And I'll
5 try at all costs to no way be lured into a policy
6 debate over the merits of this measure or the extent
7 to which it may protect Ohians.

8 And I will say that it is very likely
9 that there will be, as with any new constitutional
10 amendments litigation that that's the extent of the
11 rights protected by this. Because almost all
12 constitutional amendments contain words that aren't
13 defined in the constitutional amendments, although we
14 do define several of the more important terms.

15 With that said, I do think that your
16 question focuses only on Division A of Section 21, no
17 person shall be compelled directly or indirectly to
18 purchase health care or health care coverage, but
19 that does not give sufficient attention to Divisions
20 B and C, no law or rule shall prohibit the purchase
21 or sale of health care or health insurance, and no
22 law or rule shall impose a penalty or fine for the
23 sale or purchase of health care or health insurance.

24 These two measures actually do protect a
25 choice. What they say is that you can't be stopped

1 from obtaining any kind of health care or health care
2 coverage that you already have had a right to as of
3 the date herein, and that a person distributing
4 health care or health care insurance can't be stopped
5 from doing so and shouldn't be penalized from doing
6 so either.

7 So I believe that does preserve the
8 freedom to choose health care or health care coverage
9 as of the effective date of the amendment in that
10 options can't be taken away from you that are
11 currently on the table -- I'm sorry, that were on the
12 table as of -- as prior to the effective date of the
13 amendment.

14 MR. STRAHORN: Mr. Chair, just one more
15 question.

16 SECRETARY HUSTED: Senator Strahorn.

17 MR. STRAHORN: In having -- Mr. Thompson,
18 in having listened to your explanation of all the
19 parts of it I followed, some of it's a little
20 confusing. And it just sort of brings me to the
21 point or conclusion would it make more sense to have
22 a title that was better understood by the general
23 public than something that is clearly in my opinion,
24 just my opinion, that it's confusing.

25 It's confusing just in the fact that we

1 have to have this kind of conversation about it, have
2 you explain it in that kind of detail. It jumps out
3 at me as there are a lot of people who will
4 misinterpret what that title is as we have sort of
5 bandied back and forth.

6 In your opinion is there possibly a more
7 clear way that we could present this to the general
8 public?

9 MR. THOMPSON: Member Strahorn, the
10 answer to your question is no. There is utterly no
11 more clear way in which to present this because this
12 tracks the exact language that would be in the
13 amendment.

14 The purpose of the title is to describe
15 what's in the amendment that's being voted on. This
16 is the exact language that's in the amendment that's
17 being voted on.

18 So there is no more clear way to describe
19 the amendment, the language of the amendment, than by
20 with the language of the amendment. And the Ohio
21 Supreme Court has found no ambiguity, the Attorney
22 General has found no ambiguity.

23 So I think that the answer to your
24 question is an unequivocal no. This is the clearest
25 language, it's been approved the proper channels, and

1 it's the language that would be best to employ by the
2 Ballot Board.

3 MR. STRAHORN: Thank you, Mr. Chair.

4 SECRETARY HUSTED: Mr. Griffin.

5 MR. GRIFFIN: Thank you, Mr. Chairman.

6 Mr. Thompson, I want to thank you for
7 coming down here today. We appreciate your time and
8 thoughts.

9 I just want to understand your position
10 on this. You are not saying, are you, that a title
11 must be accepted for any language that is in the
12 proposed amendment, are you?

13 That it must always track the exact
14 language or title in the proposed amendment?

15 MR. THOMPSON: Member Griffin, no, I'm
16 not saying that. In fact, if you look at the history
17 of the Ballot Board's crafting of titles, there are
18 many instances where it's used titles that don't
19 track the exact language one way or the other. And
20 this gets us into a myriad of different issues.

21 So some constitutional amendments don't
22 contain a title for the amendment at all, as opposed
23 to this one. Some do. You're not bound to use the
24 title that's in the amendment. But if you're looking
25 to describe the amendment, perhaps the easiest way to

1 do that is to describe the amendment.

2 MR. GRIFFIN: Mr. Chairman.

3 Certainly you would agree that some
4 titles might be prejudicial?

5 MR. THOMPSON: The Ohio Supreme Court
6 standard for evaluating titles is indeed one of the
7 prongs is whether or not they may be prejudicial. So
8 that is correct. So that assumes there is such a
9 thing as a prejudicial title.

10 MR. GRIFFIN: So you agree that a title
11 could be prejudicial.

12 MR. THOMPSON: Member Griffin, I do. The
13 operative issue then is what is it prejudicial
14 towards? Does it prejudice the language in one way
15 or another?

16 MR. GRIFFIN: Mr. Chairman.

17 You spoke about language as you cited
18 Ohio Constitution 1, Section 16, that indicates that
19 our duty here is to properly identify the substance,
20 not the language; isn't that right?

21 MR. THOMPSON: That's incorrect, Member
22 Griffin. It's Article XVI, Section 1, that
23 articulates the standards. But otherwise your
24 statement is correct.

25 MR. GRIFFIN: Okay, so our task here is

1 to identify the substance of the amendment, not the
2 language that's used, correct?

3 MR. THOMPSON: The substance of the
4 amendment, that's correct. And the substance of the
5 amendment as interpreted by the Ohio Supreme Court is
6 measured by the language employed by that amendment,
7 Member Griffin.

8 MR. GRIFFIN: And certainly you would
9 agree that some titles might either deliberately or
10 accidentally misstate the substance of the amendment.

11 MR. THOMPSON: The Ohio Supreme Court has
12 in fact found in the past that certain ballot titles
13 or certain ballot language was misleading or
14 prejudicial. So that there are several instances in
15 of course of our history since 1912 where that has
16 happened. So yes, I would of course concur with that
17 statement.

18 MR. GRIFFIN: And our task here, as you
19 cited it, is to find an impartial statement without
20 prejudice for or against; is that correct?

21 MR. THOMPSON: Member Griffin, I think
22 that that's correct. There are a number of standards
23 that you can employ. I think the standard in Article
24 XVI, Section 1, is the most clear and the most
25 paradigmatic, which is the ballot language, and of

1 course we're talking about the language instead of
2 the title, shall properly identify the substance of
3 the proposal to be voted on.

4 I will note that the most clear language
5 as to the title itself, if that's in fact your
6 concern as Member Strahorn's concern was, is
7 governed -- appears to be more governed by Revised
8 Code 3505.05D, a brief title descriptive of the
9 question for the issue below it.

10 So under that standard you look directly
11 at the language and whether the title describes that
12 language.

13 MR. GRIFFIN: Mr. Thompson, in your
14 presentation and in your conversation with Member
15 Strahorn, you discussed the recent Ohio Supreme Court
16 decision regarding whether it was a single issue or
17 whether it should be divided.

18 It's true, isn't it, that that opinion
19 never used the words "impartial statement without
20 prejudice for or against"? Those words do not appear
21 in that Supreme Court opinion, do they?

22 MR. THOMPSON: To the best of my
23 knowledge, those words do not appear in that Supreme
24 Court decision.

25 MR. GRIFFIN: Let me ask you a slightly

1 different question, if I may.

2 At the bottom of the proposed ballot
3 language it's phrased "shall the amendment be
4 approved." You agree with the Secretary of State's
5 phrasing of that, that it should be a "yes" to
6 approve and a "no" to reject? Correct.

7 MR. THOMPSON: Member Griffin, yes, I do.

8 MR. GRIFFIN: And you agree that's the
9 proper way to phrase this type of ballot issue?

10 MR. THOMPSON: Member Griffin, the
11 position of the proponents of this amendment is only
12 that we are not challenging that language. We don't
13 have a position on its accuracy or its correctness,
14 other than that we're not challenging it.

15 MR. GRIFFIN: Our task is to craft a
16 title that fairly and impartially sets forth the
17 substance of the amendment, and I want to make sure
18 that I understand your view of what that substance
19 is.

20 And in No. 1 on the description -- I'm
21 sorry, I suppose the explanation, it says: No law or
22 rule shall compel directly or indirectly any person
23 to participate in a health care system.

24 So does that mean that there can be no
25 either financial incentives or penalties one way or

1 the other regarding the purchase of either health
2 care or health insurance?

3 MR. THOMPSON: That would depend upon
4 your interpretation of the word "compelled," Member
5 Griffin. And the term "compel" is defined in
6 Division E of Article I, which includes the levying
7 of penalties or fines.

8 MR. GRIFFIN: And certainly would also
9 exclude any sort of subsidy to indirectly compel or
10 encourage a person to be involved in the health care
11 provider or health care system, right?

12 MR. THOMPSON: Member Griffin, I don't
13 know that that's accurate, and I also don't know that
14 to the extent that that is an affect of the measure.
15 I don't know that it's in my purview to speak to that
16 as to the accuracy of the ballot language.

17 MR. GRIFFIN: So is it your
18 understanding --

19 SECRETARY HUSTED: Mr. Griffin.

20 MR. GRIFFIN: Yeah. Let me just wrap up.
21 Let me just have a few more questions, which I
22 appreciate, and I'll try to be brief.

23 SECRETARY HUSTED: Proceed.

24 MR. GRIFFIN: Thank you, Mr. Chair.

25 I just want to understand whether you

1 believe it would be accurate to indicate that this
2 proposed amendment would prohibit the payment or
3 subsidies to encourage participation in a particular
4 type of health care system.

5 MR. THOMPSON: For the purposes of this
6 hearing, Member Griffin, I've not developed a
7 position on the affects of the amendment.

8 MR. GRIFFIN: So is it fair to say then
9 in this description you don't know whether it's
10 accurate or inaccurate?

11 MR. THOMPSON: No, Member Griffin. I
12 think it's fair to say that when looking at the
13 accuracy of the title as describing the language,
14 that we looked at the language itself and we don't
15 try to anticipate every affect one way or the other,
16 that is again the province of the purpose and
17 explanation provisions in Article III, Section 1g.

18 MR. GRIFFIN: Thank you again your time
19 today. Appreciate your coming down.

20 SECRETARY HUSTED: Additional questions.
21 Senator Faber?

22 SENATOR FABER: Thank you.

23 Mr. Thompson, thank you for your
24 testimony and your opinion on this.

25 The way I see it, it comes down to the

1 question for the Secretary, because the Secretary's
2 ultimately the one who's going to do the title,
3 right?

4 MR. THOMPSON: Correct. The
5 constitutional language is within the province of the
6 Secretary of State or the Ballot Board. So you're
7 the Board.

8 SENATOR FABER: But I think the statute
9 gives that to the Secretary of State. Just making
10 sure we're clear on this.

11 So then the question is, does term
12 currently indicated as the title To Preserve the
13 Freedom of Ohians to Choose Their Health Care and
14 Health Coverage accurately reflect what's before on
15 the amendment, correct?

16 MR. THOMPSON: That is my understanding,
17 Member Faber.

18 SENATOR FABER: So let's start out with
19 the full text of the amendment. Article I, it says,
20 and I'm reading now to be correct: Preserving -- I'm
21 sorry, Preservation of the freedom to choose health
22 care and health care coverage.

23 That sounds awfully familiar.

24 MR. THOMPSON: Member Faber, it probably
25 sounds familiar because it tracks the title on the

1 ballot language.

2 SENATOR FABER: Exactly. Or darn near
3 exactly. One word difference I think. Right?

4 MR. THOMPSON: I concur, Member.

5 SENATOR FABER: So then we go on to the
6 actual terms and text of the amendment. Section 21a
7 says: No federal, state, or local law or rules shall
8 compel directly or indirectly any person, employer,
9 or health care provider, to participate in a health
10 care system.

11 Sounds to me like you have freedom to
12 choose to participate or not participate. You can't
13 be compelled to participate. Correct?

14 MR. THOMPSON: Member Faber, without
15 speaking in any kind of specificity to the affects of
16 the measure, I would agree that your statement is
17 essentially correct.

18 SENATOR FABER: Then it goes on in
19 Section 21b, it says: No federal, state, or local
20 law shall prohibit the purchase or sale of health
21 care insurance.

22 That again says that you're free to,
23 again, freedom to choose health care and health care
24 coverage because they're not going to eliminate the
25 market for you to have health care coverage.

1 MR. THOMPSON: Member Faber, I believe
2 that the language self-evidently does exactly what
3 you just specified.

4 SENATOR FABER: Again, then the next
5 section is: No federal, state, or local law shall
6 impose a penalty or fine for the sale or purchase of
7 health care insurance.

8 Sounds to me, again, you're making sure
9 that you don't limit the right for someone to obtain
10 health care of their choice because somewhere instead
11 of offering you're prohibiting the ability to buy,
12 you prohibit somebody's ability to sell.

13 MR. THOMPSON: Yes, again Mr. Faber, I
14 concur that without speaking to the affects of the
15 measure, that your characterization accurately
16 reflects the language and the plausible affects.

17 SENATOR FABER: Now, as I back up and
18 think about this for a second, I know there's been
19 some concern about the word "freedom." That seems to
20 be the word that caught the other side and that the
21 other side mentioned that they had some concern
22 because it seems to connote whether it's an adjective
23 or whether it's -- how it's defined and what that
24 exactly means.

25 This is amending the section of Article I

1 of the Ohio Constitution entitled the Bill of Rights.
2 Correct?

3 MR. THOMPSON: That's correct, Member
4 Faber.

5 SENATOR FABER: Would it be accurate to
6 say in the title: To Preserve the Right of Ohians to
7 Choose Their Health Care and Health Care Coverage, as
8 well? Would you agree to that's also accurate?

9 MR. THOMPSON: I believe that that would
10 also be accurate, Member Faber, and that was the
11 language that was at issue in Colorado and was
12 affirmed by the Colorado Supreme Court as under
13 similar standards that would be employed here.

14 SENATOR FABER: So the question is does
15 "preserve the right of Ohians" equal "preserve the
16 freedom"? That's the question, if you're going to
17 take issue over "freedom."

18 MR. THOMPSON: Member Faber, if one
19 peruses the Article I of the Ohio Constitution, you
20 will see the terms "liberty," "freedom," and "rights"
21 all used extensively and interchangeably.

22 In fact, the preface to the entire Ohio
23 Constitution is: We the people of Ohio, grateful to
24 our Creator for our freedom.

25 And then Section 1 of Article I, of

1 course, references certain freedoms and liberties
2 also, property rights shall be held inviolate. And
3 of course this is coterminous with language we see in
4 the federal Constitution, with freedom of speech.

5 So I think these are terms that are
6 recognized in our society rather than loaded
7 arbitrary terms representing only one political
8 philosophy or the other. To the extent they do
9 represent a political philosophy, it's that we have
10 employed in our state Constitution and that we've
11 chosen as a people.

12 SENATOR FABER: And making sure I'm clear
13 on that, because I agree, the Preamble, and I've got
14 it here in front of me, of the State Constitution
15 says: We, the people, of the State of Ohio are
16 grateful to the Almighty God for our freedoms to
17 secure its blessing, from other common welfare and to
18 establish this Constitution.

19 And then it goes directly to Article I,
20 Bill of Rights, and it says: Inalienable rights, we
21 are -- all men are by nature free and independent and
22 have certain inalienable rights.

23 That seems to mean that the people have
24 the rights, not government has the right to give them
25 to you; is that correct?

1 MR. THOMPSON: Member Faber, I certainly
2 believe that's correct.

3 SENATOR FABER: Among which are enjoying
4 and defending life and liberty and acquiring,
5 possessing, and protecting property and seeking and
6 obtaining happiness and safety.

7 And then it goes on to list other various
8 enumerated rights. And it is in those other
9 enumerated rights that this constitutional amendment,
10 if adopted by the people, will be inserted. Am I
11 right on that?

12 MR. THOMPSON: Member Faber, that's
13 exactly correct. This would be the 21st section of
14 Article 1, Ohio's Bill of Rights. So the language
15 very much tracks the first 20 sections, which, as you
16 indicate, use terms like "rights," "freedoms," and
17 "liberties" throughout.

18 SENATOR FABER: Okay, just wanted to make
19 sure I had it in proper constitutional context.

20 Thank you.

21 SECRETARY HUSTED: Thank you.

22 Additional questions?

23 Senator Strahorn.

24 MR. STRAHORN: Mr. Chair.

25 Mr. Thompson, I do have to go back again

1 as a point of clarity. There was a question I asked
2 you with regarding to former-Attorney General Richard
3 Cordray's opinion, and I might be missing and I was
4 wondering if you could help me find it here or if I
5 misinterpreted your answer.

6 That it did speak to whether the title
7 was a fair and accurate depiction, and what I've been
8 able to find in the amendment so far just really
9 speaks to the summary and it doesn't -- I haven't
10 been able to find a reference to the title. I was
11 wondering if you could clear that up for me.

12 MR. THOMPSON: Yes, Member Strahorn, I
13 can gladly clear that up for you.

14 The title is part of the summary for the
15 purposes of the petition. In other words, the cover
16 page of the petition is essentially the summary,
17 absent, of course, the language at the bottom
18 regarding the names of the petitioners, et cetera.

19 However, when we're talking about what
20 the summary is, we're talking about, at least in this
21 instance, may not always be true because the title
22 may not be included -- although the title is required
23 to be included by statute -- when we're talking about
24 what a summary is, it includes the title.

25 MR. STRAHORN: Are you in any way

1 inferring that he was referencing the title when he
2 did this, or was there some communication that makes
3 you completely sure that that's what he was
4 referencing?

5 MR. THOMPSON: Yes, Member Strahorn, I'm
6 definitely not just inferring, but explicitly
7 affirming that when Attorney General Cordray affirmed
8 that the summary was a fair and truthful statement of
9 the amendment, that he was referring to the title
10 that appears in the cover page of the petitions that
11 were circulated and signed by over 550,000 Ohians,
12 and also including the summary language that appears
13 below that title.

14 MR. STRAHORN: And when you refer to "the
15 title," you're referring to the title that is
16 included in the initiative, not any opinion that's
17 been referenced with regard to the title that we're
18 talking about actually putting on the actual ballot.

19 MR. THOMPSON: If I understand your
20 question correctly, Member Strahorn, when I'm
21 referring to the title, we are currently discussing,
22 as I understand it, the title on the petition packets
23 that were circulated, correct?

24 MR. STRAHORN: Yeah, I just want that
25 clarity from you that that's what we're talking

1 about. I don't see how there's any way he could have
2 done this, but I just want to make sure we're on the
3 same page that this summary doesn't have anything to
4 do with what we're dealing with in terms of the title
5 that would be put on the ballot.

6 You're talking about the summary that
7 includes the initiative and he's saying that that
8 heading that you have in the initiative is okay for
9 the purposes of being on that initiative.

10 I see these as somewhat two different
11 things in terms of being on a ballot and steering
12 people as opposed to something that's in the
13 initiative that is with all the other language that
14 people are going to read before they sign a petition
15 and that he didn't see any difference or problem with
16 that versus how we title an initiative on a ballot,
17 on an actual ballot.

18 MR. THOMPSON: Member Strahorn, I believe
19 I understand your question, and the summary begins --
20 I do not actually have the petition in front of me,
21 but my recollection is that the petition begins, the
22 summary language of the petition begins, quote, title
23 To Preserve the Freedom of Ohians to Choose Their
24 Health Care and Health Care Coverage.

25 In reference to that language along with

1 the language below it, Attorney General Cordray ruled
2 that this is a fair and truthful summary of the
3 ballot measure itself.

4 Now, is that the exact standard that this
5 Board is to apply? Yes and no. There are a number
6 of standards out there fair and truthful, somewhat
7 mimics some of the language from the Ohio Supreme
8 Court when we're talking about descriptive of the
9 substance.

10 In fact, Bailey v. Celebrezze, in 1981,
11 the Ohio Supreme Court stated that the text must
12 fairly and accurately present the question or issue
13 to be decided.

14 So I think that the Attorney General
15 certification is informative, but I concur with you
16 that it's not dispositive.

17 MR. STRAHORN: Just a question, Mr.
18 Chair.

19 SECRETARY HUSTED: Senator Strahorn.

20 MR. STRAHORN: Do we have any other
21 testimony on this?

22 SECRETARY HUSTED: This is the last
23 witness we have on the matter.

24 MR. STRAHORN: Are we going to take this
25 up today? Are we going to continue this?

1 SECRETARY HUSTED: The title is not for
2 the Board to decide. The language is for the Board
3 to decide. And we will be taking up the language
4 issue today. So if there are any additional
5 questions in relation to the language, which I'm not
6 sure I've heard any to this point, we might want to
7 get to that.

8 MR. STRAHORN: Thank you, Mr. Chair.

9 MR. GRIFFIN: Mr. Chair.

10 SECRETARY HUSTED: Mr. Griffin.

11 MR. GRIFFIN: I just have one last set of
12 questions I guess.

13 SECRETARY HUSTED: Sure.

14 MR. GRIFFIN: Mr. Thompson, certainly you
15 recognize that state and federal governments these
16 days have their budgets particularly tight as to
17 families across Ohio. I apologize. Let me speak
18 into the microphone.

19 We are in certainly difficult economic
20 times for both Ohio families and for government
21 budgets and my question is, is there any alternative
22 title that might avoid the cost of litigation to
23 taxpayers and to Ohio families that you might
24 propose?

25 MR. THOMPSON: Member Griffin, if

1 somebody were to initiate litigation challenging this
2 title, they would be indeed wasting taxpayer
3 resources. But my capacity to limit some people's
4 ability to waste taxpayer resources through use of
5 the courts is incredibly limited.

6 So I don't have any control over that
7 issue. If opponents of this title were in fact to
8 challenge it, it would be a fruitless waste of
9 taxpayer resources and it's something that should be
10 avoided at all costs. So I agree with your
11 sentiment.

12 MR. GRIFFIN: And is there a possible
13 alternative that might avoid that?

14 MR. THOMPSON: I can't conceive of a more
15 plausible alternative to the text of the amendment
16 than the text of the amendment itself, which is what
17 the title articulates.

18 MR. GRIFFIN: Thank you, Mr. Chair.

19 SECRETARY HUSTED: Thank you.

20 It's been an interesting dialogue
21 regarding the title, and as the individual who has
22 the responsibility to come to conclusion on this, I
23 just have a couple of questions that really seems to
24 be centered around the issue of the word "freedom,"
25 which I believe you described as interchangeable with

1 "rights" or "liberty" essentially, and whether in
2 this case it is a noun or adjective.

3 And as I look at the description as
4 submitted, the text of the amendment, I do see the
5 word "right" in the body of the text. I don't see
6 the word "freedom," and would "right," along the
7 lines of what Senator Faber requested or discussed,
8 would "right" be an equally suitable term to
9 "freedom"?

10 MR. THOMPSON: Well, Mr. Secretary, I do
11 have to correct your last observation. The term
12 "freedom" actually is in the amendment.

13 So if you look at the Ohio Constitution
14 that Member Faber has there next to you, maybe you
15 have one also, a number of the Bills of Rights, in
16 fact I believe all of them have titles.

17 So it will say Article I, Section 1, and
18 it will give a title. And that title would actually
19 appear in the Ohio Constitution. And that language
20 is preservation of the freedom of health care and
21 health care coverage.

22 So the term "freedom" is actually
23 in beyond that.

24 SECRETARY HUSTED: Beyond the title
25 language.

1 MR. THOMPSON: I concur with you that I
2 don't believe the reference to "freedom" beyond that
3 and that the term "right" is a suitable synonym for
4 the term "freedom."

5 SECRETARY HUSTED: And then the second
6 word in the title, "preserve," it was chosen because
7 established in your view would not be accurate
8 because of the right does currently exist and I
9 assume that the purpose of this is, as you say,
10 preserve, would the word "affirm" be a suitable
11 option for "preserve" in your mind?

12 MR. THOMPSON: Mr. Secretary, that is a
13 difficult question for me to answer without a
14 dictionary in front of me, Lex Law Dictionary or
15 otherwise.

16 I'm inclined to say in thinking about
17 that issue for the first time right now that the
18 terms "preserve" and the terms "affirm" are roughly
19 equivalent.

20 My initial thought is that the term
21 "preserve" merely means to, as you indicated,
22 protect, note the protection of a preexisting right.
23 An affirmation strikes me as more of a symbolic
24 acknowledgment of that right rather than an actual
25 substantive ingrainment of that right.

1 So I do see the term "affirm" as a bit
2 weaker and perhaps less accurate in describing our
3 characterization of these rights.

4 SECRETARY HUSTED: And then finally, we
5 have the term "health care and health care coverage."
6 I do not believe the word "coverage" is in there but
7 I am assuming that the word "coverage" is to entail
8 both health care and health care coverage, both the
9 means in which health care is treated and also the
10 insurance component of health care which would be
11 defined in the second issue, correct?

12 Would health care insurance and health
13 care coverage in this particular case be
14 interchangeable?

15 MR. THOMPSON: Mr. Secretary, I'm not
16 quite comfortable with the assumption that "health
17 care coverage" is interchangeable with "health care
18 insurance," only because of my limited knowledge as
19 to --

20 SECRETARY HUSTED: And given that, what
21 might in addition to "insurance" "coverage" imply?

22 MR. THOMPSON: That's exactly where I'm
23 deficient, Mr. Secretary. It may be that there are
24 other mechanisms for health care coverage aside from
25 insurance or the individuals characterize other than

1 insurance.

2 I think that insurance, if you were to
3 draw a circle, I do think insurance would fill up
4 95 percent or perhaps more of that circle. However,
5 I do think the term "coverage" is probably broader
6 and may include -- may in fact include items other
7 than insurance that are, I totally admit, perhaps
8 beyond my contemplation.

9 SECRETARY HUSTED: And as I look at the
10 comparison between the two, the one submitted by
11 Mr. McTigue and Progress Ohio and the issue here, it
12 seems that there is consensus on health care
13 coverage.

14 Although written in the negative, the
15 language, I mean it says prohibit the enactment of
16 laws or rules requiring mandatory participation in
17 health care coverage, preserve the freedom of Ohians
18 to choose their health care.

19 Does that mean anything substantially
20 different other than one is framed in the negative
21 and one is framed in the positive?

22 MR. THOMPSON: Mr. Secretary, I assume
23 that you're asking about the discrepancy between the
24 ballot title currently in the proposed ballot
25 language and Mr. McTigue's proposed alternative.

1 SECRETARY HUSTED: Correct. Basically
2 the question is, do these things mean the same thing
3 in your mind other than one is written in the
4 negative and one is written in the positive?

5 MR. THOMPSON: No, Mr. Secretary, they
6 don't mean the same thing. The reason that I say
7 that --

8 SECRETARY HUSTED: What do you think --
9 what do you distinguish is the difference between the
10 meaning of the two?

11 MR. THOMPSON: Sure, Mr. Secretary.
12 Mr. McTigue's terminology only references Division A
13 of Article I, the proposed constitutional amendment,
14 and it specifically only references the requiring of
15 mandatory participation of health care and health
16 care coverage.

17 It in no way speaks to or any way
18 embraces the freedoms preserved in Divisions B and
19 Divisions C of the Health Care Freedom Amendment.

20 I think I -- I don't want to speak for
21 anyone, but I think I can understand why, as we all
22 know, much of the public debate over this measure has
23 centered over the Patient Protection Affordable Care
24 Acts, minimum essential coverage requirement, and the
25 interplay between this and that.

1 So I think there has been advertently or
2 inadvertently a myopic focus on Division A of this
3 measure. However, importantly to us, the proponents,
4 Division B and Division C are co-equal parts of the
5 amendment that we believe are every bit as equally
6 important, and their language, their discussion, is
7 completely excluded by the language proposed by Mr.
8 McTigue, rendering it a deficient description of the
9 entire amendment as opposed to our description.

10 SECRETARY HUSTED: Thank you.

11 MR. THOMPSON: Thank you.

12 SECRETARY HUSTED: Senator Strahorn.

13 MR. STRAHORN: Mr. Chairman, if you will
14 allow, I actually had a question about the language
15 but did also want to make one last comment about
16 title for your benefit.

17 SECRETARY HUSTED: Certainly.

18 MR. STRAHORN: Either person,
19 Mr. Thompson or Mr. McTigue would like to answer a
20 language question, I would really like to hear from
21 them.

22 But I would also like to say as somebody
23 who's been misinterpreted a number of times over the
24 years, that I don't have -- I obviously believe in
25 freedom and liberty and all those things and that

1 really isn't something I want to be misconstrued,
2 it's just for precisely that reason, because so many
3 of us do believe in those things so vehemently.

4 When you hear that kind of language it
5 motivates you to want to respond in the affirmative
6 to protecting those things, and I think that biases
7 people in one way or another, so I just want to be
8 clear for the record

9 But that title that is here implies that
10 under the Patient Protection affordability --
11 Affordable Care Act that you don't have the ability
12 to choose your health care.

13 It is not my understanding that it tells
14 you you can't pick a particular health care, it just
15 directs you to pick health care. So again, in some
16 respects I found that a little less accurate.

17 I'm going to ask you a language question.
18 If you want to back up and respond to anything, feel
19 free.

20 This question is to either Mr. Thompson
21 or, if it's okay with the Chair, to Mr. McTigue. And
22 I don't know the answer to this and I want to respond
23 where it says the proposed amendment would not, and
24 it lists the things that it would not do, No. 4 it
25 says: Affect any laws calculated to deter fraud or

1 punish wrongdoing in the health care industry.

2 It is my understanding one of the reasons
3 that the compulsion to purchase health care is
4 necessary is to keep the integrity of the bill and to
5 create the savings that should occur or is intended
6 to occur from the act by not having people -- some
7 people purchase health care and other people purchase
8 health care at times that is more advantageous to
9 them, and for corporations to shed their
10 responsibility unduly to cover people that they're
11 already covering.

12 So I'd like a response as to whether any
13 of that or any of the things that you know about the
14 intended purpose of the compulsion does in fact or is
15 in fact intended to reduce or prevent any kind of
16 fraud or misrepresentation in the health care system.

17 SECRETARY HUSTED: I would -- I want to
18 remind the committee or the Board that we need to
19 stay focused on the language and not debate the
20 merits. So I just, I ask him to proceed but I don't
21 want to go far.

22 MR. STRAHORN: If I could just explain,
23 Mr. Chair, really is because the language that's in
24 here, if it's not accurate, I felt that it was our
25 responsibility to remove so I felt I had to explain

1 that.

2 SECRETARY HUSTED: Sure.

3 MR. THOMPSON: I would have given the
4 same preface, Member Strahorn, that Secretary of
5 State gave before answering that question, so I'll
6 rely upon his and try to speak concisely as to these
7 issues.

8 This amendment makes no implication at
9 all as to what the Patient Protection and Affordable
10 Care Act does or does not do. This amendment could
11 have been offered up ten years ago, it could be
12 offered up ten years from now. It operates
13 completely independent with respect to the language
14 used.

15 Your question -- so I don't agree with
16 your -- I believe it was an assertion that this
17 amendment makes an implication about the Patient
18 Protection Affordable Care Act in any way. So then
19 your ancillary question to that I will not answer.

20 The question is to whether compulsion is
21 necessary for one purpose or another. It is also a
22 question that is answered by this amendment. The
23 amendment proposes a solution, that being the
24 compulsion beyond the means explicitly recognized
25 herein is in fact never necessary or desirable.

1 And that of course is the purpose of a
2 constitution, is to decide where people may be
3 compelled or where they may not be compelled and to
4 limit government and carve out spheres of autonomy
5 for the People.

6 Your third question is of course I think
7 the most interesting one: Is the purpose of the
8 compulsion to prevent health care fraud? As I
9 understand it.

10 Again I believe that your question is
11 asking me to expound upon the purpose behind either
12 the Patient Protection Affordable Care Act, minimum
13 essential coverage requirement, which I should note
14 does require the person a particular kind of
15 insurance, not just any insurance.

16 Or, for example, Romney Care in
17 Massachusetts, which also embraces an individual
18 mandate is the purpose to prevent fraud.

19 As I understand it, the purpose is in
20 fact to subsidize private insurance companies for the
21 cost imposed upon them in covering preexisting
22 conditions as effectively. A lobbyist's trade-off.
23 So I don't know for the purpose of the compulsion is
24 to prevent fraud. I don't know that's an understood
25 meaning of the Patient Protection and Affordable Act,

1 and it's certainly not an intention of the proponents
2 of this measure.

3 I hope that I've adequately addressed
4 your last question which is a very interesting one.
5 Do you feel as if it's adequate?

6 MR. STRAHORN: Yeah. I think. Thank
7 you. In terms of your opinion, yes.

8 SECRETARY HUSTED: Mr. Griffin?

9 MR. GRIFFIN: Mr. Chair, I have a
10 question regarding the language used in the
11 description. And I'm interested in knowing why in
12 subsection 1 of the proposed amendment the
13 description says it would not affect the laws or
14 rules in fact.

15 So it includes both laws and rules,
16 presumably administrative rules, but in No. 4, our
17 description only limits it to laws but not rules
18 calculated to deter fraud or punish wrongdoing.

19 Is it your understanding that No. 4
20 applies to laws but not administrative rules, or
21 should we correct or change that description in No.
22 4?

23 MR. THOMPSON: Member Griffin, that's an
24 excellent question. And in fact you could change
25 that if you wish to, I believe.

1 If you look at Division, this section
2 does not affect the laws or rules in effect as of
3 March 19, 2010, terms and conditions of any laws
4 calculated to deter fraud.

5 Actually if you look at Division D, it
6 specifies only laws with respect to deterring fraud
7 or punishing wrongdoing. So it may be inaccurate to
8 include rules within that. Although one can be
9 viewed as following the other, but there is
10 discrepancy there.

11 The language explicitly references laws
12 and rules as to one limitation but not as to another.
13 So I think a court would draw a distinction.

14 MR. GRIFFIN: Do you know whether that
15 was an intentional policy decision to have
16 administrative rules in No. 1 and not No. 4, or do
17 you think it was just poor drafting?

18 MR. THOMPSON: I know enough to know that
19 the answer to that question is irrelevant to the
20 proceeding as to whether or not the ballot language
21 fits as we so have defined for the purpose of this
22 hearing.

23 MR. GRIFFIN: I'm not sure I concur, but
24 I appreciate your response.

25 SECRETARY HUSTED: Additional questions?

1 Thank you for your remarks and thoughts
2 and answers.

3 Is there anybody else here that wishes to
4 testify as it relates to Issue 3?

5 (No response.)

6 SECRETARY HUSTED: At this point in time
7 I would entertain a vote on the language for Issue 3.
8 The language before you is, as I mentioned, a
9 starting point for the discussion. We've had an
10 ample discussion on the matter and I would move that
11 we certify that language before you on Issue 3.

12 Is there a second?

13 SENATOR FABER: Second.

14 SECRETARY HUSTED: Is there any
15 discussion?

16 Secretary, please call the role.

17 MS. SCHUSTER: Senator Faber.

18 SENATOR FABER: Yes.

19 MS. SCHUSTER: Mr. Griffin.

20 MR. GRIFFIN: No.

21 MS. SCHUSTER: Mr. Morgan.

22 MR. MORGAN: Yes.

23 MS. SCHUSTER: Mr. Strahorn.

24 MR. STRAHORN: Yes.

25 MS. SCHUSTER: Secretary Husted.

1 SECRETARY HUSTED: Yes.

2 By a vote of 4 to 1, the motion carries
3 and the language is adopted.

4 At this time the next item on our agenda
5 will be Senate Bill 5 Referendum, and we are going to
6 at this point in time take a short recess and
7 reconvene the committee in 30 minutes. So without
8 objection.

9 We'll take a legislative recess of 30
10 minutes, that means we'll come back in 45. The
11 committee stands in recess.

12 (Recess taken.)

13 SECRETARY HUSTED: I call the Ballot
14 Board back to order. We're now going to move on to
15 process for language of the Senate Bill No. 5. We'd
16 like to proceed with that language while starting
17 discussion and without objection that's how we'll
18 proceed.

19 At this point in time we will begin the
20 public comment portion of our consideration. I want
21 to remind all of the participants that on testifying
22 today remember to identify yourself and your
23 organization which you represent.

24 At the onset of your comment we also
25 remind you to limit your comments to the explanation

1 and not the merits of the referendum, and I'd like to
2 emphasize that point right now.

3 We will first hear from Phil Hayes who is
4 representing I believe himself and is against Senate
5 Bill 5 and give him an opportunity to address the
6 Board.

7 MR. HAYES: Chairman Husted and Vice
8 Chair Strahorn and members of the Board, I just
9 simply wanted to say as a teacher, someone who's
10 opposed to Senate Bill 5, the balloting language
11 should reflect the "no" vote does away with Senate
12 Bill 5 and "yes" vote enacts Senate Bill 5. Thank
13 you.

14 SECRETARY HUSTED: Thank you.

15 Any questions?

16 SENATOR FABER: Mr. Hayes, good to see
17 you again. This is three or four times now at the
18 various committees.

19 My recollection is, consistent with all
20 the testimony you made previously, that everybody
21 that you testified to or with, the whole argument you
22 had was simplify the appeal. Is my memory correct?

23 MR. HAYES: I believe that at this point
24 in my testimony Senate Bill 5 should not go forward
25 for vote.

1 SENATOR FABER: I think at one point you
2 said appeal Senate Bill 5. Is that not correct? Is
3 my memory not correct on this?

4 MR. HAYES: No. Because you would have
5 to appeal that to be enacted into law.

6 SENATOR FABER: Okay, thanks.

7 SECRETARY HUSTED: Additional questions?

8 (No response.)

9 SECRETARY HUSTED: We'll move next to
10 Andy Douglas, Justice Douglas, who is here
11 representing I believe the Cleveland Police
12 Patrolman's Association, and he would be an opponent
13 of Senate Bill 5, and Justice Douglas, it's a
14 pleasure to have you with us today.

15 MR. DOUGLAS: Thank you very much,
16 Mr. Secretary and Chair Husted, honorable members of
17 the Ballot Board, and Ms. Schuster.

18 My name's Andy Douglas and I'm an
19 attorney with the law firm of Crabbe, Brown & James
20 here in Columbus. I represent the Cleveland Police
21 Patrolmen's Association and the Ohio Patrolmen'
22 Benevolent Association.

23 With me today are Terry Gallagher,
24 executive director of the OPBA, and Steve Loomis,
25 president of the CPPA. Here also with me are Keith

1 Logenmuth who is in-house counsel for the CPPA, and
2 Joe Rice, who is a media consultant. Together we
3 represent over 9,000 law enforcement officers and
4 their families.

5 Mr. Chairman and members of the Board, I
6 appear here at the request and direction of my
7 clients, and I have a handout that I would like you
8 to consider, if I may approach.

9 SECRETARY HUSTED: Sure.

10 MR. DOUGLAS: Members of the Board, we
11 thank you for the opportunity to appear hear today.
12 We are here to respectfully urge the Board to place
13 the language on the November ballot with regard to
14 the referendum on Senate Bill 5 in a straightforward
15 "yes" or "no" manner as required, we believe, by the
16 Ohio Constitution.

17 For the most part I'm just going to cover
18 Article II, Section 1a and 1b, and my colleague,
19 Mr. McTigue, is going to discuss with you Article II,
20 Section 1c, and also the precedent upon which we
21 rely.

22 I agree with those precedents and the
23 constitutional language that we'll be giving to you.
24 We believe that they are clear, solid, and strong.

25 What I would like to do this afternoon,

1 Mr. Chairman and members of the Board, is to briefly
2 discuss with you other parts of our Constitution, and
3 then conclude with an example to show what mischief
4 could be played by those who follow us if the wording
5 you are considering today is somehow convoluted to
6 make a "yes" vote really be a "no" vote.

7 We arrive here today because our
8 Constitution gives us that right and further mandates
9 this process. Thus, Article I, Section 20 of the
10 Constitution provides, you see the Board we have in
11 front of us, the Constitution is very clear in what
12 it does. It reserves to the people a number of
13 powers.

14 What are those powers? We leave
15 Article I and go to Article II, you can see in whom
16 the power is vested. The power is vested clearly in
17 the people who reserve to themselves the power, and
18 if look at the highlighted area, to adopt or
19 reject -- magic words -- to adopt or reject the same
20 with the polls on a referendum vote as hereinafter
21 provided.

22 People also reserve the power to adopt or
23 reject any law. Of course, that's all inclusive.
24 And then down further, and to propose amendments to
25 the Constitution and to adopt or reject the same at

1 the polls.

2 Again, consistent words used all
3 throughout the preliminary 1a in Article II.

4 We then go to Article II, Section 1a.
5 This says, you'll notice at the very top, how we go
6 about amending the Constitution. I'd recognize we're
7 here on the referendum and that I'll just briefly go
8 over this and we'll get to the referendum with
9 Mr. McTigue in just a minute.

10 But the reason I do this is because the
11 consistency throughout the Constitution that the
12 framers put together is remarkable. And this is how
13 consistent it is.

14 To amend the Constitution you'll see we
15 call this one of the first powers reserved
16 initiative. And when a petition is signed by the
17 required number of people, and it shall have been
18 filed with the Secretary of State and verified
19 properly, the Secretary of State shall submit, what,
20 for the approval or rejection of that proposed
21 amendment. And of course, any other law that works
22 out the same way.

23 So that's the section with regard to how
24 we go about the Constitution, again, using the same
25 words "adopt or reject."

1 If I might then if it please the members
2 of the Board, I move to lb. And this is how we go
3 about enacting laws. And interestingly enough,
4 whenever obviously the members of the General
5 Assembly who are here on the Board and past members
6 of the General Assembly know that the power rests
7 with the General Assembly to enact laws, but the
8 people also had reserved to themselves the right to
9 enact laws.

10 And how do you do that? We propose to
11 the General Assembly, and then it says that the said
12 proposed law shall be passed by the General Assembly
13 either as petitioned for in amended form it shall be
14 subject to the referendum.

15 If it shall not be passed, and then it
16 goes on to explain what happens, it then shall be
17 admitted to the Secretary of State to electors for
18 their approval or rejection. Again, specific
19 language and language that's commensurate with what's
20 found in each of the other sections.

21 If you'll go to the next page of your
22 handout you'll see, we get then if a proposed law so
23 submitted is approved by a majority of the electors
24 voting thereon.

25 So the words are "proposed" and then

1 "approved" and of course the corollary, the opposite
2 of that would be "rejected." So we find that down
3 further in the middle of that section, shall have
4 been rejected by the electors.

5 Further on down, any proposed law or
6 amendment to the Constitution submitted to the
7 electors if approved by the majority of the electors.
8 Not if we don't want to approve this. If approved.

9 An affirmative, a positive stand. If
10 approved by the majority of electors voting hereon,
11 shall take affect 30 days afterward.

12 And the framers even thought about
13 conflicting provisions. So that if there are two
14 conflicting provisions in the proposed laws then
15 there's proposal to take care of that too.

16 If the conflict proposed amendments to
17 the Constitution shall be approved, again, in the
18 affirmative, cast for and against the same counting
19 the votes, the one receiving the highest number of
20 affirmative votes shall be the law.

21 Those then are some of the sections that
22 we -- referendum section which again we leave
23 Mr. McTigue to talk about in a minute.

24 I think it's important to note, and
25 whenever Mr. McTigue finishes his presentation,

1 you'll see the full rest of the import of this. The
2 full power of referendum that the people have
3 reserved to themselves is about as clear and
4 unequivocal as it can be in our Constitution.

5 The point I would like to make in all of
6 this, and I respectfully ask the Board to take note,
7 is that in Article II and all of its sections the
8 words "adopt," "reject," "approval," "rejection,"
9 "approve," "rejected," "affirmative," and "negative"
10 are used by the framers of the Constitution 25 times
11 in just those sections in total.

12 And each time the words are used in the
13 context as to whether the electors are in favor of or
14 opposed to the law of the constitutional amendment in
15 question. Do they approve of the law or do they not
16 approve, reject the law? Do you think the proposal
17 should be in the law? Yes. Or do you believe that
18 the proposal should not be the law? No.

19 The General Assembly has passed Senate
20 Bill 5. Do you approve that law? Then vote yes. If
21 you do not approve the law, then vote no. Nothing
22 could be clearer I think and more simple, and the
23 course Courts said time and time again it's our
24 object or the Court's object and the General
25 Assembly's object to make this as clear for voting as

1 we can.

2 We all profess to want voting to be fair,
3 straightforward, relatively simple. What could be
4 clearer than than this? If I like something, I say
5 yes. If not, I say no. That is what the framers of
6 our Constitution wanted and clearly set forth.

7 It would be difficult I think, my
8 friends, for any fair-minded person to construct
9 language any more precise than the language used in
10 our Constitution in Article II.

11 In closing, please let me give you one
12 more thought. I'm sure that most if not all of us in
13 this room are familiar with the dialogue that has
14 taken place and currently continues to take place in
15 the past and continues to this day that maybe Ohio
16 should adopt the so-called merit retention selection
17 of judges for Ohio.

18 Merit selection involves the appointment
19 rather than the election of judges, who, after a
20 period of time, usually two years, are required to
21 have her or his name placed on the ballot to give
22 electors the right to decide if the judge, on his or
23 her record, should be retained in office.

24 There are about 22 states I think
25 involved in this, and this takes place in almost all

1 those states that have merit selection retention, and
2 that is done in the form of something that's known as
3 retention referendum.

4 If you think the judge on his or her
5 record should continue in office, and thus you
6 approve the judge's performance, then you vote yes to
7 retain the judge. If you believe otherwise and you
8 think the judge should be removed from office, then
9 you disapprove the judge's performance and you vote
10 no on the retention referendum.

11 Thus in Illinois, as an example, the
12 wording on the ballot is, quote, shall Judge Fairness
13 be retained in office as judge of the Court of
14 Benevolence? Then appears the full name of Judge
15 Fairness with the simple "yes" and "no" after the
16 name.

17 You want to keep the judge that is
18 approved, you vote yes. If you don't want to do that
19 and you want the judge to go, this happens, you vote
20 no.

21 Can you imagine with me that somehow the
22 language placed in Senate Bill 5 on the ballot
23 results in the "yes" vote meaning a "no" or
24 vice-versa what games could be played?

25 If Ohio adopted merit selection by a

1 person standing for retention who might want the
2 wording to say Should Judge Fairness not be retained?
3 So if you want to retain Judge Fairness, you vote
4 yes. If you don't want to retain Judge Fairness, you
5 vote no.

6 And I was struck watching -- we live in
7 such historical times I've lived so long I guess it's
8 all been historical.

9 But watching the debate on the Budget
10 Control Act of 2011 last few days and watching
11 Speaker Boehner and Majority Leader Reid make their
12 motion, it was shall in effect the budget that the
13 debt limit be increased.

14 What if they said let's vote on shall the
15 debt limit not be increased? At that point then if
16 you wanted to increase the debt limit you vote yes,
17 otherwise you vote no. Obviously if it leaves room
18 for confusion.

19 I submit the language you approve to be
20 placed on the ballot with regard to Senate Bill 5
21 should be if the voter approves of the law passed by
22 the General Assembly that that voter votes yes. If
23 not, that voter votes no.

24 We have 9,000 members and families with
25 the CPPA and the OBPBA respectfully request the

1 Ballot Board so find an order.

2 One concluding comment, if I might, to
3 the Chair. When I was doing the research on this
4 issue I called and talked to a number of people who
5 have been involved in these ballot issues over the
6 course of the years, as I have in different
7 capacities.

8 One of those people whom I have high
9 respect is Judge John Bender. John Bender was legal
10 counsel to Secretary Taft, and in addition to that
11 was counsel to the Ballot Board.

12 I asked him about this, the arguments
13 with regard to this and he said you can quote me and
14 say that we had people that tried all the time to try
15 to confuse the language on the ballot but we
16 consistently always ruled shall the legislation
17 involved be approved. It was always a "yes" or "no."

18 To codify that, if you will, and to show
19 that real intent, on August 12, 1997, your
20 predecessor Ballot Board met. The issue came up was
21 a "yes" or "no" ballot.

22 On page 35 of the transcript:

23 MR. TAFT: Thank you very much. I might
24 add for the benefit of everybody here today and the
25 public that the legal staff of Mr. Bender has

1 researched the issue in general and how a referendum
2 petition should be structured in terms of a yes or no
3 vote, and it's pretty clear from the language of the
4 Constitution, and I continue to quote, and also from
5 precedent the way in which referendum were previously
6 placed on the ballot that the issue before the voter
7 is: Shall the law be approved?

8 So if you're in favor with the law, says
9 then-Secretary Taft, then you vote "yes." If you're
10 not in favor of the law, you vote "no." And I'm sure
11 that there will be a lot of discussion between now
12 and election day about this point but just to
13 emphasize one more time, quote, they're voting on
14 whether or not the law itself shall be approved.

15 If you like the law that the legislator
16 passed, you vote "yes." If you don't like the law
17 that the legislator passed, you vote "no."

18 From the Ballot Board, and Mr. McTigue
19 will give you all the cases or the issues where this
20 has been before the Ballot Board before.

21 Thus, Mr. Chairman and members of the
22 Board, we ask you to place the language on the ballot
23 so that it will be a "yes" or "no" clear vote, and in
24 addition to that I have reviewed, I didn't get --
25 hear about it till late last night about 9:20 and I

1 came in this morning, I saw the language being
2 proposed by the Ballot Board, and my clients and I
3 are fully in favor of that language.

4 Mr. McTigue suggested a couple of tweaks,
5 we could do that too. Like, for instance, government
6 employees ought to be public employees because when
7 you think of government employees you think of
8 federal employees as well. But we're talking about
9 local and state public employees in Ohio.

10 But in any event, we felt you did a good
11 job of drafting what has been submitted thus far for
12 purposes of discussion. And I thank the Board for
13 your time.

14 SECRETARY HUSTED: Thank you, Justice
15 Douglas.

16 Questions?

17 (No response.)

18 SECRETARY HUSTED: Appears you're off the
19 hook. Thank you for your time.

20 Now I'd like to ask Don McTigue to come
21 forward representing We Are Ohio, and he would be an
22 opponent of Senate Bill 5.

23 MR. MCTIGUE: Mr. Chairman, members of
24 the Board, I'm Donald McTigue on behalf of We Are
25 Ohio.

1 Let me first -- I have several handouts.
2 Let me go ahead and first of all pass out the part of
3 the transcript from the Ballot Board meetings in 1997
4 that Justice Douglas read aloud. But for the record
5 I just want to pass this out so that you have it.

6 And then the next item that I have to
7 distribute is a legal memo which we've titled
8 Referendum Ballot Question Phrasing, which is a way
9 of saying should this be "yes." How do we do "yes"
10 and "no."

11 And next I have to pass out the first
12 two -- this comes from the Secretary of State's
13 Office's website, where there is a historical listing
14 of all statewide ballot issues, and it's prefaced by
15 a two-page summary of the right of initiative and
16 referendum. So I would like to distribute that as
17 well.

18 So I have two parts to my presentation
19 today: One is of course this yes/no question and how
20 we phrase the ballot language there; and the second
21 part will be on the rest of the text of the ballot
22 language.

23 So, Mr. Chairman, if I could start with
24 this question on the yes/no, the most of what I'm
25 going to say is taken from the legal memo that has a

1 picture of the little house up there.

2 I believe the Constitution is very clear
3 with regard to this point, and if you focus on the
4 second paragraph of the first page of that legal
5 memo, it quotes Section 1c, Article II, of the
6 Constitution.

7 And it says, the Constitution says that,
8 quote, no law passed by the General Assembly shall go
9 into effect until 90 days after it shall have been
10 filed by the Governor and the Office of the Secretary
11 of State, except as herein provided.

12 And then it goes on to say that, in the
13 same section of the Constitution, it then goes on to
14 say that where a referendum petition is filed, that
15 the law shall not go into effect until and unless it
16 is approved. No such law shall go into effect until
17 and unless approved by a majority of those voting
18 upon the same.

19 And we have that quoted in the first
20 paragraph of our memo. So that phrase I think is the
21 key phrase in the Constitution: No law shall go into
22 effect until and unless approved by a majority of the
23 those voting upon same.

24 And what we left out of the quote is the
25 language about where a petition, a referendum

1 petition has been filed.

2 So no law, no such law where referendum
3 petition has been filed shall go into effect until
4 and unless approved by a majority of those voting
5 upon the same. It does not say that no such law
6 shall go into effect until and unless not rejected by
7 the voters. Says approved by the voters. Doesn't
8 say "not rejected."

9 And so while the Constitution provides
10 the right of referendum to citizens to submit laws to
11 the voters for their approval or rejection, and
12 that's in the Constitution in the same section, that
13 you submit the referendum or you file the referendum
14 petition to have the law submitted to the voters for
15 their approval or rejection, that same section then
16 goes on to say how we go about garnering or
17 determining approval or rejection.

18 And we do it by providing that the law
19 shall not go into effect unless and until approved by
20 the voters. You have to read these two sentences in
21 context. You can't rely on just the one.

22 You can't rely simply on the sentence
23 that says, well, referendum is about the right to
24 approve or reject, and therefore, we can write the
25 language any way we want. Because then you're

1 forgetting about the next sentence that's in that
2 same paragraph.

3 You have to read these, as we lawyers
4 say, *pari materia*, all together. They relate to the
5 same subject matter. And this has been the
6 consistent way in which referendums have been worded
7 over the years.

8 In the memo we actually give you the
9 language of the referendum issues that have where the
10 language has been approved since 1997. There have
11 been four. Two of those made the ballot; two did not
12 make the ballot. However, the language was still
13 approved by this Board. And in those four cases it
14 was always a "yes" vote to approve, a "no" vote to
15 not approve or to reject.

16 But I went back further with a little
17 help from the Ohio Historical Society, and had
18 attached as well, and unfortunately I received this
19 last evening when the memo was already done, so this
20 is only as an attachment to the memo, but we have in
21 1919 a referendum on what was called the Crabbe Act,
22 and there again the approval is expressed as "yes"
23 for approval.

24 We have the -- and "no" for disapproval.

25 1920 we have a referendum again on

1 another Crabbe Act referendum, and which by the way
2 doesn't have to do with crabs but it has to do with I
3 believe it was on prohibition issues. So we
4 obviously had a lot of electoral activity at that
5 time.

6 And there the issue was again, and I'll
7 read this: Shall House Bill No. 620 be approved as
8 passed by the General Assembly of Ohio, January 27,
9 1920, approved by the Governor February 16, 1920,
10 filed with the Secretary of State, February 17, 1920,
11 yes/no. So, shall it be approved?

12 1927 we have a referendum as well and
13 this referendum is on Senate Bill 72, which was known
14 as the Marshall Bill, which related to fees that
15 could be charged by justices of the peace, and again
16 it was phrased in terms of "yes" for approval and
17 "no" for not, for disapproval in other words.

18 1939 we had a referendum on Civil Service
19 law, and again this was phrased as "yes" for approval
20 and "no" for disapproval as well.

21 So from what I had been able to
22 determine, every single referendum that has ever
23 appeared on the ballot in Ohio has followed this
24 format in terms of the phrasing for "yes" and "no."
25 And I think that that's a clear indication of how

1 previous state officials and the previous ballot
2 boards have interpreted the Constitution and the
3 constitutional requirement.

4 It's also, that interpretation is also
5 reflected in this two-page handout from the Secretary
6 of State's website. I don't probably need to read
7 each provision, but it is in the second page it says,
8 just as an example, if at the election a majority of
9 the voters vote against the law, it never goes into
10 effect. If at the election a majority of the people
11 vote for it, it becomes law.

12 So I think that reflects at least that
13 interpretation as it appears on the website. So
14 another way to think about this is the voters, in
15 terms of the right of referendum, the voters
16 essentially are becoming the -- they're acting as a
17 super-legislature. They're acting as the legislature
18 of the people.

19 They have the right to propose laws to
20 initiatives, either state laws or constitutional
21 amendments. Just as the General Assembly can propose
22 laws and enact laws, people can do the same thing.
23 The people act as a General Assembly.

24 The people also have the right to have
25 the final say on the enactment of laws and they

1 exercise that final say through the right of
2 referendum. And in doing so they are acting in a
3 legislative capacity. They're not acting in the
4 executive capacity, such as the Governor, where the
5 Governor has that executive power to veto a law.

6 They are not acting in the place of the
7 Governor. When they file a referendum petition,
8 they're acting in the place of a legislature.
9 They're an extension, if you will, of that
10 legislative body.

11 Because if you go to the Constitution,
12 Article II, Section 1, the people reserve to -- they
13 grant, the people grant the legislative power to the
14 General Assembly except as they herein have reserved
15 that legislative power to themselves.

16 It doesn't say they grant executive power
17 except to the extent they reserve executive power.
18 Which is the Governor's power to veto.

19 This is not about vetoing. It's about
20 approving the bill so that it can go into affect,
21 which is what the Constitution says, or voting no so
22 that it's not going into effect.

23 So we believe that the Constitution's
24 very clear in this regard. We believe that the
25 history has been very clear in this regard.

1 I now have some comments about the actual
2 text, and for that I have a couple of handouts as
3 well.

4 Mr. Chairman, members of the Board, the
5 first handout is the language, the typed portion of
6 this is the language being proposed by the Secretary
7 of State, Mr. Husted.

8 The handwritten notes are suggestions
9 that We Are Ohio are putting forward. I'd like to
10 address some of those.

11 The first is, of course, this will be for
12 the Chairman's benefit on the title. We insert -- we
13 delete the word "government" and insert the word
14 "state and local public."

15 So it would read: State and local public
16 employees.

17 Do that for two reasons. Number one,
18 whether you're using the word "public" or
19 "government," it's too broad because that would
20 include federal employees. And Ohio certainly has
21 many federal employees.

22 And so at a minimum we believe a
23 clarification is necessary to point out that this is
24 for state and local public employees or state and
25 local government employees.

1 The word -- we'd have to concede probably
2 that the word "public employee" and the phrase
3 "government employee" means the same thing, but we
4 are suggesting and urging that the word "public" be
5 used because that tracks the language in the title of
6 Senate Bill 5.

7 At the end of the title of Senate Bill 5
8 after it lists all of the Revised Code sections, it
9 says to make various changes of laws concerning
10 public employees including, and then it lists some
11 things.

12 So to track Senate Bill 5's title, we
13 respectfully recommend using the word "public" rather
14 than the word "government."

15 Now, with regard to the actual text, on
16 line 1 we struck the word "several" where it says
17 "enacted several changes." We would argue that it
18 enacts numerous changes.

19 In my mind the word "several" connotes
20 kind of a small number. Sort of like maybe more than
21 a few but less than many. Less than numerous.

22 Now, we have suggested, rather than
23 getting into a debate about whether it should be
24 "numerous" or "several" or "few," simply striking it.

25 I would note that the -- if there was a

1 need to insert some sort of modifier there, again, I
2 would go back to the title of Senate Bill 5 at the
3 end where it says to make various changes to the laws
4 concerning public employees.

5 So I would suggest inserting the word
6 "various" if you feel there's a need to insert some
7 sort of modifying term there.

8 On the second line it's the same change
9 as in the title, which is to say "state and local
10 public employees" rather than simply "government
11 employees."

12 And then other changes to the rest of
13 line 2, continuing on line 3, where it says
14 "establishing the standard for," I shortened that
15 because I think the words "establishing the
16 standards" could be debatable whether it's
17 establishing standards.

18 The law limits certain things to be
19 included in collective bargaining. I don't know if
20 that's a standard.

21 And I also think it's a problem, somewhat
22 superfluous language. Basically what you're saying
23 here is that this law includes or it's including
24 collective bargaining and then the other things that
25 are listed. So I think the word "including" would be

1 a little shorter, saving a couple words.

2 We also are recommending deleting the
3 reference to the "health insurance and pensions" and
4 changing that to "layoff procedures and leave." And
5 here's the thinking on that: If we're going to get
6 into -- if we're going to have very short language
7 here, which we believe is beneficial in this
8 particular instance, because there's so much in this
9 law that we don't want to get into cherry picking
10 what's going to be in this list.

11 Because if we're going to say "layoff
12 procedures and," or if we're going to say "layoff
13 procedures, leave, insurance, pensions," well,
14 there's about 40 or 50 other things that we should be
15 including as well.

16 Our suggestion -- you say why have you
17 listed this? Why have I done that? Well, here's the
18 reason. The reason is we decided simply again to
19 track the title from the bill.

20 The legislature felt, and you know the
21 title of the Constitution requires a title of
22 legislation to fairly reflect the contents of the
23 legislation.

24 So if we take the legislature according
25 to that standard and use their title, their title

1 says to make various changes to laws concerning
2 public employees, including collective bargaining,
3 salary schedules and compensation, layoff procedures,
4 and leave.

5 And that's, we're just tracking that.
6 Although I notice I think I left the word
7 "compensation" out. So should say "salary schedules
8 and compensation" just to fully track it.

9 That avoids the argument about the 40 or
10 50 other things that ought to be in here. If we're
11 going to start making a list, either a long string-on
12 sentence or numbered lists or bolded lists.

13 If you're going to start cherry picking
14 things, then you run the risk of having to decide
15 really what should be in there and what shouldn't be
16 in there and opening up the ballot language to
17 possible challenge by either side or by both sides.

18 So it seems to me that the safest and
19 most appropriate route would be to follow what the
20 General Assembly has already said is apparently a
21 constitutional test for reflecting the subject matter
22 of the legislation is its title to the Bill

23 The last change I have is simply where it
24 simply says a "no" vote means you reject Senate Bill
25 5 and don't want it to become law. I don't know, the

1 contraction bothered me. Maybe it's that Catholic
2 school upbringing, I don't know. But I thought it
3 would be better just to say do not want it to become
4 law.

5 So I'd be happy to answer any questions
6 we have. Except let me add one more thing, because I
7 did pass out a second handout.

8 If we don't go with the short version,
9 then here is our long version that we want that we
10 think would be appropriate, okay?

11 So we would prefer to go with the
12 Secretary of State's version as we have edited it.
13 Our second choice would be to go with the Secretary
14 of State's version as not edited. And third would be
15 to go with this long version that we've submitted
16 this morning.

17 Thank you.

18 SECRETARY HUSTED: Do we have copies of
19 the long version? Was that in here? Okay. Yeah, we
20 have that.

21 MR. MCTIGUE: And I'm sorry that I did
22 not put on here that this was being, this long
23 version was being submitted by We Are Ohio. But you
24 could write that on there, probably help keep it
25 straight.

1 SECRETARY HUSTED: I have to admit when I
2 read the "don't" I didn't really like that either,
3 but you brought it up and I didn't. So that's how it
4 ended up in there.

5 Do we have questions for the witness?

6 Mr. Griffin.

7 MR. GRIFFIN: Mr. Chairman, thank you.

8 Mr. McTigue, thank you for your research
9 and your grammar and for being here today.

10 I was interested in your testimony that
11 you'd gone back to 1919 to look at how referendums
12 had been phrased with respect to the "yes" or "no"
13 issue.

14 And during that period of time Ohio
15 certainly has had great moments of by partisanship
16 and moments where things have not been as collusional
17 and my question was whether you found any correlation
18 between the decision to phrase the referendum one way
19 or the other.

20 Was it just one party's Secretaries of
21 States or one party's elected officials who
22 determined to phrase it consistently that way since
23 1919?

24 MR. MCTIGUE: Well, Mr. Chairman,
25 Mr. Griffin, I really can't answer that. I didn't

1 research what the political parties were, the
2 individuals who decided the ballot language.

3 Even this Ohio Ballot Board, which is
4 bipartisan, hasn't existed I think all that long.
5 Previously we had I'm not really sure how long it's
6 been in existence, but previously we had a State
7 Board of Elections Supervisors in Ohio.

8 And for all I know, there may have been
9 one time where only the Secretary of State wrote the
10 ballot language, I simply don't know. So I can't
11 answer that question.

12 But I think we can assume, knowing Ohio
13 and how Ohio tends to go back and forth between
14 democratic leadership at the state level and
15 republican leadership at the state level, I think we
16 can assume that over this period of time since 1919,
17 and given that it's always been consistent, that this
18 would reflect viewpoints from leaders or officials of
19 both parties.

20 MR. GRIFFIN: Mr. McTigue, let me ask you
21 another question.

22 You also discussed the Constitution's
23 language requiring the voters in the context of the
24 referendum actually vote to affirmatively approve a
25 law that's put before them.

1 And my question is whether there's -- if
2 the ballot language were instead to be flipped into
3 the negative and asked to be rejected, whether there
4 would be risk to the validity of that choice by the
5 voters and whether it would be subject to
6 constitutional challenge.

7 MR. MCTIGUE: I believe, Mr. Chairman,
8 Mr. Griffin, it would be subject to -- well, the
9 ballot language would be subject to challenge before
10 the election. There is a provision for that in the
11 Ohio Constitution to challenge it.

12 MR. GRIFFIN: Thank you.

13 SECRETARY HUSTED: Any other questions?
14 Senator Faber?

15 SENATOR FABER: Let me pick up on that
16 for a second, Mr. McTigue, because I'm curious. I
17 read this a little differently than you do.

18 I read section -- Article II, 1c, as
19 saying essentially it's got to be put for approval or
20 rejection to the voters. And one of the roles of the
21 Ballot Board is to make sure the voters aren't
22 confused, our voters are clear on the ballot
23 language.

24 So is it your opinion that there is no --
25 the Ballot Board has no discretion on worrying

1 whether or not we ask whether or not the voters
2 choose to reject Senate Bill 5 even if it's done to
3 avoid confusion and clarity?

4 I mean I would think it's pretty clear if
5 you ask the question shall Senate Bill 5 be rejected,
6 yes or no. I don't think the Constitution requires
7 how the yes or nos are worded. I think it requires
8 you to ask whether it's rejected or approved.

9 MR. McTIGUE: Mr. Chairman, Senate Faber,
10 in answer to your question I do believe the Board has
11 the discretion, I believe the Board does not have the
12 discretion.

13 I believe that the -- and that's based on
14 I read the Constitution differently. I think that
15 the Constitution is in terms of what it says, that no
16 law shall go into effect unless and until approved by
17 voters, that that is clear to me and that that is the
18 standard.

19 And so I don't think that this Board
20 would have the discretion to one year do it this way
21 and another year do it another way because you have
22 discretion. I think you have to follow the
23 Constitution.

24 And I think we get back to then is there
25 more than one rule in the Constitution or only one

1 rule? I think there's one rule in the Constitution.
2 There may be different interpretations.

3 SENATOR FABER: Are you, Mr. McTigue, are
4 you aware of a single case that interprets the
5 Constitution the way you do?

6 MR. MCTIGUE: Mr. Chairman, Senator
7 Faber, we cite some cases in our memo which were not
8 addressed, specifically addressing, in all frankness,
9 wasn't the exact issue that they were addressing, but
10 they contained language in the cases, and we cite
11 them on the first page here.

12 The first case being the State ex rel.
13 General Assembly v. Brunner, where the Supreme Court
14 says if no referendum petition is filed in this
15 90-day period, the law becomes effective immediately.
16 If a referendum petition is filed, the law becomes
17 effective when a majority of voters approve it, or it
18 is determined the referendum petition lacks a
19 sufficient number of valid signatures.

20 And the Supreme Court there is actually
21 citing another case recently, Thornton v. Salak case.
22 And so while that wasn't the legal issue before the
23 Court, I think it is dicta but I think a reflection
24 of how the most recently, that's a 2007 case, the
25 Supreme Court views that Constitutional language.

1 SENATOR FABER: I would argue that's
2 dicta because the question is you vote no to
3 rejecting something, and that's the question that's
4 clearly presented, shall it be rejected, you approved
5 it. And I think that that's the other side of the
6 same coin.

7 So I'm not sure the Constitution requires
8 you to either land the coin one way or another, I
9 just think it requires that the coin toss be clear
10 that each side pick their clear sides on coin toss,
11 which brings me to the next question.

12 Your organization has spent a lot of time
13 and money going around the state arguing for Senate
14 Bill 5's rejection. I haven't seen anything in your
15 literature, and I think you've spent about
16 \$4.5 million so far arguing to the voters vote no on
17 whether Senate Bill 5 should be approved.

18 There's plenty of literature that you --
19 could be presented with that your literature and your
20 arguments have been very clear: Reject Senate Bill
21 5, or something to that position.

22 So haven't your organization essentially
23 created voter confusion if we give you the language
24 you're asking for, because you have effectively
25 argued for rejection and now you're coming to this

1 Ballot Board arguing that we switch the language
2 around so a "no" means "yes."

3 MR. McTIGUE: Mr. Chairman, Mr. Faber, I
4 have a couple responses to that.

5 First of all, the -- I am certain that
6 the ads that you would end up seeing, there's two
7 phases to initiative referendum campaigns. There's
8 the petition phase and there's the election phase.

9 During a petition phase you generally
10 emphasize that we want to repeal a law. It's not
11 technically correct. You're not repealing a law.
12 You are submitting to the voters the right to approve
13 it or reject it.

14 But people in common usage during when
15 they're gathering signatures might say we're against
16 this law, we think the law should be repealed. There
17 should be a citizen repeal. Yes, that is one way to
18 describe that, and it is of course during the
19 petition phase it kind of makes sense there, but when
20 you get to the campaign phase, it's about voting no.
21 You want to vote against the law.

22 And a "no" vote is what you will see
23 being urged in the advertising when we get to the
24 election phase.

25 SENATOR FABER: I want to make sure I'm

1 clear, because I think you just heard -- or, just
2 said what I understood to be the case. You have
3 spent millions of dollars and collected millions of
4 signatures asking people to repeal or reject Senate
5 Bill 5.

6 And so those million signatures were all
7 gathered, and I know this for a fact because I talked
8 to a couple of petition signature circulators when
9 they asked me to sign it. And they asked me to sign
10 a petition to reject or repeal Senate Bill 5, and
11 that's why we're here, based on the million of
12 Ohians, actually 900,000 in change of Ohians who
13 signed a document saying Reject Senate Bill 5.

14 Now, they didn't sign something that you
15 asked them: Shall Senate Bill 5 be approved? You
16 asked them to reject it, and that was the predicate
17 that those signatures were gathered. And if I'm
18 wrong on that, correct me, but I don't think I am.

19 MR. MCTIGUE: Well, Mr. Chairman, Mr.
20 Faber, I would respectfully disagree with you on
21 that, and it's not exactly what I said.

22 First of all, the petition that people
23 were asked to sign, it says right up at the top to be
24 submitted to the voters for their approval or
25 rejection. Approval or rejection.

1 Now, when people go out and ask for
2 signatures or campaign, they may say we're against
3 this Bill. Some might say we're against it, some
4 might we think it should be thrown out. Some might
5 say we think it should be rejected. Some might say
6 we think it should be repealed.

7 Lots of different phraseology is going to
8 be used both during the petition phase and during the
9 campaign phase.

10 You can't make your decisions based on
11 what someone is saying in a campaign. You have to
12 make your decisions based on the law. And as I said,
13 I don't believe the law gives you the discretion on
14 this point. And again, are you going to write your
15 ballot language to fit how somebody's campaign
16 message? No, that's not the way this Board should
17 act.

18 SENATOR FABER: Mr. McTigue, let me just
19 correct you on something. Or ask you a different
20 question.

21 If this Board did have discretion,
22 because I disagree with you whether we have
23 discretion on this topic and you would agree with me
24 that's at least an open question, no court has ever
25 resolved that issue.

1 So let's assume for a second we have
2 discretion. Then our other constitutional obligation
3 as a member of this Ballot Board, is to make sure
4 there is no voter confusion based on what the voters
5 have asked and what has been presented before them
6 and what's on the ballot.

7 And I think it would be very difficult
8 for your side to argue now that you have not been
9 asking for the rejection of Senate Bill 5. Because I
10 think that was the predicate of your entire campaign.

11 And I can substitute the word "repeal"
12 for "rejection," but there is a host of literature
13 with your organization's tag line or affiliated
14 organizations, not out there asking should it be
15 approved, vote "no," asking reject, repeal Senate
16 Bill 5.

17 And from that perspective I would argue
18 that the millions of dollars that's been spent so far
19 in this campaign has essentially created the voter
20 confusion that the Ballot Board is designed and
21 instructed under constitutional mandate to try and
22 alleviate.

23 And so, certainly I think that that
24 creates a different use of our discretion. And so
25 from that perspective I guess I just view that

1 differently than you do.

2 If we're not subject to discretion and we
3 have to do one thing or the other, then the verbiage
4 is almost rote, and I don't think that's the role of
5 this Board.

6 SECRETARY HUSTED: Additional questions?

7 Mr. McTigue, one question. In your
8 research as you're looking at this attempting for
9 those of us to resolve some of the conflicts between
10 what we heard in your remarks and Senator Faber's
11 remarks, the Court has never ruled on this issue.
12 Has the Court ever been asked on this issue?

13 MR. MCTIGUE: Mr. Chairman, the Court's
14 never ruled on it. I believe it's never been asked.

15 I would offer that -- I meant to say this
16 earlier, actually -- one of the reasons I think we
17 don't have a case directly answering that question is
18 because the Constitution's fairly clear and the State
19 of Ohio has consistently phrased referendum questions
20 the same way.

21 But I don't believe they've been asked
22 the question but I don't know for sure. I know they
23 have not ruled.

24 SECRETARY HUSTED: Senator Strahorn?

25 MR. STRAHORN: Thank you, Mr. Chair.

1 Mr. McTigue, just to speak to, you've
2 spoken to what the law says and I think you
3 referenced some of the cases, but in reviewing those
4 cases, and I think we also looked at the transcript
5 from the deposition on Workers' Comp as well.

6 In any -- in the research that you found,
7 historically how well is it supported that the vote
8 is to -- a "yes" to approve a bill passed by the
9 legislature or a "no" to reject the bill passed by
10 the legislature into law? How consistent is that?
11 Can you speak to that?

12 MR. MCTIGUE: Mr. Chairman, Senator
13 Strahorn, I believe it's been a hundred percent
14 consistent. At least in terms of the outcome.

15 You know, I don't know if the previous
16 boards have had similar debates, but in terms of how
17 they ended up, it's been consistent.

18 I would point out that in some of the
19 early issues, 1919, for example, it was -- they would
20 set out the law and then say yes/no. But again,
21 "yes" meaning you're essentially approving the law,
22 and "no" you're not approving the law.

23 But every time that the question's
24 presented as shall the law be, and then you follow
25 that, rejected or approved, it's always been shall

1 the law be approved, yes/no. It's never been shall
2 the law be rejected.

3 MR. STRAHORN: And so your read of this
4 issue is in your opinion supported by both the
5 Constitution -- or, the Constitution, a hundred years
6 of precedent, and certainly the most recent
7 deposition or case that we have before in doing this
8 with regard to Workers' Comp in '97?

9 MR. McTIGUE: '97, that's correct.

10 MR. STRAHORN: In your opinion is there
11 anything inconsistent about a "no" vote on a ballot,
12 is there anything inconsistent about that in terms of
13 the voters wanting to reject Senate Bill 5 and having
14 a "no" vote on the ballot?

15 MR. McTIGUE: Mr. Chairman, Mr. Strahorn,
16 I don't see an inconsistency there. If you say we
17 should reject Senate Bill 5, in your campaign we need
18 to reject Senate Bill 5. Well, basically you're
19 saying we're against it. We want to vote no.

20 It's how you follow the next thing.
21 Okay, we want to reject Senate Bill 5, so what do we
22 do? We vote no, we're against it.

23 MR. STRAHORN: And if we were trying to
24 reduce the confusion in the voting public, if I've
25 already -- as a practical matter if I have already

1 talked to people, worked with people to understand
2 the issue and get them to understand, they don't --
3 to see if they don't like it, if I've done the work
4 in educating them to that point, it would seem to
5 be -- I don't know if this is more of a question or a
6 statement -- it would seem to be the simpler read on
7 the ballot would be if I already know I don't like
8 Senate Bill 5, that if I'm asked to vote for it or
9 against it, that's fairly simple to me.

10 MR. MCTIGUE: Mr. Chairman, Senator
11 Strahorn, I would agree with that. I would point out
12 that when people go into the voting booth, if they're
13 going to -- if they're against the law, they're not
14 thinking I'm going in here to vote "yes."

15 And I think you actually end up
16 creating -- there's been questions about whether Ohio
17 creates voter confusion. I don't believe that.

18 But I think you certainly create voter
19 confusion if you're telling voters if you're against
20 this law, you have to vote "yes." That's the much
21 greater risk of voter confusion.

22 MR. STRAHORN: And I can only add to
23 that. I've been handed several things over the
24 course of this day that have "do not approve" or "not
25 not reject," and I'm telling you it's some of the

1 most confusing stuff when we do that rather than to
2 simply vote that we've discussed.

3 I want to thank you for your testimony,
4 Mr. McTigue.

5 Thank you, Mr. Chair.

6 SECRETARY HUSTED: Mr. McTigue, I have an
7 out-of-the-box question for you that I would be
8 interested in your response to. Seems that we get
9 hung up on yes/no and we really just want a fair
10 question: Shall it be approved; shall it be
11 rejected.

12 Is it in your opinion that you could ask
13 the question like that, that instead of having a
14 "yes" or "no" you have one box that says: Shall
15 Senate Bill 5 be approved; shall Senate Bill 5 be
16 rejected. In a separate box would in your opinion
17 that be an acceptable way to ask the question?

18 MR. McTIGUE: Shall Senate Bill 5 be
19 approved; shall Senate Bill be rejected?

20 SECRETARY HUSTED: Just as it's written
21 in the title.

22 MR. McTIGUE: I believe that that -- I
23 believe that that is legally acceptable. The
24 Constitution does provide that the ballot for --
25 provides that referendum language must be written in

1 the same terms and conditions as constitutional
2 amendments proposed by the General Assembly, in that
3 section talks about allowing for an affirmative or
4 negative vote.

5 What affirmative and negative vote means,
6 I think that probably qualifies as a negative vote if
7 you can check to reject.

8 I think probably stating my opinion right
9 now off the top of my head, I think it probably works
10 in terms of being constitutional requirements because
11 are you submitting for approval or rejection.

12 I do think that it becomes, you know, a
13 more difficult thing in terms of educating the
14 voters. Because educating the voters a lot of times
15 is how to vote "yes" or "no" on an issue. Whether
16 it's a tax levy or a constitutional amendment.

17 So I think it becomes a bigger challenge
18 there in terms of educating voters, but off the top
19 of my head, standing here today without having
20 thought about this before, I'd have to say that it
21 may pass constitutional muster, that type of
22 language. Assuming that the Ohio Supreme Court would
23 say that that is an expression of affirmative or
24 negative.

25 SECRETARY HUSTED: Just trying to solve

1 problems. Thank you.

2 Any other questions?

3 Mr. Griffin?

4 MR. GRIFFIN: Thank you. Thank you.

5 Secretary Husted asked you a question
6 about an additional -- I'm interested in your view as
7 an election lawyer and constitutional lawyer.

8 If we're trying to be as consistent as
9 possible with the language of the Constitution in the
10 history of how that clause has been interpreted, what
11 in your view is the best way the question should be
12 phrased to be consistent with past precedent?

13 MR. McTIGUE: Well, Mr. Chairman,
14 Mr. Griffin, to be consistent it should say "shall
15 the law be approved." And "yes/no."

16 In recent years the Ballot Board has
17 gotten in the habit of adding some additional
18 language after the "yes" and the "no," such as in
19 parentheses say: Vote yes if you are in favor of
20 this law; vote no if you are against this law.

21 They've gotten in that habit in just
22 recent years I think of having things like that. But
23 the basic question, the lead-off question is "shall"
24 and then substitute "Senate Bill 5 be approved," and
25 then you have a yes/no. And that is what would be

1 consistent both with the history and what I believe
2 is the Constitution.

3 SECRETARY HUSTED: Additional questions?

4 I just want to -- there are different
5 ways that it can be written. The goal is obviously a
6 clear question. I think if you look at in your own
7 packet on the Issue 2 in here it actually has both:
8 Yes to approve the law; no to reject the law under
9 the question of "shall the proposed law be approved,"
10 so.

11 MR. MCTIGUE: Exactly.

12 SECRETARY HUSTED: It has belt and
13 suspenders.

14 MR. MCTIGUE: Right. And I think,
15 Mr. Chairman, getting back to that question you asked
16 me before, the out-of-the-box question, I mean, the
17 way you phrased it it didn't include "yes/no." What
18 you just read me does include "yes/no" and I think
19 that certainly resolves that doubt that I had in my
20 mind.

21 SECRETARY HUSTED: Senator Faber.

22 SENATOR FABER: Mr. Secretary, to the
23 witness, wouldn't it be also concluded constitutional
24 and clear if the initial question was: Shall Senate
25 Bill 5 be approved or rejected? If that's your

1 question.

2 MR. MCTIGUE: Mr. Chairman, Senator
3 Faber, I would say it would not be constitutional.

4 Second, if I understood your question,
5 second, I would say that is that it would not be
6 constitutional because the question has to be phrased
7 in my view under the Constitution as shall the law be
8 approved.

9 Second, nevertheless regardless of the
10 Constitution, would it be clear? I think it would
11 be -- I will answer it this way: I think it's less
12 clear than saying "shall the law be approved."

13 SENATOR FABER: Let me back up,
14 Mr. Chairman, then.

15 I'm curious under the Constitution why
16 you believe that's not constitutional. The
17 Constitution 1c says clearly: The Secretary of State
18 shall submit to the electors of the state for their
19 approval or rejection.

20 It doesn't say "only for approval or
21 rejection." And then it goes on to say until
22 approved it doesn't go into effect.

23 Now, it doesn't say you have to have an
24 approval for "yes" vote. Doesn't say you have to
25 have a "no" vote. Doesn't say you have to have a

1 "yes" or a "no" vote. It says you have to find out
2 whether the voters approve or reject the law.

3 MR. McTIGUE: Mr. Chairman, Senator
4 Faber, it is correct that it doesn't say it in that
5 language, but as you just read, it does say the law
6 shall not go into effect until and unless approved by
7 the voters.

8 Now, in common language, common English,
9 we don't approve things by voting "no." And the Ohio
10 Supreme Court has said that we are to interpret the
11 Constitution using the same rules that we apply to
12 statutory construction. And one is that we are to
13 give the requirements in the language used in the
14 Constitution their common and ordinary meaning.

15 And if "approval" is commonly expressed
16 in the affirmative, meaning yes, then it would turn
17 things on its head, and violate those rules of
18 construction to say that approval is expressed by
19 saying no. And the Constitution does require a
20 majority voting for approval.

21 SECRETARY HUSTED: Additional questions
22 for Mr. McTigue?

23 MR. McTIGUE: Thank you.

24 SECRETARY HUSTED: Thank you.

25 At this time I would like to call Don

1 Brey forward.

2 Mr. Brey is representing Building a
3 Better Ohio, and he is a proponent of the Senate Bill
4 5.

5 MR. BREY: Thank you, Mr. Secretary,
6 members of the Ballot Board. I have a few handouts
7 which, with the permission of the Board, I'd like to
8 pass out to you.

9 SECRETARY HUSTED: Please.

10 MR. BREY: May it please the Board, my
11 understanding is that I'm to address first the issue
12 of how the ballot question should be presented, and
13 then after that is decided I have some other remarks
14 what the ballot language might look like.

15 But it might shorten the process if I
16 make that argument based upon what the question's
17 going to be rather than the hypothetical back and
18 forth.

19 SECRETARY HUSTED: However you prefer.

20 MR. BREY: Okay. My name is Donald Brey,
21 and I represent the Building a Better Ohio, a group
22 that supports Senate Bill 5 and opposes the
23 referendum.

24 The referendum petitions that were passed
25 were passed out by We Are Ohio, and I've attached to

1 a brief outline of our argument on what the vote
2 should be, pointing out the context in which this
3 petition has occurred. And I've attached four
4 documents, all of which are from the folks that filed
5 the petitions, the referendum petitions.

6 And keep in mind, a referendum is
7 different than an initiated statute or an initiated
8 Constitution, or even a proposed constitutional
9 amendment that's proposed by the legislature.

10 In the case of an initiated statute,
11 you're trying to create something that wasn't there
12 before. In the case of an initiated constitutional
13 amendment or a constitutional amendment proposed by
14 the General Assembly, you're trying to create
15 something that wasn't there before.

16 In the case of the referendum you're
17 trying to change something that was duly passed by
18 the General Assembly, signed by the Governor, and
19 filed with the Secretary of State's Office.

20 And therefore the first question we have
21 is what is the issue? It's not about whether there
22 should be "yes" or "no." Although that's a separate
23 issue that's interesting.

24 But the question is what is the issue
25 that has been presented to the public by the folks

1 that paid for, circulated, publicized, and is
2 successful in filing the referendum petition to put
3 it on the ballot.

4 And they state in the very first repeal
5 Senate Bill 5, they state that We Are Ohio is a
6 citizen-driven community-based bipartisan effort to
7 repeal Senate Bill 5. And there's a lot of talk
8 about, well, we've never done it this way before.

9 Their own literature says call their
10 movement an unprecedented grassroots movement. In
11 other words, we haven't had this kind of marketing of
12 the Repeal Senate Bill 5 in every single piece of
13 their literature. It's part of their logo. It's in
14 big all caps letters "We Are Ohio, Repeal Senate Bill
15 5."

16 And they repeat the effort to repeal
17 Senate Bill 5. They repeat they're an unprecedented
18 movement. They have on their website proposed signs
19 that say Repeal Senate Bill 5, We Are Ohio. And they
20 have issued statements when they got the signatures
21 validated, and the statement they said was We Are
22 Ohio validated signatures and ballot placement to
23 repeal Senate Bill 5.

24 And they talk about repeal of the Senate
25 Bill would be on the ballot. And state

1 notwithstanding that this suggestion has nothing to
2 do with a veto.

3 Where Mr. McTigue's own client wrote not
4 in just one press release but in two press releases
5 that we look forward to giving all Ohians the
6 opportunity to exercise the rights to a citizen's
7 veto of Senate Bill 5 on November 8, 2011.

8 And again, they talk about a poll,
9 another press release from We Are Ohio, Repeal Senate
10 Bill 5, is a poll on repeal of Senate Bill 5 they
11 state several times. Again, they look forward to
12 allowing citizens the opportunity to repeal Senate
13 Bill 5 in November

14 And again they talk about themselves as a
15 coalition that's come together to repeal Senate Bill
16 5. Now that's what they say. But it's not just them
17 that said it.

18 Matter of fact the one page sheet, the
19 colored sheet that I passed out to you has a whole
20 bunch of articles and headlines from the news media
21 throughout the state and they understand the issue,
22 the issue is to repeal Senate Bill 5.

23 The repeal of Senate Bill 5 is on the
24 ballot, Dayton Daily News; Senate Bill 5 repeal will
25 be on Issue 2; Senate Bill 5 repeal makes it to

1 November ballots; statewide grad repeals Senate Bill
2 5 gets the green light; Senate Bill 5 opponents take
3 the first step towards repeal. And so on.

4 So they have already framed the issue.
5 They spent millions upon millions of dollars
6 educating, communicating, and persuading both the
7 people that signed the petitions and the general
8 public that what was going to be on the ballot this
9 November is an issue on whether or not you're going
10 to repeal Senate Bill 5.

11 They framed the issue. We didn't tell
12 them they had do it that way. The law didn't tell
13 them they had do it that way. They chose to do it
14 that way.

15 We didn't tell them they had to spend
16 four and a half million dollars. I think we would
17 have preferred they hadn't, but they did and they had
18 a right to spend that money to communicate the
19 message that this issue is an issue about whether or
20 not we should repeal Senate Bill 5.

21 They were successful in persuading people
22 that that's what the petition was about and they were
23 successful in persuading the news folks that that was
24 what it was about as well.

25 Now, there are a couple arguments that

1 have been made on the other side, but I would point
2 out what the other side is trying to do is they're
3 trying to flip the issue. They framed the issue, now
4 they want to flip the issue.

5 They want to say, well, we don't want to
6 ask people in the voting booth whether or not you
7 should repeal Senate Bill 5. We did before in the
8 campaign but that's just campaign stuff. That has
9 nothing to do with voter confusion.

10 And Mr. McTigue correctly referred to the
11 duties of this legislature -- excuse me, the duties
12 of this Ballot Board in part and he alluded to but
13 didn't really talk in detail about the prime
14 overriding duty of the Ballot Board, which is to
15 avoid misleading, deceptive, or defrauded language to
16 the public.

17 We want to make sure this is presented in
18 a fashion that is clear. The people understand the
19 substance of what they're voting on and that the
20 language -- in fact the only way the Supreme Court,
21 according to the Article XVI, 2 Section of the Ohio
22 Constitution, Mr. McTigue says well this could be
23 challenged.

24 But the Article XVI, Section 1 of Ohio's
25 Constitution, which is attached to my little memo,

1 says that the ballot language shall not be held in
2 the ballot unless it is such as to mislead, deceive,
3 or defraud the voters.

4 Now, what is "misleading," what is
5 "deceptive," and what is "defrauding" depends upon
6 the real world context. You don't have some platonic
7 idea saying this will defraud these people. You look
8 at what the people have been looking at.

9 And what the people have been looking at
10 is they're going to go into the voting booth to vote
11 on whether or not to repeal Senate Bill 5. That's
12 what they've been looking at. And so maybe they
13 didn't have that issue whether a dozen or so
14 referendums that have come up. Maybe they didn't
15 spend four and a half million dollars.

16 And frankly, I'm old enough to remember
17 four and a half million dollars was some real money.
18 You could run governor races and have some money
19 change on both sides with that kind of money, but
20 times change.

21 And they had every right to spend the
22 money they did getting the message out that they
23 chose and selected and designed to get out.

24 But having done that, it will be
25 misleading and deceptive and will not advance the

1 cause of clarity, which is the fundamental reason for
2 this Board, for them to flip, do 180-degree turn on
3 what the issue is that's being presented to the
4 voters.

5 Now, Ms. McTigue has acknowledged and I
6 acknowledge as well, there's no precedent on this
7 either way. The Ohio Supreme Court has never
8 addressed the issue. And the cases that he cited do,
9 frankly, very little other than refer to the language
10 in the Constitution.

11 And there are a couple phrases in the
12 Constitution that say there should be an affirmative
13 or negative vote on this. And by the way, those
14 aren't magic words. If you take a look at all the
15 ballot language that's attached to Mr. McTigue's
16 language, you don't see the word "affirmative" or
17 "negative" anywhere in there. Even though it's in
18 the Constitution.

19 Likewise, he talks about having an
20 approval or rejection by the legislature, and it's
21 not in effect until or unless approved by the
22 majority. If you -- most people vote "no" appealing
23 it, they approved it.

24 And by the way, there is a possibility,
25 as we see from the language that Mr. McTigue attached

1 to his brief of having a "yes" if you wish to reject
2 the bill or repeal the bill, and having a "no" if you
3 wish it approve the bill.

4 You could choose to put that language in
5 there to make sure nobody would be confused about
6 what a "yes" means and what a "no" means. It would
7 be right next to the "yes," it would be right next to
8 "no," and it would be exactly what issue was
9 presented to the voters, to the petitioners, and to
10 the general public, by the folks that filed this
11 petition. So that's another possibility as well.

12 But it's not magic words. And if it were
13 magic words, if we say get to the voters for
14 rejecting and approving, then which magic word do you
15 choose? The word "approve" or the word "reject"?

16 We could use either one if you wanted to,
17 and I'm suggesting that we choose the word "repeal"
18 since that's the one they chose and spent four and a
19 half million dollars imprinting it on everybody's
20 mind.

21 And perhaps adding that to the language
22 saying that "yes" if you wish to repeal and "no" if
23 you wish to approve along those little boxes, which I
24 think makes you pretty much bulletproof in terms of
25 any challenge.

1 The Ballot Board has discretion. Yes,
2 it's bound by some Constitution provisions. But
3 saying the Constitution says something doesn't make
4 it say something.

5 If you vote to repeal a bill, you're
6 rejecting it. If you vote not to repeal a bill,
7 you're affirming it. Or approving it or whatever
8 language you want to do. You got to have a clear
9 vote either way, but there are all sorts of ways to
10 do that.

11 They're essentially, the main argument
12 that is presented by the other side is we've never
13 done it this way before. And for purposes of
14 initiated statutes, initiated constitutional
15 amendments, you don't have a choice.

16 The Constitution pretty much lays out
17 that you have to have -- the resolution shall be
18 enacted by the people, and then there's a "yes" if
19 you want to enact it or "no" if you don't want to
20 enact it.

21 You might have some discretion about that
22 but that's pretty much how it goes in terms of if
23 you're creating a new law. If you create a new
24 amendment to the Constitution.

25 And perhaps in days when you didn't spend

1 four and a half million dollars imprinting a
2 different issue before the public, it really didn't
3 gore anybody's ox or cause confusion to people to do
4 it differently.

5 But once you've done that, once you've
6 spent millions of dollars imprinted upon the
7 petitioners, the potential voters, the news media,
8 and the people of Ohio that we are putting on the
9 ballot an issue to repeal Senate Bill 5, I would
10 respectfully suggest that it would advance the cause
11 of clarity, of consistency, and of avoiding deceptive
12 and misleading flipping tactics to accept the very
13 issue that petitioners presented and ask the voters
14 whether or not they wish to repeal Senate Bill 5.

15 SECRETARY HUSTED: Thank you, Mr. Brey.

16 Do we have questions?

17 Senator Strahorn.

18 MR. STRAHORN: Thank you, Mr. Chair.

19 Mr. Brey, something just a second ago
20 disturbing to me is jumping out at me, I can't quite
21 make sense of it. I had another question but I'm
22 just curious about this.

23 You're an opponent of the referendum but
24 the argument that you're making would seem to support
25 a problem for the referendum passing, so it just

1 struck me as odd that if they convince people it's
2 about one thing and they want a different result on
3 the ballot, how does that help them? Why would they
4 do that?

5 MR. BREY: If it doesn't help them I'm
6 quite willing to concede the point and do the ballot
7 language the way I think it ought to be done.

8 I think it is unlikely the people spent a
9 lot of time and money arguing positions and political
10 matters unless they believe -- I have not seen a
11 single poll on that issue. So I'm arguing from utter
12 ignorance in terms of black box, and perhaps
13 Mr. McTigue has neither, but my suspicion is that
14 having framed the issue the way they have and
15 convinced everybody the issue's whether or not to
16 repeal, they have now decided it is in the political
17 interest not only to change that but to go through a
18 letter-writing campaign and a PR campaign to try to
19 put pressure on this Board, which we have not done
20 and which we think is highly inappropriate.

21 MR. STRAHORN: Mr. Chair.

22 You address some of the commentary about
23 while not maybe a constitutional or a legal precedent
24 but the way this has been handled with some other
25 ballot initiatives previously.

1 And maybe for some of those cases that
2 occurred in the earlier part of the last century in
3 terms of the amount of effort to voter education
4 might be accurate.

5 Is it your assertion that in the case of
6 the most recent that I can think of, which would have
7 been the Workers' Comp Bill in '97, that that somehow
8 didn't receive a similar level of voter education and
9 that that somehow is a departure from this that
10 there's inconsistencies between these two?

11 MR. BREY: I'm not familiar with details
12 of the Workers' Comp referendum. But I don't
13 believe -- well, frankly, don't take my word for it.
14 We Are Ohio has stated that their grassroots effort
15 is unprecedented, and I take them at their word for
16 that.

17 And I don't think there's ever been a
18 movement like the one they've had. Certainly
19 there've never been the number of signatures
20 presented as they've had.

21 So I think it's fair to say from their
22 own documents that they have communicated more
23 thoroughly and more broadly the message we're going
24 to get a repeal of Senate Bill 5 on the ballot than
25 has ever happened before in the history of Ohio. And

1 that's just one --

2 MR. STRAHORN: And your belief is that
3 those two things are incompatible. You can't go out
4 and do voter education about the merits or the
5 problems of the piece of legislation and then be
6 consistent with the way that we've done ballot
7 initiative language in the past, somehow those two
8 things are incompatible as far as you're concerned.

9 MR. BREY: Well, I think that voter
10 education is a fine thing, but when you imprint upon
11 the voter an issue in a certain matter and then flip
12 it and twist to the other side in order to obtain
13 some sort of political advantage, which I presume,
14 that's not the same thing as what happened before.

15 There might have been arguments but they
16 obviously were resolved in a different fashion.

17 MR. STRAHORN: And is this a position
18 that you hold as an absolute?

19 MR. BREY: I'm not sure what you mean by
20 "an absolute."

21 MR. STRAHORN: I mean every single case
22 that this is the scenario that you would hold the
23 same position no matter what the issue.

24 MR. BREY: I think the Ballot Board has
25 the duty as part of your constitutional

1 responsibility to frame the issue in such a way as to
2 minimize the voter confusion, as to minimize the
3 possibility of being deceived or being defrauded, and
4 that is generally a fact-based determination.

5 The facts we have here I think are pretty
6 clear in terms of the message that has been imprinted
7 upon the voters.

8 MR. STRAHORN: Was that a "yes" or a
9 "no"? Was that a "yes" or a "no"?

10 MR. BREY: Well, I wasn't quite sure what
11 you meant by "an absolute."

12 MR. STRAHORN: If we were to take another
13 issue with similar factors, would your position be
14 the same if you had gone out and told people this was
15 a bad bill and we were going to do the ballot
16 initiative, that you can't -- those two things can't
17 be in conflict.

18 MR. BREY: If you spent four and a half
19 million dollars telling me we want to repeal a bill X
20 and it comes before the Ballot Board for referendum
21 and that has been printed the same way this one has
22 had, I would suggest yes, you should do exactly the
23 same thing here for the same reason.

24 MR. STRAHORN: Now it wouldn't actually
25 depend on the amount of money -- not to be, I don't

1 want to be picky about it. We don't need an exact
2 amount of money. You mean if there's a substantial
3 effort put into for education --

4 MR. BREY: Yeah, I think substantial, and
5 obviously the difference between the difference in
6 degree and difference in kind is a difference in
7 degree. Four and a half million dollars versus
8 \$50,000 statewide, obviously there's a difference
9 there.

10 But four and a half million dollars
11 versus, you can always have a number between there,
12 was kind of not clear.

13 I would suggest in this one it's clear
14 that this effort was in precedent because even We Are
15 Ohio affirmatively said so repeatedly in their
16 literature.

17 MR. STRAHORN: Okay, thank you.

18 Thank you, Mr. Chair.

19 SECRETARY HUSTED: Mr. Griffin.

20 MR. GRIFFIN: Thank you, Mr. Chair.

21 Mr. Brey, I want to make sure I
22 understand. Is it your feeling that the campaign,
23 the four and a half million dollars has been
24 deceptive or unfair in any way?

25 MR. BREY: I'm not saying that they have

1 been deceptive or unfair. I'm suggesting that would
2 be deceptive or unfair to the voters. Now that they
3 have printed that issue to 180 and say we're not
4 going to deal with that issue anymore, we want a
5 different question presented to them in the ballot
6 language, that's what would be deceptive and unfair.

7 MR. GRIFFIN: So your position is that
8 this Ballot Board has an obligation to write the
9 ballot language so it's consistent with what third
10 parties have to say about it, even if that does not
11 properly state the law.

12 MR. BREY: Well, actually what the law
13 says in Article XVI, Section 1, is that this Ballot
14 Board has a duty to draft language in such a way as
15 to not mislead, deceive, or fraud voters. And that's
16 sort of constitutional obligation that you have.

17 MR. GRIFFIN: Right. So if third parties
18 are saying things that may be confusing or in your
19 mind inaccurate, then we need to change the ballot in
20 order to be consistent or not conflict with what
21 third parties are saying. Is that your position?

22 MR. BREY: First of all, I don't believe
23 that what they said that they would have an effort to
24 repeal is Senate Bill 5 was either misleading or
25 inaccurate. I think it was true.

1 But having said that and having said
2 that's how they want to phrase the issue, they could
3 have phrased it differently. And if they had phrased
4 it differently, there are other true and
5 non-deceptive ways to phrase it but that's the one
6 they chose. And having chose that, it would be
7 misleading to change horse in the middle of the
8 stream.

9 MR. GRIFFIN: So for future ballot boards
10 or for future decisions, this Board would have to go
11 out to look at what the amount has been spent, what's
12 been said, and then try to make a factual judgment
13 based on how to write the ballot language based upon
14 these other communications.

15 MR. BREY: When you're dealing with fraud
16 and you're dealing with deceit, you're dealing with
17 the knowledge base of the person who's likely to
18 defraud or deceive has.

19 And so if facts are presented to the
20 Board as we've tried to present them today showing
21 what has been presented to the general public and
22 showing how deceptive and misleading it would be if
23 We Are Ohio is allowed to flip the issue to make it
24 different than the one they presented, yes, I think
25 that's exactly what the Board should do.

1 MR. GRIFFIN: Isn't your issue really
2 with what the proponents have said and not what the
3 ballot language should be?

4 MR. BREY: What the proponents have said
5 they have said in such a way as to communicate to the
6 general public and create an understanding of what
7 they are going to be signing when they sign petitions
8 and vote they're going to be voting on when they vote
9 at the ballots.

10 And to tell people you're not going to be
11 voting on that anymore, or to come in and find out I
12 thought I was going to vote to repeal Senate Bill 5,
13 I guess I'm going on enact Senate Bill 5, or
14 something along those lines, creates a disconnect
15 between the messaging that was sent out -- and it's
16 like selling New Coke and doing all your advertising
17 about it and then at the last minute saying you're
18 going to get an old Coke.

19 It's a market for a purpose and then they
20 do a turnaround. I think that would be misleading.

21 MR. GRIFFIN: How do you propose the
22 Ballot Board should go about evaluating whether the
23 ballot language would conflict with what third
24 parties have said?

25 MR. BREY: Well, the Ballot Board has

1 this opportunity, among others, to have people
2 present information and arguments to it in public
3 comment so it can determine on a case-by-case basis
4 whether the public has been so infused by millions of
5 dollars in messaging a certain message as to make it
6 inappropriate and misleading for the Ballot Board to
7 change the message and to change the language at the
8 last minute.

9 MR. GRIFFIN: So you don't have an
10 objective standard we should -- you just made that
11 decision separately for each particular case.

12 MR. BREY: I believe from a fraud and
13 deceit is always a case-by-case factual
14 determination, yes.

15 MR. GRIFFIN: Mr. McTigue said that he'd
16 done some research, and Justice Douglas as well,
17 saying that he hadn't found a single situation since
18 1919 in which the referendum language had flipped
19 yes/no in the way that you're suggesting.

20 Did you find any cases contrary to either
21 Mr. McTigue or Justice Douglas' research?

22 MR. BREY: My understanding -- I don't
23 know whether this would be the 13th or the 14th, but
24 there have been about 13 referenda that have gone on
25 the ballot. This I believe would be the third one

1 since 1939, there was the Workers' Comp case and the
2 Pay Day Lending matter. And, yes, those have all had
3 a "no" vote to repeal the bill and a "yes" vote to
4 approve the bill.

5 MR. GRIFFIN: I heard McTigue's comment
6 on Bob Taft's commentary. I'd like to read it to you
7 and get your comments as well.

8 Bob Taft said in 1997, quote, It's pretty
9 clear from the language of the Constitution and also
10 from precedent the way in which referendums were
11 previously placed on the ballot that the issue before
12 the voters is shall law be approved. So if you're if
13 favor of the law, then you vote "yes," if you're not
14 favor the law, you vote "no."

15 Do you think Mr. Taft was correct when he
16 made that statement?

17 MR. BREY: I don't think he's correct as
18 a universal statement. He might have been correct
19 about a particular referendum he was dealing with.

20 But you have the cases in front of you.
21 By the way, Mr. McTigue didn't cite a single case,
22 and I don't have one either, directly citing the
23 issues. So Mr. Taft didn't have case law on that
24 either. He's reading the same Constitution we're
25 reading.

1 And we've already established these
2 aren't magic words, that no ballot has had all the
3 magic words if the real magic words are the
4 Constitution here.

5 So you're trying on have ballot language
6 that is clear, non-deceptive, and does what the
7 Constitution says needs to be done, without
8 necessarily using the words the Constitution says to
9 be used.

10 And I would suggest also, nowhere in the
11 Constitution and nowhere in the Ohio Revised Code
12 does it mandate that you have a "yes" for -- to
13 approve a referendum and a "no" to reject a bill.

14 MR. GRIFFIN: So your view is that
15 Mr. Taft was wrong when he said it's pretty clear
16 from the language in the Constitution?

17 MR. BREY: Yes. Obviously that appears
18 to be Mr. Bender's, but Mr. Bender's not here to
19 answer any questions that any of the members of Board
20 might have for him as to the rationale for that or
21 whether he would reconsider it in light of the
22 arguments that we have presented.

23 MR. GRIFFIN: In your presentation to
24 Ballot Board today on 2b, you say voting "yes" is a
25 negative vote on the law and voting "no" is an

1 affirmative vote on the law.

2 You see how that could be confusing to
3 voters when "yes" is a negative and "no" is an
4 affirmative?

5 MR. BREY: Well, what the Ballot Board
6 has done in the past, and Mr. McTigue has given you
7 examples of it, is have next to the "yes" "if you
8 wish approve the law," and "no to reject the law."

9 And it's possible to eliminate
10 possibility of voter confusion by having that just
11 done in an appropriate manner so if the question is
12 shall the law be repealed: Yes to reject the law; no
13 to approve the law. I mean you can make sure that
14 they're not even confused just by adding that in.

15 MR. GRIFFIN: And you're not aware of any
16 instance since 1919 which it's been phrased "vote to
17 repeal the law," correct?

18 MR. BREY: I'm not aware of -- I think
19 he's correct about that. Twelve or 13 times that
20 hasn't come up. I'm also not aware of any instance
21 in which four a half million dollars was spent and
22 900,000 signatures were obtained to imprint upon the
23 general public that this issue is about repealing a
24 particular bill. Had that happened, we might not
25 have 13 examples to the contrary.

1 MR. GRIFFIN: If only 4 million had been
2 spent, would that change your view?

3 MR. BREY: No.

4 MR. GRIFFIN: What number should we make
5 a ruling that it's permissible or impermissible? Is
6 it 3 million? Is it 2 million? What amount of
7 expenditure do you think we should draw as a rule?

8 MR. BREY: Well, part of it depends on
9 what the expenditure is for. Every single piece of
10 literature, every ad, every communication by We Are
11 Ohio, had the "Repeal Senate Bill 5" as part of that
12 communication.

13 So we're into the talking about millions
14 of dollars spent on something peripheral to
15 imprinting this. If they spent three and a half
16 million dollars on something that had nothing to do
17 with the messaging and spent 50 or 75,000
18 dollars with that message, I think we'd be in a
19 different situation. Might be.

20 We're not dealing with the situation
21 where newspapers hadn't picked up, as you've seen.
22 Every news outlet has phrased it this is an issue
23 going on the ballot about whether or not to repeal
24 Senate Bill 5. So it's not so much a matter of
25 having a standard of \$3 million, you know, wherever

1 the line is, 4 million is over.

2 MR. GRIFFIN: So if 4 million had been
3 spent on nail files and not on television or ads,
4 then we might have a different rule.

5 MR. BREY: On what?

6 MR. GRIFFIN: On nail files. If they had
7 spent \$4 million on a less effective source.

8 MR. BREY: I haven't seen the nail files,
9 but I would bet if they have a nail file it has
10 "Repeal Senate Bill 5" on it.

11 MR. GRIFFIN: Can you tell me what the
12 objective rule is that you would have this ballot
13 committee adopt in order to determine whether or
14 not -- you know what, I appreciate your time and I
15 want to thank you for coming down today.

16 MR. BREY: Thank you.

17 SECRETARY HUSTED: Senator Faber.

18 SENATOR FABER: Isn't the real issue not
19 so much how much of the money is spent but the people
20 who were circulating the petitions to put this on the
21 ballot were very clear in their campaign and how they
22 were promoting people to get -- given the petitions.

23 So really the question is what did the
24 people who signed the petitions certifying this to
25 the ballot expect when they signed those petitions?

1 MR. BREY: Senator, I believe you're
2 absolutely right. The money issue, in an attempt to
3 find an objective monetary standard, is somewhat off
4 the point.

5 The issue is the communication that was
6 communicated to the people who were signing the
7 petition, to the general public, through the media,
8 and that messaging has been thorough and consistent.

9 SENATOR FABER: Then my next question
10 would be, Mr. McTigue testified that this is not
11 discretionary. This is non-discretionary item with
12 the Board.

13 He didn't have any case law that said it
14 wasn't discretionary. If we wanted to be completely
15 compliant, wouldn't we essentially write instead of
16 saying "approved" or "not approved" or "yes" or "no,"
17 wouldn't we say "shall Senate Bill 5 be approved or
18 rejected?" And then in the vote get rid of the "yes"
19 and "no" and just say "approved" or "rejected."

20 MR. BREY: I certainly think the Board
21 has discretion to do that if it chooses to do that.
22 I mean the mission of the Board obviously is to try
23 to frame the issue in such a way as to minimize voter
24 confusion.

25 And I disagree with Mr. McTigue about the

1 discretion it has or not. I think the Board has a
2 great deal of discretion.

3 SENATOR FABER: So then wouldn't the
4 contrary also be true? We don't have to ask the
5 question to approve at all. We can ask the question
6 should it be rejected, since that's one of the two
7 standards.

8 And then the question is if the majority
9 of voters call heads and reject it, it's rejected; if
10 the majority of voters call tails and approve it,
11 it's approved.

12 MR. BREY: I fully agree with that.

13 SENATOR FABER: Thank you.

14 SECRETARY HUSTED: Additional questions?

15 Thank you, Mr. Brey.

16 At this time I would like to ask for the
17 members of the Board, we will take a short recess and
18 we would like, I would like to have any
19 recommendations for language that you would like to
20 see considered by the Board drafted or for
21 consideration, so that we may discuss those changes,
22 adopt any amendments that the Board wishes to adopt,
23 and proceed with the vote on the issue. So we will
24 take a recess of ten minutes.

25 (Recess taken.)

1 SECRETARY HUSTED: I'd like to reconvene
2 the Ballot Board.

3 We are now looking to certify the
4 balloting language for referendum on Senate Bill 5,
5 Issue 2, as it will appear on the ballot. And
6 before, you, the members of the committee, you will
7 find a newly issued document that will serve as the
8 language for the Issue 2 Referendum. I will read it
9 as follows:

10 A majority yes vote is necessary for
11 Amended Substitute Senate Bill No. 5 to be approved.
12 Amended Substitute Senate Bill No. 5 is a new law
13 relative to government union contracts and other
14 government contracts and policies.

15 A "yes" vote means you approve the law.
16 A "no" vote means you reject the law. And then a
17 section is provided "yes to approve the law," "no to
18 reject the law," which is followed by "shall the law
19 be adopted?"

20 If that is -- you should have that
21 document before you. At this point are there any
22 questions or comments from members of the committee?

23 (No response.)

24 SECRETARY HUSTED: Then hearing none, I
25 move that the Issue 2 Referendum language be

1 approved. Can I have a second?

2 MR. MORGAN: So moved.

3 SECRETARY HUSTED: Mr. Morgan seconds.
4 Any further discussion?

5 Secretary, please call the role.

6 MS. SCHUSTER: Senator Faber.

7 SENATOR FABER: Yes.

8 MS. SCHUSTER: Mr. Griffin.

9 MR. GRIFFIN: Yes.

10 MS. SCHUSTER: Mr. Morgan.

11 MR. MORGAN: Yes.

12 MS. SCHUSTER: Mr. Strahorn.

13 MR. STRAHORN: Yes.

14 MS. SCHUSTER: Secretary Husted.

15 SECRETARY HUSTED: Yes.

16 I want to, before we adjourn, I want to
17 thank the members of the Board for their constructive
18 work today, the staff, and all who testified today.
19 It was -- I appreciate very much your constructive
20 approach to the work we've done today, and I just
21 want to say thanks.

22 Any other business before we adjourn?

23 Hearing none, we stand adjourned.

24 (Meeting adjourned at 5:05 p.m.)

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CERTIFICATE

I do hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in this matter on Wednesday, August 3, 2011, and carefully compared with my original stenographic notes.

Julieanna Hennebert, Registered Professional Reporter and RMR and Notary Public in and for the State of Ohio.

My commission expires February 19, 2013.

(JUL-1761)

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