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SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, CO 80203

Original Proceedings Pursuant To § 1-40-107(2) C.R.S. (2006)
Appeal from the Ballot Title Board

FILED IN THE SUPREME COURT
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OF THE STATE OF COLORADO
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▲COURT USE ONLY▲

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2007-2008, #31

Petitioners: POLLY BACA, KRISTY SCHLOSS, and RON MONTOYA, objectors,

v.

Respondents: Valery Orr and Linda Chavez, proponents.

and

Title Board: WILLIAM A. HOBBS, DANIEL L. CARTON, and DANIEL DOMENCIO.

Case Number: 07SA197

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OPENING BRIEF

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INTRODUCTION

The proposed initiative at issue here (2007-2008 #31 (the "Initiative")) presents a simple and straight-forward amendment to the Colorado Constitution prohibiting discrimination by the State of Colorado and instrumentalities of the State. The essential language is as follows:

> (1) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The language is clear, the object of the initiative is specific, and no Colorado voter of reasonable intelligence will misunderstand the effect of the Initiative.

The Objectors' challenges here are based upon contrived interpretations of the Initiative. They marshal an array of arguments based upon their own view of what the Initiative does or does not say, and they fault the Title Board for failing to describe the Initiative in a manner that comports with their contrived interpretations.

As this Court is well aware, and as discussed below, the task for the Title Board is to determine whether a measure contains a single subject and to set a title that fairly describes the essential features of the measure for the voters of Colorado. The Initiative here unquestionably contains a single subject, and the

title set by the Title Board fairly describes the Initiative's essential features. Accordingly, this Court should affirm the Title Board.

STATEMENT OF ISSUES

The Objectors have presented seven issues for review. Many of these issues involve the same legal principles. For the convenience of the Court and to avoid repetition, the Proponents have grouped issues for review involving similar legal issues together, rather than addressing each issue in the order presented by the Objectors. Furthermore, the Proponents believe that the Objectors' issues five and six are substantially identical and have addressed them as a single argument.

STATEMENT OF THE CASE

This is an appeal from a decision of the Ballot Title Setting Board ("Title Board"). On May 18, 2007, the Proponents filed the Initiative to amend the Colorado Constitution. The purpose of this one-page Initiative is to prohibit discrimination by the State of Colorado in certain areas. The Initiative bars discrimination or preferential treatment on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting. The Initiative contains certain exceptions, including exceptions for bona fide qualifications based on sex, and for actions required to maintain

eligibility for federal funds. On June 6, 2007, the Title Board set the ballot title for the Initiative. The Objectors sought a rehearing, and argued that the Initiative contained more than one subject and that the title set by the Title Board was misleading and contained an impermissible catch phrase. On June 20, 2007, the Title Board denied the Objectors' motion for a rehearing. The Objectors subsequently filed this appeal.

SUMMARY OF ARGUMENT

The Title Board properly determined that the Initiative contains a single subject, and properly set the title for the Initiative in a manner that was neither misleading nor utilized an impermissible catch phrase.

The subject of the Initiative is the prohibition of certain types of discrimination by the State. To accomplish this goal, the Initiative prohibits both discrimination and its necessary counterpart, preferential treatment. The Title Board properly determined that the ban on preferential treatment is not a distinct purpose from that of prohibiting discrimination generally. For the same reason, the title set by the Title Board is not misleading by virtue of the fact that it characterizes the prohibition on preferential treatment as an element of a wider ban on discrimination. Nor is the title misleading because it sets forth the overarching

purpose of prohibiting discrimination, but not the bar on preferential treatment, in the opening clause.

The Initiative applies the ban on discrimination to three areas of state government: public employment, public contracting, and public education. The Title Board properly determined that an Initiative which applies a single principle to these three areas does not, as a result, contain more than one subject.

The Initiative creates an exception for bona fide qualifications based on sex. Bona fide qualifications are not discriminatory and, in any event, the Initiative does not purport to alter Colorado law with respect to such qualifications. Thus, the Title Board properly determined that the Initiative did not violate the single subject rule by both prohibiting, and creating or "sanctioning" discrimination as posited by the Objectors. For the same reasons, the title set by the Title Board is not misleading by virtue of the fact that it does not describe the Initiative as "sanctifying a new form of discrimination."

The title set by the Title Board contains the phrase "preferential treatment." This is a descriptive term, not a political slogan, and it does not constitute an impermissible catch phrase.

STANDARD OF REVIEW

The standard of review for all of the issues presented by the Objectors is highly deferential. E.g., In re Petition on Campaign and Political Finance, 877 P.2d 311, 313 (Colo. 1994) ("we indulge all legitimate presumptions in favor of the propriety of the Board's action, and only in clear cases will we invalidate the title, ballot title and submission clause, or summary prepared by the Board"). In reviewing the actions of the Title Board, the Court "may not address the merits of a proposed initiative or suggest how an initiative might be applied if enacted." In re Proposed Initiative for 1999-2000 #29, 972 P.2d 257, 260 (Colo. 1999) (internal quotation omitted). However, the court will "sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated." Id (internal quotation omitted).

ARGUMENT

The Title Board is responsible for determining whether a proposed initiative contains a single subject as required by Colorado law. C.R.S. § 1-40-106.5. The Title Board is also responsible for setting a title for an initiative that "fairly express[es] the true intent and meaning" of the initiative. C.R.S. § 1-40-106(b). Finally, the Title Board must act to "prevent surreptitious measures and apprise the

people of the subject of each measure by the title" in order to "prevent surprise and fraud from being practiced upon voters." C.R.S. § 1-40-106.5(1)(e)(II). The Title Board more than met its statutory obligations in this case.

I. The Title Board Properly Determined That The Proposed Initiative's Ban On Preferential Treatment Is Directly Connected To The Subject of Prohibiting Discrimination

A. The Initiative Is Limited To The Single Subject of Prohibiting Discrimination

The principles underlying the single-subject requirement are set forth in the implementing legislation, C.R.S. § 1-40-106.5(e):

> (I) To forbid the treatment of incongruous subjects in the same measure, especially the practice of putting together in one measure subjects having no necessary or proper connection, for the purpose of enlisting in support of the measure the advocates of each measure, and thus securing the enactment of measures that could not be carried upon their merits;
>
> (II) To prevent surreptitious measures and apprise the people of the subject of each measure by the title, that is, to prevent surprise and fraud from being practiced upon voters.

Id at § 1-40-106.5(1)(e). See In re Proposed Initiative 2001-2002 #43, 46 P.3d 438, 440-441 (Colo. 2002). There are no incongruous subjects joined in the Initiative, nor is there any aspect of it that is surreptitious.

The Initiative would establish a basic constitutional principle that neither the State of Colorado nor her instrumentalities may discriminate against any individual

or group on the basis of race, sex, color, ethnicity, or national origin. Government-sponsored preferential treatment ***is*** discrimination. Accordingly, discrimination and the prohibition of preferential treatment are congruous principles having a necessary and proper connection. See C.R.S. § 1-40-106.5(1)(e)(I); In re Proposed Initiative 2001-2002 #43, 46 P.3d at 440-441.

Nothing about the term "preferential treatment" is surreptitious. Indeed, the term was included in the Initiative to make it unquestionable in the Colorado Constitution (and to Colorado voters voting on the Initiative), that preferential treatment by government in certain defined areas is prohibited. "A voter of average intelligence would [***not***] be surprised to find out that" the Initiative prohibits state action that either discriminates against or grants preferential treatment to certain persons or groups under certain defined situations. See In re Proposed Initiative 2001-2002 #43, 46 P.3d at 446.

The Objectors' claim of "logrolling" is groundless. The Initiative itself and the title set by the Title Board inform Colorado voters that a vote for the Initiative prohibits very specific aspects of discrimination by the State and her instrumentalities. Neither the Objectors nor other persons who oppose the Initiative will feel in any way torn to vote for it because it includes a prohibition of "discrimination" along with a prohibition of government-sponsored "preferential

treatment." The Initiative offers a clear choice to Colorado voters to decide whether certain types of government discrimination should be prohibited.

Discrimination and preferential treatment are a single subject – both as a matter of logic and under the legal standards established by the General Assembly and this Court.

B. The Opening Clause of the Title Is Fair, Accurate, and Not Misleading

The opening clause of the title set by the Title Board states: "An amendment to the Colorado constitution concerning a prohibition against discrimination by the state, and, in connection therewith, prohibiting the state from discriminating against or granting preferential treatment to any individual or group . . . ." The Objectors contend, in their fifth and sixth issues for review, that this initial clause renders the Initiative misleading.

Although not clearly stated in the issues presented for review, the Objectors appear to claim that the title set by the Title Board is misleading because the opening clause refers only to "a prohibition against discrimination" and not "a prohibition against discrimination and preferential treatment." The Objectors' argument that the opening clause is misleading is wholly dependant on the success of their argument that a prohibition of preferential treatment is unconnected to a

prohibition of discrimination. Moreover, the Objectors cannot suggest that the title fails to disclose the bar on preferential treatment in the Initiative. Their challenge is based solely on the failure of the Title Board to mention preferential treatment in the first clause of the title.

The Proponents have been unable to locate any case in which the Colorado Supreme Court has addressed a challenge to a title set by the Title Board based on the contents of the first clause alone. Nor does the Court appear to have ever held that the first clause of a title must contain any particular quantum of information relative to the initiative at issue.

As a general matter, however, the Court has made it clear that titles "need not set out every detail of the initiative." In re Proposed Initiative 2005-2006 #73, 135 P.3d 736, 740 (Colo. 2006); See In re Proposed Initiative 1999-2000 #256, 12 P.3d 246, 255 (Colo. 2000) (holding that a summary is "not intended to fully educate people on all aspects of the proposed law, and it need not set out in detail every aspect of the initiative") (internal quotations omitted). The Court "will uphold the Board's choice of language if it clearly and concisely reflects the central features of the initiative." In re Petition on Campaign and Political Finance, 877 P.2d at 313 (internal quotation omitted). It is appropriate to apply this limitation on judicial review of the title as a whole to the first clause of the

title. Only a limited amount of information about an initiative can be conveyed in the first clause. As is the case with the title as a whole, the court should uphold the initial clause of the title as written by the Title Board unless "the language it has adopted is so inaccurate as to clearly mislead the electorate." Id.

An initial reference to discrimination alone, which is the purpose of the Initiative, is not "clearly misleading" to voters. As discussed previously, discrimination and preferential treatment are simply two sides of the same principle. To grant preferential treatment to one is to discriminate against another. Discrimination is "the effect of a law or established practice that confers privileges on a certain class, or that denies privileges to a certain class . . . ." Black's Law Dictionary 79 (7th ed.). Treatment that is preferential is treatment "[o]f, relating to, or of the nature of preference; involving or exhibiting a preference or partiality; constituting a favor or privilege." Oxford English Dictionary (available online at www.oed.com) (accessed July 2, 2007); See Colo. Const. art. II § 4 (guaranteeing the free exercise of religion "without discrimination" and prohibiting a grant of "any preference" to particular denominations).

There is no basis on which this Court could find that the title "is so inaccurate as to clearly mislead the electorate." In re Petition on Campaign and Political Finance, 877 P.2d at 313. Preferential treatment is prominently

mentioned within the first thirty words of the title. The Title Board cannot fit every concept covered by a proposed initiative into the first clause. Id. (holding that "the language the Board adopts must be brief, unambiguous, and direct" and need only reference "the central points of the proposed measure"). The decision to mention preferential treatment only in the second clause of the title is well within the broad discretion of the Title Board.

II. Applying One Principle To Several Areas of State Government Does Not Violate The Single Subject Requirement

The proposed Initiative provides that "[t]he state shall not . . . grant preferential treatment . . . in the operation of public employment, public education, or public contracting." (Initiative ¶ 1) An initiative may properly contain related purposes, and seek to achieve multiple effects, related to a single subject. Under these principles, a proposed initiative which applies to more than one area of government does not for that reason violate the single subject requirement. The Objectors' second issue for review offers no basis on which to overturn the decision of the Title Board.

The purpose of the single subject requirement is to ensure that each initiative depends on its own merits to pass and to protect voters from surprise and fraud. In re Proposed Initiative 2001-2002 #43, 46 P.3d at 440. To achieve these goals,

Colorado law bars the proponent of an initiative from "joining two distinct and separate purposes that are not dependent upon or connected with each other." In re Proposed Initiative 1999-2000 #258(A), 4 P.3d 1094, 1097 (Colo. 2000). While the goals of the single subject requirement are important, the single subject requirement "must be liberally construed . . . so as not to impose undue restrictions on the initiative process." In re Proposed Initiative 1997-1998 #74, 962 P.2d 927, 929 (Colo. 1998); See In re Proposed Initiative 1999-2000 #256, 12 P.3d at 255 (holding that the court should "construe constitutional and statutory provisions governing the initiative process in a manner that facilitates the right of initiative instead of hampering it with technical statutory provisions or constructions") (internal quotations omitted).

An initiative can contain distinct and separate purposes, so long as the purposes are interrelated. In re Proposed Initiative 2005-2006 #55, 138 P.3d 273, 278 (Colo. 2006). Moreover, "the fact that an initiative may be intended to achieve more than one beneficial *effect,* i.e., the reduction of both air and water pollution, does not mean it embraces more than one *subject*, i.e. regulation of swine operations." In re Proposed Initiative 1997-1998 #113, 962 P.2d 970, 971 (Colo. 1998) (emphasis in original). Put another way, a proposed initiative does not violate the single subject requirement simply because it "may have different

effects." In re Proposed Initiative 1999-2000 #256, 12 P.3d at 254. Rather, "[i]t is enough that the provisions of a proposal are connected." Id.

In keeping with these principles, the Colorado Supreme Court has noted that "[m]ultiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces." In re Proposed Initiative 1997-1998 #74, 962 P.2d at 929. This Court held that such an analysis "is neither required by the single-subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado's Constitution." Id.

It is well-established that an initiative which specifically addresses several subsections of a single subject does not therefore violate the single subject rule. Thus, for example, the Court has held that the application of a proposed amendment applicable to magistrates, commissioners, and referees "clearly falls within the subject of the selection, retention, and removal of judicial officers." In re Proposed Initiative 1999-2000 #245(f) and #245(g), 1 P.3d 739, 743 (Colo. 2000); compare U.S. Const. amend. V ("nor be deprived of life, liberty, or property, without due process of law"). Furthermore, the Court has repeatedly upheld initiatives which would impact a wide range of activity by the State and

private individuals. E.g., In re Proposed Initiative 1999-2000 #235(a), 3 P.3d 1219, 1226 (Colo. 2000) (conservation of open space).

The Initiative properly applies regulation of a single subject to three specific areas of activity by the State. The determination by the Title Board that it contains only a single subject is correct and should thus be upheld.

III. The Exception For Bona Fide Qualifications Based On Sex Does Not Adopt or Sanctify Discrimination

A. The Proposed Initiative Does Not Adopt Any Form of Discrimination and Thus Contains Only A Single Subject

The proposed Initiative provides that "[n]othing in this section shall be interpreted as prohibiting bona fide qualifications based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting." (Initiative ¶ 3) The Objectors' third issue for review asserts that the proposed Initiative violates the single subject requirement by virtue of its adoption and sanctification of a wholly new form of discrimination in the context of an anti-discrimination initiative. (Petition For Review at 3)

The Initiative does not purport to alter Colorado law with respect to bona fide qualifications. Rather, it simply states that it is not intended to apply to existing laws governing the matter. The Initiative thus cannot be characterized as adopting or sanctifying such exceptions. The Title Board thus properly determined

that the Initiative does not adopt and sanctify a wholly new form of discrimination and thus contains only a single subject.

The proposed Initiative does not have any effect on current law regarding bona fide qualifications. Nor would it prevent the General Assembly from eliminating or modifying the scope of bona fide qualifications. The phrase "nothing in this section shall be interpreted as prohibiting" cannot be interpreted to mean that the section imposes some sort of a requirement. Thus, for example, in Daly v. Aspen Center for Women's Health, Inc., 134 P.3d 450, 452-453 (Colo. App. 2005), the court held that a statute which included the phrase "nothing in this article shall be construed," with respect to the power of a hospital to control a physician's independent judgment, had simply retained the existing common law doctrine.

The initiative does not purport to alter Colorado law regarding bona fide qualifications. The Title Board thus correctly determined that the Initiative does not violate the single subject requirement through the adoption of a new form of discrimination.

B. The Initiative Does Not Adopt Any Form of Discrimination, and the Title is Thus Not Misleading

The Objectors argue, in their fourth issue for review, that the title of the Initiative is misleading because it fails to "disclose the adoption and sanctification of a wholly new form of discrimination." (Petition for Review at 3) As discussed in the preceding sections, there is nothing in the text of the Initiative to support the assertion that the Initiative adopts or sanctifies discrimination, and the Objectors' argument must thus be rejected.

The Title Board is granted "great deference" to set titles. In re Proposed Initiative 1999-2000 #256, 12 P.3d at 255. The Supreme Court only reverses the Board's actions when "the language chosen is clearly misleading." Id. In addition, "neither the Board nor [the] court is authorized to interpret the meaning of a proposed amendment prior to its adoption." In re Proposed Initiative Concerning State Personnel System, 691 P.2d 1121, 1125 (Colo. 1984). The Court may only interpret an initiative to the extent necessary to carry out its limited review of the actions of the Title Board. In re Proposed Initiative 1999-2000 #29, 972 P.2d at 260 (holding that while the court must sufficiently examine an initiative to determine if it contains multiple subjects, the court cannot suggest how an initiative might be applied if enacted).

The Colorado Supreme Court has held on more than one occasion that a petitioner cannot simply read its own meaning into a proposed initiative and argue from that meaning that the title is misleading. In In re Proposed Initiative 1996-6, 917 P.2d 1277, 1281 (Colo. 1996), the Court held that:

> petitioners' legal argument consists mainly of comparing the title phrase to their hypothetical constructions of [the initiative] . . . and thereby finding the title misleading and confusing. The petitioners' interpretations are not the only ones permissible, however, and given the testimony before the Board, and the wording of the Initiative itself, we conclude that the title . . . is well within the Board's discretion in setting a title.

Similarly, in In re Proposed Initiated Constitutional Amendment Concerning Fair Treatment II, 877 P.2d 329 (Colo. 1994), the Court held that "[t]he alleged effect that the Initiative may have on other constitutional rights is based solely upon the petitioners' interpretation of the Initiative and not upon its plain language . . . . the Board was not required to include reference to such a potential effect in the title, submission clause or summary." Id. at 332.

The Initiative neither adopts nor sanctions any form of discrimination. Moreover, even were the Court to determine otherwise, the Objectors' objection is based on what is, at best, one possible interpretation of the Initiative. It is well within the discretion of the Title Board to have rejected that interpretation in setting the title.

IV. "Preferential Treatment" Is Not an Impermissible Catch Phrase

The title set by the Title Board includes the phrase "preferential treatment." The Objectors contend, in their seventh issue for review, that this phrase is an impermissible slogan or catch phrase.[1] This phrase simply describes the activity to which the Initiative applies, and thus does not constitute a prohibited catch phrase.

The Objectors bear the burden of showing that "preferential treatment" is a catch phrase. See In re Proposed Initiative 1996-6, 917 P.2d at 1281. The "bare assertion" of the Objectors is insufficient to meet this burden. Id. Rather, the Objectors must show how, "in the context of the contemporary political debate," the phrase preferential treatment has degenerated into a catch phrase. Id; see In re Amend Tabor No. 32, 908 P.2d 125, 130 (Colo. 1995) (holding that petitioners failed to show the existence of a catch phrase when they "fail[ed] to offer any evidence . . . beyond their bare assertion that political disagreement currently exists over the effect of a change in tax policy"). Furthermore, because "[t]he deterioration of a group of terms into an impermissible catch phrase is an imprecise process," the Court must take special care to ensure that it does not create a catch

[1] The Objectors also contend that the title of the Initiative is misleading because it fails to include a reference to preferential treatment. Objectors' argument that preferential treatment is a prohibited catch phrase is obviously incompatible with this position.

phrase, but only recognizes existing catch phrases. In re Proposed Initiative 1997-1998 #105, 961 P.2d 1092, 1100 (Colo. 1998) (holding that "refund to taxpayers" is not a catch phrase).

To rise to the level of a prohibited catch phrase, the phrase in question must "generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of the catch phrase." In re Proposed Initiative 1999-2000 #258(A), 4 P.3d 1094, 1100 (Colo. 2002). To constitute a catch phrase, the phrase must be more than merely descriptive. In re Proposed Initiative 1999-2000 #258(A), 4 P.3d at 1100 ("We approach the potential existence of a catch phrase cautiously. Our task is to recognize terms that provoke political emotion and impede voter understanding, as opposed to those which are merely descriptive of the proposal") (internal citation omitted). In In re Proposed Initiative 1999-2000 #258(A) the court held that the phrase "as rapidly and effectively as possible" was an impermissible catch phrase when applied to teaching children English in an immersion environment. Id. The court held that the phrase rose to the level of a slogan because there was "great public debate" as to whether English immersion was in fact the most rapid and effective method possible to teach English, and this debate was masked by the use of the catch phrase. Id.

In this case, in contrast, the phase preferential treatment does no more than describe the conduct to which the Initiative applies. See In re Proposed Initiative 1999-2000 #256, 12 P.3d at 257 (holding that "concerning the management of growth" was a neutral and "merely descriptive" phrase); In re Amend Tabor No. 32, 908 P.2d at 130, (collecting cases) (holding that descriptive phrases such as "adjusted net proceeds," "adjusted gross proceeds," and "Worker's Choice of Care" are not catch phrases). The Title Board properly determined that "preferential treatment" is not a catch phrase, and its determination should be upheld.

CONCLUSION

The Title Board properly determined that the Initiative contained a single subject and set a clear and fair title for the Initiative. The Court should thus affirm the Title Board.

Dated: July 16, 2007

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CERTIFICATE OF SERVICE

I certify that on this 16th day of July, 2007, the foregoing **OPENING BRIEF** was served on all parties via overnight delivery service, postage pre-paid, addressed to the following:

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