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BEFORE THE STATE OF OHIO BALLOT BOARD

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In the Matter of the :  
Examination of Workplace :  
Freedom Proposed :  
Constitutional Amendment :  
to Determine Whether It :  
Contains Only One :  
Constitutional Amendment. :

- - -

PROCEEDINGS

before Secretary of State Jon Husted, Chair; Senator  
Keith Faber; Mr. Mark Griffin; and Mr. William N.  
Morgan, Ohio Ballot Board, at the Statehouse, Senate  
Finance Hearing Room, One Capitol Square, Columbus,  
Ohio, called at 10:30 a.m. on Thursday, February 9,  
2012.

- - -

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Thursday Morning Session,  
February 9, 2012.

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SECRETARY HUSTED: I would like to call  
the meeting of the Ballot Board to order.

Good morning. My name is Jon Husted. I  
am the Ohio Secretary of State and the Chairman of  
the Ohio Ballot Board.

If there is no objection from the Board  
Members, my Chief Elections Counsel, Bets -- Betsy  
Schuster will serve as the Secretary for the Ballot  
Board for this meeting.

A record of these proceedings is being  
transcribed by a court reporter from Armstrong & Okey  
and the Ohio Channel is streaming this meeting live  
on their website where it will be archived.

If I could ask the Secretary to please  
call the roll.

MS. SCHUSTER: Senator Faber.

SENATOR FABER: Yes.

MS. SCHUSTER: Mr. Griffin.

MR. GRIFFIN: Here.

MS. SCHUSTER: Mr. Morgan.

MR. MORGAN: Yes.

MS. SCHUSTER: Mr. Strahorn.

1           And Secretary Husted.

2           SECRETARY HUSTED: Here.

3           Okay. We have a quorum so let the record  
4 reflect that.

5           The purpose that we are gathered here  
6 today is for the Ballot Board to Examine the  
7 Workplace Freedom Proposed Constitutional Amendment  
8 to Determine Whether It Contains Only One Proposed  
9 Constitutional Amendment. If the Board determines  
10 that it contains more than one amendment, the Board  
11 must divide the proposed constitutional amendment  
12 into individual constitutional amendments.

13           The proposed constitutional amendment  
14 text and summary were provided to the Ballot Board  
15 Members in advance of the meeting and their -- and  
16 are in the Ballot Board Members' notebooks. Extra  
17 copies are available at the front table for anyone  
18 whose interested.

19           At this point anyone wishing to address  
20 the Board for the purposes that we are assembled may  
21 do so. I remind folks that we are not here to debate  
22 the merits of the proposed amendment, just to  
23 determine -- we are here just to determine whether  
24 it's one amendment or more.

25           MS. SCHUSTER: We do have one person

1     testifying.

2                   SECRETARY HUSTED:   And we have one  
3     person.

4                   MS. SCHUSTER:   Maurice Thompson.

5                   SECRETARY HUSTED:   And that's Maurice  
6     Thompson.   Mr. Thompson, if you would please come  
7     forward and -- and provide your testimony to the  
8     Board.

9                   MR. THOMPSON:   Thank you, Mr. Secretary,  
10    Members of the Board.   I'm used to there being some  
11    significant opposition to our measures when we're  
12    here, so seeing that there doesn't appear to be at  
13    least as much today, I will try to curtail the  
14    remarks that I've prepared here and be a little bit  
15    more concise focusing more -- more strictly on the  
16    amendment and the standard that the Board is to apply  
17    and then some helpful examples that I think can guide  
18    the Board's decision making today.

19                   As the Board knows, the seminal rules of  
20    law guiding this -- this Board were set forth by the  
21    Ohio Supreme Court in Ohio Liberty Council v. Brunner  
22    which is a case that I litigated regarding a ballot  
23    measure that I also drafted.   And I think importantly  
24    here the text of the Workplace Freedom Amendment is  
25    essentially identical to the framework that we used

1 for the Ohio Health Care Freedom Amendment so for the  
2 same reasons that the Court found that that amendment  
3 contains one subject it's appropriate to find that  
4 this amendment contains one subject.

5 So I'm just going to briefly identify the  
6 standard of construction for this Board, the tests to  
7 apply, and then apply this test to the amendment at  
8 hand. Again, the purpose here of 3505.062 is to  
9 guard against the notion of blatant disunity,  
10 subjects that are completely unrelated to one another  
11 appearing within the same amendment. And the Ballot  
12 Board is under a duty to literally construe in favor  
13 of the notion that there is one subject in OLC v.  
14 Brunner the Court stated the Ballot Board has a clear  
15 legal duty to liberally construe the right  
16 initiative, and as long as the citizen initiated  
17 proposed amendment bears some reasonable relationship  
18 to a single general object or purpose, the Board must  
19 certify its approval of the amendment as written  
20 without dividing it into multiple petitions.

21 The test that the Court made clear in OLC  
22 v. Brunner is the proposal consists of one amendment  
23 to the Constitution so long as each of its subjects  
24 bear some reasonable relationship to a single general  
25 object or purpose. And, thus, "where an amendment to

1 the Constitution relates to a single purpose or  
2 object and all else contained therein is incidental  
3 and reasonably necessary to effectuate the purpose of  
4 the amendment such amendment is not violative of the  
5 provisions of Section 1, Article XVI of the Ohio  
6 Constitution."

7 The second test that the Court laid  
8 forward there that is helpful is that limitations on  
9 the scope of the amendment do not create a second  
10 subject nor do exceptions to the amendment create a  
11 second subject nor the definitions in the amendment  
12 of terms used in the amendment create a second  
13 subject.

14 And -- and then we can see how this plays  
15 out when we look at the text of the Workplace Freedom  
16 Amendment. So if you have the full text in front of  
17 you, we have divisions A through G, each of which is  
18 related to the title of the amendment which is  
19 freedom to choose whether to participate in a labor  
20 organization as a condition of employment.

21 So let's run through each of those really  
22 quickly and demonstrate how they are related to that  
23 title. So, again, the test in OLC v. Brunner where  
24 an amendment to the Constitution relates to a single  
25 purpose or object and all that is contained therein

1 is incidental and reasonably necessary to effectuate  
2 the purpose of the amendment, such amendment is not  
3 violative of the provisions. And the Court there  
4 made it clear you look at the title to try to  
5 understand the general purpose so this title Freedom  
6 to Choose Whether to Participate in a Labor  
7 Organization is really critical to the Board's  
8 inquiry.

9           And then when we look at each of the  
10 divisions, we see how they relate to that. Division  
11 A, no law, rule, agreement, or arrangement shall  
12 require directly or indirectly any person or employer  
13 to become or remain a member of a labor organization.  
14 This division simply recognizes the understanding  
15 that forced membership is forced participation as  
16 envisioned in the title of the amendment.

17           The second substantive protection of the  
18 freedom to choose is in division B. Division B  
19 states no law, rule, agreement, or arrangement shall  
20 directly -- or shall require directly or indirectly  
21 as a condition of employment any person or employer  
22 to pay or transfer any dues, fees, assessments, other  
23 charges of any kind, or anything else of value to a  
24 labor organization or third party in lieu of the  
25 labor organization. And this division simply

1 recognizes that being forced to fund an organization  
2 is also being forced to participate in it and is  
3 antithetical to the freedom to choose to participate  
4 in it.

5           The next three divisions, division C, D,  
6 and E, simply speak to the scope and extent of the  
7 amendment. So division -- Section 22(C), nothing in  
8 this section shall prevent any person from  
9 voluntarily belonging to or voluntarily providing  
10 support to a labor organization or to apply to  
11 agreements entered into or renewed prior to the  
12 enactment of this section. So, in other words, this  
13 is a check or a limitation on the freedoms to choose  
14 articulated in A and B, basically finding that this  
15 doesn't apply to contracts that are already in effect  
16 by the time this measure is enacted and also does  
17 nothing to limit people from voluntarily choosing to  
18 be part of a labor organization, whether it's through  
19 funding or through membership participation.

20           Section -- there are -- division D,  
21 likewise no other provision of the Ohio Constitution  
22 shall impair or limit the rights contained herein  
23 speaks to the scope or the extent of the amendment.  
24 This language you will find is identical to the  
25 language in Article II, Section 34 of the Ohio

1 Constitution which was submitted to the voters in  
2 1912 and that relates to the fixing and regulating  
3 hours of labor, minimum wage, comfort, health,  
4 safety, and general welfare of the employees.

5 So, again, this is also the test there's  
6 no independent meaning separate from the remainder of  
7 the amendment contained in this division which is the  
8 test for whether it's a second subject.

9 Division E, this section shall be  
10 implemented to the maximum extent that the United  
11 States Constitution and federal law permit. Any  
12 invalid or inoperative provision shall be first  
13 construed as not conflicting with federal law and  
14 then only if necessary severed from the remaining  
15 portion of the section which shall remain in effect.

16 Again, there's no independent meaning to  
17 this section. It's simply a check on the freedoms to  
18 choose articulated in divisions A and B of the  
19 section and speaks to the scope and extent of the  
20 exemption. It doesn't run rough shot over federal  
21 law. It makes it clear they don't intend to do that.

22 Division F, any person directly or  
23 indirectly affected or threatened with any harm by a  
24 violation of this section may bring a civil or  
25 equitable action to enforce this action and upon

1 prevailing entitled to injunctive relief, reasonable  
2 attorney's fees, costs, and other damages, and the  
3 workplace freedom provisions in other states  
4 typically have some sort of division of how the  
5 measure is being enforced so this is simply our  
6 version of that.

7           Again, there is no independent meaning or  
8 separate subject of this amendment. It simply  
9 specifies the freedoms to choose that are in division  
10 A and B are to be enforced. Sometimes you'll see it  
11 done this way. Sometimes in those Workplace Freedom  
12 Amendments you'll see that done through requiring  
13 criminal prosecution where this section is violated  
14 so that's very typical.

15           And then section G is merely the  
16 definitions and Liberty Council v. Brunner made it  
17 clear the definitional section is not a separate  
18 subject. So with that said I would note that if we  
19 wanted to look at the recent precedent or the recent  
20 patterns and practices of the Board, we've see  
21 numerous subjects come before the Board that are  
22 lengthier than this one. This all fits on one page.  
23 The medical marijuana initiative I saw was six pages  
24 and dealt with a whole host of subjects related to  
25 the more general premise of alternative treatment I

1 think was the term used there. State Issue 3, the  
2 casino's amendment, the Healthy Families Act, even  
3 the groundwater protections in Section 19, Article I,  
4 Section 19(B), that is, Article I of the Ohio  
5 Constitution touch upon more subject matter than does  
6 this amendment.

7 This is really identical to the Health  
8 Care Freedom Amendment in its framework, structure,  
9 and its breadth which was found to be one subject and  
10 it's also like other workplace freedom or right to  
11 work amendments that have been approved in other  
12 states.

13 The most recent amendment of this type to  
14 appear on the ballot nationwide was 2008 in Colorado.  
15 Colorado has a title board that is almost exactly  
16 like this Ballot Board in terms of the functions that  
17 it performs guarding against multiple subjects is  
18 also part of the duty of that board and there the  
19 title board approved language very similar to this as  
20 containing one subject. So it's very typical for  
21 the -- any measure like this to credit both forced  
22 funding and forced membership.

23 That's also true in Oklahoma where the  
24 constitutional amendment that passed there and became  
25 part of their Constitution in 2001 looked a lot like

1 this, preserved the same two freedoms to choose at  
2 the top of the constitutional amendment and actually  
3 went much further. And likewise there they have a  
4 title board and a single subject rule that prohibits  
5 more than one subject from being circulated or  
6 offered to the voters.

7           And then finally I would note that  
8 there -- simply if there are policy objections,  
9 language objections, objections about the effects of  
10 the amendment, it's important to remember the effects  
11 of the amendment are not actually before this Board  
12 and that there are a number of alternative safeguards  
13 in the Ohio Constitution to guard against those types  
14 of concerns, but they aren't before this Board with  
15 relationship to this administrative matter.

16           The arguments, explanations, the  
17 requirement of a clear title and clear language for  
18 the ballot are all in the Ohio Constitution and are  
19 ways of safeguarding against other issues that may be  
20 of concern to this Board but are not directly before  
21 it today.

22           So with that said I will be happy to  
23 answer any questions you may have about the  
24 amendment.

25           SECRETARY HUSTED: Any questions for

1 Mr. Thompson?

2 MR. GRIFFIN: Mr. Secretary.

3 SECRETARY HUSTED: Mr. Griffin.

4 MR. GRIFFIN: Mr. Thompson, thank you for  
5 coming down to talk to us today. Our task here is to  
6 determine, of course, whether it is more than one  
7 subject. Can you tell me how many different parts of  
8 the Ohio Revised Code will this proposed amendment  
9 affect?

10 MR. THOMPSON: I can't tell you that,  
11 Member Griffin. The -- when you say how many do they  
12 affect, well, Mr. Secretary, Member Griffin, let me  
13 backtrack first and remind -- remind you that the  
14 Ohio Supreme Court explicitly stated in Liberty  
15 Council v. Brunner that the effects of the amendment  
16 are not part of -- are not to be part of this Board's  
17 consideration in determining whether or not it  
18 complies with 3505.062(A).

19 I can tell you that I don't think that it  
20 would affect any of the Revised Code with  
21 relationship to private labor unions. With respect  
22 to Revised Code 4117 governing public collective  
23 bargaining, this doesn't affect any of those sections  
24 per insofar as you would write in an exception, but  
25 it would certainly be a background principle that

1 would determine how those -- how those sections are  
2 construed, and in some cases to the extent they  
3 require forced participation, there -- there would be  
4 an effect on those provisions. The -- those  
5 provisions do affect exclusive bargaining units and  
6 this does nothing to affect the exclusive bargaining  
7 unit provisions which is what you find primarily in  
8 4117.

9 SECRETARY HUSTED: Mr. Griffin.

10 MR. GRIFFIN: So I understand your point,  
11 this is a single topic of collective bargaining  
12 rights; is that fair to say?

13 THE WITNESS: No. Mr. Secretary, Member  
14 Griffin, no. I wouldn't at all characterize this as  
15 a set of collective rights. I would characterize  
16 this as a set of two individual rights, the freedom  
17 to choose whether to become a member of a labor union  
18 and the freedom to choose whether to be forced to  
19 fund a labor union or not. I don't think it speaks  
20 to collective rights at all, whether in the  
21 bargaining context or otherwise.

22 SECRETARY HUSTED: Mr. Griffin.

23 MR. GRIFFIN: I just want to make sure  
24 for a moment I thought that you may have  
25 misunderstood what I was saying. I was referring to

1 collective bargaining rights as opposed to some  
2 concept of collective rights. Does that change your  
3 response at all?

4 MR. THOMPSON: Member Griffin, I don't  
5 believe that there is a distinction between  
6 collective bargaining rights and collective rights.

7 MR. GRIFFIN: So your answer would be the  
8 same. So just so that I understand it, it's your  
9 view that this is a single issue that would alter any  
10 obligation to join a union in any public or private  
11 context -- is that -- is that a fair assessment?

12 MR. THOMPSON: Member Griffin, that is a  
13 fair assessment.

14 SECRETARY HUSTED: Any other questions  
15 for Mr. Thompson?

16 Thank you for being here today.

17 MR. THOMPSON: Thank you.

18 SECRETARY HUSTED: Is there anyone else  
19 that wishes to address the Board at this time?

20 Okay. Hearing none I would like to  
21 entertain a motion. Call on Senator Faber.

22 SENATOR FABER: Thank you, Mr. Secretary.  
23 I move that we certify the Workplace Freedom Proposed  
24 Constitutional Amendment as containing only one  
25 proposed Constitutional amendment.

1 MR. MORGAN: Second.

2 SECRETARY HUSTED: We have a motion and a  
3 second. Is there any discussion?

4 Mr. Griffin.

5 MR. GRIFFIN: Yes, Mr. Secretary. We are  
6 here only to decide whether it affects one topic, and  
7 although it is deeply flawed policy, I do think that  
8 it affects a single topic, a topic that's an attack  
9 on organized labor, but I think it falls within our  
10 ambit as a single topic.

11 SECRETARY HUSTED: Thank you,  
12 Mr. Griffin.

13 Secretary, would you please call the  
14 roll.

15 MS. SCHUSTER: Senator Faber.

16 SENATOR FABER: Yes.

17 MS. SCHUSTER: Mr. Griffin.

18 MR. GRIFFIN: Yes.

19 MS. SCHUSTER: Mr. Morgan.

20 MR. MORGAN: Yes.

21 MS. SCHUSTER: Secretary Husted.

22 SECRETARY HUSTED: Yes.

23 MS. SCHUSTER: By a vote 4-0 the motion  
24 carries.

25 SECRETARY HUSTED: The motion carries.

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Is there any other business to be brought  
before the committee?

Then hearing none, we stand adjourned.

(Thereupon, the meeting was concluded at  
10:50 a.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 Thursday, February 9, 2012, and carefully compared with my original stenographic notes.

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Karen Sue Gibson, Registered  
Merit Reporter.

(KSG-5483)

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