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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT MAY 28 2008 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (2007) Appeal the Ballot Title Board	▲ **COURT USE ONLY** ▲
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008 #82) ("Discrimination/Preferential Treatment by Colorado Governments") JESSICA PECK CORRY, Opponent, Petitioner, v. MARY PHILLIPS, CLARA NEVAREZ AND ANDREW PAREDES, Proponents, and WILLIAM A. HOBBS, DANIEL L. CARTIN AND DANIEL DOMENICO, Title Board , Respondents.	Case No.: 08SA163
JOHN W. SUTHERS, Attorney General MAURICE G. KNAIZER, Deputy Attorney General* 1525 Sherman Street, 7th Floor Denver, CO 80203 (303) 866-5380 Registration Number: 05264 *Counsel of Record	

OPENING BRIEF OF TITLE BOARD

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STATUTES

William A. Hobbs, Daniel L. 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 the issues set forth in the Petition for Review filed by Petitioner Jessica Peck Corry ("Petitioner")

STATEMENT OF THE CASE

On March 31, 2008, Andrew Paredes Clara Nevarez and Mary Phillips, the Proponents ("Proponents") submitted initiative 2007-2008 # 82 (#82) to the Board. On April 16, 2008, the Board determined that #82 contained and single subject and proceeded to set titles. On April 13, 2008, Petitioner filed a motion for rehearing. She contended that the measure contained multiple subjects and was surreptitious. Petitioner also alleged that the titles did not fairly represent the measure. The Board denied the motion on May 7, 2008. Petitioner then filed this appeal.

STATEMENT OF THE FACTS

#82 proposes to amend the Colorado Constitution to add section 32 to article II.

II: 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. "Preferential treatment" means adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin.
>
> (2) Nothing in this section shall be interpreted as prohibiting action taken to establish or maintain eligibility for any federal program.
>
> (3) Nothing in this section shall be interpreted as invalidating or prohibiting any court-ordered remedy or consent decree in a civil rights case.
>
> (4) 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.

SUMMARY OF THE ARGUMENT

#82 contains a single subject: Prohibition against discrimination by the State. All provisions within #82 relate directly to the single subject.

The titles are fair, clear and accurate. The Board cannot compare and contrast the content of the measure with other related measures.

ARGUMENT

I. #82 contains a single subject.

#82 declares, "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." It defines "preferential treatment" to mean "adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin." The measure excepts from its prohibition "actions taken to establish or maintain eligibility for any federal program" or any interpretations "invalidating or prohibiting any court-ordered remedy or consent decree in a civil rights case." The measure also defines the term "State".

Measures offered in other states containing language similar to that in #82 have generated great controversy. The term "preferential treatment" has been particularly controversial, in part, because the term has not been defined. *Operation King's Dream v. Connerly*, 501 F.3d 584 (6th Cir. 2007); *Coalition 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). Several courts analyzed the meaning of terms such as "discrimination" and "preferential treatment" without the benefit of definitions within the measures. *Hi-Voltage*, 12 P.3d at 1087; *Coalition to Defend Affirmative Action,* at *28.

This Court has addressed two similar measures. In *In re Title, Ballot Title and Submission Clause for 2007-2008 #31*, 07SA197, the objectors challenged titles set by the Board concerning a prohibition on discrimination and preferential treatment by the state. The challenge alleged that "discrimination" and "preferential treatment" are two different subjects. The Court was equally divided on whether the measure contained multiple subjects, and the Court affirmed the Board's action by operation of law.

On May 16, 2008, this Court issued a decision in a second proposal concerning a prohibition on discrimination and preferential treatment. *In the Matter of the Title, Ballot Title and Submission Clause for 2007-2008 # 61*, 2008WL2081574 (May 16, 2008) (*#61*). #61 stated, in pertinent 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. 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.

The Board concluded that the prohibitions in the first sentence and the exception in the second sentence were inherently contradictory and constituted two separate subjects. The Board refused to set titles. The Court disagreed with the Board's interpretation. It concluded that the second sentence did not constitute a separate subject because "it permits, but does not require action permitted by the United States Constitution." *#61, at* *3.

The same analysis applies to #82. The measure establishes a prohibition against discrimination and preferential treatment. It then defines "preferential treatment" to mean "adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin". It also establishes exemptions which state that the measure "shall not be interpreted as prohibiting action taken to establish or maintain eligibility for any federal program" or "as invalidating or prohibiting any court-ordered remedy or consent decree in a civil rights case."

Like *#61*, #82 does not require any action by the State or mandate a particular result. It merely permits the State to implement certain programs which do not fall within the definition of "preferential treatment" or which may be

required under federal law. It also recognizes that the measure cannot undermine court orders or consent decrees in civil rights cases.[1]

Petitioner argues that the measure's definition of "preferential treatment" so significantly differs from the commonly-accepted definition that it must be deemed surreptitious. This Court has rejected a single subject challenge made on the ground that the measure changed accepted definitions. *Industrial Commission v. Continental Inv. Co.*, 78 Colo. 399, 242 P. 49 (1925). The Workmen's Compensation Law provided that an employer who conducted a business by leasing or contracting out any part or all of work related to the business was an employer and was liable to pay compensation for death or injury resulting from the work to lessees or contractors. The employer argued that the definitions of "employer" and "employee" were not germane to the title because the definitions were not consistent with the common definitions of these words. The Court disagreed, holding that the general assembly had the power to "declare the sense in which words are used both in the title and in the rest of the act." *Id.* 78 Colo. at 403, 242 P. at 50. Thus, a proposed measure does not violate the single subject

[1] The exemptions permitting preferential treatment in order to qualify for federal programs and to comply with court orders or consent decrees were part of #31.

limitation because a definition within the proposal differs from a commonly-accepted definition.

The definition of "preferential treatment" avoids the potential for a surreptitious measure. The absence of a definition can complicate the ability of the Board and the Court to comprehend a measure and can result in the concealment of separate subjects within a complex proposal. *In re Title, Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.2d 273, 282 (Colo. 2006). The definition of "preferential treatment" clarifies and narrows the measure and avoids the confusion and controversy that arose in other states.

For these reasons, the Court must affirm the Board's conclusion that the measure contains a single subject.

II. The titles for #82 and #31 do not conflict.

Petitioner states that the titles conflict with the titles set for #31. For the following reasons, the Court must reject their arguments.

A conflict between ballot titles "exists where the titles fail to accurately reflect the distinctions between the measures and 'voters comparing titles would [not] be able to distinguish between two proposed measures'". *#61* at *7 (quoting *In re Proposed Initiated Constitutional Amendment Concerning "Fair Treatment II"*, 872 P.2d 329, 333 (Colo. 1994)). The titles must have internal clarity. *See,*

*#61**7 (Rice, J., dissenting) (titles must have internal clarity). When drafting titles, the Board cannot bury key provisions in a dense title. *In re Proposed Initiated Constitutional Amendment Concerning Limited Gaming in the City of Antonito*, 873 P.2d 733, 742 (Colo. 1994).

Petitioner contends that the Court must reverse the Board's titles because the statements of the single subject are the same as the statements in #31's titles. The statements of the single subject may be the same if the general subject of the two measures is the same. The titles will not be rejected if the subsequent clauses of the titles reflect the differences in the titles.

The analysis in *#61* governs this case. The title for #31 read in pertinent part:

> An amendment to the Colorado constitution concerning a prohibition against discrimination by the state, and, in connection therewith, prohibiting the state from discriminating against or granting 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; allowing exceptions to the prohibition when bona fide qualifications based on sex are reasonably necessary or when action is necessary to establish or maintain eligibility for federal funds; preserving the validity of court orders or consent decrees in effect at the time the measure becomes effective.

The primary distinction between #31 and #82 is the definition of "preferential treatment." The Board acknowledged the importance of the definition by placing it immediately after the statement of the single subject. A side-by-side comparison of the titles for the two measures immediately conveys to the reader the difference between the two measures. #31 does not have definitions. #82 has a definition, and that definition is repeated in the titles immediately after the statement of the single subject. The placement of the definition immediately after the single subject statement "affirmatively differentiates[s] its purpose from that of Initiative 31." *#61*8* (Rice, J., dissenting) (titles of measures with same statement of single subject must "affirmatively differentiate" purposes.) Thus, signers and voters are immediately informed about the major difference between the two measures.

Petitioner also contends that the titles must "make it clear to voters that "Proposed Initiative #82 is intended to apply only to a small subset of preferential treatment, while Proposed Initiative applies to all preferential treatment." (Motion for Rehearing, p.6.) This argument must fail. Petitioner asks the Board and the Court to assess the effect of the measure. Neither the Board nor the Court can assess the impact of the definition of "preferential treatment". *In re Title, Ballot*

Title and Submission Clause and Summary for 1999-00, 12 P.3d 246, 257 (Colo. 2000).

Finally, Petitioner contends that the titles set for #82 must contrast its content with that of #31. Specifically, Petitioner argues that the titles for #82 must draw attention to the differences concerning the definition of "preferential treatment", and the exceptions for Federal program eligibility and for consent decrees. This argument is without merit. The Board must create titles that "unambiguously state the principle of the provision." Section 1-40-106(3), C.R.S. (2007) The Board must craft language which allows the public to compare and contrast the titles. The titles themselves cannot include comparative language. To do what Petitioner suggests will force the Board to interpret measures and lead the Board inexorably into interpreting the effects of measures.

The titles accurately reflect the definition of "preferential treatment" and the exceptions for federal programs and consent decrees. The titles incorporate much of the operative language of the proposal. The titles for #82 allow the public to compare and contrast the measure with #31. #82's titles state the definition of "preferential treatment" immediately after the statement of the single subject. #82's titles state that the measure "preserve[es] the state's authority to take action

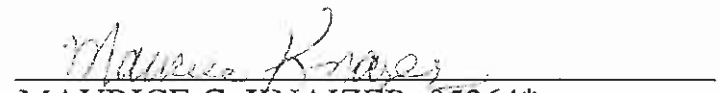
to establish or maintain eligibility for a federal program." This clause reflects the content of the measure, which states that the amendment, if passed, shall not "be interpreted as prohibiting actions taken to establish or maintain eligibility for any federal program." The titles also state that the measure "protect[s] the validity of a court-ordered remedy or consent decree in a civil rights action", which is an accurate summary of the remedy exception set forth in the measure.

The titles set for #82 reflect the differences between the #31 and #82. The public can compare and contrast the competing measures by reading the respective titles.

CONCLUSION

For the above-stated reasons, the Court must affirm the action of the Board.

JOHN W. SUTHERS
Attorney General



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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 overnight Express Mail, postage prepaid, at Denver, Colorado, this 28th day of May 2008 addressed as follows:

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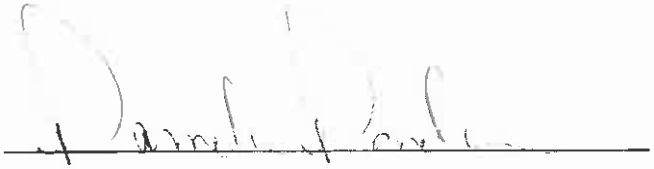

Final #82

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. "PREFERENTIAL TREATMENT" MEANS ADOPTING QUOTAS OR AWARDING POINTS SOLELY ON THE BASIS OF RACE, SEX, COLOR, ETHNICITY, OR NATIONAL ORIGIN.

(2) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS PROHIBITING ACTION TAKEN TO ESTABLISH OR MAINTAIN ELIGIBILITY FOR ANY FEDERAL PROGRAM.

(3) NOTHING IN THIS SECTION SHALL BE INTERPRETED AS INVALIDATING OR PROHIBITING ANY COURT-ORDERED REMEDY OR CONSENT DECREE IN A CIVIL RIGHTS CASE.

(4) 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.

Ballot Title Setting Board

Proposed Initiative 2007-2008 #82[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning a prohibition against discrimination by the state, and, in connection therewith, prohibiting the state from discriminating against or granting certain forms of preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, education, and contracting; defining preferential treatment to mean adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin; preserving the state's authority to take action to establish or maintain eligibility for a federal program; protecting the validity of a court-ordered remedy or consent decree in a civil rights action; and defining "state" to include, without limitation, 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.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning a prohibition against discrimination by the state, and, in connection therewith, prohibiting the state from discriminating against or granting certain forms of preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, education, and contracting; defining preferential treatment to mean adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin; preserving the state's authority to take action to establish or maintain eligibility for a federal program; protecting the validity of a court-ordered remedy or consent decree in a civil rights action; and defining "state" to include, without limitation, 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?

Hearing April 16, 2008:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 3:07 p.m.

Hearing May 7, 2008:
Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.
Hearing adjourned 9:32 a.m.

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