SUPREME COURT, STATE OF COLORADO Court Address: 2 East 14th Avenue, Denver, Colorado 80203	FILED IN THE SUPREME COURT MAR 11 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 **Petitioners**: ANDREW PAREDES, CLARA NEVAREZ and MARY PHILLIPS, Proponents, v. **Respondents**: JESSICA PECK CORRY, Opponent, and **Title Board**: WILLIAM A. HOBBS, SHARON EUBANKS, and DANIEL DOMENICO	▲**COURT USE ONLY**▲
Attorney for Petitioners: Melissa Hart, #34345 2260 Clermont Street Denver, CO 80207 Phone No.: 303/893-8877 E-mail: geminimrh@yahoo.com	Case No. 08SA89

PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #61

Mary Phillips, Clara Nevarez and Andrew Paredes ("Petitioners"), being registered electors of the State of Colorado, through their undersigned counsel, respectfully petition this Court pursuant to § 1-40-107(2), C.R.S. (2007), to review the actions of the Ballot Title Setting Board with respect to the setting of the title, ballot title, and submission clause for proposed Initiative 2007-2008 #61.

I. ACTIONS OF THE BALLOT TITLE SETTING BOARD

The Title Board conducted its initial public meeting and set titles for proposed Initiative 2007-2008 #61 on February 20, 2008. Respondent filed a Motion for Rehearing pursuant to § 1-40-107(1), C.R.S. (2007), on February 27, 2008. The Motion for Rehearing was heard at the next meeting of the Title Board on March 5, 2008. At the rehearing, the Board granted Respondent's Motion, vacated the titles set and declined to set titles for proposed Initiative 2007-2008 #61. Petitioners hereby seek review of the final action of the Title Board with regard to proposed Initiative 2007-2008 #61 pursuant to § 1-40-107(2), C.R.S. (2007).

II. ISSUES PRESENTED

1. Does the proposed initiative meet the single subject requirement of Colo. Const. art. V, § 1(5.5) and § 1-40-106.5, C.R.S. (2007) because it concerns exclusively the subject of the State's nondiscrimination obligation?

2. Should the Title Board have retained the title originally set for this simple, three-sentence initiative that seeks to address nondiscrimination by the state?

III. SUPPORTING DOCUMENTATION

As required by § 1-40-107(2), C.R.S. (2007), a certified copy of the Petition, with the titles and submission clause of the proposed constitutional amendment, together with a certified copy of the Motion for Rehearing and the rulings thereon, are submitted herewith.

IV. RELIEF REQUESTED

Petitioners respectfully request this Court to reverse the actions of the Title Board with directions to reinstate the title and submission clause set at the original Title Setting Board hearing on February 20, 2008.

Respectfully submitted this 11th day of March, 2008.

By: 

Melissa Hart, #34345
2260 Clermont Street
Denver, CO 80207

ATTORNEY FOR PETITIONERS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of March, 2008, a true and correct copy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #61** was placed in the United States mail, postage prepaid, to the following:

Richard A. Westfall, Esq.
Aaron Solomon, Esq.
Hale Friesen, LLP
1430 Wynkoop Street, Suite 300
Denver, CO 80202

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 6th Floor
Denver, CO 80203

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, MIKE COFFMAN, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2007-2008 #61".

IN TESTIMONY WHEREOF I have unto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver this 7th day of March, 2008.

Mike Coffman

SECRETARY OF STATE

Final Text #61

Be It Enacted by the People of the State of Colorado:

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

Section 32. Equal Opportunity

(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. NOTHING IN THIS SECTION SHALL BE INTERPRETED AS LIMITING THE STATE'S AUTHORITY TO ACT CONSISTENTLY WITH STANDARDS SET UNDER THE UNITED STATES CONSTITUTION, AS INTERPRETED BY THE UNITED STATES SUPREME COURT, IN PUBLIC EMPLOYMENT, PUBLIC EDUCATION, OR PUBLIC CONTRACTING.

(2) AS USED IN THIS SECTION, "STATE" MEANS, BUT IS NOT LIMITED TO, THE STATE OF COLORADO, ANY AGENCY OR DEPARTMENT OF THE STATE, ANY PUBLIC INSTITUTION OF HIGHER EDUCATION, ANY POLITICAL SUBDIVISION, OR ANY GOVERNMENTAL INSTRUMENTALITY OF OR WITHIN THE STATE.

February 1, 2008

Mike Coffman
Secretary of State
1700 Broadway, Suite 270
Denver, Colorado 80290

Dear Secretary of State Coffman:

Enclosed with this letter are the documents required for filing the proposed Colorado Equal Opportunity Initiative (the original initiative as filed with Legislative Council, a red-lined version indicating changes made in response to the review, and a clean copy of the current initiative). The Initiative was filed with the Legislative Council on January 14, 2008. The Legislative Council review and comment hearing on the proposed initiative was held on January 28. The proponents have made technical changes to the proposed initiative in accordance with the recommendations of the Legislative Council. No amendments to the text have been made.

Notices and information concerning the initiative should be sent to Melissa Hart, 2260 Clermont Street, Denver, CO 80207. My phone number is 303-229-5323 and my email is geminimrh@yahoo.com. I can receive faxes at 303-893-8877. I am serving as counsel for the proponents of the initiative.

The proponents themselves include:

Mary Phillips
1837 Albion Street, Denver, CO 80220
Maryphillips1837@comcast.net
303-514-5427; 303-362-8131 (fax)

Clara Nevarez
2915 Baseline Rd, Unit #538, Boulder, CO 80303
Clara.nevarez@colorado.edu

Andrew Paredes
7225 Middleham Place, Castle Rock, CO 80108
ap@redwoodfinancial.net

Please let me know if I can answer any questions or provide additional information.

Sincerely,

Melissa Hart

BEFORE THE BALLOT TITLE SETTING BOARD
STATE OF COLORADO

PROPOSED INITIATIVE 2007-2008 #61

MOTION FOR REHEARING

Jessica Peck Corry, a registered elector, pursuant to C.R.S. § 1-40-107, and through her counsel, hereby moves the Title Setting Board for rehearing of Proposed Initiative 2007-2008 #61.

The proposed initiative is nothing more than a Trojan horse. It is designed to trick voters into believing that they are voting to limit the power of the state to engage in discrimination and preferential treatment when in fact they would be voting for a measure that allows the state to engage in all discrimination and preferential treatment allowed under the United States Constitution. To accomplish this deception, the proposed initiative contains two distinct initiatives wrapped up in one: a purported ban on discrimination and preferential treatment (the first sentence) and the intended preservation of such treatment (the second sentence). This deception violates Colorado's single subject prohibitions, and the title set by the Board, which fails to alert voters to the fact that the proposed initiative does nothing to limit the power of the state to engage in discrimination and preferential treatment, is misleading.

ARGUMENT

I. The Measure Contains a Deceptive Opening Sentence Disguising the True Effect of the Initiative

One of the critical roles of the Title Board is "**[t]o prevent surreptitious measures and apprise the people of the subject of each measure by title, that is, to prevent surprise and**

fraud being practiced upon voters." C.R.S. § 1-40-106.5(e)(II) (emphasis added) *In re Proposed Initiative 1997-1998 #74*, 962 P.2d 927, 928 (Colo. 1998) (holding that "[t]he single-subject requirement is intended to prevent voters from being confused or misled . . ."); *In re Proposed Initiative on Parental Choice in Educ.*, 917 P.2d 292, 294 (Colo. 1996) (holding that the "single-subject requirement is designed to protect the voters from fraud and surprise . . ."); *In re Proposed Initiative 1997-98 #84*, 961 P.2d 456, 458 (Colo. 1998) (holding that "the single subject requirement is intended to protect voters against surprise and fraud").[1]

The substance of the proposed measure consists of two sentences. The first sentence provides that "[t]he 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 second sentence provides that "[n]othing in this section shall be interpreted as limiting the State's authority to act consistently with the standards set under the United States Constitution, as interpreted by the United States Supreme Court, in public employment, public education, or public contracting."

The second sentence of the proposed initiative provides that Colorado may take any action in the area of public employment, public education, or public contracting that the United States Supreme Court has not ruled unconstitutional. The measure expressly permits legislation or other governmental action that supports programs that may have a discriminatory effect. *E.g., Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (allowing the "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that

[1] Colorado's single subject prohibition has special protections against fraudulent and surreptitious measures.

flow from a diverse student body"). This purpose is unquestionably disguised by the addition of a superfluous opening sentence that appears to be designed to 'track' Initiative 31.

At the Board's hearing, Proponents' Counsel was candid that the proposed initiative was one "concerning the prohibition of denial of equal opportunity by ensuring that modest equal opportunity programs remain possible in Colorado." (2-20-08 Hearing Audio Recording, part 3, at approximatly 2:50-3:07).[2] Rather than simply stating this purpose, however, the proposed initiative cloaks it as an exception to a seemingly broad prohibition on discrimination. The measure's first sentence is rendered virtually inoperative by the second sentence, which allows the state to act in any manner consistent with current Supreme Court interpretation. In fact, the only programs which would be prohibited by the proposed initiative are ones that have already been deemed unconstitutional.

The use of this "exception that swallows the rule" is inherently deceptive. The second sentence of the proposed initiative literally swallows the first, rendering it meaningless. The use of complex exceptions to a purported general rule is "the epitome of a surreptitious measure". *In re Proposed Initiative 2001-02 #43*, 46 P.3d 438, 447 (Colo. 2002) (holding that "[t]hose voters in favor of repealing TABOR may vote for this initiative believing that it will permit just this. Only later will they discover that an obscure line in the initiative for which they voted exempts TABOR from the provision apparently permitting its repeal"). "A voter of average intelligence would be surprised to find out that" a ballot initiative that purported to prohibit discrimination and preferential treatment, was craftily drafted to allow the state to engage in discrimination and

[2] Available at http://www.sos.state.co.us/pubs/info_center/archived_conference.htm.

preferential treatment to the full extent allowed under the United States Constitution. *In re Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 446 (Colo. 2002).[3]

The Board is not required to interpret the rulings of the United States Supreme Court to reach this conclusion. The proposed initiative is clear that it allows the state to engage in whatever discrimination and preferential treatment is permissible under the United States Constitution. Moreover, the proponents indicated at the Board's hearing that the purpose of the measure is to ensure that "equal opportunity programs" remain possible in Colorado. The Board can find that the United States Constitution has been interpreted to allow preferential treatment in certain circumstances without exceeding its authority to interpret the initiative. Moreover, if the Board does feel that it must resort to interpretations outside of its authority to understand the meaning of the second sentence of the initiative, it must reject the initiative. *In re Proposed Initiative for 1999-2000, #25*, 974 P.2d 458, 465 (Colo. 1999) ("If the Board cannot comprehend a proposed initiative sufficiently to state its single subject clearly in the title, it necessarily follows that the initiative cannot be forwarded to the voters").

Finally, to the extent that the first sentence of the proposed initiative is alleged to serve the purpose of signaling that the state disapproves of discrimination, it is duplicative of provisions already in the Colorado Constitution. "Although the Colorado Constitution does not contain an explicit equal protection clause, equal treatment under the laws is a right constitutionally guaranteed to Colorado citizens under the due process clause of article II, section

[3] Ms. Eubanks asked at the Title Setting Hearing whether the second sentence of the proposed initiative should be viewed simply as an exception to the general rule set out in the first sentence of the proposed initiative. Opponents respectfully submit that it is not appropriate to classify as an "exception" something that is, at a minimum, the principal purpose and effect of the measure.

25, of the Colorado Constitution." *Mayo v. National Farmers Union Property and Cas. Co.*, 833 P.2d 54, 56 n. 4 (Colo. 1992).

Initiative 61 is a surreptitious measure that would practice surprise and fraud on Colorado voters, and, thus, violates C.R.S. § 1-40-106.5(e)(II). The Board should grant rehearing and rule that 61 violates single subject on this basis.

II. The Measure Does Not Constitute a Single Subject Because It Purports to Both Limit and Expand the Power of the State to Engage in Certain Forms of Discrimination and Preferential Treatment

It is well-established that any proposed ballot initiative is limited to a single subject. C.R.S. § 1-40-106.5(e)(I). The proposed initiative, however, contains two subjects. On the one hand, it purports to eliminate the power of the state to engage in certain types of discrimination and preferential treatment. On the other, it purports to allow the state to engage in precisely the same activity to the full extent allowed under the United States Constitution. The joinder of these two distinct measures constitutes fraud on Colorado's voters and violates C.R.S. § 1-40-106.5(e)(I).

The single subject requirement is to be liberally construed to prevent abuse of the initiative process. C.R.S. § 1-40-106.5(2). "An initiative violates the single subject requirement when it (1) 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* 2005-2006 #55, 138 P.3d 273, 277 (Colo. 2006). Thus, "an initiative may neither hide purposes unrelated to its central theme nor group distinct purposes under a broad theme." *Id.* "This limitation . . . protects against fraud and surprise occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex bill." *Id* (internal quotations omitted). Thus

initiatives which "bury[] unrelated revenue and spending increases within tax cut language" or "contain[] mandatory reductions in state spending on state programs, which was a purpose both hidden and unrelated to the central theme of effecting tax cuts" violate the single subject rule. *Id*

In this case, the proposed initiative purports to involve both the preservation of "equal opportunity" programs and the elimination of discrimination and preferential treatment in public education, contracting, and employment. Thus, to the extent the proposed initiative is not one in which a single subject is wrapped in misleading and inoperative language, it is necessarily one that relates to more than one subject and has two independent—indeed contradictory—purposes. The Board should grant rehearing and determine that 61 violates C.R.S. § 1-40-106.5(e)(I).

III. The Title Is Misleading Because It Fails To Clearly Inform Voters That The Initiative Will Allow—Indeed Is Intended to Allow— the State to Engage in All Discrimination and Preferential Treatment Allowable Under the United States Constitution

In setting the title for a proposed initiative, the Board is required to "correctly and fairly express the true intent and meaning" of a proposed initiative. C.R.S. § 1-40-106(3)(b). Only by setting a fair title will the Board serve its purpose of "enabling informed voter choice." *In re Proposed Initiative for 1999-2000 #37*, 977 P.2d 845, 846 (Colo. 1999). In this case, any title set by the Board must clearly inform voters that the intended effect of the proposed initiative is to allow the state to engage in all discrimination and preferential treatment allowable under the United States Constitution in the areas of public employment, public contracting, and public education.

The title set by the Board fails to meet this standard. Because the proposed initiative will not prohibit any discrimination or preferential treatment, the title set by the Board should not refer to such a prohibition. Rather than tracking the deceptive language of the proposed

initiative, the title set by the Board should be clear that the purpose and true subject matter of the initiative is to preserve discrimination and preferential treatment programs in Colorado to the full extent allowed by the United States Constitution.

As presently drafted, the only reference in the title to the fact that the proposed initiative would place no new limits on the power of the state to engage in discrimination or preferential treatment is the clause which notes that the proposed initiative preserves "the state's authority to take actions regarding public employment, public education, and public contracting that are consistent with the United States constitution as interpreted by the United States [S]upreme [C]ourt." While the import of this clause might be apparent to a careful lawyer, lay voters should not be expected to understand and consider the interplay between the Federal and State constitutions or the equal protection jurisprudence of the United States Supreme Court in order to make an informed choice regarding the proposed initiative. *See Dye v. Baker*, 354 P.2d 498, 500 (Colo.1960) (holding that a submission clause employing "legalistic language" had the potential to mislead voters).

In addition, it is impossible to consider the proposed initiative without also considering initiative 2007-2008 #31, which contains very similar language barring discrimination and preferential treatment, but without the "exception" contained in the second sentence of proposed initiative #61. The Board must select a title that allows voters to clearly distinguish between the two very different initiatives. C.R.S. § 1-40-106(3)(b) ("ballot titles shall not conflict with those selected for any petition previously filed for the same election...."); *In re Proposed Initiated Constitutional Amendment Concerning Fair Treatment II* 877 P.2d 329, 332 (Colo. 1994) ("What is prohibited are conflicting ballot titles **which fail to distinguish** between overlapping

or conflicting proposals"; emphasis added). Initiative 31 is dramatically different in purpose from proposed initiative 61, yet both initiatives contain identical opening sentences. Thus, the title presently set by the Board is fatally flawed; it should omit any reference to the opening sentence of the proposed initiative, not only because it is of no effect, but because such a reference will cause voter confusion.

CONCLUSION

The proposed initiative is designed and intended to "ensur[e] that modest equal opportunity programs remain possible in Colorado." However, the measure appears to have been intentionally crafted to obscure this purpose behind misleading prohibitory language. The Board should either refuse to set a title for this proposed initiative or ensure that the title clearly discloses the purpose and effect of the proposed initiative.

Respectfully submitted February 27, 2008

HALE FRIESEN, LLP

Richard A. Westfall, No. 15295
Aaron Solomon, No. 38659

Ballot Title Setting Board

Proposed Initiative 2007-2008 #61[1]

Hearing February 20, 2008:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 2:43 p.m.

Hearing March 5, 2008:
Motion for Rehearing granted; title setting denied on the basis that the measure does not constitute a single subject.
Hearing adjourned 10:57 a.m.

[1] Unofficially captioned **"Federal Standards for Discrimination/Preferential Treatment by Colorado Governments"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.