SUPREME COURT STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, CO 80202	FILED IN THE SUPREME COURT AUG 16 2011 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), 1 C.R.S. (2010) Appeal from Ballot Title Board	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR 2011-2012, #29, #30, #31, #32, #33, #34, #35, AND #36 DOUGLAS BRUCE, Petitioner, v. MASON TVERT AND BRIAN VINCENTE, PROPONENTS AND WILLIAM HOBBS, DAN DOMENICO AND JASON GELENDER, Title Board Respondents.	▲ **COURT USE ONLY** ▲ Case No. 2011SA194
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OPENING BRIEF OF TITLE BOARD

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all applicable requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, undersigned counsel certifies that the brief complies with C.A.R. 28(g). The brief does not exceed 30 pages.

Maurice Knaizer

Maurice G. Knaizer

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William Hobbs, Dan Domenico and Jason Gelender, in their capacities as members of the Title Board (hereinafter "Board"), hereby submit their Opening Brief.

STATEMENT OF THE ISSUES

Does the filing of an appeal with this Court deprive the Board of jurisdiction to hear Objector's motion for rehearing?

Does the Board lack jurisdiction to consider Objector's motion for rehearing filed to reconsider modification of the titles at a hearing on a motion for rehearing filed by another registered elector when the Objector did not file a motion for rehearing or appear at the hearing on the original motion for rehearing after the Board set the initial titles?

Does the Court lack jurisdiction because Objector failed to file an appeal within five days after the Board denied his motion for rehearing?

Does the Court lack jurisdiction to determine whether the titles set by the Board are consistent with Colo. Const. art. X, § 20(3)?

Assuming the Court has jurisdiction to determine whether the titles are consistent with Colo. Const. art. X, § 20(3), do the titles violate that constitutional provision?

STATEMENT OF THE CASE

On June 3, 2011 Mason Tvert and Bruce Vincente ("proponents") filed Proposed Initiatives ##29-36 with the Board. The Board held a hearing to set the titles on June 15, 2011. The Board concluded that the initiatives each contained a single subject and set the titles.

On June 22, 2011, Corey Donahue, filed a motion for rehearing. He alleged that the titles did not express the true meaning and intent of the proposed initiatives. On July 6, 2011, the Board granted the motion for rehearing in part and set the titles. Donahue appealed the Board's decision to this Court on July 12, 2011. (11SA198)

On July 7, 2011 Objector submitted an e-mail to Secretary of State Scott Gessler and Deputy Secretary of State William Hobbs. He stated that the titles set for the measures violated Colo. Const. art. X, § 20(3). He asked them to reconvene the Board and to revise the titles.

On July 11, 2011, Objector in this case filed a Petition for Review with this Court. On July 12, 2011, Objector filed a revised motion for rehearing with the Board. On July 20, 2011, the Board held a hearing on Objector's motion for rehearing. It concluded that it did not have jurisdiction to determine Objector's motion for rehearing.

STATEMENT OF THE FACTS

Each of the initiatives purports to amend the Colo. Const. art XVIII by adding section 16. Although the proposed measures differ in certain respects, they have certain similar provisions regarding the authority of the General Assembly to enact taxes. Paragraph 5(d) in measures 29, 31, 33, and 35 states, "The General Assembly *shall* enact an excise tax to be levied upon marijuana...at a rate not to exceed fifteen percent prior to January 1, 2017 and at a rate to be determined by the General Assembly thereafter." (Emphasis added.) Paragraph 5(d) in measures 30, 32, 34 and 36 states, "The General Assembly *may* enact an excise tax to be levied upon marijuana...at a rate not to exceed

fifteen percent prior to January 1, 2017 and at a rate to be determined by the General Assembly thereafter." (Emphasis added.)

SUMMARY OF THE ARGUMENT

The Board correctly concluded that it did not have jurisdiction to hear Objector's motion for rehearing. The Board lost jurisdiction when Objector filed this appeal in this Court. The Board did not have jurisdiction because Objector did not file a timely motion for rehearing after the Board initially set the titles. Under prior court decisions, an objector must file a motion for rehearing within seven days after the titles were set initially.

Even if the Board had jurisdiction, the Court does not have jurisdiction. The Objector has not filed an appeal within five days after the Board denied his motion for rehearing. In addition, the Court does not have jurisdiction to determine whether the measures comply with Colo. Const. art. X, § 20(3).

If the Court does have jurisdiction, it must affirm the decision of the Board. The measures themselves do not set a tax; rather, they

authorize the General Assembly to set a tax. Therefore, the titles were not required to utilize the language in Colo. Const. art. X, § 20(3).

ARGUMENT

I. Neither the Board Nor This Court Has Jurisdiction to Hear Objector's Motion for Rehearing.

A. Standard of Review.

Where the jurisdictional issue is one of law and the facts are not in dispute, the Court reviews the jurisdictional ruling de novo. *Tidwell v. City and County of Denver,* 83 P.3d 85, 81 (Colo. 2003).

B. The Board Lost Jurisdiction When The Appeals Were Filed in This Court.

Objector filed his motion for rehearing on July 6, 2011. He filed this appeal on July 11, 2011. He filed an amended motion for rehearing on July 12, 2011. Corey Donahue filed an appeal in this Court on July 12, 2011.

"[T]he filing of a notice of appeal is generally an event of jurisdictional significance." *Colorado State Board of Medical Examiners v. Lopez-Samayoa,* 887 P.2d 8, 14 (Colo. 1995). Jurisdiction is removed

from the lower judicial body and conferred upon the appellate body upon the filing of an appeal. *Id.* The rule prevents simultaneous action by two bodies and "ensures the efficient administration of appeals." *Id.* The lower body "is without authority to change, alter or vacate an order while review proceedings are pending." *Id.*

The Court has applied the holding in *Lopez-Samayoa* to appeals from Title Board decisions. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #255*, 4 P.3d 485, 494 (Colo. 2000). Granting Objector's motion for rehearing would have required the Board to amend the titles after the titles were submitted to this Court by Mr. Donahue and by Objector. *Id.* Thus, the Board properly concluded that it did not have jurisdiction to hear Objector's motion for rehearing. As a result, this Court cannot consider Objector's substantive challenges to the titles. *Id.*

C. The Board Lacked Jurisdiction Because Objector Failed To File a Timely Motion for Rehearing after the Board Set the Initial Titles.

Section § 1-40-107(1), C.R.S. (2010) provides, in pertinent part:

> ...any registered elector who is not satisfied with a decision of the title board with respect to whether the petition contains more than a single subject pursuant to section 1-40-106.5, or 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 rehearing within seven days after the decision is made or the titles and submission are set.

Section § 1-40-107(2), C.R.S. (2010) provides:

> If... any registered elector who filed a motion for rehearing pursuant to subsection (1) of this section, or any other registered elector who appeared before the title board in support of or in opposition to a motion for rehearing is not satisfied with the ruling of the title board upon the motion, then the secretary of state shall furnish such person, upon request, a certified copy of the petition with the titles and submission clause of the proposed law or constitutional amendment, together with a certified copy of the motion for rehearing and of the ruling thereon. If filed with the clerk of the supreme court within five days thereafter, the matter shall be disposed of promptly....

The Court must give effect to the legislative purpose underlying the Initiative Code. *In re Title, Ballot Title and Submission Clause and Submission Clause, and Summary for 1999-2000 No. 219*, 999 P.2d 819,

820 (Colo. 2000). The Court will not apply rules of statutory construction where the language is clear and unambiguous on its face. *Id.* at 820.

Here, the language of the statute is unambiguous. A registered elector cannot file an appeal in this court unless the elector meets the following criteria: the elector (1) filed a motion for rehearing after the title board set the original titles, or (2) appeared before the Board in support or in opposition to a motion for rehearing has standing to contest the actions of the Board.

If the language of the Initiative Code is ambiguous, the Court will construe its provisions "in light of the General Assembly's objective, employing the presumption that the legislature intended a consistent and sensible effect." *Id.* at 820-21. The Initiative Code seeks to balance the rights of citizens to present petitions to Colorado electors with the rights of voters to be presented with clear initiatives that are not misleading. *Id.* at 821. In order to meet these dual goals, "stringent time constraints are placed on proponents and opponents of initiatives, as well as the Title Board." *Id.*

To permit an objector to wait to file his first motion for rehearing until after the Board has conducted its initial hearing and a hearing on a motion for rehearing filed by another objector would effectively extend the time for rehearing and stall circulation of petition in the early stages of the process. Objector's interpretation "would frustrate the general purpose of the initiative process to protect the 'right in the people of Colorado to bring initiatives before the Colorado electorate.'" *Id.* (quoting *Montero v. Meyer*, 13 F.3d 1444, 1449 (10th Cir. 1994)

By his own admission, Objector did not either file a motion for rehearing to reconsider the setting of the initial titles or appear at the hearing held on July 6th to consider opposition to the content of the initial titles. Therefore, the Board did not have jurisdiction to determine the merits of his motion for rehearing.

D. This Court lacks jurisdiction because Objector failed to appeal timely the Board's denial of his motion for rehearing.

A registered elector who has timely filed a motion for rehearing or who has appeared at a hearing on such a motion may file an appeal

with this Court. "If filed with the clerk of the supreme court within five days thereafter, the matter shall be docketed as a cause there pending..." Section § 1-40-107(2). An objector's failure to file an appeal within five days deprives the Court of jurisdiction. *In re Title, Ballot Title and Submission Clause and Summary for 1997-98"62*, 961 P.2d 1077, 1079 (Colo. 1998). See also, *Cacioppo v. Eagle County School District RE 50J,* 92 P.3d 453, 462 (Colo. 2004) (challenge to titles for school board measure time-barred when citizen failed to bring suit within five days after titles set).

The Objector's appeal of the July 6th Board action does not obviate the need to appeal the Board's action of July 20. Each review raises separate issues which must be appealed in a manner consistent with the Initiative Code. An appellant cannot use an earlier appeal as a placeholder for issues in another independent action. See, *Colorado State Board of Medical Examiners v. Lopez-Samayoa*, 887 P.2d at 14.

In this case, Objector has not appealed the Board's action of July 20, 2011. Instead, he challenges the action of July 6, 2011. His failure to challenge the July 20th decision deprives this Court of jurisdiction.

E. The Court Does Not Have Jurisdiction to Determine Whether The Titles Violated Colo. Const. art. X, § 20(3).

The Objector argues that the Court must reject the titles because they do not comply with the requirements of Colo. Const. art. X, § 20(3). The Court must reject this argument.

This Court has concluded that it does not have jurisdiction to determine whether titles comply with Colo. Const., art. X, § 20(3) until after the measure is adopted by the electorate. *In re Title, Ballot Title and Submission Clause, and Summary Adopted May 21, 1997 by the Title Board Pertaining to Proposed Initiative #1997-98 #10,* 943 P.2d 897, 899 (Colo. 1997) (*#10).* A determination of whether a proposal violates Colo. Const. art. X, § 20(3) would require the Court to interpret the language of the measure or predict its application if adopted by the voter. In particular, the Court would be required to analyze whether the measures are "ballot title[s] for tax or bonded debt increases." *Bickel v. Boulder*, 885 P.2d 215, 234 (Colo. 1994). Thus, the Court would decide the legal effect of a measure, a review which is not appropriate at this

stage of the initiative process. Any such analysis must await a vote of the electorate. *#10*, 943 P.2d at 899.

This result is particularly apt under the facts of this case. The language of each of the measures would require this Court to interpret the substance of the measures. Each measure delegates to the General Assembly the power to authorize a tax. However, the language of each measure is ambiguous. It could be interpreted to mean that the imposition of tax is not a primary purpose; therefore, the measure is not subject to article X, § 20(3). Or, the language can be interpreted to mean that the General Assembly is exempt from the requirements of article X, § 20(3), even if imposition of tax is a primary purpose. Alternatively, the language can mean that the General Assembly must employ the procedures outlined in article X, § 20(3) before a tax can be imposed.

F. The time limit to file an appeal of actions of the Board does not violate Colo. Const. art. X, § 20(3).

Objector asserts that the five-day time limit within which to appeal a decision of the Board violates Colo. Const. art. X, § 20(3). The Court has rejected this argument.

In *Cacioppo,* an elector challenged time limits similar to those in § 1-40-107. The elector failed to appeal the setting of titles by a school district within the five-day limit established in § 1-11-203.5, C.R.S. (2010). The elector argued that the time limit within which to appeal violated article X, § 20. The Court disagreed. Article X, § 20 includes provisions that relate to the order of preference on the ballot and syntax and diction. "Because these two requirements address only the form or content of a ballot title governed by article X, section 20 of the Colorado Constitution-and not what that constitutional provision will substantively permit voters to approve-they appear to be within the purview of section 1-11-203.5." *Cacioppo*, 92 P.3d at 464. In addition, article X, section 20 does not provide a specific mechanism by which a person can make a form or content objection to the ballot titles based on the aforementioned provisions. *Id.* Section 1-11-203.5 is the exclusive procedure for local ballot issues, and it does not create an exception for claims based on article X, section 20. *Id.*

Cacioppo disposes of Objector's constitutional claim.

II. The Clear Title Requirement

If the Court determines that it has jurisdiction, then it must affirm the Board's decision. The titles meet the clear title requirement.

A. Standard of Review

Section § 1-40-106(3), C.R.S. (2008) establishes the standard for setting titles. It provides:

> In setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general effect of a "yes" or "no" vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly state the true intent and meaning thereof, together with the ballot title and submission clause, shall be completed within two weeks after the first meeting of the title board...Ballot titles shall be brief, shall not conflict with those selected for any petition previously filed for the same election, and shall be in the form of a question which may be answered "yes" (to vote in favor of the proposed law or constitutional amendment) or "no" (to vote against the proposed law or constitutional amendment) and which shall unambiguously state the principle of the provision sought to be added, amended or repealed.

The titles must be fair, clear, accurate and complete. *In re Title, Ballot Title and Submission Clause and Summary for 1999-00 #256*, 12 P.3d 246, 256 (Colo. 2000) (*#256*). However, the Board is not required to set out every detail. *In re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 222 (Colo. 2002) (*#21*). In setting titles, the Board may not ascertain the measure's efficacy, or its practical or legal effects. *In re Title, Ballot Title and Submission Clause for 2007-2008 #62*, 184 P.3d 52, 60 (Colo. 2008). "The interplay of a ballot initiative with various provisions of existing law is an issue for post-election, no the basis for a ballot title challenge." *Id.* The titles are adequate if they properly repeat the operative language of the measure and express its true intent and meaning. *In the Matter of the Title, Ballot Title and Summary for Proposed Constitutional Amendment Concerning Suits Against Nongovernmental Employers Who Knowingly and Recklessly Maintain an Unsafe Workplace*, 898 P. 2d 1071, 1074 (Colo. 1995).

The Court does not demand that the Board draft the best possible title. *#256*, 12 P.3d at p. 219. The Court grants great deference to the

Board in the exercise of its drafting authority. *Id.* The Court will reverse the Board's decision only if the titles are insufficient, unfair or misleading. *In re Proposed Initiative Concerning "Automobile Insurance Coverage"*, 877 P.2d 853, 857 (Colo. 1994). All legitimate presumptions will be resolved in favor of the Board. *Armstrong v. Davidson*, 10 P.3d 1278, 1282 (Colo. 2000).

B. The Titles Are Fair, Clear and Accurate.

Even if the Court has jurisdiction to decide the issue at this stage of the initiative process, the Court must reject the argument. The Court faced a similar question in *Bickel v. City of Boulder*, 885 P.2d 215 (Colo. 1994). Citizens challenged a City of Boulder measure which would have granted a franchise to distribute gas and electricity within the city. The measure also provided that in the event that the franchise fee was uncollectable, then city taxes would be increased by up to eight million dollars by deeming the franchise fee to be an occupation or sales and use tax. Plaintiffs argued that the measure violated Colo. Const. art. X, § 20(3) because it did not begin with the words "SHALL CITY OF

BOULDER TAXES BE INCREASED BY UP TO EIGHT MILLION DOLLARS..."

The Court held that the language did not violate article X, § 20(3). The primary purpose of the measure was to grant a franchise. Because the primary purpose was the grant of a franchise and not the imposition of a tax or bonded increase, article X, § 20(3)(c) did not apply.

In this case, the primary purpose of the initiatives is to change the status of marijuana laws. The imposition of taxes at most is a secondary purpose. Therefore, article X, § 20(3)(c) does not apply.

Moreover, the measures themselves do not raise a tax. They only command or authorize the General Assembly to raise an excise tax of up to fifteen percent of specified sales of marijuana. However, the exact amount of the tax remains within the discretion of the General Assembly. The question of the applicability of article X, § 20 does not arise until the General Assembly establishes the tax.

The titles are fair, clear and accurate.

CONCLUSION

For the above-stated reasons, the Board respectfully requests that the Court approve the titles set by the Board.

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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 by overnight Express Mail and FedEx, at Denver, Colorado, this 16th day of August, 2011 addressed as follows:

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