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Voter initiatives have not always been a part of America's history.[1] In fact, there was a point in America's history when no mechanism existed for average citizens to initiate laws.[2] However, during the Progressive Era of the early twentieth century, many Americans grew concerned about the amount of concentrated power held by wealthy state legislators.[3] Consequently, particularly in the West, citizens pressed for and gained adoption of "voter initiative"[4] resolutions, amending various state constitutions to enable average voters to have a direct voice in state lawmaking.[5] This is particularly noteworthy because it enables voters to bypass legislators to enact laws, subject to some limitations.[6] In addition, many state ballot measures involve highly divisive and politically charged issues that legislators are unwilling to address through legislative action because it could diminish the likelihood of their re-election.[7] The Colorado Supreme Court once noted that "[l]ike the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government."[8]

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1. *See* Elisabeth R. Gerber et al., Stealing the Initiative: How State Government Responds to Direct Democracy vii (2001).

2. *See id.*

3. *See, e.g.*, K.K. DuVivier, *State Ballot Initiatives in the Federal Preemption Equation: A Medical Marijuana Case Study*, 40 Wake Forest L. Rev. 221, 231 (2005). The Progressive Era, which lasted from 1880 to 1920, was a period marked by social activism and great political reform. *See* Maryann Zihala, Rights, Liberties & the Rule of Law 183 (2005).

4. The term "initiative" refers to the "electoral process by which a percentage of voters can propose legislation and compel a vote on it by the legislature or by the full electorate. Recognized in some state constitutions, the initiative is one of the few methods of direct democracy in an otherwise representative system." Black's Law Dictionary 854 (9th ed. 2009); *see, e.g.*, Colo. Const. art. V, § 1(2). For ease of reference, this comment will use the terms "voter initiative" and "initiative," but other sources may reference "ballot initiatives."

5. *See* DuVivier, *supra* note 3, at 232–33 ("Currently, twenty-four states give their citizens some opportunity to vote directly to adopt new laws or to amend their state constitutions."). Additionally, voter "referenda" amendments were also adopted. *Id.* While the terms "initiative" and "referenda" are often used interchangeably, they are not one and the same. *See* Black's Law Dictionary 854, 1393–94 (9th ed. 2009) (defining "initiative" as a "process by which a percentage of voters can propose legislation" and defining "referendum" as "[t]he process of referring a state legislative act, a state constitutional amendment, or an important public issue to the people for final approval by popular vote"). This case comment will focus on a voter initiative that was passed by voters at the ballot, but enacted into law by the state legislature.

6. *See* Gerber, *supra* note 1 ("Every winning initiative gives government actors opportunities to make implementation and enforcement decisions. When making these decisions, they regularly reinterpret, and sometimes reverse, electoral outcomes."). In many states, there are limitations on the subject matter that can be voted on by referendum. These limitations are preserved by the insertion of a "safety clause." *See, e.g.*, Colo. Const. art. V, § 1(3) ("The second power hereby reserved is the referendum, and it may be ordered, except as to laws necessary for the immediate preservation of the public peace, health, or safety, and appropriations for the support and maintenance of the departments of state and state institutions . . . .").

7. *See* Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 Yale L.J. 107, 108 (1995).

8. McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980) (en banc).

Yet, in a recent case, *Beinor v. Industrial Claims Appeals Office,* the Colorado Court of Appeals issued a decision that undermined a recently passed voter initiative.[9] In 2000, a voter initiative, referred to as the "Medical Marijuana Amendment," proposed an amendment to the Colorado Constitution to authorize the medical use of marijuana for persons suffering from a debilitating medical condition.[10] Despite the Medical Marijuana Amendment's passage, the court in *Beinor* upheld the denial of unemployment benefits to a discharged employee who had been diagnosed with a debilitating condition, solely because of his off-the-job use of marijuana for medical purposes.[11] This case comment contends that the court's strained reading of the Medical Marijuana Amendment—finding that the law merely decriminalized marijuana use but did not create an affirmative right to this use—ignored the clear will of voters and renders beneficiaries of medical marijuana psychologically and financially vulnerable to losing necessary medications and diminishing their general well-being. The precedent established by this opinion forces ill patients to choose between employment (and the attendant receipt of state unemployment benefits) and unemployment with the lawful treatment of a debilitating medical condition without access to important benefits. Furthermore, this precedent could undermine the public's confidence in the century-old right of voter initiative.

In 1910, the Colorado Constitution was amended to include voter initiative and referenda procedures.[12] Despite the many steps and complicated formalities, Colorado citizens have historically used the initiative process more expansively than citizens in most other states.[13] Initial proposals must be submitted, reviewed, commented on, revised, and eventually submitted to the secretary of state.[14] Once an independent board agrees on the title of the initiative, signatures must be gathered and verified.[15] An impartial analysis, referred to as a "Bluebook," is prepared by the legislative council staff and distributed to voters.[16] When all these steps have been completed, the initiative is put to a vote.

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9. *See* Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011).

10. This comment will refer to the constitutional provision enacted and now contained in article XVIII, section 14 of the Colorado Constitution as the "Medical Marijuana Amendment" or the "Amendment." However, some sources may reference "Amendment 20," the common name used *before* the amendment had been passed by voters.

11. *See Beinor*, 262 P.3d at 971–78.

12. *See* Colo. Const. art. V, § 1(1) ("[T]he people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly and also reserve power at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.").

13. *See* DuVivier, *supra* note 3, at 233–34 ("Historically, Oregon, California, Colorado, North Dakota, and Arizona have used the initiative process most extensively.").

14. *See* Colo. Const. art. V, § 1.

15. *See id.*; *see also* Colo. Rev. Stat. Ann. §§1-40-106 to -111 (West 2012).

16. Colo. Rev. Stat. Ann. §§1-40-124 to -124.5 (West 2012); *see* Colo. Const. art. V, § 1(7.5)(a); *see, e.g.*, Legis. Council of the Colo. Gen. Assemb., Research Pub. No. 475-6, An Analysis of the 2000 Statewide Ballot Proposals and Recommendations on Retention of Judges (2000) [hereinafter

The proposed Medical Marijuana Amendment was placed on the November 2000 general election ballot.[17] The Bluebook prepared by the Colorado Legislative Council stated, in relevant part, that the Medical Marijuana Amendment

> allows patients diagnosed with a serious or chronic illness and their care-givers to legally possess marijuana for medical purposes. [This] proposal does not affect federal criminal laws, but amends the Colorado Constitution to legalize the medical use of marijuana for patients who have registered with the state. . . . Patients on the registry are allowed to legally acquire, possess, use, grow, and transport marijuana and marijuana paraphernalia. . . . Employers are not required to allow the medical use of marijuana in the workplace.[18]

The Amendment title, as it appeared on the ballot, read, "An amendment to the Colorado Constitution authorizing the medical use of marijuana for persons suffering from debilitating medical conditions, and, in connection therewith, establishing an affirmative defense to Colorado criminal laws for patients . . . and providing that no employer must accommodate medical use of marijuana in the workplace."[19] Under the Medical Marijuana Amendment scheme, physicians were neither required nor permitted to prescribe marijuana, which would have violated federal law, but rather were only able to sign "written documentation" verifying a patient's need for medical marijuana.[20] Colorado then licensed the patient to use medical marijuana by issuing a "registry identification card."[21]

On November 7, 2000, Colorado voters passed the Medical Marijuana Amendment by a margin of 53.8% to 46.2%.[22] On December 28, 2000, the measure became effective upon the proclamation of the governor.[23] The text of the Medical Marijuana Amendment is now a part of the Colorado State Constitution in article XVIII, section 14, and is titled the "Medical Use of Marijuana Amendment."[24] Since 2000, guidelines have been adopted regulating the implementation of the medical marijuana program.[25] The language contained in article XVIII, section 14 remains

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Bluebook 2000]. The ballot proposals contained in the Bluebook ought not to be confused with The Bluebook: A Uniform System of Citation (Columbia Law Review Ass'n et al. eds., 19th ed. 2010).

17. *See* Bluebook 2000, *supra* note 16, at 1.

18. *Id.*

19. *Id.* at 35.

20. Colo. Const. art. XVIII, § 14(1)(j) (defining written documentation as "a statement signed by a patient's physician or copies of the patient's pertinent medical records").

21. *Id.* § 14(1)(g) (defining a registry identification card as a "document, issued by the state health agency, which identifies a patient authorized to engage in the medical use of marijuana and such patient's primary care-giver, if any has been designated").

22. *See Colorado Marijuana Act, amendment 20*, Ballotpedia, http://ballotpedia.org/wiki/index.php/Colorado_Marijuana_Act,_Amendment_20_(2000) (last visited Aug. 18, 2012).

23. *See* Colo. Const. art. XVIII, § 14(11).

24. *See id.* § 14.

25. *See, e.g.*, Colo. Rev. Stat. Ann. § 25-1.5-106 (West 2012) (originally enacted as § 25-1-107(1)(jj) (2001)) (describing the powers and duties of the state health agency in implementing the medical

identical to the language contained in "Amendment 20," which the citizens of Colorado approved through a vote at the ballot.[26]

Subsection (1) of article XVIII, section 14 defines the terms used in the remaining provisions of section 14.[27] Subsection (2) provides, in relevant part, that "[e]xcept as otherwise provided in subsections (5), (6), and (8) of this section, a patient or primary care-giver charged with a violation of the state's criminal laws related to the patient's medical use of marijuana will be deemed to have established an affirmative defense to such allegation" where the patient was previously diagnosed with a debilitating medical condition, was advised by a physician that the patient might benefit from marijuana use, and is in possession of the permitted amount of marijuana.[28] In addition, subsection (2) provides that this "affirmative defense shall not exclude the assertion of any other defense where a patient or primary care-giver is charged with a violation of state law related to the patient's medical use of marijuana."[29]

Subsection (4)(a) states that a "patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition."[30] Consequently, a patient's medical use of marijuana is lawful if it does not exceed "more than two ounces of a usable form of marijuana."[31] In addition, if a patient possesses a greater amount of marijuana than permitted under subsection (4)(a), subsection (4)(b) provides that the patient "may raise as an affirmative defense to charges of violation of state law that such greater amounts were medically necessary to address the patient's debilitating medical condition."[32] Subsection (5)(a) provides that "[n]o patient shall engage in the use of medical marijuana" in a way that either endangers the health of any person or is in plain view of the general public.[33] Subsection (10)(b) states that "[n]othing in this section shall require any employer to accommodate the medical use of marijuana in any work place."[34]

Jason M. Beinor, a Colorado citizen, was experiencing severe headaches as a result of a head injury he sustained from an assault and battery.[35] To relieve his pain, he consulted a licensed physician who recommended that Beinor use medical

marijuana program); Colo. Rev. Stat. Ann. § 18-18-406.3 (West 2012) (interpreting the constitutional amendment and enacting criminal penalties in relation thereto).

26. *Compare* Bluebook 2000, *supra* note 16, at 35–42, *with* Colo. Const. art. XVIII, § 14.

27. Colo. Const. art. XVIII, § 14(1).

28. *Id.* § 14(2)(a).

29. *Id.*

30. *Id.* § 14(4)(a).

31. *Id.* § 14(4)(a)(I).

32. *Id.* § 14(4)(b).

33. *Id.* § 14(5)(a).

34. *Id.* § 14(10)(b).

35. Petition for Writ of Certiorari at 5, Beinor v. Indus. Claim Appeals Office, No. 11SC676, 2012 WL 1940833 (Colo. Oct. 3, 2011), *available at* http://blogs.denverpost.com/crime/files/2011/10/Beinor-Colo-Sup-Ct-Petn-for-Cert-stamped.pdf.

marijuana to treat his debilitating condition.[36] The physician produced "written documentation," defined in article XVIII, section 14 of the Colorado Constitution as a "statement signed by a patient's physician or copies of the patient's pertinent medical records."[37] This documentation made Beinor eligible for a "registry identification card," which is issued by the state health agency and "identifies a patient authorized to engage in the medical use of marijuana."[38] With his documentation, Beinor obtained and used marijuana to alleviate his pain.[39]

In 2010, Beinor was an employee of Service Group, Inc.[40] His job was to sweep Denver's 16th Street Mall with a broom and dustpan.[41] Pursuant to its random drug-testing policy, Service Group ordered Beinor to submit to a drug test, which he failed.[42] After testing positive for marijuana, Beinor was fired in February 2010.[43] Beinor thereafter applied for state unemployment benefits.[44] Under Colorado's unemployment compensation provision, an employee may be disqualified from receiving benefits because of the "presence in an individual's system, during working hours, of not medically prescribed controlled substances . . . or a previously established, written drug . . . policy of the employer."[45] Service Group did not dispute that Beinor used marijuana for medical reasons.[46] Nor did it claim that his medical use of marijuana affected his performance on the job.[47] Rather, Service Group argued that it simply followed its written drug policy, which stated that any employee testing positive for "illegal drugs" would be terminated.[48]

Beinor's claim for unemployment benefits was initially denied, but a hearing officer reversed that decision, noting that "[Beinor] has a state constitutional right to

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36. Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 972 (Colo. App. 2011).

37. Colo. Const. art. XVIII, § 14(1)(j) (defining "Written Documentation"); *Beinor*, 262 P.3d at 972.

38. Colo. Const. art. XVIII, § 14(1)(g) (defining "Registry identification card"). While Beinor had yet to actually obtain the registry identification card, this fact was not significant. Beinor contended that he simply had not yet received it and the unemployment hearing officer, who was responsible for finding the facts, found that there was "no reliable evidence that . . . [Beinor] was not eligible for a medical marijuana license." *Beinor*, 262 P.3d at 972.

39. *Beinor*, 262 P.3d at 972.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *See id.* at 972. *See generally* Colo. Rev. Stat. Ann. §8-73-108 (West 2012) (explaining Colorado's unemployment compensation provisions, outlining both eligibility for and disqualification of benefits).

45. Colo. Rev. Stat. Ann. §8-73-108(5)(e)(IX.5) (West 2012).

46. *See Beinor*, 262 P.3d at 972.

47. *Id.*

48. *Id.*

use marijuana" and therefore was not at fault for the separation from his employment.[49] Service Group appealed and a unanimous Industrial Claim Appeals Panel set aside the hearing officer's order.[50] The Panel concluded that the Medical Marijuana Amendment did not create an exception to the disqualification regarding benefits for an employee who tests positive for the presence of a "not medically prescribed controlled substance."[51] Although Beinor had a medical authorization, he did not possess an actual prescription.[52] The Medical Marijuana Amendment, however, required a registry identification card to receive marijuana and did not require a medical prescription.[53] Accordingly, the Panel denied Beinor's claim.[54] Beinor, appearing pro se, appealed to the Colorado Court of Appeals.[55] On August 18, 2011, in a 2–1 opinion, that court upheld the Panel's decision.[56]

The court of appeals reached its decision by addressing the two primary issues raised by Beinor's appeal. First, the court considered whether the language of the unemployment statute disqualified Beinor from benefits.[57] The court interpreted Colorado's unemployment law as establishing that a claimant could be disqualified from benefits either because the employee tested positive for a "not medically prescribed controlled substance" or because the employee violated an employer's

49. *Id. See generally How Do I Appeal an Unemployment Decision*, Colo. Dep't Labor & Emp't, http://www.colorado.gov/cs/Satellite/CDLE-UnempBenefits/CDLE/1251566393561 (last visited Aug. 20, 2012) (explaining the appeals process for the disqualification of unemployment benefits).

50. *See Beinor*, 262 P.3d at 972.

51. *Id.* The unemployment statute explains that an employee may be disqualified from receiving unemployment benefits because of the "presence in an individual's system, during working hours, of not medically prescribed controlled substances." Colo. Rev. Stat. Ann. § 8-73-108(5)(e)(IX.5) (West 2012). The unemployment statute refers to the statute governing pharmaceuticals and pharmacists to define what "controlled substance" means. *See id.* The statute governing pharmaceuticals and pharmacists indicates that "controlled substance" has the meaning of the phrase under the Colorado Criminal Code, Colo. Rev. Stat. Ann. §12-22-303(7) (West 2012), which defines a "controlled substance" as "a drug, substance, or immediate precursor included in schedules I through V of part 2 of this article, including cocaine, marijuana." Colo. Rev. Stat. Ann. §18-18-102(5) (West 2012).

52. *See Beinor*, 262 P.3d at 972.

53. Colo. Const. art. XVIII, § 14(1)(j) (defining "Written Documentation").

54. *See Beinor*, 262 P.3d at 972.

55. *See id.* at 971–72.

56. *Id.* at 973–78. After the court of appeals rendered its decision, Beinor, represented by counsel, submitted a petition for Writ of Certiorari on October 3, 2011 asking the Supreme Court of Colorado to review his case. *See* Petition for Writ of Certiorari, *supra* note 35, at 3–23. The Deputy Attorney General submitted a cross-petition for Writ of Certiorari, arguing that, given the extraordinary impact this case will have, it is critical that the Supreme Court of Colorado create a binding precedent. *See* Cross-Petition for a Writ of Certiorari at 2–17, Beinor v. Indus. Claim Appeals Office, No. 11SC676, 2012 WL 1940833 (Colo. May 29, 2012), *available at* http://blogs.denverpost.com/crime/files/2011/10/Cross-Petition-for-Cert-with-exhibits.pdf. On May 29, 2012 both the petition and cross-petition for certiorari were denied by Colorado's Supreme Court; *see* Beinor v. Indus. Claim Appeals Office, 2012 WL 1940833 (Colo. May 29, 2012).

57. *Beinor*, 262 P.3d at 973–75; *see* Colo. Rev. Stat. Ann. § 8-73-108 (West 2012) (describing both eligibility for and disqualification from benefits under Colorado's unemployment compensation statute).

previously established written drug policy.[58] Reading the unemployment statute narrowly, the majority concluded that neither a registry card nor written documentation from a physician constituted a prescription.[59] Therefore, the court found that the statute authorized the denial of unemployment benefits.[60] The court noted that the written document Beinor produced explicitly acknowledged that it was "not a prescription," and further emphasized that, in any case, Beinor's physicians could not "prescribe" marijuana because prescriptions are regulated by federal law.[61] Under federal law, *doctors* are required to *register* with the federal Drug Enforcement Agency and can prescribe only Schedule II through V controlled substances.[62] Thus, no Colorado physician can prescribe marijuana, which is a Schedule I controlled substance.[63] Additionally, the court pointed to the fact that the term "controlled substance" was defined in Colorado's Criminal Code to include marijuana, so that even under Colorado law, physicians could not prescribe marijuana.[64] Hence, the court concluded that the denial of unemployment benefits was proper.[65]

Second, the court addressed whether the unemployment statute, which the court had found to justify the denial of benefits, was itself unconstitutional insofar as it violated Beinor's rights under the constitution's Medical Marijuana Amendment.[66] Implicitly, the court was asked to decide whether Beinor had a constitutionally conferred affirmative right to use medical marijuana or, conversely, whether the Amendment provided him only the right not to be criminally prosecuted for using marijuana for medical purposes.[67] The majority interpreted the Medical Marijuana Amendment as merely creating an exception to state criminal law, and not as establishing an affirmative right to use marijuana under the conditions outlined in

58. *Beinor*, 262 P.3d at 973. Specifically, the relevant portion of the unemployment statute states that an employee may be disqualified from benefits due to the "presence in an individual's system, during working hours, of not medically prescribed controlled substances, as defined in section 12-22-303(7), C.R.S., or . . . written drug or alcohol policy of the employer." Colo. Rev. Stat. Ann. § 8-73-108(5)(e)(IX.5) (West 2012).

59. *See Beinor*, 262 P.3d 973–74.

60. *See id.* at 975.

61. *Id.* at 973–75; *see* 21 U.S.C. § 812(c) (2006) (stating that marijuana is classified as a Schedule I drug); *see also* 21 C.F.R § 1301.13 (stating that, under the applicable federal law, a Schedule I drug, such as marijuana, cannot be prescribed by a physician).

62. 21 C.F.R. § 1301.13(e)(1)(iv) (2012); *see also Beinor*, 262 P.3d at 973–74.

63. *See* 21 U.S.C. § 812(c) (2006) (stating that, under the applicable federal law, marijuana is a Schedule I drug); *see also Beinor*, 262 P.3d at 973–74.

64. *See* Colo. Rev. Stat. Ann. §18-18-102(5) (West 2012) (defining a controlled substance as a "drug, substance, or immediate precursor included in schedules I through V . . . including marijuana"); *Beinor*, 262 P.3d at 973.

65. *Beinor*, 262 P.3d at 974–75.

66. *Id.* at 975–78.

67. *Id.* at 972–73. For a background discussion on the differences between legalization and decriminalization in regard to marijuana laws, see Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 Vand. L. Rev. 1421, 1427–33 (2009).

the Amendment.[68] The majority examined the purpose of each provision, giving great weight to the legislation enacted by the Colorado General Assembly shortly after the Medical Marijuana Amendment was approved by voters to regulate the medical marijuana program.[69] The court found no ambiguity. Rather, it found that the Amendment simply did not create a "constitutional right other than exemption from [criminal] prosecution."[70]

The majority further found that the Amendment's provision that "nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place" was properly understood to mean that employers need not "accommodate" a positive drug test result.[71] Finding that the "Colorado Constitution does not give medical marijuana users an unfettered right to violate employers' policies," the court implicitly conferred on all Colorado employers the right to deny their employees the ability to use medical marijuana simply by adopting zero-tolerance policies.[72] Accordingly, the majority held that the Panel properly disqualified Beinor from receiving unemployment compensation benefits.[73]

Judge Gabriel, in dissent, emphatically disagreed with the majority's interpretation of the Medical Marijuana Amendment and, consequently, with the majority's ultimate holding.[74] Judge Gabriel argued that the constitutional Amendment could be reasonably interpreted as creating a separate constitutional right to use marijuana, in addition to establishing an exception to criminal prosecution, and was sufficiently ambiguous to require the court to look to extrinsic evidence.[75] Judge Gabriel relied heavily on the publicly distributed Bluebook to ascertain the intent of voters and the purpose of the Amendment.[76] In Judge Gabriel's view, the Bluebook made it clear that voters intended to create an affirmative constitutional right to use marijuana under prescribed conditions.[77] Having established that medical marijuana use was, in his view, constitutionally protected, Judge Gabriel's dissent pointed out that the U.S. Supreme Court has explicitly and repeatedly held that unemployment benefits could not be conditioned on relinquishing a constitutionally protected right.[78] Thus, Judge

68. *See generally Beinor*, 262 P.3d at 973–78.

69. *See id.* at 975–76 (citing Colo. Rev. Stat. Ann. § 18-18-406.3 (West 2012)).

70. *Id.* at 976.

71. *Id.* at 975–76 (citing Colo. Const. art. XVIII, § 14(10)(b)).

72. *Id.* at 976.

73. *Id.* at 978.

74. *See id.* at 978–82 (Gabriel, J., dissenting).

75. *See id.*

76. *See id.*

77. *See id.* at 979.

78. *See id.* at 981–82; *see, e.g.*, Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136, 144 (1987) ("[T]he employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice."); Thomas v. Review Bd., 450 U.S. 707, 708 (1981) ("A person may not

Gabriel would have held that Beinor's off-the-job use of medical marijuana could not be the basis for denying him unemployment benefits.[79]

In *Beinor,* the Colorado Court of Appeals held that a terminated employee could properly be denied unemployment benefits based solely on the employee's use of "medical marijuana," which is "lawful" under article XVIII, section 14 of the Colorado Constitution.[80] Addressing a question of first impression, the court construed the Amendment as merely protecting patients from state *criminal* laws and not as protecting a patient's receipt of state benefits.[81] This case comment contends that the majority's narrow interpretation of the Medical Marijuana Amendment improperly treated the popularly enacted amendment as a product of the traditional legislative process and, as a result, undermined Colorado's citizens' constitutionally conferred right of voter initiatives. First, the majority erred when it concluded that the statutory language of the Medical Marijuana Amendment was unambiguous.[82] Second, the Bluebook that was distributed to voters demonstrates that the court's strained interpretation of the amendment allowed its preference to supplant the voice and intent of voting citizens.[83] If this holding stands, employees who avail themselves of the protections of the Medical Marijuana Amendment will be faced with a gut-wrenching decision: continue to use a lawful medication for a debilitating medical condition but risk the loss of certain state benefits, or keep their jobs and state benefits but abstain from using marijuana to alleviate their pain. Moreover, the

be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."); Sherbert v. Verner, 374 U.S. 398, 404 (1963) ("The ruling forces [Sherbert] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.").

79. *Beinor*, 262 P.3d at 981–82. Additionally, Judge Gabriel was unconvinced by the majority's broad interpretation of the "in any work place" language, which did not take the location where the marijuana was actually ingested or possessed into consideration. *Id.* at 980–81 (citing Colo. Const. art. XVIII, § 14(10)(b)) ("Nothing in this section shall require any employer to accommodate the medical use of marijuana in any work place."). Judge Gabriel opined that the provision at issue referred "solely to the acquisition, possession, production, use, or transportation of medical marijuana, or paraphernalia related to it, *in the workplace*. [He did] not believe that these provisions encompass the presence of marijuana in ones blood after the lawful use of medical marijuana at home." *Id.* at 980 (citing Colo. Const. art. XVIII, § 14(1)(b)) (clarifying the term "medical use," which is defined within the Amendment as "the acquisition, possession, production, use, or transportation of marijuana or paraphernalia related to the administration of such marijuana to address the symptoms or effects of a patient's debilitating medical condition, which may be authorized only after a diagnosis of the patient's debilitating medical condition by a physician"). Thus, Judge Gabriel argued that this provision unambiguously referred to use "in the workplace," but did not unambiguously answer the question before the court in *Beinor*. *Id.* at 980–81. While there are extensive arguments about what this provision could mean, the majority's denial of benefits turns on its interpretation of the criminal exception provision. For this reason, further discussion of the "in the workplace" provision of the Amendment is outside the scope of this comment.

80. *See generally Beinor*, 262 P.3d 970 (majority opinion).

81. *Id.* at 972.

82. *See infra* notes 85–130 and accompanying text.

83. *See infra* notes 131–50 and accompanying text.

holding of this court has consequences for an even larger number of stakeholders and has implications that extend far beyond the issue of unemployment benefits .[84]

When a court is charged with interpreting a statute, it first decides whether the issue presented can be resolved using just the statutory text itself.[85] However, if the text is ambiguous or susceptible to more than one reasonable interpretation, the court may then use extrinsic evidence to help it decipher what the legislative body intended the statute to mean.[86] When confronted with an ambiguous statute that has been enacted by the legislature, the court will examine the statute's legislative intent.[87] The same examination of a law's intent is required in the context of voter initiatives. However, the theoretical framework for judicial interpretation of *popularly enacted* laws remains largely unexamined in legal scholarship.[88]

The pool of interpretive sources a court can or should consult when searching for the intent of voters may be different from that which is appropriate for traditionally enacted legislation.[89] Some experts argue that voter initiatives require greater judicial deference because of the potential for public outrage that might cause the public to question the court's legitimacy following an unfavorable decision in conflict with the electorate's wishes.[90] Some courts, too, have acknowledged that popular intent should

84. *See infra* notes 156–68 and accompanying text.

85. *See* Abner J. Mikva & Eric Lane, An Introduction to Statutory Interpretation and the Legislative Process 9–19 (1997); *see, e.g.*, Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J., concurring) ("The starting point in every case involving construction of a statute is the language itself."); Wash. Cnty. Bd. of Equalization v. Petron Dev. Co., 109 P.3d 146, 149 (Colo. 2005) ("In discharging our judicial function, we afford the language of constitutions and statutes their ordinary and common meaning; we ascertain and give effect to their intent.").

86. *See* Mikva & Lane, *supra* note 85, at 27–41, 50–56 (describing the circumstances in which courts use extrinsic evidence); *see, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 195–212 (1978) (Powell, J., dissenting) (arguing that the majority's decision clearly contravenes the intent of Congress as found in the legislative history of the bill); State v. Nieto, 993 P.2d 493, 502 (Colo. 2000) (resorting to legislative history to ascertain legislative intent).

87. *See In re* Submission of Interrogatories on House Bill 99–1325, 979 P.2d 549, 554 (Colo. 1999); *see also* Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 978 (Colo. App. 2011).

88. *See* Schacter, *supra* note 7, at 108 ("[Legal scholars] have left largely unexamined the judicial interpretation of popularly enacted laws: how courts construe direct legislation when litigants contest statutory meaning rather than constitutionality.").

89. *Id.* at 119–23 (documenting the different sources a court uses to determine popular intent and how often courts explicitly use these sources). For more information on Colorado's interpretive methodology, see *In re* Interrogatories Relating to the Great Outdoors Colo. Trust Fund, 913 P. 2d 533, 542 (Colo. 1996) ("[I]n construing constitutional language, each clause and sentence must be presumed to have purpose and use."); Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996) ("Courts should consider the amendment as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions.").

90. *See* Kenneth P. Miller, *The Role of Courts in the Initiative Process: A Search for Standards* 28–29 (Am. Pol. Sci. Ass'n, Sept. 1999), *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/Miller%20-%20Courts%20and%20I&R%20IRI.pdf ("Recent cases suggest that the watchdog approach is gaining ground in the courts. But judicial vigilance potentially comes at the cost of voter outrage. . . . If courts continue to invalidate voter-

guide a court's inquiry and that the court should aim to give effect to what it deems to have been the voters' objective in enacting the legislation.[91] Nonetheless, despite criticism, ballot initiatives have been treated by the courts as largely the same, for interpretive purposes, as statutes adopted through the traditional legislative processes.[92] The established policy of judicial deference to the enacting body's intent is not, as evidenced by the holding in *Beinor*, always followed in practice.[93]

There are three main arguments that support the conclusion that the majority of the court in *Beinor* erred in its conclusion that the Medical Marijuana Amendment was unambiguous. First, in reaching its decision the majority concluded that the Medical Marijuana Amendment was unambiguous only by narrowly interpreting the meaning of the words contained in the amendment. Because the court found that the state unemployment law allowed the denial of benefits to someone authorized to use medical marijuana, the court next had to determine whether the Amendment, by its terms, explicitly or implicitly overrode the unemployment provision.[94] This, in turn,

approved initiatives at a high rate, there is a danger that public resentment against the judiciary will grow."); *see, e.g.*, Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1997) (reversing a decision that invalidated California Proposition 209, the court noted that a "system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy. These principles of judicial review are no less true today than in the days of *Marbury v. Madison*.").

91. *See, e.g.*, Urbish v. Lamm, 761 P.2d 756, 760 (Colo. 1988) (en banc) ("Because Amendment 3 was adopted by popular vote, we must seek to determine what the people believed the amendment to mean when they accepted it as their fundamental law."); Estate of Turner v. Wash. State Dep't of Revenue, 724 P.2d 1013, 1016 (Wash. 1986) ("[I]t is the function of this court to discern voter intent behind [the] Initiative . . . .").

92. *See* Schacter, *supra* note 7, at 109 (noting that the "gap in the literature about direct [voter] legislation is both lamentable and surprising . . . . As these measures are applied and interpreted, they raise the same problems of ambiguity and prompt the same kinds of litigation over interpretation that are so familiar in the context of legislative law."). For Colorado's treatment of the appropriate standard to apply to voter-enacted legislation, see Bolt v. Arapahoe Cnty. Sch. Dist. No. Six, 898 P.2d 525, 532 (Colo. 1995); *see also* Zaner v. City of Brighton, 917 P.2d 280, 283 (Colo. 1996) ("Courts should not engage in a narrow or technical reading of language contained in an initiated constitutional amendment if to do such would defeat the intent of the people."); *Bolt*, 898 P.2d at 532 (stating that when interpreting an initiative, an "absurd result should be avoided").

93. *Compare* Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011), *with* Paul Grant, Initiative & Referenda Institute, Citizens Initiatives Under Attack in Colorado, *available at* http://www.iandrinstitute.org/New%20IRI%20Website%20Info/I&R%20Research%20and%20History/I&R%20Studies/Grant%20-%20Citizens%20Initiatives%20Under%20Attack%20in%20Colorado%20IRI.pdf (last visited Sept. 9, 2012) (documenting recent attacks by Colorado courts on the initiative process).

94. *See Beinor*, 262 P.3d at 975–77. The court's first task in interpreting the Medical Marijuana Amendment in *Beinor* was thus to determine whether the Amendment spoke directly to the issue of unemployment benefits. *See id.* at 975. The most established principal of statutory interpretation, commonly known as the "plain meaning rule," suggests that a court first examine the plain text within the "four corners" of the document to ascertain meaning. *See* Mikva & Lane, *supra* note 85, at 9; *see, e.g.*, Tenn. Valley Auth. v. Hill, 437 U.S. 153, 173 (1978) (upholding the "ordinary meaning of plain language"); Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229, 1235 (Colo. 1998) ("The so-called 'four corners' principle . . . provided that a court should not look beyond the instrument for any purpose unless it first determined that the deed was ambiguous."). In *Beinor*, there is no mention in the Amendment of unemployment benefits, so it plainly did not.

required the court to decide whether the Amendment merely decriminalized medical marijuana use or whether it went further and "legalized" its use, subject to certain limitations.[95] Finding mere decriminalization, as the majority did, meant that the Amendment did not conflict with or override the unemployment law's prohibition on a person receiving certain benefits where the use of marijuana occurred without a prescription.[96] The latter finding, that the Amendment "legalized" medical marijuana use, would have established a constitutional right and overridden the unemployment law's limitations.[97]

Subsection (4)(a) of the Medical Marijuana Amendment reads, "A patient may engage in the medical use of marijuana, with no more marijuana than is medically necessary to address a debilitating medical condition. A patient's medical use of marijuana, within the following limits, is *lawful*,"[98] which means "legal."[99] The courts have recognized a difference between decriminalization and legalization.[100] Decriminalization involves the removal of criminal penalties and therefore the removal of the threat of incarceration and loss of freedom.[101] For example, when Connecticut decriminalized the possession of marijuana under one-half ounce, it did not thereby create a right to possess marijuana, but rather made such possession a criminal infraction and not a criminal act.[102] In contrast, legalization means the government has the ability to regulate use and distribution.[103] Colorado made it "lawful" to use marijuana for medical purposes, and thus created a right to use medical marijuana within the prescribed conditions. Thus, the question is whether "lawful" indicates that the Amendment arguably did more than remove a criminal

95. *See Beinor*, 262 P.3d at 975–76.

96. *See id.* at 975–77.

97. *See id.* at 978–82 (Gabriel, J., dissenting).

98. Colo. Const. art. XVIII, §14(4)(a) (emphasis added).

99. *See* Black's Law Dictionary 965 (9th ed. 2009) (defining lawful as "[n]ot contrary to law; permitted by law. See legal"); *see also* Erich Goode, Between Politics and Reason: The Drug Legalization Debate, 78 (1997) ("Legalization refers to a state licensing system more or less similar to that which prevails for alcohol and tobacco.").

100. *See* Sam Kamin & Christopher S. Morris, The Impact of the Decriminalization and Legalization of Marijuana: An Immediate Look at the Cannabis Reform Movement, 2010 Aspatore Special Rep. 22 (2010) (explaining the difference between legalization and decriminalization). *Cf.* People v. Trippet, 66 Cal. Rptr. 2d 559, 568 & n.8 (Cal. Ct. App. 1997) (explaining that California's Proposition 215, which merely decriminalized the use of medical marijuana, did not change its use from a crime to a "right").

101. *Decriminalize Definition*, Merriam-Webster.com, http://www.merriam-webster.com/dictionary/decriminalize (last visited Aug. 21, 2012).

102. *See* Conn. Gen. Stat. Ann. § 21A-279(c) (West 2012).

103. *See* Cynthia S. Duncan, *The Need for Change: An Economic Analysis of Marijuana Policy*, 41 Conn. L. Rev. 1701, 1731 (2009) ("Having failed to effectively exert control over marijuana availability and marijuana use from the outside through prohibition, legalization exerts control from the inside-replacing government prohibition of marijuana with government regulation.").

prohibition and created a *right* to use medical marijuana under the conditions specified. At the very least the Amendment was ambiguous in this regard.

The Colorado Court of Appeals was bound to construe the Amendment by giving meaning to every word it contained, using the ordinary meaning of the Amendment's words.[104] The word "lawful" means "legal"; therefore the result of making something lawful (when it previously was not) is to legalize, something materially different than a mere exemption from criminal prosecution.[105] Legalization typically means that civil and other penalties cannot be imposed for engaging in a given behavior.[106] The majority noted that it was not empowered to "add or subtract language from the express words of the amendment."[107] Yet, by construing the word "lawful" to mean decriminalize rather than anything other than "legal," the court *changed* the apparent meaning of the Amendment, thereby allowing it to find that no ambiguity existed and to avoid looking at extrinsic evidence that would have clarified what the voters intended in approving the initiative.[108]

Second, had the court chosen to read the amendment as a harmonious whole, it would have had to consider the possibility that the amendment was ambiguous and could well have been interpreted to override statutory provisions such as those contained in the unemployment law. The Colorado courts have noted that, when interpreting a statute, it should be treated as a "holistic endeavor" and that unclear text can often be clarified by looking at the entire statutory scheme.[109] Subsection (5)

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104. *See* Wash. Cnty. Bd. of Equalization v. Petron Dev. Co., 109 P.3d 146, 149 (Colo. 2005) ("We construe [constitutional and statutory] provisions as a whole, giving effect to every word and term contained therein, whenever possible.").

105. *See also* Jordan Blair Woods, *A Decade After Drug Decriminalization: What Can the United States Learn from the Portuguese Model*, 15 UDC/DCSL L. Rev. 1, 6–14 (2011) ("There are three main legal approaches to drug use, each of which has benefits and drawbacks. At one end of the spectrum is criminalization. . . . At the other end of the spectrum is legalization.").

106. *Id.* at 6 ("In a legalized regime, people are legally permitted to use drugs under regulated conditions without the threat of criminal, civil, or administrative sanctions. In between these two options is decriminalization. In a decriminalized regime, drug use is not a criminal offense, but may remain subject to non-criminal sanctions (such as administrative sanctions).").

107. Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 975 (Colo. App. 2011) (citing Turbyne v. People, 151 P.3d 563, 567 (Colo. 2007)).

108. However, the clear meaning of "legal" does not demonstrate that the text of the Medical Marijuana Amendment as a whole is unambiguous. Subsection (2) creates an exemption from criminal prosecution and, as I argue, subsection (4)(a) legalizes medical use. It is difficult to conjure up a scenario where legalization would not automatically decriminalize and thus the two provisions are inconsistent. This internal conflict, between the competing subsections, begets sufficient ambiguity in the text that the court should have examined extrinsic evidence (i.e., the Bluebook) to ascertain what voters intended the amendment to mean.

109. *See, e.g.*, United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear . . . .") (citations omitted); Charnes v. Boom, 766 P.2d 665, 667 (Colo. 1988) (en banc) ("[W]e must read and consider the statutory scheme as a whole to give consistent, harmonious and sensible effect to all its parts.").

(a) of the Medical Marijuana Amendment contains limitations on the right of medical marijuana use.[110] It begins, "[N]o patient shall . . . ." and then details the various circumstances in which the use of medical marijuana is *not* protected from criminal prosecution.[111] These circumstances include engaging in use that would endanger another person and using medical marijuana in public.[112] The majority's reading of subsection (4) as merely decriminalizing use is diminished when the statute is read as a whole. If the sole purpose of subsection (4) was to set the permissible uses ("the limits beyond which prosecution is not exempted,"[113] as the majority wrote), then there is no reasonable way to differentiate subsections (4) and (5)(a), which specify impermissible uses. By the majority's logic, the distinction is only that subsection (5)(a) is worded in the negative and subsection (4) is worded in the affirmative, a reading that hardly gives full effect to the meaning of each clause.[114]

Subsection (2) of Medical Marijuana Amendment states that "*except as otherwise provided in subsections (5), (6), and (8)* of this section, a patient . . . with a violation of the state's criminal laws related to the patient's medical use of marijuana will be *deemed to have established* an affirmative defense."[115] Subsections (5), (6) and (8) generally pertain to use in public view or a use that endangers others,[116] use by minors,[117] and misrepresentations to a physician or use of another person's registry identification card or fraudulent production of a registry identification card.[118] The majority found that subsection (4)(a) merely describes the limits of the state criminal law exemption, and that subsection (4)(b) provides an affirmative defense of medical necessity that "may" be raised when a patient possesses marijuana in excess of the limit.[119] But conspicuously lacking in the language of subsection (4)(b) is the word "criminal." Instead, subsection (4)(b) uses the term "charges of violation of state law."[120] The omission of the word "criminal" in subsection (4)(b) suggests that its affirmative defense was intended to apply beyond criminal law to other sorts of legal

110. *See* Colo. Const. art. XVIII, § 14(5)(a).

111. *Id.*

112. *Id.* ("No patient shall: (I) Engage in the medical use of marijuana in a way that endangers the health or well-being of any person; or (II) Engage in the medical use of marijuana in plain view of, or in a place open to, the general public.").

113. Beinor v. Indus. Claim Appeals Office, 262 P.3d 970, 975 (Colo. App. 2011).

114. *Compare* Colo. Const. art. XVIII, § 14(5)(a) ("No patent shall . . . ."), *with Beinor,* 262 P.3d 970, at 975 (interpreting subsection 4(a) as merely "the limits beyond which prosecution is not exempted").

115. Colo. Const. art. XVIII, § 14(2) (emphasis added).

116. *See id.* § 14(5)(a)–(b).

117. *See id.* § 14(6)(a)–(i).

118. *See id.* § 14(8)(a)–(d).

119. *Id.* § 14(4)(b) ("For quantities of marijuana in excess of these amounts, a patient or his or her primary care-giver *may* raise as an affirmative defense to charges of violation of state law that such greater amounts were medically necessary to address the patient's debilitating medical condition.") (emphasis added); *Beinor*, 262 P.3d at 975.

120. Colo. Const. art. XVIII, § 14(4)(b).

violations, such as use within one thousand feet of a public housing development.[121] Thus, reading subsection (4)(b) together with subsection (2)(a) further strengthens the argument that subsection (4)(a) is at least ambiguous and cannot be read as unambiguously creating a defense only to criminal prosecution, rather than an affirmative right to medical use of marijuana.[122]

Third, the majority's reliance on the general assembly's legislation, following voter approval of the initiative, is another indication of the statute's ambiguities. Subsection (8) of the Amendment indicated that the general assembly shall "define such terms and enact such legislation as may be necessary for implementation" of the Medical Marijuana Amendment.[123] In 2001, the Colorado General Assembly enacted a statute that established criminal penalties for violating certain provisions of the Amendment, such as penalties for counterfeiting registry identification cards.[124] The majority's reliance on the general assembly is misguided for two reasons. First, the majority asserts that the general assembly's construction, made shortly after voters approved the constitutional amendment, is to be given great weight.[125] However, it was the *voters* who passed the amendment, which the general assembly later enacted, and it is the voters' intent that should control. The general assembly can only enact a bill based on the voter-approved amendment.[126] The power of the general assembly is not unlimited.[127] It has neither the power to amend a constitutional initiative,[128] nor the power to enact "legislation which directly or indirectly impairs, limits or destroys rights granted by self-executing constitutional provisions."[129] If, as the majority contends, the Medical Marijuana Amendment unambiguously protects patients from criminal prosecution only, then the court may not look to the general assembly's construction for guidance. Second, the general assembly's construction asserts both that the amendment "creates a limited exception to the criminal laws" and "sets forth the lawful limits on the medical use."[130] Thus, the majority's reliance on the Colorado General Assembly's reading of the Amendment is erroneous and does not support the conclusion that the amendment is unambiguous in merely decriminalizing medical use of marijuana.

121. *See id.*; *see also* Colo. Rev. Stat. Ann. § 18-18-407(2)(a) (West 2012).

122. As the *Beinor* dissent acknowledges, the majority's reading of the Amendment may be a reasonable one, but it is far from the only logical interpretation of the Amendment's text. *Beinor*, 262 P.3d at 979 (Gabriel, J., dissenting). As the above analysis reveals, one might equally (or more reasonably) conclude, as the dissent does, that "[c]onversely, one could reasonably read the Amendment as creating a right to use medical marijuana (within established limits)." *Id.*

123. Colo. Const. art. XVIII, § 14(8).

124. *Beinor*, 262 P.3d at 975 (majority opinion) (citing Colo. Rev. Stat. Ann. § 18-18-406.3(4) (West 2012)).

125. *Id.* at 976.

126. *See id.*

127. *See, e.g.*, Colo. Const. art. V, § 1(5).

128. *See id.*

129. Zaner v. City of Brighton, 917 P.2d 280, 286 (Colo. 1996).

130. *Beinor*, 262 P.3d at 976 (citing Colo. Rev. Stat. Ann. § 18-18-406.3(1) (West 2012)).

Traditionally, when the legislature enacts statutes, the "legislative history," meaning the records attendant to passage including committee reports, transcripts of legislative debates and the sponsor's statements, is typically consulted to determine legislative intent.[131] This type of documentation does not exist, however, for *voter*-enacted legislation.[132] Thus, the Colorado Supreme Court has held that "a court may ascertain the intent of the voters by considering other relevant materials such as the ballot title and submission clause and the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature."[133]

All states that allow for ballot initiatives require a state government official to make some information about the initiative public. In Colorado, ballot materials, including the proposed title and arguments for and against a measure, are published in the Bluebook.[134] In states that prepare similar ballot pamphlets for voters, the courts rely upon them as a legitimate source of authority.[135] To the extent that popular intent exists, the best-documented evidence of intent is contained in the Bluebook because many voters rely on it to understand the meaning of the initiative that they vote for or against.[136]

The text of the 2000 Bluebook describing the Medical Marijuana Amendment indicates that voters approved a measure that would "legalize," not just decriminalize, the medical use of marijuana.[137] Likely distributed to millions of voters across the state of Colorado, the Bluebook's very first page contained bullet points informing voters that the amendment would allow diagnosed patients "to legally possess marijuana."[138] The same bullet points made no mention of criminal prosecution or

131. Black's Law Dictionary 983 (9th ed. 2009) (defining legislative history as "[t]he background and events leading to the enactment of a statute, including hearings, committee reports, and floor debates").

132. *See generally* Schacter, *supra* note 7.

133. *Beinor*, 262 P.3d at 978–79 (Gabriel, J., dissenting) (quoting *In re* Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549, 554 (Colo. 1999)).

134. *See also* Grossman v. Dean, 80 P.3d 952, 962–63 (Colo. App. Div. 2003) (explaining the Bluebook).

135. *See* Macravey v. Hamilton, 898 P.2d 1076, 1079 n.5 (Colo. 1995) (referring to the Bluebook, the court explains that "[i]n past cases, we have found the Legislative Council's publication to be a helpful source equivalent to the legislative history of a proposed amendment"); Schacter, *supra* note 7, at 121–22 (explaining that forty-two percent of courts interpreting a statutory initiative either used ballot material or identified ballot material as a legitimate source of extrinsic evidence to determine voters' intent).

136. *See* Schacter, *supra* note 7, at 128–29. *But see* Schacter, *supra* note 7, at 128–29 (challenging the courts' assumption that a popular intent exists or is discoverable).

137. *See* Bluebook 2000, *supra* note 16, at 1–3, 35; *see also Beinor*, 262 P.3d at 980.

138. According to the Bluebook, the proposed Medical Marijuana Amendment:

> [A]llows patients diagnosed with a serious or chronic illness and their care-givers to legally possess marijuana for medical purposes. For a patient unable to administer marijuana to himself or herself, or for minors under 18, care-givers determine the amount and frequency of use; allows a doctor to legally provide a seriously or chronically ill patient with a written statement that the patient might benefit from medical use of marijuana; and establishes a confidential state registry of patients and their care-givers who are permitted to possess marijuana for medical purposes.

Bluebook 2000, *supra* note 16, at 1.

state criminal law.[139] Nor did the background section make explicit mention of Colorado criminal laws, stating merely that this "proposal does not affect federal criminal laws, but amends the Colorado Constitution to *legalize* the medical use of marijuana for patients who have registered with the state."[140] In addition, the same section stated that "[p]atients on the registry are allowed to *legally* acquire, possess, use, grow, and transport marijuana and marijuana paraphernalia."[141]

Furthermore, the Bluebook consistently refers to the amendment as legalizing medical marijuana use, both in the "for" and the "against" arguments of the Amendment. In addition to the brief summary, bullet points, and background to the proposal, the Bluebook also contains an "arguments for" and "arguments against" section to help voters understand the possible ramifications of the proposed Amendment.[142] The arguments for the proposed Amendment explain the benefits of an additional treatment option.[143] The text explains that the benefits of medical marijuana for patients can be more effective than taking prescription drugs, with fewer harmful side effects.[144] The "arguments for" section contains no mention of the fact that the Amendment is limited and will not affect workplace drug policies or public benefits (and their likely cost to voters).[145] Neither do the arguments against the proposal suggest that the Amendment is limited to exempting marijuana users only from criminal prosecution.[146] Rather, the arguments against the Amendment explicitly warn of the dangerous precedent set by "*legaliz[ing]*" medicines through popular vote.[147]

When construing a constitutional amendment that was passed by voter initiative, courts must give effect to the intent of the electorate adopting the amendment.[148] The language contained in the Bluebook, which likely influenced many voters, runs contrary to the majority's interpretation of the Amendment in *Beinor*. The language contained in the Bluebook suggests that this ballot measure would *legalize* and not merely *decriminalize* the use of medical marijuana, a distinction that is crucial for medical marijuana patients in need of unemployment benefits.[149] Voters seem to have intended, as evidenced by the Bluebook, to legalize medical marijuana usage for patients, affording them a right

139. *Id.*

140. *Id.* (emphasis added); *see also Beinor*, 262 P.3d at 980.

141. Bluebook 2000, *supra* note 16, at 1.

142. *Id.* at 2–3.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 2 (emphasis added).

148. *See* Bolt v. Arapahoe Cnty. Sch. Dist. No. Six, 898 P.2d 525, 532 (Colo. 1995).

149. Bluebook 2000, *supra* note 16, at 2–3.

thereto.[150] The court's conclusion that the Amendment merely decriminalizes does not comport with the language used in the Bluebook that voters relied on.

It is worth noting here that while the Bluebook is a more widely accepted indicator of voter intent, there are other materials that may have aided the court. One study of initiative measures found that voters rely almost entirely on mass media for information about the ballot measure.[151] While pre-ballot media advertising and coverage is perhaps not a reliable indication of voter intent because it may be part of a larger political agenda being promoted by the measure's backers,[152] media coverage of the ballot measure *after* the vote is completed does not raise the same concerns.[153] Thus, after the Colorado initiative had passed, the many headlines claiming that voters had legalized medical marijuana use provide persuasive evidence that a significant amount of the voting public believed they had done so.[154] Mass media does not merely shape, but can also reflect, public opinion.[155]

The decision in *Beinor* may appear injurious to only a relatively small class of citizens, namely patients who are authorized to use medical marijuana in the state of Colorado and may be fired for medical marijuana use and seek unemployment benefits. However, the effect of this decision should not be underestimated.[156] Both critics and supporters of the *Beinor* decision recognize the tremendous impact this case will have.[157] As a direct result of this decision, a person suffering from a

150. *Id.*; *see also* Davidson v. Sandstrom, 83 P.3d 648, 654 (Colo. 2004) ("Courts should not engage in a narrow or technical construction of the initiated amendment if doing so would contravene the intent of the electorate."); Petition for Writ of Certiorari, *supra* note 35, at 5.

151. *See* David B. Magleby, Direct Legislation: Voting On Ballot Propositions In The United States 133 (1984) (finding that regarding initiative measures that "voters rely almost entirely upon the mass media for information about propositions"); *see also* Schacter, *supra* note 7, at 131–33 (explaining the importance of Magleby's findings).

152. *See also* Schacter, *supra* note 7, at 131–39 (discussing agenda setting).

153. *See id.* at 133–39.

154. *Id.* After results of the election were made official, many mass media sources ran stories indicating that citizens of Colorado had legalized marijuana for medical use. *See, e.g.*, Carey Goldberg, *The 2000 Elections: The Ballot Initiatives: Changes in Drug Policy and Gun Laws Are Picked*, N.Y. Times, Nov. 9, 2000, at B12 ("In Nevada and Colorado, voters approved initiatives legalizing the medical use of marijuana, bringing the total of states with such laws to eight."); Ann Schrader, *Marijuana Measure an Apparent Winner,* Denver Post, Nov. 8, 2000, at AA ("Amendment 20, the initiative to legalize marijuana for medical use, was an apparent victor Tuesday.").

155. *See id.* (discussing the reciprocal relationship between mass media and ballot initiatives); *cf. id.* at 138 (suggesting that it is "unseemly for courts to pay such conspicuous homage to popular prerogative while ignoring the sources of information so central to the populace").

156. As of May 31, 2012, the total number of patients who possessed valid Registry ID cards was 98,910. *See* Colo. Dep't of Pub. Health, *The Medical Marijuana Registry* (May 31, 2012), *available at* http://www.cdphe.state.co.us/hs/medicalmarijuana/statistics.html.

157. *Compare* Petition for a Writ of Certiorari, *supra* note 35, at 9 ("This Petition raises issues of substance not heretofore determined by the Court concerning matters of great importance affecting Petitioner and hundreds of thousands of other citizens and residents of Colorado. . . . A ruling on this issue would further impact the rights of Colorado citizens and residents to education, financial assistance, licenses, permits, and other State benefits otherwise available to all Colorado citizens and residents."), *with* Cross-

debilitating medical condition must choose between employment (and being eligible for unemployment benefits) and a medically beneficial treatment that is potentially safer than alternatives but results in a potential job loss and the loss of important state benefits. In addition, employees in occupations requiring state licensure or certification, ranging from midwives to plumbers, may be deprived of their right to engage in their occupations if they use medical marijuana, because civil law provides for license revocation for the "habitual" use of a "controlled substance."[158] Other civil benefits, such as receipt of welfare benefits or public housing, are likely to be affected as well.[159]

Although difficult to measure prospectively, there may well be an impact on voters' willingness to engage in voting on ballot initiatives in the future and the consequent diminution of this important form of democratic governance.[160] Ballot initiatives promote citizen participation, provide a mechanism for responding to particularly controversial issues, and are useful in reacting to the failures of the legislative process.[161] Consequently, courts must construe ambiguous provisions or language in accord with voter intent as much as possible.[162] The Colorado Supreme Court has expressly held that

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Petition for a Writ of Certiorari, *supra* note 56, at 8–13 ("[T]he Court of Appeals' published decision has an impact that extends far beyond this case. Whether a right was created when Amendment 20 passed, and if so, whether that right is narrow or broad and how it will impact everyday life for all Coloradans, is a matter of great public interest and concern. . . . This uncertainty has real world implications on unemployment compensation benefits and realms far beyond the unemployment statutes.").

158. Numerous occupations subject individuals to discipline, including denial of licensure and registration, for habitual use of a habit-forming drug, or a controlled substance. *See, e.g.*, Colo. Rev. Stat. Ann. § 12-43-222(e) (West 2012) (Mental Health professionals including those practice of psychology, social work, marriage and family therapy, licensed professional counseling, and addiction counseling); Colo. Rev. Stat. Ann. § 12-36-117(i) (West 2012) (physician or physician assistant); Colo. Rev. Stat. Ann. § 12-64-111(p) (West 2012) (veterinarians); Colo. Rev. Stat. Ann.§ 12-45-113(h) (West 2012) (landscape architect); Colo. Rev. Stat. Ann.§12-33-117(d) (West 2012) (chiropractors); Colo. Rev. Stat. Ann. § 12-25-208(i) (West 2012) (engineers, surveyors, and architects); Colo. Rev. Stat. Ann. §12-37-107(d) (West 2012) (direct-entry midwives); Colo. Rev. Stat. Ann. §12-39-111(g) (West 2012) (nursing home administrators); Colo. Rev. Stat. Ann. §12-8-132(d) (West 2012) (barbers and cosmetologists); Colo. Rev. Stat. Ann.§ 12-41-210(h) (West 2012) (physical therapists and assistants); Colo. Rev. Stat. Ann. §12-58-110(l) (West 2012) (plumbers); Colo. Rev. Stat. Ann. §12-2-123(p) (West 2012) (accountants).

159. Because welfare recipients are required to work to receive benefits, yet cannot do so and use medical marijuana if their employers have drug-testing and zero tolerance policies, they must choose between welfare benefits and medical marijuana use. Additionally, those who live in public housing projects (with or without established drug policies) may be forced to choose between their home and treatment that involves medical marijuana use. *See* Colo. Rev. Stat. Ann. § 26-02-111(e)(II) (West 2012) (providing that a recipient of public assistance must "[d]emonstrate on a periodic and random basis that he or she remains free of the use of alcohol or any nonprescribed controlled substance on a form verified by the treatment program. Any person whose random test results are positive two times in any three-month period shall be denied eligibility.").

160. *See also* DuVivier, *supra* note 3, at 236. *See generally* Schacter, *supra* note 7, at 165.

161. *See* DuVivier, *supra* note 3, at 235–41.

162. *See In re* Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 62, 961 P.2d 1077, 1080 (Colo. 1998).

> the initiative and referendum and statutes enacted in connection therewith should be liberally construed . . . [so that] the constitutional right reserved to the people 'may be facilitated and not hampered by either technical statutory provisions or technical construction thereof further than is necessary to fairly guard against fraud and mistake in the exercise by the people of this constitutional right.[163]

Another troubling aspect of this case is the court's disregard for the purposes of the Medical Marijuana Amendment and of the unemployment statute. By voting for the Medical Marijuana Amendment, citizens supported patients' rights to medicinally treat their ailments; the primary justification for the use of medical marijuana in the treatment of illness is that patients avoid needless suffering from chronic and debilitating pain.[164] In order to protect *physicians* from criminal prosecution, a doctor signs "written documentation," not a prescription.[165] For practical purposes, this official doctor's note is equivalent to a prescription and the drafters of the amendment employed this word-game to avoid conflicts with federal law, which regulates "prescriptions." Rather than reading this "documentation" as "equivalent to" a prescription for purposes of the unemployment benefits scheme, the majority read the term literally and, as a result, the claimant lost.[166] In addition, the justification for unemployment benefits is guided by the belief that unemployment insurance is for the benefit of persons unemployed through no fault of their own.[167] For that reason, most statutes distinguish between unemployment due to incompetence, which leads to a grant of benefits, and unemployment due to misconduct, which leads to denial.[168] To equate a cancer or migraine headache sufferer who uses medical marijuana with someone who commits theft or assault or to call medical marijuana use "misconduct" seems plainly contrary to what the voters intended in passing the Medical Marijuana Amendment to help individuals obtain effective treatment for pain. Indeed, it is difficult to imagine a person less at fault than a patient suffering from a debilitating condition, exercising a seemingly protected choice to treat his or her condition as he or she, together with a doctor, sees fit.

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163. Brownlow v. Wunsch, 83 P.2d 775, 777 (Colo. 1938). This precise language has been used by the Supreme Court of Colorado in at least eight other cases. *See, e.g.*, *In re* Title, Ballot Title and Submission Clause, and Summary For 1999-2000 No. 255, 4 P.3d 485 (Colo. 2000); Buckley v. Chilcutt, 968 P.2d 112 (Colo. 1998); Armstrong v. O'Toole, 917 P.2d 1274 (Colo. 1996); Fabec v. Beck, 922 P.2d 330 (Colo. 1996); McClellan v. Meyer, 900 P.2d 24 (Colo. 1995); Loonan v. Woodley, 882 P.2d 1380 (Colo. 1994); Montero v. Meyer, 795 P.2d 242 (Colo. 1990); Baker v. Bosworth, 222 P.2d 416 (Colo. 1950).

164. *See generally* Jay M. Zitter, Annotation, *Propriety of Employer's Discharge of or Failure to Hire Employee Due to Employee's Use of Medical Marijuana,* 57 A.L.R. 6th 285 (2010).

165. *But cf. Brownlow*, 83 P.2d at 777 ("[T]he initiative and referendum and statutes enacted in connection therewith should be liberally construed. . . . [so that] the constitutional right reserved to the people 'may be facilitated and not hampered by either technical statutory provisions or technical construction thereof . . . .'").

166. *See, e.g.*, Beinor v. Indus. Claim Appeals Office, 262 P.3d 970 (Colo. App. 2011).

167. *See* Colo. Rev. Stat. Ann. § 8-73-108 (West 2012).

168. *See, e.g.*, *id.*

In reaching its conclusion, the majority frustrated the intent of the voting citizens of Colorado and the holding, though based on very specific facts, has the potential to jeopardize the ability of Colorado patients to use medical marijuana as a viable treatment option in the future and may undermine the electorate's confidence in the voter initiative process.