

SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2006) Appeal from Ballot
Title Board

IN THE MATTER OF THE TITLE, BALLOT
TITLE AND SUBMISSION CLAUSE FOR 2007-
2008 #36

ELIZABETH ANNISON, ELLEN BRILLIANT,
TRUDY B. BROWN, VICKI J. COWART,
CATHRYN L. HAZOURI, JACINTA
MONTOYA, AND TONI PANETTA
OBJECTORS

Petitioners,

v.

KRISTINE BURTON AND MARK MEUSER,
PROponents

AND

WILLIAM A. HOBBS, DANIEL CARTIN, AND
DANIEL DOMENICO,
TITLE BOARD,

Respondents.

JOHN W. SUTHERS, Attorney General
MAURICE G. KNAIZER, Deputy Attorney
General*

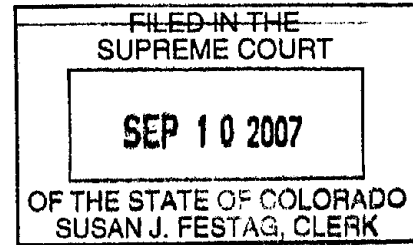
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Case No.: 07SA245

OPENING BRIEF OF TITLE BOARD

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William A. Hobbs, Daniel Cartin, and Daniel Domenico, as members of the Title Board (hereinafter "Board"), hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

The Board adopts the statement of issues as set forth in the Petition for Review.

STATEMENT OF THE CASE

On July 3, 2007, Kristine Burton and Mark Meuser, the proponents ("Proponents"), submitted Initiative 2007-2008 #36 (#36) to the Board. On July 18, 2007, the Board determined that the content of #36 constituted a single subject and proceeded to set a title. On July 25, 2007, Elizabeth Annison, Ellen Brilliant, Trudy B. Brown, Vicki J. Cowart, Cathryn L. Hazouri, Jacinta Montoya, and Toni Panetta, the objectors ("Objectors"), filed a motion for rehearing. They contended that the measure contained more than one subject and that the titles did not clearly set forth the true meaning of the proposal. On August 1, 2007, the Board denied the motion for rehearing. The Objectors filed a timely appeal with this Court. A certified copy of the entire administrative record has been filed.

STATEMENT OF THE FACTS

#36 purports to amend the Colorado Constitution to add section 31 to article

II. The measure states:

Person Defined. As used in sections 3, 6, and 25 of article II of the State Constitution, the terms “person” or “persons” shall include any human being from the moment of fertilization.

The Board set the following title:

An amendment to the Colorado constitution defining the term “person” to include any human being from the moment of fertilization as “person” is used in those provisions of the Colorado constitution relating to inalienable rights, equality of justice, and due process.

The Objectors claim that the measure violates the single subject requirement because (1) it adds the term person to three different sections of article II of the Colorado constitution; (2) it does not allow the voter to consider the merits of changing the definition of “person” in each of these sections; and (3) the proposed amendment hides the purpose of the amendment to prohibit abortions. The Objectors also contend that the measure is misleading because it does not disclose that the measure is intended to prohibit abortions.

SUMMARY OF THE ARGUMENT

The measure includes only one subject: defining the term person as it is used in sections 3, 6, and 25 of article II of the Colorado Constitution. Defining the term in three sections of article II does not create multiple subjects. These sections are related to each other. The statement of inalienable rights, the ability to enforce those rights in court, and the related right of due process are connected to the power of individuals to enforce rights accorded to persons.

The measure is not surreptitious. The measure and the title clearly seek to extend certain rights to human beings from the moment of fertilization. A reasonable voter could not be surprised that such a measure could have some impact on abortion. Yet what that impact would be is uncertain, and Objectors' argument would require the Court, and the Board, to engage in improper speculation about the potential legal ramifications of the measure.

For the same reason, the titles are not misleading. The Board correctly refused to mention any impact on abortion because any impact on abortion is conjectural.

ARGUMENT

I. The Measure Contains Only One Subject: Defining The Term “Person” in Colo. Const. art. II, §§ 3, 6, and 25.

A. Introduction

Objectors contend that the Board should not have set titles because #36 contains more than one subject, thereby violating Colo. Const. art. V, § 1(5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but 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. If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if (1) “it relates to more than one subject, and (2) has at least two distinct and separate purposes that are not dependent upon or connected with each other.” *In re Title, Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 277 (Colo. 2006) (#55); *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 215 (Colo. 2002) (#21). A proposed initiative that “tends to effect or to carry out one general objective or purpose presents only one

subject.” *In re Ballot Title 1999-2000 #25*, 974 P.2d 458, 463 (Colo. 1999). The single subject rule both prevents joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002) (#43). The single subject requirement must be liberally construed to avoid the imposition of undue restrictions on initiative proponents. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74*, 962 P. 2d 927, 929 (Colo. 1998).

B. Sections 3, 6, and 25 of article II are closely related.

The proposed definition applies to three different provisions within Colorado’s Bill of Rights. The fact that a measure may affect more than one provision in the constitution does not mean that the measure has multiple subjects. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #255*, 4 P.3d 485, 496 (Colo. 2000). It is the relationship among the provisions that is important. If the affected provisions are related, then a proposed measure will be deemed to have a single subject. As will be shown, sections 3, 6 and 25 are related to the protection of fundamental rights of persons.

The proposed definition of “person” is not entirely new to Colorado law. From 1923 through 1967, Colorado laws governing dependent and neglected children included the following definition: “The laws of this State concerning dependent or neglected children or persons who cause, encourage or contribute thereto, shall be construed to include all children under the age mention herein *from the time of their conception and during the months before birth.*” (Emphasis added.) 1923 Colo. Sess. Laws, ch. 77, § 1, p. 204. In analyzing this statute, this Court stated:

No violence is done to the orderly process of the rational mind by letting the word “child” include a human being immediately upon conception and during the period of pregnancy, as well as one actually born. It is no longer doubted that the months of prenatal existence are tremendously important ones from the standpoint of human welfare.

Metzger v. People, 98 Colo. 133, 137, 53 P.2d 1189, 1191 (1936).

Section 3 of article II states that a person possesses certain inalienable rights. Section 6 of article II gives each person access to courts to enforce those rights, and section 25 of article II ensures that each person is afforded the process necessary to protect those rights. Justice Frantz, in a concurring opinion in *Herbertson v. Russell*, 371 P.2d 422 (Colo. 1962), explained the relationship

among these sections in the course of discussing his views of the right of a parent to collect damages for the wrongful death of a child. A person's "right to enjoyment of life is a fundamental or natural right." *Id.* at 428. Justice Frantz then identified sections 3, 6, and 25 of article II as necessary to secure the enjoyment of life. "Beyond contention, [these sections] of the constitution proclaim the right of a person to his life and the duty of another person not to destroy that life through intentional or negligent act." *Id.*

Justice Kirschbaum also noted the relationship among these three provisions in a dissent in *State Farm Mutual Automobile Ins. Co. v. Broadnax*, 827 P.2d 531 (Colo. 1992). He noted that section 3 contains a statement about the inalienable rights afforded to all persons, *id.* at 542, and that the right of access to courts and the right of due process are guarantees of means by which inalienable and natural rights may be enforced. *Id.* at 543. ("Right of access must be considered in relationship to the significance of the right advanced by the party seeking access").

The inalienable rights granted under article II, § 3 are integrally related to the rights of access to courts in article II, § 6 and the right of due process in article II, § 25. If one is deemed a person with inalienable rights, then one must, as a corollary, have the right to go to court to defend those rights and have the right to

due process in the courts and elsewhere. Inalienable rights are diminished if they cannot be enforced.

C. The measure does not hide an unrelated purpose.

Objectors also claim that the measure is surreptitious because it will render abortions illegal in Colorado. The Court must reject this argument.

A measure is surreptitious only if it hides or buries purposes unrelated to an initiative's central theme. #55, 138 P.3d at 277. If a measure includes a result that will clearly occur but is not adequately stated in the measure and is not sufficiently related to the purpose of the measure, it is surreptitious. *In re Title, Ballot Title, Submission Clause and Summary for 1997-98 Nos. 84 and 85*, 961 P.2d 456, 461 (Colo. 1998) (*Nos. 84 and 85*). Conversely, a measure is not surreptitious if any potential effect on other constitutional measures is uncertain or unknown.

Moreover, the Court cannot address the merits of a proposed initiative, interpret it or construe its future legal effects. #21, 44 P.3d at 215-16; #43, 46 P.3d at 443. The Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. #55, 138 P.3d at 278. The Court will "determine unstated purposes and their relationship to the central theme of the initiative." *Id.*

If the unstated theme is consistent with the general purpose, the single subject requirement will be met. *Id.*

As an initial matter, any impact the measure may have on abortion is unknown and unknowable at this point. Indeed, the impact of any state law definition of "life" on the federal constitutional questions surrounding abortion is at best conjectural and uncertain. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 444 (1983) (discussing impact on constitutional right to abortion of state law theory of when life begins); *Eubanks v. Brown*, 604 F. Supp. 141, 144 (W.D. Ky. 1984) (same).

The mere fact that the proponents may wish to use this measure as vehicle to outlaw abortion does not mean that the measure, by itself, can achieve that result. The motivations or hopes of the proponents are immaterial. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 No 200A*, 992 P.2d 27, 31 (Colo. 2000) (motivation of proponents who supported measure imposing reporting requirements on abortion providers immaterial to single subject analysis.)

Because the effect of the measure on abortion cannot be measured at this time, the measure cannot be held to be surreptitious.

Moreover, even if it could be argued that a reasonable person would not understand that the measure is intended to affect abortion policies, that purpose is not unrelated to the central purpose of extending certain fundamental rights to human beings from the moment of fertilization. The Court therefore may not reject the measure on this basis. *See Nos. 84 and 85*, 961 P.2d at 461.

II. The titles are fair, clear and accurate.

Section § 1-40-106(3), C.R.S. (2006) establishes the standard for setting titles. It provides:

In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a “yes” or “no” vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered “yes” (to vote in favor of the proposed law or constitutional amendment) or “no” (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be amended or repealed.

Titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256*, 12 P.3d 246, 256 (Colo. 2000).

The Board is not required, however, to set out every detail of a measure. #21, 44 P.3d at 222. In setting titles, the Board may not ascertain the measure's efficacy, or its practical or legal effects. #256, 12 P.3d at 257; *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #246(e)*, 8 P.3d 1194, 1197 (Colo. 2000). The Court does not demand that the Board draft the best possible title. #256, at p. 219. The Court grants great deference to the Board in the exercise of its drafting authority. *Id.* The Court will reverse the Board's decision only if the titles are insufficient, unfair, or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994).


For the reasons stated in the discussion of the single subject, Objectors' argument that the title is not accurate or complete must fail. Most clearly, the Objectors are asking the Court to require the Board to engage in conjecture about the potential effect of the measure on a right under the federal constitution. Such analysis is not appropriate at the title-setting stage. *In re Limited Gaming in the*

City of Antonito, 873 P.2d 733, 740 (Colo. 1994) (“potential effect” on constitutional provisions not subject to review during title setting process.).

CONCLUSION

The Court should approve the action of the Title Board.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **OPENING BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same in the United States mail, Express Mail, postage prepaid, at Denver, Colorado, this 10TH day of September 2007 addressed as follows:

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A handwritten signature in cursive script, appearing to read "Daniel Dore", is written over a horizontal line.