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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT APR 21 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007) Appeal From Ballot Title Setting Board	▲ COURT USE ONLY ▲
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #61 ANDREW PAREDES, CLARA NEVAREZ AND MARY PHILLIPS, PROPONENTS, Petitioners, v. JESSICA PECK CORRY, OPPONENT AND WILLIAM A. HOBBS, SHARON EUBANKS AND DANIEL DOMENICO, Respondents.	Case No.: 08SA89
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ANSWER BRIEF OF TITLE BOARD

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The Title Board, by and through undersigned counsel, hereby submits its Answer Brief. The Board's statement of the case, statement of the facts statement of the issues and summary of the argument were set forth in its Opening Brief.

ARGUMENT

I. The terms of proposed Measure #61 are inherently contradictory. The Board could not determine the scope of the Measure. Therefore, it properly refused to set a title.

Proponents argue that #61 has but one subject: it affirms the state's obligation to act in a non-discrimination manner. According to Proponents, this obligation includes the option to take actions, in accordance with Supreme Court precedent, that remedy past discrimination. Proponents describe the measure as one that "prohibits discrimination and preferential treatment without eliminating entirely the State's remedial authority and its ability to enact modest equal opportunity programming." (Proponents' Opening Brief, p.3.) According to Proponents, the second sentence "defines the prohibitions against discrimination and preferential treatment through a specific enforcement regime." (Proponents' Opening Brief, p. 10).

Although the Board must consider the testimony Proponents regarding the intent and meaning of their proposal, *In re Title, Ballot Title, Submission Clause, and Summary Adopted April 6, 1994, By the Title Board Pertaining to a Proposed*

Initiative on Water Rights, 877 P.2d 321, 327 (Colo. 1994), Proponents' testimony is not necessarily dispositive. Ultimately, the Board is obligated to determine the meaning of the measure based upon the measure's express language. *Id.* at 328. To the extent that the express language contradicts the proponents' interpretation, the Board must base its decision upon the express language.

Measures containing language very similar to that in the first sentence of #61 have engendered great passion and controversy. *Operation King's Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007); *Coaltion for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 2008 WL 732162 (E.D. Mich.) (March 18, 2008); *Michigan Civil Rights Initiative v. Board of State Canvassers*, 716 N.W.2d 590 (Mich. 2006); *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000). Each of these cases involves language similar or identical to the language employed in the first sentence of #61. Colorado courts look to the interpretation of similar provisions in other state constitutions, particularly when the language has been adopted in Colorado. *People v. Rodriguez*, 112 P.3d 693, 699 (Colo. 2005). An analysis of the language in these other states shows that courts have uniformly interpreted language in the first sentence of #61 to exclude any type of discrimination or preferential treatment.

High-Voltage Wire Works discussed Proposition 209, which provided in part: "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." Cal. Const. art. I, § 31(a). The court in *High-Voltage Wire Works* analyzed this sentence. First, it detailed the history of equal protection and remedies designed to ameliorate the effects of discrimination. It noted that the law had evolved over the years from a prohibition against any type of racial or gender classification to allowing remedies based upon race or gender that would offset past discrimination. "As with decisions of the United States Supreme Court, we thus find a fundamental shift from a staunch antidiscrimination jurisprudence to approval, sometimes endorsement, of remedial race- and sex- conscious governmental decisionmaking." *Id.* at 1081. The language employed in Proposition 209 was intended to return to the principle that whatever the rationale, preferences or discrimination of any sort, even if designed to remedy past wrongs, is anathema to the democratic process. *Id.* at 1083. The literal language does not allow for a compelling state interest exception. *Id.* at 1087.

A federal district court in Michigan interpreted similar language in the Michigan constitution to preclude remedial action based upon race, sex, color,

ethnicity or national origin. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 2008 WL 732162. The provision stated, "The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or nation origin in the operation of public employment, public education or public contracting." The Court concluded that the measure's "ban against 'grant[ing] preferential treatment to [ ] any individual or group on the basis of race' can mean nothing less than barring affirmative action programs." *Id.* at *28.

In these cases, wording similar or identical to that in the first sentence of #61 has been interpreted to be an absolute prohibition on all forms of discrimination, including remedial actions taken to cure past acts of discrimination. The language in this context has been interpreted uniformly to prohibit the state from making any type of distinction among various groups for any purpose in the areas of public employment, public education or public contracting. This sentence removes the power of the state to enact remedial legislation, even if the state has a compelling interest.

Under the second sentence, the state may take remedial action to correct past harms as long as the actions are consistent with the federal constitution. It provides, "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." In essence, it permits the State to take any action authorized by law that is not unconstitutional.

The first sentence drastically alters the status quo, and the second sentence reinstates it. They are inherently inconsistent, and the true purpose of the measure is difficult, if not impossible, to discern. Because the concepts in the measure are inherently inconsistent, the Board properly concluded that it could not determine the exact scope of the measure, thereby precluding setting a title. [1]

II. Even if #61 is not confusing, it contains a hidden purpose that is not related to the stated subject.

Proponents assert that the only subject of #61 is Colorado's non-discrimination obligation. (Proponents' brief, p.1) Proponents' explanation, by itself, is not conclusive. The Court will independently analyze and characterize the proposal to determine whether it contains a single subject. *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006).

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[1] The concern is exacerbated by the vague and indeterminate nature of the second sentence. The scope of any preferential treatment or discrimination is dependent upon future, and therefore unknowable, interpretations by the United States Supreme Court. The Court conceivably could radically alter its jurisprudence.

The Court must decide whether the measure has unstated purposes and the relationship of such purposes to the central theme of the measure. If the unstated purpose is a logical extension of the primary purpose, it will be deemed a part of the single subject. Unstated purposes which are not necessarily related to the primary purpose are separate subjects. *Id.* at 278-79.

If #61 can be understood and interpreted, the Court must conclude that the measure includes a hidden purpose. Proponents argue that the purpose of the measure is to ensure non-discrimination. Although the first sentence outlaws all forms of preferential treatment and discrimination in public employment, public contracting and public education, the second sentence permits preferential treatment for the purpose of creating equal opportunity. This purpose is significantly different from the concept that all preferential treatment and discrimination must be prohibited.

Proponents emphasize that the second sentence does nothing more than implement and define the first sentence. However, definitions and implementation provisions can sometimes carry a hidden purpose. The initiative at issue in *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), provides an example. Washington State voters enacted a statute which prohibited school boards from requiring students to attend a school other than one which is geographically

close to the student's place of residence. The law set out a number of exceptions. It also proscribed seven methods of student assignment. *Id.* at 462. The law was challenged on the ground that it established an impermissible racial classification. Washington State argued that the measure could not create an impermissible racial classification because it never mentioned race. The Court easily rejected this argument. It found "it difficult to believe that appellants' analysis is seriously advanced, however, for despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes." *Id.* at 471. While the measure merely set standards for busing, its underlying purpose was to reallocate the power of the government by removing the authority to address a racial problem. *Id.* at 474.

In this case, the stated purpose of the measure hides a second, incongruous purpose. The intent is not only to outlaw preferences and discrimination but to preserve programs designed to enhance equal opportunity. The existence of the hidden subject is confirmed by a statement made by Proponents:

> We are saying—we constitutionally want to say in our state's constitution no preferential treatment, but yes to the limited programs that have been found constitutional by the United States Supreme Court and that do not constitute preferential treatment, they constitute equal opportunity programs, and we do not want them destroyed in this state.

(March 5, 2008 hearing, p. 31, ll. 13-20).

Proponents' primary retort is that the second sentence is nothing more than a modification to the definition of the definition. The flaw in the argument is that it has no basis in the language of the proposal. The measure does not include a definition of "preferential treatment." As noted above, the term "preferential treatment" has been interpreted by courts to include "equal opportunity" programs advocated by Proponents. The second sentence does not contain any language that denotes an intention to carve out an exception to the broad use of "preferential treatment." Instead, its intent is to codify the right of the state to enact certain programs despite the apparent ban imposed by the first sentence. These matters are two separate and distinct subjects.

III. The decision regarding Initiative 31 is not precedent for this Measure.

Proponents argue that #61 should be considered in relation to the titles set for Initiative #31. The Board set titles for Initiative #31, which purported to make discrimination and preferential treatment illegal. The Board's decision to set the titles was appealed. By a vote of 3-3, this Court affirmed the Board's decision by operation of law. *In re Title, Ballot Title and Submission Clause for 2007-2008 #31*, 07SA197. An affirmance by an equally divided court is a judgment by

operation of law and is not entitled to any precedential value. *People ex rel. Walker v. Stapleton*, 79 Colo. 629, 630, 247 P. 1062, 1063 (1926).

Finally, Proponents ask that the Court to reinstate the titles set by the Board. The Court cannot order reinstatement. The Objector's motion for rehearing asked the Board to reverse its decision because the measure was deceptive, the measure contained more than one subject, and the titles were not fair and accurate. Because the Board concluded that it could not set a title, it did not reach the question of whether the titles were fair and accurate. Therefore, if the Court reverses the Board's decision, it must remand the matter to the Board to consider Objector's argument that the titles are not fair or accurate.

CONCLUSION

For the reasons stated in the Board's Opening and Answer Briefs, the Court must affirm the decision of the Board.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF OF TITLE BOARD** upon all parties herein by depositing copies of same, overnight by DHL at Denver, Colorado, this 21st day of April 2008 addressed as follows:

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