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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 APR 2 1 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK ▲COURT USE ONLY▲
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2007-2008, #61 **Petitioners:** MARY PHILLIPS, CLARA NEVAREZ, ANDREW PAREDES, proponents, v. **Respondent:** JESSICA PECK CORRY, objector, and **Title Board:** WILLIAM A. HOBBS, DANIEL L. CARTON, and DANIEL DOMENCIO.	Case Number: 08SA89
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RESPONSE BRIEF OF RESPONDENT JESSICA PECK CORRY

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INTRODUCTION

The first sentence of Proposed Ballot Title Initiative #61 (the "Initiative" or "measure") purports to ban certain forms of preferential treatment or discrimination by the State. However, the second sentence of the Initiative provides that this purported ban does not apply to any discrimination or preferential treatment allowed under the United States Constitution as interpreted by the United States Supreme Court. Under the Initiative's express grant of power to the State, and under the Supremacy Clause, the Initiative will not ban **any** discrimination or preferential treatment not already unconstitutional under United States Supreme Court precedent. In other words, the true purpose of the measure is to preserve the State's ability to engage in race and gender conscious governmental action, not to prohibit it, as deceptively suggested by the first sentence of the measure. The Initiative is thus deceptive, and the Title Board properly declined to set a title for it.

ARGUMENT

I. The Initiative is Inherently Deceptive

a. Proponents Admit That Their True Purpose is To Preserve the State's Ability to Engage in Race Conscious Governmental Action

The Proponents go to great lengths in their *Opening Brief* to argue that the Initiative involves only the single subject of "the State's nondiscrimination

obligation." *See, e.g, Opening Brief*, p. 1. Yet, occasionally throughout the brief, Proponents admit the true purpose of the measure is to preserve the State's ability to continue to engage in race conscious action. See, e.g., *Opening Brief*, p. 6 ("second sentence . . . clarify[ies] that the prohibition on discrimination and preferential treatment will not limit the State's authority to act in a manner consistent with the United State Supreme Court's interpretation of the federal constitution."); id (recognizing that the purpose of the measure is to insure an interpretation of "preferential treatment" that preserves "the State's ability to remedy discrimination and ensure opportunity for all citizens"); id at 7-8 (measure "would ensure that these broad prohibitions were not read so broadly as to eliminate the State's ability to address past and existing discrimination"). These occasional admissions demonstrate that the true purpose of the measure is to attempt to preserve the State's ability to continue to engage in race conscious action, not prohibit discrimination, as the measure deceptively suggests.

b. The Supremacy Clause of the United States Constitution Renders the Initiative Meaningless

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). The Supremacy Clause of the United States

Constitution provides that the "Constitution . . . shall be the supreme law of the land . . . anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. Const. Article VI, § 2. Thus, any discrimination or preferential treatment forbidden by the United States Constitution is forbidden in the State of Colorado, regardless of the text of the Colorado Constitution. The "exception" to the Initiative in its second sentence allows **all** discrimination and preferential treatment not barred under the United States Constitution as interpreted by the United States Supreme Court. Thus, it prohibits **no** discrimination not already barred by the United States Constitution. The first sentence of the Initiative is, put simply, rendered a nullity by the second – the unquestionable purpose of the measure. This is the epitome of an exception that swallows the rule. Proponent's suggestion that "what is prohibited is significantly more that what is preserved" (*Opening Brief,* p. 7), simply ignores the existence of the Supremacy Clause.

The purpose of the Initiative is to ensconce in the Colorado Constitution preservation of the status quo under the guise of a purported "prohibition." Indeed, to the extent to which the status quo is altered at all, it would be, as noted in the Title Board's *Opening Brief*, to grant power to the State to engage in preferential treatment in some situations.

c. The Initiative Contains an "Exception That Swallows the Rule"

The Proponents suggest that the Initiative "preserve[es] a very limited range of equal opportunity programs" and "[w]hat is prohibited is significantly more than what is preserved." (Id) The Proponents also suggest that the Initiative "would clearly prohibit the State from adopting quotas or using race or gender preference point systems." (Id) These arguments simply ignore the existence of the Supremacy Clause. In fact, the Initiative prohibits nothing that is not already prohibited by the United States Constitution.

The Proponents also suggest that the Initiative "would ensure that the State had some limited flexibility" to engage in "targeted programs designed to enforce the equal protection guarantee." (*Opening Brief*, p. 11) In fact, the Initiative would do nothing whatsoever to limit the authority of the State. Indeed, if anything, it expands it. Were the Initiative to be enacted, the State would still have the full and complete range of authority potentially available to it.

II. The Title Board Properly Considered the Precedent of the Colorado Supreme Court

Proponents suggest that because "the single subject analysis is highly specific to each initiative at issue" the Title Board "committed fundamental error in supposing that this Court's conclusion about the shortcomings of an earlier, entirely unrelated initiative compelled the board to reject" the Initiative. (*Opening*

Brief, p. 16) In fact, the Title Board is required to consider the precedent of the Colorado Supreme Court, and properly did so in this case.

a. The Title Board is Required to Consider Supreme Court Precedent

The Title Board is required to apply the precedent of the Colorado Supreme Court. C.R.S. § 1-40-106.5(3) states that in evaluating ballot measures, the Title Board "should apply judicial decisions construing the constitutional single-subject requirement for bills . . . ". See In re Proposed Initiative 1999-2000 #25, 974 P.2d 458, 466 (Colo. 1999) (holding that Colorado Supreme Court decisions on related initiatives are "controlling precedent which governs . . . the Title Board").

b. The Title Board Properly Applied Supreme Court Precedent

The Court's decision in In re Proposed Initiative 2005-2006 #55, 138 P.3d 273 (Colo. 2006) was properly applied by the Title Board and supports the conclusion of the Title Board that the Initiative is deceptive. At the Rehearing Ms. Eubanks stated: "I do think that 55 is very helpful in understanding that even a short measure can be complex and may be worded in a way that does not allow voters from knowing what they're voting on." (Hearing Tr. 82:21-82:25) In re Proposed Initiative 2005-2006 #55 involves a short measure whose "complexity and omnibus proportions are hidden from the voter." Id. at 282. It was thus

properly relied on by the Title Board for the proposition that a short measure can nevertheless be worded in such a manner that it leads to voter confusion.

This case is structurally quite similar to the situation in In re Proposed Initiative 2001-2002 #43, 46 P.3d 438 (Colo. 2002). There, the measure, which modified in many material respects requirements for the initiative process, exempted TABOR from its reach. This led the Court to observe:

> Not only is this the epitome of a surreptitious measure, it is also intended to secure the support of various factions which may have different or even conflicting interests. Those 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.

Id. at 447. Similarly here, voters would be surprised to find out that a vote to prohibit state discrimination in fact ensconced into the Colorado Constitution the power for the State to engage in precisely such discrimination.

III. Proposed Initiative #61 is Structurally Distinct from Initiative #31

Proponent complains that "[a]lthough Initiative #61 and the earlier-approved Initiative #31 are extremely similar, they were not treated equally by the Title Board." (*Opening Brief*, p. 20) As an initial matter, allegations that the Proponents of Initiative #61 were somehow discriminated against by the Title Board do not fall within the issues accepted for review by this Court, and should

not be considered. Sager v. District Court, 698 P.2d 250, 254 n.7 (Colo. 1985). Moreover, Proponents' arguments seems to rest on the assumption that because the Initiative allegedly had more definitions or fewer exceptions that Initiative #31, it must be less confusing. This ignores the central concern of the Title Board: While simple on its face, the Initiative (unlike #31) hides its true effect behind misleading language.

IV. The Court Should Decline to Order the Title Board to Set a Particular Title in the First Instance

The Proponents request that the Court "reinstate the title and submission clause set at the original Title Setting Board hearing . . .". (*Opening Brief*, p. 21) Proponents cite no authority to support their right to such relief, and such an order would deprive Respondents of their statutory right to a rehearing on the contents of the title under C.R.S. § 1-40-107.

C.R.S. § 1-40-107(1) provides that:

> Any person . . . who is not satisfied with the titles and submission clause provided by the title board and who claims that they are unfair or that they do not fairly express the true meaning and intent of the proposed state law or constitutional amendment may file a motion for a rehearing with the secretary of state within seven days after the decision is made or the titles and submission clause are set.

This provision is mandatory. Thus "[n]o petition for any initiative measure shall be circulated nor any signature thereto have any force or effect which has been

signed before the titles and submission clause have been fixed and determined as provided in section 1-40-106 and this section." C.R.S. § 1-40-107(4). Objector has had no opportunity for a rehearing on the language of the title and submission clause set and then vacated by the Title Board. The Court should enter no order which purports to deprive her of this right.

CONCLUSION

While the Initiative purports to limit the ability of the State to engage in preferential treatment and discrimination it will, in fact, because of the clever drafting of the measure and the operation of the Supremacy Clause, do no such thing. Rather than addressing this issue, the Proponents have simply ignored the operation of the Supremacy Clause and continue to insist that the Initiative will in fact limit the authority of the State. The Initiative is improperly deceptive, and the Court should affirm the decision of the Title Board to refuse to set a title for the Initiative.

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CERTIFICATE OF SERVICE

I certify that on this 21st day of April, 2008, the foregoing **RESPONSE BRIEF OF RESPONDENT JESSICA PECK CORRY** was served on all parties via overnight delivery service, postage pre-paid, addressed to the following:

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