ORIGINAL

CERTIFICATE OF WORD COUNT: 5,132

SUPREME COURT, STATE OF COLORADO Court Address: Colorado State Judicial Building 2 E 14th Avenue, Suite 400 Denver, Colorado 80203	**COURT USE ONLY**
ORIGINAL PROCEEDINGS PURSUANT TO C.R.S. § 1-40-107(2), Appeal from the Title Board IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2005-2006 #55	FILED IN THE SUPREME COURT MAR 17 2006 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
MANOLO GANZALEZ-ESTAY, Petitioner, and RICHARD D. LAMM, WALDO BENAVIDEZ & FRED ELBEL, Proponents, and WILLIAM HOBBS, ALLISON EID, and DAN CARTIN, Respondents.	
Attorney: Mark G. Grueskin; Kara Veitch Isaacson Rosenbaum P.C. Address: 633 Seventeenth Street, Suite 2200 Denver, Colorado 80202 Phone No.: (303) 292-5656 FAX No.: (303) 292-3152 E-mail: mgrueskin@ir-law.com; kveitch@ir-law.com Atty. Reg. #: 14621, 32227	Case No.: 06SA20

REPLY BRIEF

TABLE OF CONTENTS

SUMMARY OF THE ARGUMENT 1
ARGUMENT 1
I. There are no final judicial decisions in this matter to which the Law of the Case Doctrine can be applied 1
II. Claim preclusion does not prevent this Court from deciding this matter ... 5
A. Claim preclusion is inapplicable because this action concerns different subject matter and different claims than previous decisions 5
B. The application of claim preclusion to this matter would deny Petitioner his statutory right of appeal 10
III. The initiative contains more than one subject by combining a blanket prohibition on non-emergency services for illegal aliens and repealing the guarantee of access to state courts 12
A. The Petitioner was authorized to bring, and the Board was required to consider, this single subject challenge 12
B. Does legislative authority to define "non-emergency services" resolve single subject concerns? 15
C. Does the U.S. Constitution guarantee aliens' access to the courts? 17
D. Is access to the judicial system contained within the subject of denying non-emergency services to aliens? 18
E. Is access to the judicial system merely an ancillary effect of the initiative and therefore beyond the single subject inquiry? 21
CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Argus Real Estate, Inc. v. E-470 Public Highway Authority,
109 P.3d 604 (Colo. 2005) 5
Armstrong v. Davidson,
10 P.3d 1278 (Colo. 2004) 15
Colorado Project—Common Cause v. Anderson,
495 P.2d 220 (Colo. 1972) 17
Creacy v. Industrial Comm'n,
366 P.2d 384 (Colo. 1961) 4
Gavrills v. Gavrills,
116 P.3d 1272 (Colo. App. 2005) 5, 7
Giampapa v. American Family Mut. Ins. Co.,
64 P.3d 230 (Colo. 2003) 4
In re Amend TABOR 25,
900 P.2d 121 (Colo. 1995) 9, 19
In re Proposed Initiative 1996-4,
916 P.2d 528 (Colo. 1996) 19
In re Proposed Initiative Concerning "State Personnel System",
691 P.2d 1121 (Colo. 1984) 7
In re the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-98 #30,
959 P.2d 822 (Colo. 1998) 9, 20, 22
In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # # 227 & 228,
3 P.3d 1 (Colo. 2000) 13
In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995,
898 P.2d 1076 (Colo. 1995) 19
In the Matter of the Application for Water Rights,
993 P.2d 483 (Colo. 2000) 9
In the Matter of the Title, Ballot Title and Submission Clause for 2003-04 #88,
(04SA98, May 6, 2004) ..... passim

In the Matter of the Title, Ballot Title and Submission Clause forProposed Initiative #43,
46 P.3d 438 (Colo 2002) 9, 21, 22
In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted Feb. 10, 1992,
832 P.2d 1301 (Colo. 1992) 13
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for "W.A.T.E.R.",
831 P.2d 1301 (Colo. 1992) 11
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #64,
960 P.2d 1192 (Colo. 1998) 16
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-98 #84,
961 P.2d 456 (Colo. 1998) 9
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #104,
987 P.2d 249 (Colo. 1999) 16
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #215,
3 P.3d 447 (Colo. 2000) 8, 10, 11
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #219,
999 P.2d 819 (Colo. 2000) 8, 10, 11, 12
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #235a,
3 P.3d 1219 (Colo. 2000) 3
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25,
974 P.2d 458 (Colo. 1999) 16
In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29,
972 P.2d 257 (Colo. 1999) 4, 16
Johns v. Miller,
594 P.2d 590 (Colo.Ct.App. 1979) 21
Kuhn v. State,
897 P.2d 792 (Colo. 1995) 1

Nienke v. Naiman Group, Ltd.,
857 P.2d 446 (Colo.App. 1992) 2
Qual-Med, Inc. v. Rocky Mountain Hospital and Medical Service,
914 P.2d 419 (Colo.App. 1995) 5
Rasul v. Bush,
542 U.S. 466 (2004) 14
White v. State of Colorado,
157 F.3d 1226 (10th Cir. 1998) 18

Statutes

Colorado Revised Statutes Section 1-40-106(3) 10
Colorado Revised Statutes Section 1-40-106.5(1)(e)(II) 20
Colorado Revised Statutes Section 1-40-107 11
Colorado Revised Statutes Section 1-40-107(1) 11, 12
Colorado Revised Statutes Section 1-40-107(2) ..... passim

Other Authorities

www.defendcoloradonow.org 15, 16, 19, 20

Constitutional Provisions

Colorado Constitution, Article V, Section 1(5.5) 6, 9
Colorado Constitution, Article VI, Section 6 ..... 16, 20, 21
Colorado Constitution, Article VI, Section 21 ..... 17, 21
Colorado Constitution, Article VI, Section 25 ..... 17, 21
United States Constitution, Amendment I 17
United States Constitution, Amendment XIV 17

SUMMARY OF THE ARGUMENT

Neither the Law of the Case Doctrine nor claim preclusion bars this Court from deciding whether or not the Title Board's denial of Petitioner's Motion for Rehearing was proper. The Law of the Case Doctrine is inapplicable because there are no prior judicial decisions in this matter. Claim preclusion also is inapplicable because the subject matter and claims raised in this matter are different than those presented in previous litigation.

Proposed initiative 55 violates the single subject constitutional requirement. The initiative provides a blanket prohibition on non-emergency services to illegal aliens and repeals guaranteed access to state courts. For these reasons, as elaborated below, this Court should strike the title and return the proposed initiative #55 to the proponents.

ARGUMENT

I. There are no final judicial decisions in this matter to which the Law of the Case Doctrine can be applied.

Proponents in this matter misapplied the Law of the Case Doctrine. The Doctrine generally requires a court to follow prior relevant rulings in the same case. Proponents' Answer Brief, at 7 (*quoting Kuhn v. State*, 897 P.2d 792, 795 (Colo. 1995) "Law of the case... applies to final decisions that affect the same parties in the same case.") (emphasis added). The Law of the Case Doctrine

provides that "a determinative decision on an issue made at one stage of the case becomes binding precedent to be followed in successive states of the same litigation." *Nienke v. Naiman Group, Ltd.*, 857 P.2d 446, 454-55 (Colo.App. 1992) (emphasis added) (Judge Rothenberg dissent). There have been no judicial decisions in this case and therefore no rulings for this Court to follow. This is an appeal of the Title Board's denial of Petitioner's request for a rehearing regarding Proposed Initiative 2005-06 #55 ("Initiative #55"). *See* Statement of the Case Section of Petitioner's Opening Brief. Thus, the Law of the Case Doctrine is inapplicable because there are no previous judicial decisions in this case.

Certainly, Proponents are not arguing that the Title Board's decision is not appealable. This would contradict statutory authority granting anyone who files a motion for rehearing that is overruled by the Title Board to file an appeal with the Colorado Supreme Court. *See* Colo. Rev. Stat. § 1-40-107(2).

Proponents inadvertently argue that the Law of the Case Doctrine should be expanded. Specifically, Proponents assert that the Supreme Court's ruling in another case, *In the Matter of the Title, Ballot Title and Submission Clause for 2003-04 #88*, (04SA98, May 6, 2004) (the "*Title #88 Litigation*"), prevents this Court from considering the Title Board's rejection of Petitioner's motion for rehearing regarding Initiative #55. This argument ignores the well established

limitation of the Law of the Case doctrine; this doctrine only restricts judicial decisions based on prior judicial decisions in the same case. As stated above, because there have been no prior judicial decisions in this case, the Law of the Case Doctrine is inapplicable.

Additionally, Proponents' argument ignores the fact that the decision in the *Title #88 Litigation* has no precedential value because this Court decided the case without an opinion. *See* Order of the Court, entered in the *Title #88 Litigation*. In *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #235a*, 3 P.3d 1219 (Colo. 2000), this Court was presented with a challenge to a title set by the Title Board. The Court noted that it had previously addressed a virtually identical initiative drafted by the same proponents. *Id.*, at 1222 n. 2. The Court stated that because the previous decision was affirmed without an opinion, that it was not precedent. *Id.* Additionally, the Court noted that "[a] decision without opinion becomes the law of the case but it does not establish precedent as to any legal issues decided for purposes of application to other cases." *Id.* Similarly, this Court's decision in the *Title #88 Litigation* is not the law of the case in this action nor is it precedent regarding any issue addressed in this action.

It is important to note that even if this Court's decision in the *Title #88 Litigation* was the law of the case in this matter, it would not preclude this Court from reconsidering its earlier decision. The Law of the Case Doctrine is discretionary "when applied to a court's power to reconsider its own prior rulings." *Giampapa v. American Family Mut. Ins. Co.*, 64 P.3d 230, 243 (Colo. 2003). For these reasons, this Court should reject Proponents' assertion that the Law of the Case Doctrine precludes judicial consideration of Petitioner's arguments regarding Initiative #55.

Additionally, stare decisis would not preclude this Court's decision regarding Initiative #55. The purpose of stare decisis is the "uniformity and stability of the law and the rights acquired thereunder." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d 257 (Colo. 1999) (*quoting Creacy v. Industrial Comm'n*, 366 P.2d 384, 386 (Colo. 1961)). However, stare decisis is not an inflexible rule. *Id.* Courts should be willing to overrule a prior decision "where sound reason exists and where the general interests will suffer less by such departure than from strict adherence." *Id.* Stare decisis allows this Court to render a decision in this case even if the Court concludes that its decision in the *Title #88 Litigation* is the law of the case. For these reasons the

Law of the Case Doctrine does not preclude this Court from reviewing the Title Board's denial of Petitioner's Motion for Rehearing.

II. Claim preclusion does not prevent this Court from deciding this matter.

A. Claim preclusion is inapplicable because this action concerns different subject matter and different claims than previous decisions.

Claim preclusion[1] does not prevent a decision regarding Initiative 55. Claim preclusion only prevents litigation of a claim if the following four elements are satisfied: "(1) finality of the first judgment, (2) identity of the subject matter, (3) identity of claims for relief, and (4) identity or privity between parties to the actions." *Gavrills v. Gavrills*, 116 P.3d 1272, 1273 (Colo. App. 2005); *Qual-Med, Inc. v. Rocky Mountain Hospital and Medical Service*, 914 P.2d 419, 420 (Colo.App. 1995). Claim preclusion does not preclude a decision in this matter because the *Title #88 Litigation* did not concern the same subject matter or the same claim as raised in this action.

The subject of this action, Initiative #55, is different than the subject matter in the *Title #88 Litigation*. In this action, Petitioner asserts that the Title Board lacked jurisdiction to set the title for Initiative #55. In the *Title #88 Litigation*, the petitioners did not address the Title Board's jurisdiction to set the title for Initiative

[1] Based on this Court's reasoning in *Argus Real Estate, Inc. v. E-470 Public Highway Authority*, 109 P.3d 604, 608 (Colo. 2005), the term "claim preclusion" rather than "*res judicata*" will be used throughout this brief.

2003-04 #88 ("Initiative #88"). The only claim raised was whether or not the title was accurate and not misleading.

Claim preclusion also is inapplicable because this action concerns a different claim than that presented in the *Title #88 Litigation*. In the *Title #88 Litigation*, this Court rejected an argument that the Title Board set a misleading title for Initiative #88. *See* Petition for Review, at 3, filed in the *Title #88 Litigation*. The petitioners asserted, in part, that Initiative #88 was confusing because it "fail[ed] to describe the enforcement provision..." Petitioners' Opening Brief, at 1, filed in the *Title #88 Litigation*.

Proponents in this matter incorrectly assert that the petitioners in the *Title #88 Litigation* filed the appeal because Initiative #88 violated the single subject requirement in Article V, Section 1(5.5) of the Colorado Constitution. Proponents' Answer Brief, at 4. Proponents base this argument on a statement in Petitioners' Opening Brief, which provided that the means of enforcement was a "major, related topic." Proponents' Reply Brief, at 5 (*citing* Petitioners' Opening Brief, at 1, filed in the *Title #88 Litigation*). In the same breath, Proponents recognize that the petitioners in the *Title #88 Litigation* stated that "Petitioners do not contend that this is a separate subject..." Proponents' Answer Brief, at 5 (*citing* Petitioners' Reply Brief, at 1, filed in *Title #88 Litigation*). It is clear from

a reading of the Answer Briefs filed in the *Title #88 Litigation*, that neither the proponents nor the Title Board believed that the petitioners had asserted an argument about the single subject requirement because the Answer Briefs do not address this topic. *See* Answer Brief of Respondents and Initiative Proponents, and Answer Brief of Title Board filed in the *Title #88 Litigation*.

The claim in this matter, violation of the single subject requirement, is different than the claims asserted in the *Title #88 Litigation*. When determining if there is an identity of claims, the focus is on the injury for which relief is requested. *Gavrills*, 116 P.3d at 1273-74. The injury claimed in the *Title #88 Litigation* was that Proposed Title #88 was misleading. The purpose of preventing misleading titles is to "enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose such a proposal." *In re Proposed Initiative Concerning "State Personnel System"*, 691 P.2d 1121, 1123 (Colo. 1984). The remedy, reconfiguration of the proposal, only can be provided by the proponents. In the *Title #88 Litigation*, the injury sought to be remedied was voter confusion. This could only be remedied by a correction by the Title Board. Therefore, claim preclusion does not prevent this Court from considering Petitioner's arguments regarding Initiative #55.

Respondents cite *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #219, 999 P.2d 819 (Colo. 2000)* ("*Title #219 Litigation*") and *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #215*, 3 P.3d 447 (Colo. 2000) ("*Title #215 Litigation*") for the proposition that this Court has recognized the need for claim preclusion in allowing motions for rehearing to the Title Board. Answer of Title Board at 8. In these cases, this Court held that a registered elector has a right to a single rehearing of a Title Board's determination even if the Title Board re-sets the title. *Title #219 Litigation*, 999 P.2d at 821. The policy behind this Court's ruling was to "balance the rights of citizens to present petitions to the voters of Colorado... with the rights of the voters to be presented with clear, single-subject initiatives that are not misleading." *Id.*, at 820. This Court said nothing of claim preclusion. It is important to note that this policy is preserved by Colo. Rev. Stat. § 1-40-107(2), which grants an elector the right to file an appeal with the Colorado Supreme Court. An appeal only may be filed after a motion for rehearing is ruled on by the Title Board. Colo. Rev. Stat. § 1-40-107(2). Since only one motion for rehearing may be filed by an objector, the objector has a single opportunity to appeal the Title Board's determination.

Petitioner's single subject argument can be characterized as a challenge to the Title Board's jurisdiction. *See e.g., In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative #43,* 46 P.3d 438, 441 (Colo 2002). The Title Board only has jurisdiction to set titles that contain a single subject. Colo. Const. art. V, sec. 1(5.5) (no title may be set that does not clearly express a single subject). Unlike other claims for relief, lack of jurisdiction can be raised at any time. *In the Matter of the Application for Water Rights*, 993 P.2d 483, 488 (Colo. 2000). Neither the Law of the Case nor claim preclusion bars a determination regarding jurisdiction.

It is important to note that this Court need not consider all of the grounds challenging a title. The Court must dispose of any judicial challenge promptly to allow the proponent to proceed with the petition process even if the initiative must be first resubmitted to the Title Board. *See* Colo. Rev. Stat. 1-40-107(2). When presented with several challenges to a proposed initiative, this Court has, on occasion, limited its ruling to one of the challenges. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-98 #84*, 961 P.2d 456, 458 (Colo. 1998) (*citing In re 1997-98 #30*, 959 P.2d 822, 827 (Colo. 1998) (the Court did not need to address each challenge because the initiative encompassed more than one subject); *In re Amend TABOR 25*, 900 P.2d 121, 123 (Colo. 1995)

(declining to address whether or not the title complied with Colo. Rev. Stat. § 1-40-106(3) because the title contained more than one subject)). Because the Court need not consider all of the grounds challenging a title, the Court should not be bound by a previous ruling that did not address the specific grounds before the Court. In this matter, the Court need not be bound by its ruling in the *Title #88 Litigation* because the there was no constitutional challenge to the title for violation of the single subject requirement.

This does not contradict the Court's rulings in the *Title #215 Litigation* and the *Title #219 Litigation*. In each of these cases, two motions for rehearing were filed with the Title Board. The petitioners attempted to file multiple objections to the same title during the same election cycle by filing multiple motions for rehearing. In this matter, only a single motion for rehearing was filed and a single petition for review. For these reasons, claim preclusion does not bar this Court's determination regarding Petitioner's Motion for Rehearing.

B. The application of claim preclusion to this matter would deny Petitioner his statutory right of appeal.

Colorado law grants Petitioner the right to appeal the Title Board's denial of the Motion for Rehearing in this matter. Any registered elector who filed a motion for rehearing and is not satisfied with the Title Board's ruling may file an appeal with the Colorado Supreme Court. Colo. Rev. Stat. § 1-40-107(2). There is no

argument and neither Proponents nor Respondents assert that Petitioner did not satisfy the statutory requirements of Colo. Rev. Stat. § 1-40-107. Petitioner is a registered elector, he timely filed a motion for rehearing, he was not satisfied with the Title Board's ruling, and he timely filed his appeal with the Colorado Supreme Court. Therefore, Petitioner is entitled to have his day in court.

Hearings before the Title Board are "more akin to a public forum" than an adjudication. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for "W.A.T.E.R."*, 831 P.2d 1301, 1306 (Colo. 1992). "The public meeting is not an adversarial proceeding designed to adjudicate the legal rights or duties of specific individuals vis-à-vis other parties through the application of legal norms to past or present facts developed through sworn testimony and other evidence." *Id.* Thus, Petitioner is not taking more than one bite at the apple. He has filed a single Motion for Rehearing and a Petition for Review with this Court regarding Initiative #55.

This statutory right to appeal a Title Board's determination distinguishes this matter from the *Title #219 Litigation* and the *Title #215 Litigation*. In these cases, this Court held that Colo. Rev. Stat. § 1-40-107(1) only allowed a registered elector to bring a single motion for rehearing to challenge a title set by the Title Board regardless of whether or not the Title Board had re-set the title. This

Court's decisions were based on the ambiguity of the statute. *Title #219 Litigation*, 999 P.2d at 821. The statute provides that an elector may file a motion for rehearing, implying that only one motion could be filed, and that a motion must be filed within seven days after the title and summary are set, implying that more than one motion could be filed. *Id.*

Colo. Rev. Stat. § 1-40-107(2), which grants electors the right to file an appeal with the Colorado Supreme Court, is unlike Colo. Rev. Stat. § 1-40-107(1) because it is not ambiguous. Colo. Rev. Stat. § 1-40-107(2) clearly gives a registered elector the right to appeal any Title Board's ruling if the registered elector satisfies the statutory requirements discussed above. Colo. Rev. Stat. § 1-40-107(2). However, a registered elector may only file one appeal based on a motion for rehearing. *Id.* The Petitioner in this matter exercised this statutory right. He filed a single Motion for Rehearing and a single appeal of the Title Board's denial of his Motion for Rehearing.

III. The initiative contains more than one subject by combining a blanket prohibition on non-emergency services for illegal aliens and repealing the guarantee of access to state courts.

A. The Petitioner was authorized to bring, and the Board was required to consider, this single subject challenge.

The Proponents criticize the Petitioner's for raising any objection to the decision of the Title Board on #55, given their appeal of a ballot title set in a

previous election cycle. Proponents' Answer Brief at 2-3. It is true that no single subject claim was brought in 2004 regarding Initiative #88; Petitioner stated he found no credible basis for doing so at that time. The accuracy of the title on #88 was challenged, and this Court sustained the Title Board decision. As to this initiative, #55, the overarching basis for the single subject objection is its curtailment of illegal immigrants' access to the courts.

The title setting process does not occur in a vacuum. That process necessarily takes into account contemporary political debate. *Cf. In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 # # 227 & 228*, 3 P.3d 1, 7 (Colo. 2000) (possible political slogans in a ballot title can only be evaluated in light of evidence about the political climate surrounding the issue). And this makes sense, given that a ballot title setting is not an adjudicatory process; it is a "public forum" in which views are solicited and considered to establish a fair and accurate title for the voters to consider. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Adopted Feb. 10, 1992*, 832 P.2d 1301, 1306 (Colo. 1992).

One would have to ignore headlines and legal developments since the Court's decision in the *Title #88 Litigation* to say that aliens' access to the courts has not had an important role in the introduction of #55. For example, at the end of

its 2004 term (and after this Court's decision concerning Initiative #88), the U.S. Supreme Court announced an opinion that crystallized the public's attention to this issue. The Court held that illegal aliens, even if suspected of being involved in terrorist activities, have due process rights and are entitled to invoke the jurisdiction of the federal courts. *Rasul v. Bush*, 542 U.S. 466, 481 (2004). This controversial decision, among others announced that same day, helped recast the debate over what rights illegal aliens are owed under our system of government, and it is no coincidence that this initiative was rejuvenated in its aftermath. Even if Initiative #55 is largely the same measure as #88 from two years ago, one cannot view a proposed initiative in isolation, particularly where political circumstances and legal precedents have changed since its earlier introduction.

In a similar vein, Proponents complain that judicial review of a ballot title for its compliance with the single subject and accuracy requirements obstructs their signature gathering activities. Proponents' Answer Brief at 9-10. This allegation is born out in neither fact nor law. The Proponents are quite open about the fact that the period provided by this challenge allows them time to mobilize volunteers, which will permit the necessary number of signatures to be collected in a few

weeks.[2] Further, this Court has noted that a title challenge is not a factor in determining when initiative proponents may begin their signature collection. *Armstrong v. Davidson*, 10 P.3d 1278, 1282-83 (Colo. 2004). And finally, if the Petitioner's challenge is as baseless as Proponents assert, it should be no impediment whatsoever to the commencement of their signature collection activities. In a single subject challenge, there can be no concern that this Court would "change[] even a comma in the title" to invalidate signatures gathered.[3] Thus, their argument that the judicial process should not be permitted to run its course is not credible.

B. Does legislative authority to define "non-emergency services" resolve single subject concerns?

The Board maintains that the measure is deliberately open-ended, allowing the General Assembly to define whether access to the judiciary is an emergency service. Answer Brief of the Title Board at 10-11. The Proponents have publicly noted that this definitional authority in the initiative is broad, although in the same

---

2 *See* http://www.defendcoloradonow.org/info/current_status.html (Attachment 1 hereto) at 1 ("[W]e have decided to delay gathering petition signatures in order to build our volunteer army.... When we pull the trigger on volunteer petition gathering, we will be able to gather tens of thousands of signatures within a few short weeks.")

3 *See* http://www.defendcoloradonow.org/info/current_status.html (Attachment 1 hereto) at 1.

virtual breath, they state, "today the government is so intertwined in our lives that a list of public non-emergency public services would be almost endless."[4]

What the legislature will – or will not – do is not relevant to this Court's inquiry. On more than one occasion, an initiative that worked an implied repeal upon an already existing provision of the Constitution was been found to contain a second subject. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #104*, 987 P.2d 249, 256 (Colo. 1999) (implied repeal of existing constitutional provision a second subject); In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29, 972 P.2d at 264-65 (indirect repeal of existing constitutional provision a second subject); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #64*, 960 P.2d 1192, 1198 (Colo. 1998) (indirect repeal of existing constitutional provision a second subject). #55 certainly achieves an implied repeal of the constitutional guarantee of a system of justice open to all persons. Colo. Const., art. VI, sec. 6. It likewise implicitly repeals the universality of due process and

---

[4] *See* http://www.defendcoloradonow.org/amendment/will_do.html (Attachment 2 hereto) at 1; *see also In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #25*, 974 P.2d 458, 465 (Colo. 1999) (title should reflect expressed intent of proponents).

habeas corpus guarantees. Colo. Const., art. VI, sec. 21, 25. Because of these implied repeals, the single subject requirement has been violated.

In any event, because of the limited grant of power by the people to the General Assembly, an implied repeal of a constitutional provision adopted by initiative could not be reversed by a subsequent act of the General Assembly. *See Colorado Project—Common Cause v. Anderson,* 495 P.2d 220, 222-23 (Colo. 1972) (statute cannot limit reserved constitutional right of initiative). The Board's analysis assumes facts and legal capacity – namely that the legislature will act to preserve this access to the courts – that go far beyond the current inquiry. Because the General Assembly cannot restore constitutional rights that are repealed, explicitly or implicitly by an initiative, the legislature's right to define certain terms and implement certain provisions of the amendment is not an answer to Petitioner's single subject concerns.

C. Does the U.S. Constitution guarantee aliens' access to the courts?

The Board argues that the First and Fourteenth Amendment afford persons access to the courts. Answer Brief of the Title Board at 11. Yet, the case law the Board cites acknowledges that there is no such guarantee.

> [T]he Supreme Court has never held the Due Process Clause of the Fourteenth Amendment requires that all individuals be guaranteed a right of access to the courts in all circumstances.... The Supreme Court has 'stopped short of an unlimited rule that an indigent at all

> times and in all cases has the right to relief without the payment of fees....' Accordingly, 'Congress is no more compelled to guarantee free access to federal courts than it is to provide unlimited access to them.'

White v. State of Colorado, 157 F.3d 1226, 1233 (10th Cir. 1998) (citations omitted). Even the Board recognizes that it is only "possible" that federal law may require access to the courts. Answer Brief at 11. And the Board is correct that it would be inappropriate for this Court to interpret federal law, *id.*, particularly where the federal courts have not clearly reached such a conclusion.[5]

Accordingly, the potential that an interpretation of the U.S. Constitution will rescue rights otherwise withdrawn by this initiative is speculative and does not resolve this dispute about the measure's reach.

D. Is access to the judicial system contained within the subject of denying non-emergency services to aliens?

The Board argues that denial of court access is part of the broader topic of denying all non-emergency services to illegal aliens. Answer Brief of the Title Board at 12.

---

[5] The Proponents actually urge the Court to interpret federal statutes to determine what comprises mandated federal services. Proponents' Answer Brief at 16-18. As they acknowledge earlier in their brief, though, this is a step that the Court may not take. Id. at 14.

Taking the Proponents at their word, the list of non-emergency services that would be covered by this measure is "almost endless."[6] Subjects this unwieldy do not comply with the single subject requirement. The topic of ending "non-emergency services" to illegal aliens makes other multi-subject measures, justified under so-called single subjects like "public waters" and "revenue changes," seem downright approachable. *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995*, 898 P.2d 1076, 1078 (Colo. 1995); *In re Title, Ballot Title and Submission Clause, and Summary With Regard to a Proposed Petition for an Amendment to Section 20 of Article X (Amend Tabor 25)*, 900 P.2d 121, 125 (Colo. 1995). In fact, curtailing such access to all non-emergency services provided by all public entities is on par with "limiting government spending," which this Court found to be simply too wide-ranging to reflect just one topic. *In re Proposed Initiative 1996-4*, 916 P.2d 528, 533 (Colo. 1996). The label used to encapsulate #55 is much too expansive to qualify as a single subject.

Given that breadth, this measure and its title is virtually certain to result in voter surprise or fraud. Even the measure's Proponents admit the list of services covered is "almost endless." How, then, will voters be able to discern the far-ranging nature of this measure's provisions? Initiatives that are drafted to embrace

---

[6] *See* http://www.defendcoloradonow.org/amendment/will_do.html (Attachment 2 hereto) at 1.

such hidden topics cannot survive single subject scrutiny. #30, *supra*, 959 P.2d at 827; *see* § 1-40-106.5(1)(e)(II), C.R.S. (one objective of the single subject requirement intended was to prevent surreptitious measures).

Notably, the Proponents in their Answer Brief insist that certain rights to participate in the judicial process could not be compromised: "the right to appeal a criminal conviction, file a writ of habeas corpus, access to the courts to insure against deprivation of life[,] liberty[,] and property, ant (sic) the like." Proponents' Answer Brief at 17. Assuming but not conceding this representation to be accurate, Proponents do not suggest that access to the courts will be guaranteed for all purposes, including uses which are currently ensured by Article VI, section 6 of the Constitution. For instance, how could such individuals use the judicial process to establish legitimate title to real property when one of the measure's intended impacts is to prevent them from owning property in this State? As the Proponents point out, if #55 is enacted, illegal aliens will not be permitted to record the transfer of real property in a county clerk's office because they "should not be allowed to own real property in Colorado."[7] The suggestion that #55 does not affect due process rights that "insure against deprivation of... property" is thus at odds with the Proponents' stated goals in offering this initiative. And even if the

[7] *See* http://www.defendcoloradonow.org/amendment/will_do.html (Attachment 2 hereto) at 3.

Proponents' Answer Brief can be taken as their legal position for all purposes, the fact that Proponents do not insist that their measure ensures access to the courts for all purposes is telling. The implicit repeal of this guarantee, as discussed above, is real.

The Board also argues that #55 does not cover both procedural and substantive matters. Answer Brief of the Title Board at 13. Yet, the matter of making appropriations for governmental services is clearly a procedure to which constitutional rights do not attach. *See Johns v. Miller*, 594 P.2d 590, 593 (Colo.Ct.App. 1979) (district attorney had no due process rights in connection with budgetary process by which his salary was set), *cert. denied*. In contrast, providing access to the judicial system is fraught with explicit constitutional guarantees and fundamental rights. Colo. Const., art. VI, sec. 6, 21, 25. The two are no more related than are the subjects of petition processes and the right to referendum on matters of local concern. *See In the Matter of the Title, Ballot Title and Submission Clause for 2001-02 #43*, 46 P.3d 438, 448 (Colo. 2002).

As such, the measure must be found to contain multiple subjects.

E. Is access to the judicial system merely an ancillary effect of the initiative and therefore beyond the single subject inquiry?

The Proponents suggest that an initiative's impact on other constitutional provisions is beyond the single subject analysis. Proponents' Answer Brief of the Title Board at 13-14.

This Court has held specifically that the "impacts" of a proposed initiative on existing constitutional provisions must be considered in the single subject analysis. "[T]he initiative impacts government revenue and spending measures previously approved by the voters.... Although we cannot reach the merits of Initiative # 30 at this stage, our examination for compliance with the single-subject requirement reveals that the initiative impacts the outcome of past elections by imposing requirements that did not exist when the voters approved those measures." *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-98 #30*, 959 P.2d 822, 826, 827 (Colo. 1998). Impacts on other constitutional provisions thus raise legitimate and problematic single subject concerns, particularly where such impacts operate to restrict fundamental rights that are guaranteed by our Constitution. #43, *supra*, 46 P.3d at 448 n.13. Because #55 is promoted as prohibiting access by illegal aliens to a wide variety of government services, including the right of access to the courts, this Court has adequate grounds, based on precedent, to find that this measure violates the single subject requirement.

CONCLUSION

Petitioner respectfully requests that this Court reverse the State Title Board's action, and to direct the Board to strike the title and to return Initiative #55 to the Proponents.

Dated this 17th day of March, 2006.

ISAACSON ROSENBAUM P.C.

By: Kara Veitch
Mark G. Grueskin
Kara Veitch

ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of March 2006, a true and correct copy of the foregoing Reply Brief was served via hand delivery or overnight delivery to the following:

Maurice G. Knaizer, Esq.
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Richard D. Lamm
Institute for Public Policy Studies
University of Denver
Mary Reed Building, Room 107
2199 S. University Blvd.
Denver, Colorado 80208

Robert Hardaway
Professor of Law
University of Denver
Sturm College of Law
2255 East Evans Avenue, Suite 407F
Denver, Colorado 80208

Defend Colorado Now

Home

The DCN Amendment

nguage of the amendment
What the amendment will do
What the amendment won't do

DCN Info

About Defend Colorado Now
Current status and news
News releases
Perspective
Links

pport Defend Colorado Now

Join the DCN team - sign up!
Print our flyer
Contact us
Tell a friend!

Defend Colorado Now Current Status and News

March 7, 2006 - Defend Colorado Now welcomes John Andrews aboard - brings bipartisan leadership to initiative effort (see news release).

The initiative wording was submitted to the Secretary of State in December, 2003. Then the title of the initiative (the wording that appears on the ballot) was approved twice by the Title Setting Board in 2004. Opponents took us to the Colorado Supreme Court in 2004, saying the title violated Colorado's single-subject rule. This was a delaying tactic that kept us from having enough time to obtain signatures by the August deadline.

We could not run the initiative in 2005, according to Colorado statute. 2006 is a replay of 2004. The initiative wording is identical, except for a comma and the order of two words. The title is the same and was approved twice by the title setting board in January, 2006. The opposition again is taking us to the Supreme Court as a delaying tactic.

The opposition will *not* succeed in delaying the initiative. It is obvious to everyone that the Supreme Court will again rule in favor of Defend Colorado Now.

We could begin collecting signatures at any time, but if the Court changes even a comma in the title, the signatures would be invalidated and collecting would have to begin all over again. We don't anticipate the Court to change the title (they did not do so in 2004). However, we have decided to delay gathering petition signatures in order to build our volunteer army. We are targeting April for the start date, but we constantly will be reevaluating this date. When we pull the trigger on volunteer petition gathering, we will be able to gather tens of thousands of signatures within a few short weeks.

ATTACHMENT 1

Defend Colorado Now

Home

The DCN Amendment

Language of the amendment
What the amendment will do
What the amendment won't do

DCN Info

About Defend Colorado Now
Current status and news
News releases
Perspective
Links

Support Defend Colorado Now

Join the DCN team - sign up!
Print our flyer
Contact us
Tell a friend!

What the Defend Colorado Now amendment will do

Questions and Answers about Defend Colorado Now

What is the purpose of Defend Colorado Now?

The amendment seeks to prevent persons not legally in the United States from receiving public services other than those directly related to public safety or life-threatening emergencies. Citizens and persons who are in the country lawfully will not be affected by this amendment.

What public services are restricted?

Non-emergency public services at any level of government, if not mandated by federal law, are prohibited under this amendment. Emergency services include police and fire protection services, and medical services in hospital emergency rooms are mandated by federal law.

Will this amendment cost taxpayers money or will it save money?

This amendment will save money by reducing unauthorized expenditures.

Why doesn't the amendment list all the services that will be restricted?

This would have been possible in earlier, less complex times, but today the government is so intertwined in our lives that a list of non-emergency public services would be almost endless. The General Assembly has constitutional, plenary power to define emergency services that are exempted from this restriction and enact reasonable and appropriate provisions to implement

ATTACHMENT 2

this amendment.

How will this amendment affect illegal aliens attending Colorado institutions of higher education?

The amendment will prevent them from getting in-state tuition.

What about in-school programs funded by State taxpayer funds, such as school-based vaccinations and after-school reading programs?

K-12 classroom instruction and activities related to instruction (such as school counseling and athletic programs) are exempt because they are mandated by federal law. Health-related school-based services may be allowed if defined as emergency services by the enforcement legislation to be enacted by the General Assembly.

What about emergency room medical services? If an illegal alien is injured in an automobile accident, can he get medical services?

Yes. Emergency medical services are mandated by federal law and will not be affected by this amendment.

Are police and fire services available to illegal aliens under this amendment?

Yes. All law enforcement and fire suppression services are emergency services required to maintain pubic safety and security, and as such are not included in the restrictions.

Does the amendment restrict services provided by private agencies using state monies, such as organizations operating under grants or contracts?

Yes.

Does the amendment restrict services using federal funds but not mandated by federal law?

Yes.

Does the amendment include "quasi-governmental" institutions that receive public

funds?

Yes.

Are individual public employees to be held liable for violations of the intent of this amendment?

No. State agencies may be sued by any citizen to assure enforcement, but individual civil servants are not liable in a civil suit for violations. However, as is the case with any provision of the law, public employees may be held accountable administratively for willful and deliberate non-performance of their sworn duties as public servants.

Does the amendment restrict the County Clerk's recordation of the transfer of real property?

Yes. Persons not in the United States lawfully should not be allowed to own real property in Colorado.

Does the amendment include services provided by home-rule municipalities?

Yes. It includes all municipalities and all political subdivisions and special districts.

Does the amendment intend that persons "lawfully present in the United States" include persons on tourist visas, student visas, a work visa, or other temporary visa?

Yes. Any person who entered the country in a lawful manner is by definition here lawfully- whether a student, tourist, airline pilot, conference attendee, or simply visiting a sick relative.

Does the restriction apply to persons who entered the U.S. on a legal visa but whose visa has expired?

Yes. If the visa has expired, they are here unlawfully unless an extension has been granted.

How will state, county or municipal employees know who is entitled to services and who is not?

House Bill 1224 [C.R.S. 24-72.1] passed by the General Assembly and signed by the Governor in May 2003 sets standards for secure and verifiable identification documents that may be accepted by state agencies providing services to the public. Each agency may establish reasonable standards and procedures for the programs it administers within the limits, guidelines and definitions established by the General Assembly.

Home What the amendment will not do