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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203 ORIGINAL PROCEEDING PURSUANT TO §1-40-107(2), C.R.S. (2007) Appeal from the Ballot Title Setting Board IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008 #124 ("Conditions of Employment") **Petitioners:** Reed Norwood and Charles Bader, Proponents, v. **Respondent:** Julian Jay Cole, Objector, and **Title Board:** William A. Hobbs, Dan Cartin, and Daniel Dominico	 **▲COURT USE ONLY▲** Case Number: 08SA200
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ANSWER BRIEF OF THE RESPONDENT

Table of Contents

Table of Authorities

Cases

Constitutional Provisions

Statutes

Other

I. STATEMENT OF THE ISSUES

Petitioner Julian Jay Cole "Cole" adopts the statement of the issues set forth in his *Opening Brief*, with the following two additions:

A. During the review and comment session before the office of legislative legal services and legislative counsel, the proponents told legislative staff that the proposed initiative applied to all definitions in Article XVIII of the Colorado Constitution, not Article XXVIII. Was this a substantive change, in response to a "question" or "comment" from legislative staff?

B. The Proponents ask this Court to: (1) render a decision prior to issuing an opinion; (2) set a title and submission clause without additional Title Board consideration or public input; (3) dispense with any further proceedings before the Title Board; and (4) suspend the time normally allowed for a mandate. Have the proponents shown good cause for such extraordinary relief?

II. STATEMENT OF THE CASE

Cole adopts the Statement of the Case set forth in his *Opening Brief.*

III. SUMMARY OF THE ARGUMENT

The Title Board did not have jurisdiction to set a title, because the Proponents made a substantive change to the original language they submitted. Instead of overruling any competing definitions of "labor organization" in Article XXVIII (Campaign Finance) of the Colorado Constitution, they changed the initiative to overrule any competing definitions of "labor organization" in Article

XVIII (Miscellaneous). And this change was not in direct response to a comment from legislative staff, because it did not respond to the self-identified "comments" in the memorandum produced by legislative staff.

The proposal contains two subjects. On one hand, Proponents describe their initiative as one that seeks to "keep mandatory, non-work organizations out of the work place." On the other hand, they admit that the initiative seeks to override another measure, which has nothing to do with keeping "mandatory, non-work organizations out of the work place." The two are separate subjects unconnected with one another and independent from one another. By way of example, the override provision could be removed and not affect the operation of the initiative with respect to mandatory, non-work organizations.

The proposal also contains a third subject – an effort to change the rules in which govern conflicts between initiatives. Again, this is not necessary to enact the substance of the initiative, and it self-consciously impacts other initiatives that may have much different subjects. The rule change impacts well-established statutory provisions that govern the enactment of initiatives.

Finally, this Court should not grant further expedited relief. Both the legislature and this Court have already established expedited proceedings, and further changes would effectively eliminate the right of the public to comment on a motion for rehearing in addition to truncating the right of any objector to have comments fully considered by the Title Board. This is particularly important in

light of the Title Board's misgivings about the initial title it set. The Proponents claim a time crunch, but this results solely from their own actions in delaying their proposal. This Court should not engage in hasty action solely to help these Proponents, particularly since the Proponents have ample opportunity to propose initiatives in the next election cycle.

IV. ARGUMENT

A. The Title Board did not have jurisdiction to set a title.

The Title Board declined to set a title after finding that the measure's single subject violation deprived it of jurisdiction. For this reason, Cole believes that the Title Board's lack of jurisdiction on other grounds is not ripe for resolution, but rather becomes ripe only if this Court declares that the measure has a single subject. Nonetheless, to the extent the Court wishes to consider the jurisdictional arguments in this briefing, the Title Board was without jurisdiction to set a title because the proponents made a substantive change that was not in response to a question or comment.

1. The proponents made a substantive change to the initiative proposal.

As part of the ballot initiative process, all proponents must submit their original typewritten drafts to legislative council and the office of legislative legal services for review and comment.[1] "If any substantial amendment is made to the petition, other than an amendment in direct response to the comments of the

[1] C.R.S. § 1-40-105(1) (2007).

directors of the legislative council and the office of legislative legal services, the amended petition shall be resubmitted to the directors for comment . . ."[2] Accordingly, the first step in determining whether the Title Board had jurisdiction is to identify whether any changes were "substantial amendments" to the original language.

As initially submitted to the legislative staff, Initiative #124 stated that its definition of labor organization "would prevail over any conflicting definition of 'labor organization' in Article XXVIII . . . ."[3] Prior to submission to the Title Board, however, the proponents changed the final language to read ". . . would prevail over any conflicting definition of "labor organization" in Article XVIII . . ." This was a substantial change because it "substantially alter[ed] the intent and meaning of central features of the initial proposal."[4]

As originally written, Initiative #124 defined labor organization as used in the campaign finance laws in Article XXVIII. That Article repeatedly uses the term "labor organization"[5] but does not define the term. Accordingly, Initiative #124 it would have altered campaign finance laws by effectively exempting

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[2] C.R.S. § 1-40-105(2) (2007).

[3] Original Proposed Ballot Initiative 2007-2008, #124 (**Exhibit 1**).

[4] *In re Title, Ballot Title & Submission Clause, & Summary Approved Feb. 12, 1992, with Regard to the Proposed Initiated Constitutional Amendment Concerning Limited Gaming in Idaho Springs*, 830 P.2d 963, 968 (Colo. 1992).

[5] *See, e.g.*, Colo. Const. art. XXVIII, § 3(4).

organizations traditionally considered "labor organizations." This was a major provision of Initiative #124, as originally submitted.

By contrast, Article XVIII contains no provision that uses the term "labor organization" and so the provision as finally submitted would only apply to competing measures or future laws included as part of Article XVIII. The change from Article XXVIII to Article XVIII has real, meaningful consequences regarding how "labor organizations" may be regulated. "Substantial" means "of considerable importance, size or worth."[6] The Proponents made a "substantial" amendment.

The Proponents attempt to escape the plain consequences of this change by first arguing that the change from Article XXVIII to Article XVIII merely corrected a "typographical error." Even assuming this is factually true, it is irrelevant. At most, the proponents explain why they initially used the phrase "Article XXVIII." But the phrase "Article XXVIII" means the same, whether it is included purposefully or accidentally. And any change from "Article XXVIII" to "Article XVIII" has real, meaningful consequences, regardless of the motivation for inserting or changing the original language.

Second, the Proponents essentially say that the change is not substantial, because Initiative #124 was intended to amend Article XVIII. Again, this is irrelevant. Regardless of the initiative's placement in Colorado's constitution, the

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[6] Oxford Am. Coll. Dictionary 1372 (1st ed. 2002).

plain language of Initiative #124 (as originally submitted) changed the operations of Article XXVIII, not Article XVIII.

Finally, the Proponents claim that the lack of questions in the review and comment memorandum concerning the impact on Article XXVIII indicates that the change was insubstantial. This is a "heads I win, tails you lose" argument. On one hand, proponents claim they can make a change, because the lack of questions on the subject shows that any change is insubstantial. But if there had been questions on the subject, than the proponents would instead argue that they could make the change because it was in response to a question or comment. The proponents' argument would always allow them to change the initial language.

2. <u>The change was not in direct response to a question or comment</u>.

The second test is whether the substantial amendment was in direct response to comments from legislative staff.[7] Proponents assume that "comments" include anything discussed during the review and comment hearing, but in fact Colorado law carefully limits the term "comments" to the written comments submitted to proponents before the public review and comment hearing. Specifically:

> no later than two weeks after the date of submission of the original draft . . . the directors of lf the legislative council and the office of legislative legal services, or their designees, shall render their comments to the proponents of the petition concerning the format or contents of the petitions at a meeting open to the public. . . . Except with the permission of the proponents, *the comments shall not be*

[7] C.R.S. § 1-40-105(2) (2007).

disclosed to any person other than the proponents prior to the public meeting with the proponents of the petition.[8]

Thus, the legislative staff prepares and submits comments to the proponents, and these comments are then made public at a public meeting with the proponents. In other words, the comments are not generated at the public meeting, but rather made public at the review and comment hearing (unless the proponents agree to disclose the comments before the hearing). This approach properly creates a written record of questions and comments, which provides written notice to the proponents and the public concerning what is and is not a question and comment. By the same token, the written comments provide certainty to the Title Board and this Court in reviewing the Title Board's jurisdiction. Accordingly, a response to "comments" must be the response to the comments prepared by legislative staff prior to a public meeting.

The Proponents made their substantial changes in response to a recitation of the proposals purposes. This recitation was not a "comment" as defined by legislative staff. As listed in Exhibit A to *Petitioners' Opening Brief*, the review and comment memorandum first identifies the initiative's purposes, which is designed to ensure that the Title Board and this Court understand the proponents'

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[8] C.R.S. § 1-40-105(1) (2007) (emphasis added).

"intent and . . .objective in proposing the amendment."[9] Thus, by the terms of the memorandum this introductory material is designed to ensure that observers understand the initiative's written words. It is not part of the "comments and questions" submitted by staff.

In contrast, the memorandum's plain language plainly identifies what constitutes the "comments and questions" prepared by legislative staff. Simply stated, the legislative staff's "comments" appear under the section entitled "comments and questions." Both the Title Board and this Court should defer to this plain, written, interpretation as to what constitutes a "comment and question."

The interpretation of a statute or regulation by the agency charged with its administration is ordinarily accorded deference, and a court will accept an agency's interpretation if it has a reasonable basis in law and is warranted by the record.[10] This reasoning applies with particular force here, because members of legislative staff have absolute discretion to provide whatever comments they see fit. Accordingly, if they identify their communications as "comments and questions" then such communications are "comments" as anticipated by Colorado statute. And if legislative staff chooses to exclude certain items from "comments and questions" then those items are not "comments" for purposes of Colorado law.

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[9] Exhibit A to *Petitioners' Opening Br.*, p. 1; *see also In re Title, Ballot Title & Submission Clause, & Summary Pertaining to Matter of Proposed Initiative on Sch. Pilot Program*, 874 P.2d 1066, 1071 (Colo. 1994).

[10] *Stell v. Boulder County Dep't of Soc. Servs.*, 92 P.3d 910, 915 (Colo. 2004).

Accordingly, the proponent's change to Initiative #124 was not in direct response to a question or comment from legislative staff. Rather it indirectly responded to the introductory comments.

Even if the introductory materials are considered "comments," the Proponents' changes were not in direct response. Specifically, legislative staff queried whether they understood the measure's purposes, as Initiative #124 was then written. Rather than limit themselves to a discussion of the initiative's purposes, the proponents instead used this as an invitation to fundamentally change one of the initiative's central provisions. The word "direct" as used in Colorado statute means "characterized by or giving evidence of a close esp. logical, causal, or consequential relationship."[11] When a question asks whether a text has a particular meaning, it is not logical to change the words in the text. As a general matter, if this Court allows proponents to change the text in response to a summary of an initiative's purposes, the term "direct" loses all meaning.

[11] Webster's Third New Int'l Dictionary 640 (1st ed. 2002).

B. The Proponents' goal is to overrule another measure. This subject is different than restrictions on mandatory membership in "labor organizations."

1. The override provisions are not connected with or necessary to keep "mandatory, non-work organizations out of the work place."

The Proponents describe the measure's single subject as keeping "mandatory, non-work organizations out of the work place."[12] At the same time, proponents admit that this measure is intended to overrule another measure that has a much different purpose.[13] Specifically, the other measure – proposed Initiative #41, now certified for the ballot as Amendment 47 – prohibits employers from requiring membership in a labor union. Indeed, the proponents have purposely designed Initiative #124 to have a subject that differs from Initiative #41.

The proponents wish to "keep mandatory, non-work organizations out of the work place." This goal is, of course, permitted in the initiative process. The proponents also wish to render Initiative #41 inoperative. This is also permitted in the initiative process. But these two efforts cannot take place within the same ballot initiative, because they form two separate subjects. The override provision is unnecessary to "keep mandatory, non-work organizations out of the work

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[12] *Petitioners' Opening Br.* at 9

[13] *Petitioners' Opening Br.* at 13.

place." This is starkly demonstrated by removing the override provisions; the removal that does not change the meaning or operation of Initiative #124.

Likewise, the override provisions are not connected with keeping mandatory, non-work organizations out of the work place. The override provisions are not a natural result of Initiative #124's prohibition, they are not a condition precedent, and in fact they involve a separate subject, by design.

Furthermore, this override is surreptitious. Proponents have certainly been forthright about the potential impact on Initiative #41. But this impact cannot be discerned from the single subject description. Instead, it requires a careful reading of Initiative #124 and a careful reading of Initiative #41, followed by an inferential step to understand that Initiative #124 conflicts with Initiative #41 through an unusual "definition" that exempts certain types of organization from the term "labor organization." Indeed, a voter seeking to educate him or herself cannot even turn to the existing statute books to determine how Initiative #124 modifies current law. Despite Proponents' statements before the Title Board and this Court, the fact remains that the single subject description masks Initiative #124's effort to overturn a different initiative that neither impacts nor addresses "mandatory *non-work* organizations in the workplace." This single subject violation remains, no matter how clear or simple the initiative appears.

2. The proposed initiative does not define "labor organization."

Proponents argue that an uncommon definition cannot cause a single subject violation. But an "uncommon definition" is not the reason the proposed measure violates the single subject requirements. It fails for other reasons.

First, the proposal does not, under any reasonable reading of the English language, define the term "labor organization." Proponents state that "including a clearly stated definition in the measure, rather than allowing voters to guess what is meant by a particular phrase, helps establish compliance with the single subject requirement."[14] Agreed. But a fair reading of the "definition" of "labor organization shows that this is not a definition at all. A definition is "a statement expressing the essential nature of something," or "the action or the power of describing, explaining, or making definite and clear,"[15] or "an exact statement or description of the nature, scope, or meaning of something."[16] Here, the measure defines exemptions from the term "labor organization," but it never states what constitutes a "labor organization." By design, the term "labor organization" is unclear and undefined.

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[14] *Petitioners' Opening Br.* at 15.

[15] Merriam Webster OnLine Dictionary, http://www.merriam-webster.com/dictionary/labor%20organization (last visited June 19, 2008).

[16] Oxford Am. Coll. Dictionary 359 (1st ed. 2002).

Second, this ambiguity in the term "labor organization" shows that Initiative #124 in reality does not have a single subject of keeping mandatory, non-work organizations out of the work place, for the simple reason that no one knows what "non-work" organizations are. They may mean professional licensing organizations, or educational associations, or even religious organizations. In contrast, though, the detailed exemptions from the term "labor organization" are critical to the separate subject of the override provisions. Without these exemptions, the Proponents will not effectively override a competing measure. Accordingly, the current measure is vague, uncertain, and undefined with respect to its subject regarding mandatory, non-work organizations in the work place. But it is exact, precise, and well-defined with respect to the subject of overriding a competing ballot measure.

Third, the Proponents create an incredibly broad, sweeping proposal, due to their failure to define "labor organization," combined with their stated intent to keep mandatory, non-work organizations out of the work place. As described by the proponents, Initiative #124 would prohibit law firms from requiring membership in the Colorado Bar, as a condition of employment as a lawyer. Or a church could not require certain employees, such as priests or ministers, to belong to a certain religion. By listing exemptions to labor organization, rather than defining the term, the Proponents effectively conceal the multiple subjects.

C. The proponents seek to change the rules of interpretation that apply to other proposals that may conflict with this one.

The Proponents argue that Initiative #124 differs in meaning from #123, because #123 states:

> This definition shall prevail over any conflicting definition of "labor organization" in article XVIII of this constitution, including any provision adopted at the 2008 general election, regardless of the number of votes received by this or any other such amendment,[17]

whereas Initiative #124 states:

> This definition shall prevail over any conflicting definition of "labor organization" in article XVIII of this constitution, including any provision adopted at the 2008 general election.[18]

In other words, Initiative #124 excludes the language "regardless of the number of votes received by this or any other such amendment." This phrase, however, is merely redundant, and initiatives #123 and #124 are identical with respect to their override provisions. Accordingly, the same single subject arguments apply to both initiatives.

Initiative #124 contains a separate subject because it changes the manner in which this Court resolves conflicting initiatives, by overriding any conflicting initiative at the 2008 election. The Proponents claim that this change applies only

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[17] *Pet. for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2007-2008 #123* at Exhibit A.

[18] *Pet. for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2007-2008 #124* at Exhibit A.

to this initiative[19] and that the provision is equivalent to language that states "notwithstanding any other provision in law."[20] Neither statement is correct.

By containing a conflict resolution clause, Initiative #124 not only affects how it is enacted, but it affirmatively seeks to alter how other, conflicting initiatives function, regardless of their subject. Accordingly, Initiative #124 contains provisions that extend beyond its purported subject.

Furthermore, the initiative's override language is much different than the phrase "notwithstanding any other provision of law." That phrase generally operates to prevent other measures from overriding the statute in which it appears. For example, if used here it would prevent a different definition of labor organization from affecting the prohibition contained in this measure. In other words, the "notwithstanding . . ." language is equivalent to a self-protection clause.

But here, the measure's explicit override provision of the definition of "labor organization," combined with the conflicting rules of interpretation, mean that Initiative #124 does not merely prevent other initiatives from interfering with its prohibition. Rather, it specifically intends to interfere with other provisions of law, regardless of their subjects. This effort to have effects beyond the mere

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[19] *Petitioners' Opening Br.* at 16.

[20] *Petitioners' Opening Br.* at 17.

implementation of "keeping mandatory non-work organizations out of the work place" is a separate subject.

D. This Court should not grant the emergency relief requested by Proponents.

The Proponents request extraordinary relief, in order to "further" the initiative process. Last-minute initiatives are nothing new, and indeed the General Assembly and this Court have already enacted provisions designed to expedite the process. For example, a motion for rehearing must be heard by the Title Board heard within 48 hours,[21] and this Court has provided an extremely compressed briefing schedule. Accordingly, both the legislature and this Court have already provided expedited proceedings for proponents who wait until the last minute to propose and circulate initiatives. Indeed, the Proponents did not submit their proposals until April 25, 2008. In less than two months, Proponents have received comments by legislative staff, two reviews by the Title Board, and a full briefing before this Court. By any measure, Proponents have already received expedited consideration of their measure.

Yet in this instance, the Proponents want more. In the interests of speed, the Proponents wish to: (1) dispense with full Title Board consideration of Cole's motion for rehearing, despite misgivings about the title voiced by Board members; (2) extinguish the right of any member of the public to comment on Cole's motion

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[21] C.R.S. § 1-40-107(1) (2007).

for rehearing; (3) Prohibit any further Title Board action; and (4) suspend the normal mandate period.

Proponents certainly have a right to propose initiatives to the public, but at the same time the procedures for constitutional amendments and statutory changes are channeled by law, in an attempt to ensure that laws are well-considered, that proposals receive the necessary public support, and that voters understand what they are asked to enact. Here, proponents seek to short-circuit some of these procedures, solely because they waited until the very last minute before submitting their proposal. This Court should guard against hasty actions that single out certain Proponents for special treatment and weaken the initiative process.

Proponents have not shown any particularized need for relief or other good cause to explain their request to suspend the normal procedures for initiative review. Proponents state that the deadline for petitions is August 4, 2008, but this deadline is mandated by Colorado's constitution,[22] and it is the same deadline faced by every other proponent. This initiative does not differ from any other in this respect. This Court should not make special provision for these Proponents.

Finally, it should be emphasized that the initiative process will continue beyond this election. Even though the Proponents are keen to place their proposal on the November, 2008, ballot, nothing prohibits them from placing an initiative on the 2010 ballot. Indeed, the Proponents can accomplish all of their goals –

[22] Colo. Const. art. V, § 2.

keeping mandatory, non-work organizations out of the work place, and even overruling Initiative #41 (in a separate measure, of course) – at the 2010 election. Accordingly, this Court should recognize that any decision it makes will not prohibit the Proponents from moving forward. They may be required to reword their initiative. Or they may be required to wait two years. But if the Proponents feel that it is important to change Colorado's constitution, they will have ample opportunity to do so.

V. CONCLUSION

This Court should affirm the Title Board's decision. Alternatively, it should remand the matter to the Title Board in order to set a title.

Respectfully submitted this 19th day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of June, 2008, a true and correct copy of the foregoing **ANSWER BRIEF OF THE RESPONDENT** was served via hand delivery, to the following:

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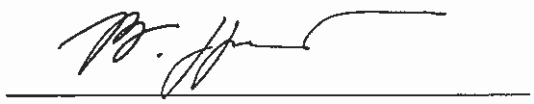

ORIGINAL #424

Be it enacted by the People of the State of Colorado:

SECTION 1. Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

Section 17. Limits on conditions of employment.

(1) AN EMPLOYER SHALL NOT REQUIRE, AS A CONDITION OF EMPLOYMENT, THAT AN EMPLOYEE JOIN OR PAY DUES, ASSESSMENTS, OR OTHER CHARGES TO OR FOR A LABOR ORGANIZATION.

(2) AS USED SOLELY IN THIS ARTICLE, AND NOTWITHSTANDING ANY OTHER PROVISION OF LAW, "LABOR ORGANIZATION" MEANS ANY ORGANIZATION OF EMPLOYEES THAT EXISTS SOLELY OR PRIMARILY FOR A PURPOSE OTHER THAN DEALING WITH EMPLOYERS CONCERNING GRIEVANCES, LABOR DISPUTES, WAGES, RATES OF PAY, EMPLOYEE BENEFITS, HOURS OF EMPLOYMENT, OR CONDITIONS OF WORK. THIS DEFINITION SHALL PREVAIL OVER ANY CONFLICTING DEFINITION OF "LABOR ORGANIZATION" IN ARTICLE XXVIII, INCLUDING ANY PROVISION ADOPTED AT THE 2008 GENERAL ELECTION.