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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
AUG 06 2007
OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

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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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REPLY BRIEF OF PROPONENTS

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INTRODUCTION

The Proponents have drafted a concise and straightforward Initiative designed to prohibit discrimination by the State of Colorado. The Title Board determined that this Initiative contained a single subject, and set a title for the Initiative. Opponents' appeal to this Court is nominally a challenge to the actions of the Title Board. However, their arguments constitute a thinly veiled challenge to the merits of the Initiative.

The Title Board has considerable discretion to determine whether an initiative contains a single subject and to set the title for an initiative. The Title Board acted well within its discretion in this case. Indeed, Opponents have gone so far as to concede that the Title Board's interpretation of the Initiative is a permissible one, yet they would have this Court reverse the Title Board based upon their own speculative interpretation. This Court's role is limited to a deferential review of the decisions of the Title Board. Neither the Title Board nor the Court have jurisdiction to review the merits of the Initiative except to the limited extent required by the unique nature of a Title Board action. The Court must decline the Opponents' invitation to go beyond the scope of its review and should affirm the decision of the Title Board.

ARGUMENT

I. The Initiative Contains A Single Subject

The Title Board determined that the Initiative's prohibition on discrimination and preferential treatment is a single subject. In reaching this conclusion, the Title Board satisfied itself that the terms preferential treatment and discrimination were sufficiently understandable and connected for it to determine that the Initiative contained only a single subject. To the extent that they were raised, the Title Board also rejected Opponents' arguments that: (1) the application of an anti-discrimination provision to allegedly remedial discrimination is a separate subject from the prohibition of non-remedial discrimination; and (2) that the application of the Initiative to separate areas of government implicated multiple subjects. In their Opening Brief, Opponents failed to show that the Title Board abused its discretion in rejecting their arguments.

A. The Title Board Adopted a Permissible Interpretation of the Initiative

Opponents have conceded that "[i]t is certainly possible to define 'preferential treatment' . . . in such a way as to limit its application to actions and programs that are indeed 'discriminatory' in nature." (*Opponents' Opening Brief* at 14) The Opponents assert, however, that there is no support for this interpretation in the Initiative. (Id. at 15) The Title Board clearly disagreed.

The Proponents have been clear before this Court and the Title Board, that, as they interpret the Initiative, "government sponsored preferential treatment ***is*** discrimination." (*Proponents' Opening Brief* at 7; *Opponents' Opening Brief*, Attachment 3 at 27:11-27:12) The Title Board was satisfied that the text of the Initiative was sufficiently simple and understandable to allow it to understand the Initiative and set a title. In so doing, the Title Board rejected the Opponents' arguments that the Proponents should be required to delineate in detail the anticipated effects of the measure. Mr. Hobbs, for example, stated that "I tend to agree that the term 'preferential treatment' is a general term. And that it's really not possible, reasonable to define every instance what it may mean right now, and how it may be applied . . . . It doesn't bother me at this point that the term 'preferential treatment' may be general. And it may not be perfectly knowable right now." (*Opponents' Opening Brief*, Attachment 3 at 24:17-24:21, 25:2-25:5) Even the Opponents understood the position of the Proponents. (Id. at 15) ("[Proponents are] suggesting that 'preferential treatment' . . . should be viewed per se as 'discrimination'"). The Title Board has the discretion to set a title so long as it believes it possesses sufficient information to understand the Initiative. See In re Proposed Initiative 1999-2000 #25, 974 P.2d 458, 465 (Colo. 1999). It did so here.

Although the Opponents complain that the term preferential treatment is poorly defined, that is not an issue that was before the Title Board and it is not one that should be considered by this Court. It is well-established that the Title Board "is under no duty to define vague terms" in order to be able to set a title. In re Proposed Initiative 1996-6, 917 P.2d 1277, 1282 (Colo. 1996). Nor is a proponent required to define the terms used in an initiative. See id. Thus, in In re Proposed Initiated Constitutional Amendment Concerning Unsafe Workplace Environment, 830 P.2d 1031, 1034 (Colo. 1992), the proponent testified that he intended the language of his proposed initiative to remain vague so that the courts could define its application. This court held that the Title Board, nevertheless, had properly set a title. Id.

In this case, "[t]he [Opponents] are in fact complaining that the ***Initiative itself*** is vague and misleading." In re Proposed Initiative 1997-1998 #10, 943 P.2d 897, 901 (Colo. 1997) (emphasis added). However, it is not the role of either the Title Board or the Court to interpret the scope of the Initiative beyond that minimum necessary to determine whether it contains a single subject and to set a title. "Any problems in the interpretation . . . are beyond the functions assigned to the Title Board . . . and outside the scope" of review by the Court. Id. The exact scope of the Initiative will be defined – to the extent that further definition is

needed – through legislative action and judicial review. The Initiative is clear and straightforward. The Title Board determined that it had the necessary understanding of the Initiative to set a title, and the Opponents have failed to show that the Title Board abused its discretion in making this determination.

Opponents—contrary to their admission noted above—assert that there is no language in the Initiative on the basis of which the Title Board could have adopted an interpretation of preferential treatment that is consistent with its determination that the Initiative contained a single subject of preventing discrimination. Notably, however, courts have not had difficulty in so construing the term preferential treatment when interpreting similar measures in other states. In Hi-Voltage Wire Works, Inc. v. City of San Jose, 12 P.3d 1068 (Cal. 2000) (cited by amicus cure ACLU), the California Supreme Court interpreted Article I § 31 of the California Constitution, which is very similar to the Initiative. The court held that: "Discriminate means to make distinctions in treatment; show partiality (in favor of) or prejudice (against); preferential means giving preference, which is a giving of priority or advantage to one person over others." Id. at 559-560 (internal citations and quotations omitted). The court concluded that discrimination and preferential treatment covered largely identical conduct, but differed only in that "[a]n overt act of discrimination against one person does not require the granting of preferential

treatment to another. Preferential treatment may, but does not necessarily, involve overt discrimination." Id. at 560 n. 13. Indeed, at the title setting stage, the California Court of Appeals had no trouble understanding nearly identical text and deemed it "straightforward" and "subject to common understanding." Lungren v. Superior Court, 48 Cal. App. 4th 435, 441 (Cal. App. 1996).

The Opponents have set out a parade of potential applications of the Initiative which they contend illustrate that discrimination and preferential treatment could be interpreted to have different meanings and thus, presumably, constitute separate subjects. A common-sense reading of Opponents' examples demonstrates that they involve either both discrimination and preferential treatment or neither discrimination nor preferential treatment. Pre-natal care, for example, does not discriminate against men, nor constitute preferential treatment for women. (See *Opponents' Opening Brief* at 14) Nor does it involve public education, public employment, or public contracting. The Title Board was well within its discretion to adopt an interpretation of preferential treatment consistent with that of courts in other jurisdictions which have considered the issue rather than the strained hypotheticals suggested by Opponents.

B. The Application of the Initiative to Allegedly Remedial Discrimination Does Not Violate the Single Subject Requirement

The Opponents contend that because the Initiative applies to all forms of discrimination, even those which supposedly remedy past discrimination, it contains multiple subjects. Opponents reach this conclusion by arguing that some voters might prefer an initiative which did not apply to allegedly remedial discrimination. Thus, they claim, the Initiative involves "logrolling" and, therefore, multiple subjects.[1]

Opponents' argument is a non-sequitor and the fact that Opponents would prefer a differently worded initiative is irrelevant. This Court reviews the Title Board's decision that an Initiative contains a single subject by assessing whether the Initiative contains subjects without any "necessary and proper connection." C.R.S. § 1-40-106.5(e)(I). The single subject requirement exists in part to ensure that a measure passes on its own merits and to prevent logrolling. Id. But the fact that some voters may find an initiative less than ideal is not evidence that it contains more than one subject. A vote for almost any measure will involve some form of compromise for most voters. The fact that some voters might prefer a different initiative is totally irrelevant to the question of whether the Title Board properly determined that the Initiative contains a single subject.

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[1] As an initial matter, this argument appears nowhere in Opponents' extensive list of issues for review. The Court should thus decline to consider it. Sager v. District Court, 698 P.2d 250, 254 n.7 (Colo. 1985).

C. The Application of the Initiative to Multiple Areas of Government Does Not Violate the Single Subject Requirement

The Opponents are apparently unable to identify a single Colorado case to support their proposition that the application of the Initiative to multiple areas of government violates Colorado's single subject requirement. Indeed, they all but concede that Colorado precedent is against them on this issue. Instead, they rest their arguments on a Florida Supreme Court case and an assertion that discrimination in education is so different in character from discrimination in employment and contracting that it constitutes a separate subject.

The advisory opinion of the Florida Supreme Court in In re Amendment to Bar Government From Treating People Differently Based on Race In Public Education, 778 So.2d 888 (Fla. 2000), is totally irrelevant to this case. The Florida court applies a different legal standard to the single subject inquiry than exists in Colorado. Opponents have suggested no reason for the Court to overrule its own precedent by adopting the Florida single subject analysis. See, e.g., In re Initiative on Parental Rights, 913 P.2d 1127 (Colo. 1996) (cited by Opponents).

Under In re Initiative on Parental Rights, "[i]n order to violate the single subject requirement the text of the measure must relate to more than one subject and have at least two distinct and separate purposes which are not dependant upon or connected with each other. The single subject requirement is not violated if the

matters encompassed are necessarily or properly connected to each other rather than disconnected or incongruous." Id. at 1130-1131 (internal quotations and citations omitted). Applying this standard, In re Initiative on Parental Rights held that an initiative applying to parents' right to control their children's upbringing, education, values, and discipline did not violate the single subject requirement. Id. at 1131-1132.

The purpose of a single subject inquiry by the Florida courts is to "insulate Florida's organic law from precipitous and cataclysmic change." In re Save Our Everglades Trust Fund, 636 So. 2d 1336, 1339 (Fla. 1994). In contrast, the purpose of the single subject inquiry in Colorado is to prevent surprise and fraud and to ensure that each measure is enacted on its own merits. C.R.S. § 1-40-106.5(e). The Florida courts utilize a "'oneness of purpose' standard in applying the single subject rule." In re Save Our Everglades Trust Fund, 636 So. 2d at 1339. Under this standard "[a]lthough a proposal may affect several branches of government and still pass muster, no single proposal can substantially alter or perform the functions of multiple branches." Id. at 1340 (emphasis added). The Florida standard thus involves a substantive limitation completely unlike Colorado's statute. Under Colorado law, 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 246, 254 (Colo. 2000).

Opponents allege that non-discrimination in education has more social importance than in other areas. This allegation might be debated by those who have missed out on job opportunities because of discrimination. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (holding that Title VII requires the removal of discriminatory barriers to employment). Regardless, it is irrelevant to the question of whether the Initiative contains a single subject or distinct and separate purposes. In re Initiative on Parental Rights, for example, applied to both education and several other areas, and the court conducted no analysis of their relative importance. 913 P.2d at 1131. The scope of the single subject requirement has been clearly defined by the Court and Opponents provide no reason to alter this well-established precedent.

Opponents also argue that, by virtue of the fact that it applies to more than one area of government, the Initiative will extend the doctrine of a bona fide qualification beyond the context of employment to education and contracting. Opponents' argument rests on a mischaracterization of the Initiative. The Initiative in no way purports to change the existing law regarding bona fide qualifications. It simply recognizes their existence, leaving it to the legislature and the courts to

continue to define their scope. The doctrine of bona fide qualifications is limited to employment by the legislature and the courts. If the Initiative passes, there will be no change either to the scope of the doctrine or the power of the courts and the legislature to modify it in the three circumscribed areas of government covered by the Initiative.

II. The Title Set By The Title Board Is Clear, Fair, and Accurate

The Title Board set a title that is clear, fair, and accurate and that does not contain a prohibited catch phrase. The Court should reject the Opponents' unsupported assertions that the title is deceptive.

A. The Title Clearly and Accurately Informs Colorado Voters

The Court's role in reviewing a title set by the Title Board is limited to determining whether the title fairly and accurately describes the initiative. It is the role of voters, not the Court, to assess the merits of the proposed initiative. In re Proposed Initiative 1999-2000 #235(a), 3 P.3d 1219, 1222 (Colo. 2000) ("we will not address the merits of a proposed initiative"). Indeed, one of the core purposes of the Court's review is to preserve the initiative process for the voters. See C.R.S. § 1-40-106.5(2) (expressing the intent of the General Assembly that the single subject requirement be liberally construed to both prevent abuse of the initiative process and preserve and protect the right of initiative). While nominally an attack

on the fairness and accuracy of the title, the Opponents' brief is in fact primarily directed at the merits of the Initiative.[2] This is the wrong inquiry and not a matter that is before the Court.

Opponents' characterization of the title as deceptive is entirely dependant upon the Court's acceptance of their argument that discrimination and preferential treatment are unrelated. However, this form of argument has been rejected, and Title Board has great discretion in setting a title. Thus, when multiple interpretations of an initiative are possible, the court will not accept the "hypothetical constructions" of a petitioner as a basis for finding that the title is misleading or confusing. In re Proposed Initiative 1996-6, 917 P.2d at 1291.

The Opponents also argue that the measure largely duplicates other anti-discrimination provisions in the United States and Colorado Constitutions and thus that the "primary subject and thrust" of the measure is a prohibition on preferential treatment, not discrimination. (*Opponents' Opening Brief* at 22-23) The present anti-discrimination language in the Colorado Constitution, as identified by

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[2] The brief of amicus curiae ACLU does not even purport to address this issue of the fairness of the title. The ACLU states that "[a]s the phrase [preferential treatment] has no clear meaning and is submitted without definition, the proposed initiative is ambiguous, misleading and inaccurate, and the effect of a "yes" vote on the proposed initiative is unclear." (*ACLU Amicus Brief* at 2) (emphasis added).

Opponents, is Article II § 25, which states, in its entirety that "[n]o person shall be deprived of life, liberty or property, without due process of law." This provision has been interpreted to constitute a bar against state discrimination in the absence of a sufficiently compelling reason. Lujan v. Colorado State Board of Education, 649 P.2d 1005, 1015-1016 (Colo. 1982). The proposed Initiative would supplement the current constitutional language with a more textually specific prohibition on discrimination. It would also strengthen protections against discrimination by adding an explicit prohibition to the Constitution rather than leaving it to the courts to define the extent to which the due process of law prohibits discrimination.

These same arguments apply to the application of the Fourteenth Amendment to the United States Constitution to Colorado. See Coalition to Defend Affirmative Action v. Granholm, 473 F.3d 237, 240 (6th Cir. 2006). Under the Fourteenth Amendment, "the United States Constitution . . . permit[s] states to use racial and gender preferences . . . . [but does] not prohibit a state from eliminating them." Id. (emphasis omitted). In addition, the mere fact that a right is guaranteed by the United States Constitution does not render its explicit inclusion in the Colorado Constitution superfluous. Indeed, because of the nature of the

federal system, many provisions of the Colorado Constitution (including Article II § 25) closely parallel provisions of the United States Constitution.

Finally, Opponents argue that the title is deceptive because allegedly "key" aspects of the Initiative are not included in the opening clause of the title set by the Title Board. Opponents offer no legal support for their proposition that the title, which is itself a summary, must itself contain a summary of all key provisions in its opening clause. Nor do they explain why Colorado voters might be deceived by the fact that the opening clause of the title contains some, but not all, information about the Initiative.

B. Preferential Treatment Does Not Constitute a "Catch Phrase"

The term preferential treatment does not constitute an impermissible catch phrase. Indeed, even the United States Supreme Court has made use of the similar term, racial preferences, in a descriptive context. Grutter v. Bollinger, 539 U.S. 306, 342-343 (2003) (O'Conner, J.). The Opponents have failed to meet their burden to show that the title contains an impermissible catch phrase by reference to the "contemporary political debate." In re Proposed Initiative 1996-6, 917 P.2d at 1281). In order to meet their burden, the Opponents are required to come forward with evidence other than their unsupported opinion or argument. Id. The Opponents' cite to a single piece of evidence, a nationwide Pew Research Center

poll. As an initial matter, this is a nationwide poll that says nothing about the attitudes of Colorado voters. In addition, the poll says nothing relevant about the phrase preferential treatment. According to the poll, Americans have a more favorable view of affirmative action than they do of preferential treatment. (*Ridder Amicus Brief*, Ex. 2, p. 39). This is not surprising, as affirmative action and preferential treatment are not analogous concepts. Affirmative action encompasses actions designed to eliminate existing discrimination, remedy past discrimination, and prevent future discrimination. Black's Law Dictionary 60 (7th ed.). Preferential treatment has a broader scope, and includes preferential treatment that does not purport to be remedial or preventive. What the poll does not say is that Americans have a more negative view of the term preferential treatment than they do of some more "neutral" phrase conveying the same concept (which the Opponents and amici have notably declined to suggest).

The amicus brief of the ACLU offers no support for Opponents' position on this issue. Rather than presenting evidence or argument regarding the use of the phrase "preferential treatment" in Colorado, the ACLU brief points to various potential interpretations of the phrase. This confuses the allegedly imprecise nature of the phrase with the question of whether it is a catch phrase. Similarly, the Ridder brief makes the obviously incorrect assumption that because the phrase

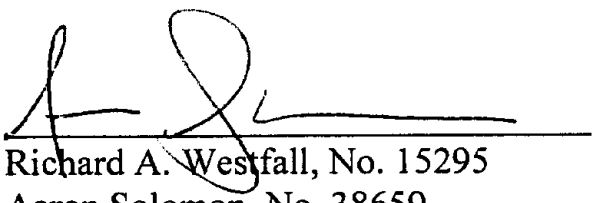
preferential treatment was used in an advertisement (in another state) it must be a catch phrase.

CONCLUSION

The Title Board is charged with ensuring that an initiative contains only a single subject and setting a clear, fair, and accurate title. The Title Board has considerable discretion in making these determinations. The Title Board properly determined that that the Initiative contained only a single subject, and set a clear, fair, and accurate title. The Court should thus affirm the Title Board.

Dated: August 6, 2007

HALE FRIESEN, LLP



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CERTIFICATE OF SERVICE

I certify that on this 6th day of August, 2007, the foregoing REPLY BRIEF OF RESPONDENTS was served on all parties via overnight delivery service, postage pre-paid, addressed to the following:

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