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Supreme Court, State of Colorado Court Address: Colorado State Judicial Building 2 East 14th Avenue, Suite 400 Denver, CO 80203	FILED IN THE SUPREME COURT JUN 19 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
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 DAN DOMENICO	**▲COURT USE ONLY▲**
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PETITIONERS' ANSWER BRIEF

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I. Initiative #124 reflects a single subject.

A. The provision that determines which conflicting measure takes effect is not a second subject.

Cole argues the provision that #124 prevails over any conflicting measure is a second subject. Opening Brief of the Respondent at 9-10. He echoes the Solicitor General's argument that this provision is the functional equivalent of requiring less than a majority of votes cast in order for the measure to become effective. As the Chairman of the Title Board noted in rejecting that argument:

> [T]he rules that would be applied to determine if that (initiative) takes effect is whether or not a majority of voters pass it; and if a majority of voters don't pass it, that (initiative) would never be effective.... [T]he difference (between the provisions in #124 and giving effect to measure that do not get at least a majority of votes cast) is that the voters would have approved a measure that says it trumps a measure that gets more votes, but that wouldn't be the case if the measure said 40 percent, because the measure would never take effect.

May 30 Tr., 88:20-23; 89: 9-13.

The substance of a measure and the procedural adjuncts that govern its applicability are parts of the same subject. This applicability provision of #124 would be meaningless and would have no effect without the substantive measure that limits conditions of employment and enacts certain exceptions based on a definitional clause. The provisions in question are interdependent components of the same single subject.

In its own defense, the Board makes a comparable point. It suggests that trumping other measures adopted by the voters is a second subject and directs the Court's attention to *In re Initiative 1997-98 #30*, 959 P.2d 822 (Colo. 1998). *See* Opening Brief of Title Board at 6. In *#30*, the Court held a constitutional amendment could not revamp the rules for revenue and spending measures already approved under TABOR. However, the more relevant and more recent case in analyzing this issue is *In re Initiative 2005-2006 #73*, 135 P.3d 736 (Colo. 2006). In that matter, the Court considered an initiative that expanded campaign finance regulations. For violations of the new limits on issue campaigns, ballot measures that had been enacted would be deemed void and the funds collected would be refunded. The Court held that this provision was not a separate subject because it was "directly tied" to the measure's substantive objective. *Id.* at 739. In the same vein, establishing the procedural ground rules for which measures accepted by voters is part of #124's single subject. Because it provides greater certainty about what the state of the law will be after the 2008 general election, it is actually the antithesis of a surreptitious measure.

B. The potential future applications of #124's definition of "labor organization" are not a second subject.

Cole argues that, because #124 applies to all sections of Article XVIII of the Constitution, it may apply to provisions that are placed in that article in the future but do not address "conditions of employment." Opening Brief of the Respondent at 11-12.

Obviously, this argument calls for conjecture. It simply is not the charge of the Board or the Supreme Court to go down that road. "This court cannot determine the future application of an initiative in the process of reviewing the action of the Title Board in setting titles for a proposed initiative." *In re Initiative 1999-2000 #235(a)*, 3 P.3d 1219, 1225 (Colo. 2000). Unforeseeable, undefined events do not violate the single subject requirement.

C. The anticipated conflict between #124 and Amendment 47 is not a second subject.

Cole states that ensuring #124 prevails over a conflicting measure violates the single subject rule. Opening Brief of the Respondent at 12-14.

At the heart of Cole's argument is his statement that there is no express definition of "labor organization" in the measure. He asserts that the proposal "avoids defining what constitutes a 'labor organization....' *Id.* at 13. He suggests that the lack of a definition makes it impossible to know how the measure will be implemented. *Id.* at 13-14.

Yet, Cole also argues that "labor organization" is a commonly accepted phrase. *Id.* at 20. He points out that it is specifically defined by statute. *Id.* "Labor organization" is defined to mean "any organization which exists for the purpose in whole or in part of collective bargaining, or of dealing with employers concerning grievances, terms, or conditions of employment, or of other mutual aid or protection in dealing with employment." C.R.S. 24-34-410(6). Voters cannot both be befuddled and fully informed by the same two words, "labor organization."

In any event, as this Court has recently noted, a proposed measure need not define all terms in order to meet the single subject requirement. For instance, a proposal that dealt with liability for criminal conduct of a business entity and certain of its agents did not define "crime" or "offense," both of which were key terms used throughout the measure. This fact did not stand in the way of a finding that the measure was one subject. *In re Initiative 2007-2008 #57*, Case No. 08SA91, slip op. at 9 (May 23, 2008).

Cole relies on *In re Initiative 2005-2006 #55*, 138 P.3d 273 (Colo. 2006), to support his contention. However, *#55* stood for the proposition that an initiative can violate the single subject requirement if it imposes no parameters at all on the measure's key term and that such term is subject to widely varying interpretations. "[T]he Initiative's failure to specify any definitions, services, effects, or purposes makes it impossible for a voter to be informed as to the consequences of his or her

vote." *Id.* at 282. #124 suffers no such infirmity. As noted by Cole, there are already parameters containing "labor organization" based in part on existing statutes. That statutory definition parallels the definition of "labor union" in Amendment 47, including the elements of collective bargaining, addressing grievances, terms, and conditions of employment, and "other mutual aid or protection in dealing with employment." The Proponents here are narrowing a phrase that is, according to Cole, well within voter comprehension. As was true in the first preferential treatment initiative the Court addressed this year, any confusion here exists because of the vagueness of the earlier measure introduced, not because of #124.[1] *In re Initiative 2007-2008 #61*, Case No. 08SA91, slip op. at 15-16 (May 16, 2008)

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[1] Amendment 47 uses an exceedingly broad definition of "labor union." *See* Petitioner's Opening Brief at 4, fn. 2. If Cole is correct that the lack of specificity in #124's definition is a single subject problem, Amendment 47 is similarly flawed. In contrast to #124's ballot title, Amendment 47's title is silent about that measure's more expansive definition. *See* Exhibit F to Petitioner's Opening Brief. As such, Amendment 47 is subject to a post-election, single subject challenge in which the provisions that are not disclosed in the title are invalidated. Colo. Const., art. V, sec. 1(5.5) ("if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed"); *see Polhill v. Buckley*, 923 P.2d 119 (Colo. 1996) ("Upon post-election review, if the court determines that the referendum violates the single-subject requirement of the Colorado Constitution, then the referendum will be invalidated."). Cole, as a proponent of Amendment 47, cannot benefit from an undisclosed, unbounded definition and hold Proponents to a different standard. This Court can conclude the Board acted correctly in finding multiple subjects in #124 **only by acknowledging the analogous title deficiency in Amendment 47.**

II. The title initially set by the Board is fair and accurate.

A. This Court should correct the title, if the need exists.

Cole argues the title should be remanded to the Board to take advantage of the process and the Board's expertise. Opening Brief of the Respondent at 14-17.

However, Cole made no such argument before the Title Board. Once the single subject decision had been made, his position was that the Board should not fix a title, given the constitutional mandate that no title be set when a measure has been found to comprise multiple subjects. May 30 Tr., 96:17-97:5; Colo. Const., art. V, sec. 1(5.5). Because Cole did not preserve this issue before the Board, he cannot argue it for the first time on appeal. *In re Initiative 1999-2000 #265*, 3 P.3d 1210, 1215-16 (Colo. 2000).

In any event, Cole's position is at odds with the Court's most recent pronouncement on this issue. If a title is deficient because of the wording chosen by the Board, it is up to the Court to "articulate the title to be set." *#61*, slip op. at 12. The Court is not prevented from revising the Board-approved title for #124.

B. The title adequately conveys the substance contained in the measure's definitional section.

Cole asserts that the title does not reflect the fact that the measure defines the exemptions to "labor organization" more than "labor organization" itself. Opening Brief of the Respondent at 19-20. Yet, the title repeated, virtually verbatim, the exclusions in the measure itself. Where a measure did not define a

term but listed, as examples, what was included or excluded, the measure's title was not objectionable. "[W]e find that the titles to Initiative 245(g) defining 'judge' as not including judges and magistrates of the county court of the City and County of Denver are not misleading." *In re Initiative 1999-00 #245(f) and 245(g)*, 1 P.3d 739, 744 (Colo. 2000).

Cole also argues that the definition's use of "other than" conceals the effect of the measure. Opening Brief of Respondent at 20-21. How else would the Proponents craft a measure that achieves this end? Cole's suggestion leads to the following conundrum. If one initiative authorized a government action or regulation and another initiative expressly prohibited it, the latter's use of the word "not" in the initiative text, essential to achieving the proponents' objective, would invalidate the title. Voters are given credit for the capacity to evaluate ballot titles. *See #61*, slip op. at 15 (voters not mislead even where single subject statements of two competing initiatives were exactly the same). And if this language needs to be modified to highlight the exemption language, the Court can accomplish that goal.

As proof that confusing wording was used, Cole points to one Board member's comments that he had to read the measure ten times and draw a flow chart in order to understand what the measure did. *Id.* at 21, *citing* May 30 Tr., 57:16-18. This statement appears to be more hyperbole than fact. This same Board member voiced no personal confusion over the measure during the prior

Title Board meeting. At that point, he concluded that #124 was a single subject, given this Court's decision in *#61*. May 21 Tr., 10:19-23; 13:11-15; 18:25-19:3. He added, "I wish I could come up with a reason to oppose it, but I can't." May 21 Tr., 26:13-14. Nine days later, he decided the single subject requirement had been violated but still did not attribute his decision to the wording of the initiative's prohibition on conditions of employment or its definitional section. May 30 Tr., 83:21-86:24. Thus, the Court will have to determine what, if any, weight to give his "flow chart" comment.

CONCLUSION

This Court should reverse the Title Board, find that the measure reflects one subject, and ratify the title originally set for this measure. *See* Exhibit D to Petitioner's Opening Brief at 9. Moreover, because the Title Board lacks discretion to reword a ballot title that has been established in this type of an appeal, the Court should allow Proponents to obtain their petition form certification from the Secretary without any additional delay, including any further proceedings by the Board or the typical fifteen-day period before the mandate issues. Finally, the Court should issue its direction in this regard as soon as possible.

Respectfully submitted this 19th day of June, 2008.

ISAACSON ROSENBAUM P.C.

By: _____
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ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of June, 2008, a true and correct copy of the foregoing **PETITIONERS' ANSWER BRIEF** was served via over night delivery to the following:

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