

Colorado Supreme Court)
101 West Colfax Avenue, Suite 800)
Denver CO 80202)

FILED IN THE
SUPREME COURT

Original Proceeding Pursuant to section 1-40-107 (2),)
C.R.S. (2010) Appeal from the Ballot Title Board)

AUG - 8 2011

In the Matter of the Title, Ballot Title, and Submission)
Clause for Proposed Initiatives 2011-2012 #29-#36,)

OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

Petitioner:)

Douglas Bruce, Objector)

v.)

Respondents:)

Mason Tvert and Brian Vicente, Proponents)

Supreme Court Case No.

and)

2011SA194

Title Board:)

Williams Hobbs, Dan Domenico, and Jason Gelender)

Word count: 2238

OPENING BRIEF and ANSWER TO MOTION TO DISMISS

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TABLE OF AUTHORITIES

Colorado Constitution, Article X, section 20 (“TABOR”).....	passim
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STANDARD OF REVIEW

The statutory standard of review for all issues here is set forth in C.R.S. 1-40-106 and 107. A measure shall contain a single subject. Ballot titles (ballot titles are titles with an added submission clause to form a question) shall be brief, fair, not in conflict with other petition titles, avoid public confusion, and clearly state the true and unambiguous meaning of the proposal as a question in words that inform the public, all petition signers, and all voters of the effect of a “yes” or “no” vote. Deference is given to title board actions unless its decisions are clearly erroneous, as they are here.

The board must also comply with all constitutional requirements, including the state constitutional ballot title requirements in Article X, section 20 (3)(c), the Taxpayer's Bill of Rights (“TABOR”) Amendment. No deference or discretion can be tolerated.

STATEMENT OF THE ISSUES

1. Do registered voters have the right to file a timely motion for rehearing ballot titles that were changed upon rehearing? Or are those changes not subject to any right of review by them despite the clear language of C.R.S. 1-40-107 (1) allowing it?
2. Do registered voters have the right to raise issues of constitutionality of a title-setting process and outcome? Is it reasonable to assume a title board will obey the constitution?
3. Can constitutional violations be excused because of procedural hurdles, or can they be raised when discovered? Is jurisdiction still an issue which can be raised at any time?
4. Do titles set in this case violate the TABOR requirements for capitalization and for opening words for tax increases? Obviously. That is not in dispute.
5. Are objectors forced to guess between a supreme court petition and a motion for rehearing before the title board, where the board said the former choice deprived the board of jurisdiction to conduct a rehearing on the merits?

STATEMENT OF FACTS

Respondents filed eight similar drafts of a nine-page proposal to basically legalize adult use of small amounts of marijuana. A title hearing was held on June 15, 2011. A timely motion for rehearing was filed, and the titles reheard on July 6, 2011. Title wording spurred that motion; the title was changed to a material degree. Objector first read in the next day's paper that the measure contained a mandatory tax increase to be imposed by the legislature, not by voters. It was not disclosed in the manner expressly required by TABOR (3)(c), with capitalization and opening words to warn the public, petition signers, and voters that it was a tax increase and what the annual tax hike would be in dollars. The board did not properly correct the title upon its first rehearing.

Objector, a registered elector, filed a motion for rehearing six days after the title was revised. He also filed a petition for review with this court within statutory time. ("Belt and suspenders.") The board said at the July 20 rehearing it lacked jurisdiction to alter the title as this case was also before this court. Now respondents want a court dismissal as well. In addition, objector was required to print and mail 1600 sheets of paper for his petition (10 copies of eight 20-page certificates), when one disc from the secretary of state could have been emailed to this court and sent to each justice. Objector Donahue had the same burden. Don't burden good citizens who seek to enforce the law with such outdated requirements and arcane snares. Case consolidation here will allow one simple review of the issues raised in both cases on the merits. The court should tell the title board emphatically: ALWAYS obey the constitution.

STATEMENT OF THE CASE

The title board seeks to test the TABOR mandate for the opening words in a state tax increase. The reference to this multi-million dollar tax hike is buried about six lines down from the title opening, where the constitution expressly requires it to appear. If government can adopt procedural barriers to complying with the constitution, the voter-approved supreme law of Colorado, all constitutional provisions can be overridden by such statutes of limitations and other devices. Politicians can pass tax a increase without voter approval by simply requiring any challenge to it must be filed within one day. The supremacy of the constitution will be replaced by “gotcha” tricks by lawyers, and TABOR and other constitutional language will be repealed and nullified. Citizens do not have the eternal burden of monitoring each governmental action on an hourly basis. We have the right to expect lawyers and judges who take an oath to uphold the constitution to do so, and to make corrections when knowing violations are brought to their attention.

Initiative #25 is a tax increase with the proper TABOR opening phrase. It was written by the title board April 20, 2011 and just filed petition signatures. It lacked the required capitalization, but Deputy Secretary William Hobbs told objector that would be changed if it made the ballot. Hobbs does not grasp that the law requires a “ballot title” appear on the petitions. The state and respondents say no jurisdiction exists to revise a final ballot title after the deadline, but the state plans to do just that, so a “ballot title” on a petition form can vary from the “ballot title” in an election. Such word games are reprehensible.

SUMMARY OF THE ARGUMENT

The duty to obey the constitution trumps any short-term procedural deadlines set by statute or rule or tradition. The issue of jurisdiction can always be raised. The title board lacked jurisdiction to violate willfully (eight times per day on two occasions) its oath to the state constitution and that constitution itself. The statute allows a rehearing on a rehearing that changed the wording and restarted the seven-day motion deadline.

ARGUMENT

Objector read of the July 6, 2011 rehearing the next day. He immediately emailed the secretary of state and deputy secretary of state with his objections. First, the title board failed to set this tax increase ballot title in all capital letters, as required by Article X, section 20 (3)(c), the Taxpayer's Bill of Rights ("TABOR"). That TABOR requirement was affirmed in 1993 in the tourism tax increase case in Denver District Court. Judge John McMullen ruled that it was literally required, and the state did not appeal that ruling; instead, it complied with it then and in later cases until this April.

The title board here also willfully refused to alert voters in the required manner that all eight measures are tax increases. TABOR (3)(c) requires ballot titles for tax increases begin, "SHALL STATE TAXES BE INCREASED (\$X) ANNUALLY....?" The title board knew of this requirement and applied it April 20, 2011 to another draft by other

petitioners for a tax increase. See initiative ballot title for #25. The board arbitrarily and capriciously violated here the same constitutional requirement that it applied there. This explicit, verbatim requirement has been widely honored and enforced since 1993. By its erratic enforcement, the title board repudiated the equal protection of the law mandate.

These constitutional violations cannot be shielded by adopting a statutory one-week time limit to request title rehearings. TABOR (1) allows enforcement suits for multiple years after violations. Nor can the state have a different "ballot title" for an election than for a "ballot title" statutorily and administratively required to be printed on the petition forms, which must be approved by the secretary of state before petition form circulation. Nor can the secretary repeat the violation by approving a petition form that contains an overtly unconstitutional ballot title. The TABOR ballot title is mandatory. No procedure exists for a post-petition validation title setting.

These drafts are for the 2012 ballot. Proponents have six months for their petition drives. This petition for review does not reduce the time they have to get signatures. Even if it did, the duty to enforce the literal constitutional requirement is paramount. Voters have the right to enforce the constitution at all times and to have ballot titles that are lawful and that provide full and immediate disclosure as required by the constitution. Separate and contradictory ballot titles at various stages would confuse and mislead voters. Election chaos would result. Post-signature filing changes in a ballot title would

admit the original ballot title was illegal, and impugn the legality of petition signatures from signers presented with an illegal ballot title on their petition.

The title board said objector's petition to this court removed the board's jurisdiction for a rehearing. If this court says this petition for review was premature because objector had also filed for a rehearing, then these constitutional violations have no adequate remedy. Such circular excuses remind us of "Catch 22." They cannot be the law.

A spokesman for the secretary of state told the media there would be a separate election on the excise tax contained in these measures. That is not the wording of the initiatives. Such an official opinion is improper and dishonest. Ballot titles say in part, *"....requiring the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana..."* The first nine words do not refer the tax increase to the voters. They amend TABOR's key point of VOTER APPROVAL of all new taxes and tax rate increases and delegate to legislators increasing taxes in an unstated amount. These eight initiatives are later constitutional amendments and would normally prevail in a conflict. TABOR is very controversial. The ballot titles do not say TABOR's main feature would be repealed under a alleged single subject of "concerning marijuana." By violating the ballot title mandate, the title board is concealing the intent of the measure, which is to eviscerate the heart of TABOR. Voters will be confused as to whether to believe the state's chief election officer or the text of the petition. Are they voting to authorize the

legislature to raise taxes, as the text says, or only to vote again on an unknown referral?
A main purpose of title setting is to tell signers and voters what the measure does. These eight initiatives ALL FAIL THAT TEST.

Petitions circulating now with a ballot title to be changed after this petition for review succeeds would not maintain the status quo and would harm the public interest. Signatures already collected would be invalidated, and citizens would not know if they had signed or could sign under two different ballot titles. Public confusion would exist. Government will look utterly incompetent. Voter confidence in elections will shrink. That is why the ballot title must be corrected before any signatures are collected, as stated in C.R.S. 1-40-107 (4).

A careful and literal reading of 1-40-107 (1) C.R.S. allows objector's timely motion for rehearing that was heard on July 20, 2011. Note this excerpt:

...any registered elector 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...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.

That statute does not say you cannot move for a rehearing on a rehearing, or that only the first hearing can have a rehearing. Compare the clear statutory ban on amending an amended petition in a signature cure period. This title board CHANGED

the titles on July 6, 2011 and objector timely filed a motion for rehearing of that changed title on July 12, 2011. That filing was "within seven days after the decision was made (and the revised titles set, creating a NEW TITLE). Clearly, it is "unfair" to set a ballot title violating the state constitution. Clearly, the titles do not express their true meaning and intent when they bury in a nine-page text and near the end of the ballot title the radical and controversial plan to allow politicians to raise taxes without voter approval of a properly-titled tax increase.

Section 1-40-107 (2) says court review may be sought by any registered elector who filed a motion for rehearing or who attended a rehearing. Objector did file a motion for rehearing. The chairman of the title board told objector in writing objector could not appear by telephone, so objector appeared by a representative, a registered elector from the Denver area. Objector lives far away and the meeting was set for early morning. That should constitute attendance by objector since the title board refused to allow his appearance by telephone. Such rigidity by the title board improperly favors Denver-area residents. It should not be used against objector, who could not attend in the flesh.

CONCLUSION

Objector requests that this court issue a mandate to the title board to comply on the remand of this case, and in all eight draft initiatives, with both TABOR requirements

described in Article X, section 20 (3)(c), discussed above. C.R.S. 1-40-107 (4) prohibits the circulation of any petition until the title is finally set, even if no change is made in this proceeding. The court opinion should also remind respondents and the secretary of state that any signature collected before final government action on these titles is void.

Submitted,



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Certificate of Service

I certify that I mailed this OPENING BRIEF and ANSWER TO MOTION TO DISMISS, first-class and postage pre-paid, on August 8, 2011, addressed to:

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