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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	FILED IN THE SUPREME COURT JUN 19 2006 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No.	
IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2005-2006 #55, MANOLO GONZALES-ESTAY, Petitioner, v. RICHARD D. LAMM, WALDO BENAVIDEZ AND FRED ELBEL, PROPONENTS, AND WILLIAM HOBBS, ALLISON EID AND DAN CARTIN, TITLE BOARD Respondents.	▲ COURT USE ONLY ▲ Case No.: 06SA20
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TITLE BOARD'S PETITION FOR REHEARING

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Pursuant to C.A.R. 40, the Title Board respectfully petitions this Court for rehearing, and as grounds therefore states as follows:

REASONS FOR GRANTING PETITION

Rehearing should be granted in this matter for three reasons. First, the Court relied on arguments and evidence improperly presented for the first time in the Petitioner's Reply Brief. Second, the decision conflicts with, and therefore overrules, well-established principles regarding the single subject doctrine, leaving the Board with inconsistent guidance. Third, the Court erroneously applied a single subject analysis to perceived errors in the title.

ARGUMENT

I. The Court relied on arguments and evidence improperly presented for the first time in Petitioner's Reply Brief

This Court has long adhered to the axiomatic rule that arguments and evidence presented for the first time on appeal or in a Reply Brief will not be considered. *Accord People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990). Contrary to this fundamental rule, however, the Court accepted new evidence and expressly adopted at least two new arguments introduced for the first time in the

Petitioner's Reply Brief, to which the Proponents had no opportunity to respond and the Board had no opportunity to consider.

First, Petitioner argued in his Reply Brief that the measure violates the single subject rule because of the measure's inherent overbreadth. Reply Brief at 19. As support, Petitioner introduced for the first time the Defend Colorado Now website, and attached printouts therefrom. Reply Brief, attach. 1-6. Though neither the Title Board nor the Proponents had the opportunity to consider or respond to that evidence, the Court expressly relied on it to find the measure vague and overly broad. *Compare* Slip Op. at 17,fn. 4 *with* Reply Brief at 19, fn. 6 and Attachment 2 thereto.

Second, Petitioner argued for the first time in his Reply Brief that the measure is intended to prevent illegal aliens from owning property in the State. As authority, Petitioner again cites, quotes, and attaches pages from the Defend Colorado Now website. Reply Brief at 20, fn. 7, and Attachment 2 thereto. Relying on this same material, the Court expressly adopted that argument as the basis for its determination that one subject of the measure is to restrict access to certain administrative services. *Compare* Slip Op. at 20-21, fn. 5 *with* Reply Brief at 20, fn.7 and Attachment 2 thereto.

Third, the Court relied on this previously undisclosed evidence to find another allegedly hidden subject in the measure: the decrease of taxpayer expenditures. Slip Op. at 20 (citing and quoting Defend Colorado Now website). Absent Petitioner's reference to the additional materials, the Court would not have had any evidence before it to make this finding, nor would it have been appropriate for it to research and cite this information independently. This case highlights the reasons courts have long refused to consider such arguments. *See generally Czemerynski*, 786 P.2d at 1107.

Had these arguments been raised during the initial Title Board hearing, the Proponents surely would have responded and the Board would have carried out its obligation to determine whether the measure contained multiple subjects or purposes, and set a proper title. Prior to his Reply Brief, Petitioner never contested that Proponents' purpose was to restrict non-emergency services to those whose presence in this country is lawful, arguing only that the measure contained a hidden second subject of denying certain fundamental rights (access to the courts, writ of habeas corpus, the right of due process, etc.). *See* Opening Brief at 6-7. Only in his Reply Brief did Petitioner contend that the measure's breadth necessarily required finding multiple subjects, and that the measure contains the unconnected subject of denying illegal aliens the right to own property. These

novel arguments were expressly adopted by the Court and served as the foundation for its multi-subject holding.

The Court's reliance on arguments and evidence not considered by the Board has several deleterious effects. First, the Court has undermined the long standing principle that arguments presented for the first time on appeal or in a Reply Brief will not be considered. As a result, opponents of proposed initiatives, and indeed petitioners in all cases before the Court, will be encouraged to reserve arguments and evidence until a time after which the proponents can respond, either directly during the Board's initial hearing, upon a motion for rehearing, or in the opponents appeal to this Court, thereby eliminating the Board's opportunity to consider such information. This also hinders this Court's ability to fairly judge the merits of an argument because proponents will be denied the opportunity to respond to such arguments and evidence, and similarly denies the Board the opportunity to explain to the Court its single subject analysis. Finally, by considering evidence not presented to the Board, the Court has displaced the Board as initial examiner and arbiter of whether a measure meets the single subject requirement, a role given exclusively to the Board by the General Assembly. *See* § 1-40-106, C.R.S. (2005).

Because the Court's opinion turned on evidence and arguments made for the first time in Petitioner's Reply Brief, the decision of the Court should be withdrawn and reconsidered solely on the arguments existing in the record and the Opening and Answer Briefs. Because the arguments made therein do not support a finding of multiple subjects, the Court should affirm the decision of the Board.

II. The Court's decision overrules well established precedent, terminates the "necessary connection" doctrine, and is irreconcilable with the court's recent "Headnote Veto" decision

As the Court acknowledges, the general rule is that a measure violates the single-subject requirement only if it contains "(1) more than one subject and (2) has at least two distinct and separate purposes that are not dependent upon or connected with each other." Slip Op. at 9-10 (citing *In re Proposed Initiative for "Public Rights in Waters II."* 898 P.2d 1076, 1078 (Colo. 1995)(emphasis added)). "[A]lthough an initiative may contain several purposes, they must be interrelated." Slip Op. at 11. This rule is often referred to as the "necessary connection" doctrine. *Accord In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 440 (Colo. 2003). Yet despite the Court's recitation, the Opinion can only be read as overturning that well-established principle in favor

of an unwavering rule that a proposed initiative can never be motivated by two purposes, no matter how logically and necessarily interwoven.

This is the only conclusion that can be reached when one considers the multiple purposes the Court found here: the elimination of certain government services to illegal aliens and the taxpayer savings resulting from the elimination of other government services to illegal aliens. It is hard to imagine two more logically and necessarily connected purposes than elimination of government services and savings to taxpayers. If the Court's decision stands, the Board will likely be forced to reject any proposed initiative that has both a fiscal impact and a substantive impact.[1]

The Court's decision is a drastic departure from how the Board and the Court have interpreted the single subject requirement. Indeed, relying on this Court's prior decisions, the Board has made clear on multiple occasions that it considers the "logical incidents" of a substantive provision to be part of a single

[1] The Board is further confused by the Court's reliance on a supposed substantive distinction between "medical and social services" and "administrative services" that serves as the basis for its conclusion that the measure contains multiple subjects and purposes. Slip Op. at 19-20. As the Court acknowledges, "local services typically include medical and social services [and] also include administrative services." Slip Op. at 18. The same can obviously be said for state and county services. Moreover, regardless of how a service is classified under the rubric of "government," it cannot be reasonably contested that most, if not all, government services impact taxpayer burdens.

subject. *See, e.g. In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000* #258(A), 4 P.3d 1094, 1098 (Colo. 2000). Accordingly, the only possible interpretation of this decision is that any fiscal impact is a distinct and unconnected subject not permitted within the same proposal as another subject or purpose. And because a fiscal impact obviously cannot stand alone as a measure, the only possible interpretation of the Court's opinion is a strict prohibition on all citizen initiatives that result in a change to government revenues or expenditures.

This holding directly conflicts with the historical application of the single-subject rule, which recognized that the fiscal impact of a measure is necessarily part of the subject of any measure that eliminates or requires some government services, even administrative services. Indeed, for six years after the single subject rule was adopted, all proposed initiatives were required by statute to include an analysis of their fiscal impact on both state and local government. It was never suggested by this Court during that time that measures with a fiscal impact violated the single subject rule. Nor in the six years since the requirement of a fiscal impact statement was eliminated, *see* 2000 Colo. Sess. Laws 1620, until this case, has a measure been rejected by the Board or the Court under the reasoning that an associated fiscal impact was an impermissible separate subject. *See generally In re Ballot Title 1999-2000* #258(A), 4 P.3d 1094 (Martinez, J. and Bender, J. specially

concurring on separate grounds); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000* #255, 4 P.3d 485, 502 (Colo. 2000). The Board can only conclude that had this Opinion been in place prior to those cases, none would have passed the single-subject test.

Moreover, the Court's ruling directly conflicts with this Court's "Headnote Veto" ruling issued the same day as this Opinion. *See Colorado General Assembly v. Owens*, 2006 WL 1589646 (Colo. 2006). In that case, the Court held that the Governor may not veto the appropriations clause of a substantive bill because that clause and the bill's substantive portions are in fact one and the same. Said another way, the Court held that the substantive and fiscal provisions of a bill are a single subject. In marked contrast, the Court held here that the fiscal impact of a proposed initiative is an impermissibly separate and distinct subject from the measure's substantive provisions. These two cases cannot logically be reconciled. Either the "Headnote Veto" case was wrongly decided, or this case was.

III. The Court erroneously applied the single-subject doctrine to alleged errors in the title

The Court held that the separate purpose of restricting access to administrative services is hidden from voters because the public is more likely to equate "non-emergency services" with "non-emergency *medical* services" than

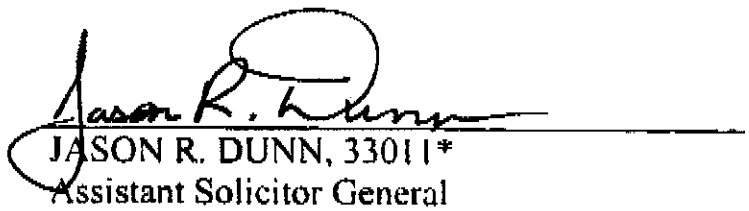
with "all services other than emergency services." Slip Op. at 23. Assuming, *arguendo*, that the Court correctly characterized the voting public as unable to understand the meaning of "non-emergency services," that issue relates not to the single subject requirement, but to the title or to the vagueness of the measure. As such, the proper course of action would be for the Court to reject the measure on vagueness grounds, amend the title, or remand to the Board with instruction to reset the title. In this case, however, even those options are inappropriate because Petitioner never challenged the title or claimed that the measure was so vague that a title could not be set. Rather, Petitioner has only claimed a single-subject violation. Accordingly, that part of the Court's Opinion relating to the public's understanding of "non-emergency services" should be removed as improvidently decided. *See In re Matter of Proposed Initiative for Title, Ballot Title & Submission Clause for 2003-04 #88*, (No. 04SA95, May 6, 2004)(where Court did not address single subject requirement because not raised by petitioner).

CONCLUSION

The Board requests that the Opinion be withdrawn and the decision of the Board that the measure contains a single subject be affirmed.

Respectfully submitted this 19th day of June, 2006.

JOHN W. SUTHERS
Attorney General



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CERTIFICATE OF MAILING

This is to certify that I have duly served the within **TITLE BOARD'S PETITION FOR REHEARING** upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 19th day of June 2006 addressed as follows:

Catrina Reyes