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SUPREME COURT, STATE OF COLORADO Court Address: Colorado State Judicial Building 2 E 14th Avenue, Suite 400 Denver, CO 80203	
ORIGINAL PROCEEDING PURSUANT TO C.R.S. § 1–40–107 (2), Appeal from the Title Board IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2005-2006 #55	
MANOLO GONZALES-ESTAY, Petitioner, and RICHARD D. LAMM, WALDO BENAVIDEZ & FRED ELBEL, Proponents, and WILLIAM HOBBS, ALLISON EID, and DAN CARTIN, Respondents.	**COURT USE ONLY**
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RESPONDENT'S PETITION FOR REHEARING

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BACKGROUND FACTS

In 2004 a substantially similar version of Initiative #55(#88) was presented to the Board, and was approved as a single subject by the Board. On appeal, Petitioner argued not only that the title was misleading, but also brought up the whole question of separate subject, submitting that such an arguably unrelated subject as the enforcement mechanism did not present a separate subject and stating that "Petitioners do not contend that this is a *separate subject*, nor could they do so in a principled manner." (Emphasis added, Pet. Reply Br. at 1).

Petitioners concluded their challenge to #88 by stating that "As title challenges go, this one is admittedly spare." (Pet. Reply Br. at 6). Not surprisingly, this Court upheld the Board's decision that the initiative stated but a single subject. Nevertheless, by merely filing their "admittedly spare" challenge, Petitioners managed to delay a decision until it was too late for Respondents to gather sufficient signatures for the ballot.

When Initiative #55 was yet again approved by the Board as a single subject, Petitioners, apparently reconsidering their prior concession that there was no separate subject issue, filed yet another challenge to the initiative. Petitioners now claimed to have found *other* conceivable separate subjects that had not apparently not occurred to them before, such as the theoretical possibility that limiting non-emergency services to illegal aliens might conceivably save the taxpayers an

undetermined amount of money, and that some voters might therefore be surprised to learn that not providing such services to illegal aliens might conceivably relieve the tax burden on the taxpayers. This argument, as well as the argument that #55 might conceivably affect "administrative services" was adopted by this Court as a principled rule of decision. In reaching its decision, this Court further resurrected as part of its "single subject" analysis, its concern that ambiguity in the meaning of "non-emergency" services would leave the court or legislature unable to "enforce" initiative #55. (Slip. Op. at 17).

Accordingly, Respondents now respectfully petition this Court for rehearing, and as grounds therefore states as follows:

ARGUMENT

I. This Court failed to take into account Federal Law 8 U.S.C.A. 1621, 1611, and 1601 (restricting welfare and public benefits for aliens) in reaching its conclusion that initiative #55 would "decreas(e) Colorado taxpayer expenditures..."

Public Law 8 U.S.C.A. 1621(a), enacted into law on October 28, 1998, provides that illegal aliens are "not eligible for any State or local benefit (as defined as subsection (c) of this section.)" Inasmuch as Initiative #55 *specifically* excludes from its restrictions those "mandated by federal law", and since federal law *already forbids* states from providing non-emergency services to illegal aliens,

Initiative#55 could therefore have no conceivable *additional* affect on taxpayer expenditures.

The fact that Initiative #55 would make an act already illegal under federal law an act also illegal under Colorado law is of course irrelevant, as it is not uncommon for a state to make illegal under state law an act already made illegal under federal law (such as drug possession). Since virtually *any* initiative or legislation could conceivably have some fiscal impact, setting forth as a rule of decision the speculative fiscal impact of a piece of legislation would render virtually *any* proposed initiative invalid on those grounds.

For example under such an amorphous standard a proposed Equal Rights Amendment could be vetoed by a Court antagonistic to it as a matter of policy on grounds that if passed, the state might conceivably have to increase taxes and expenditures in order to provide equal facilities to women.

Surely the Court did not intend this to be the applicable standard of decision in determining whether an initiative states a single subject.

II. The Court's conclusion regarding single subject was based on initiative #55's alleged failure to "describe 'non-emergency' services"; it therefore failed to take into account #55's exclusion of services "mandated by federal law", inasmuch as non-emergency services are explicitly defined and set forth in 8 U.S.C.A. 1621.

Although the relevance to single subject of the alleged failure of #55 to describe "non-emergency services" is not readily apparent, to the extent that this alleged failure was relied upon by the Court in its single subject analysis (Slip Op. at p. 16-17), the Court failed to note that 8 U.S.C.A. 1621 (b) sets forth in excruciating detail both the specific non-emergency benefits to which illegal aliens are entitled despite their illegal status, as well as emergency services to which they are entitled despite their illegal status. Since #55 excludes from its restrictions those benefits "mandated by federal law", it follows that that there could be no ambiguity in enforcing #55.

III. The Court inadvertently did not consider C.R.C.P. 8 (c) in determining that law of the case and *res judicata* do not preclude the Court from relitigating its prior determination of single subject in #88.

Despite the facial applicability of the doctrines of the law of the case (assuming #55 to be essentially the same case as #88), or res judicata (assuming in the alternative that #55 is a different case from #88), the Court rejected application of both principles on the sole grounds that C.R.S. 1-40-107(2) entitled "any registered voter" unsatisfied with a title board ruling to a prompt disposal of the

matter "consistent with the rights of the parties, either affirming the action of the title board or reversing it..."

However, the doctrines of law of the case and res judicata have never been applied to prevent a party from its right *to file an action* or to a hearing. Rather, the defense of Res Judicata is explicitly set forth in C.R.C.P. as an *affirmative defense, raised only after an action has been filed.* Unlike defenses set forth in CRCP 12 (b), such as failure to state a claim, which can result in the dismissal of a claim at the outset, Rule 8 (c) defenses include such substantive defenses as contributory negligence and statute of limitations.

For example, if the Petitioners in this case had exceeded the statutory deadline for filing a challenge in the matter of #55, it is inconceivable that CRS 1-40-107 (2), which entitles Petitioner only to a prompt decision, could be applied so as to deprive Respondents of the right to assert such appropriate defenses as the statute of limitation or Res Judicata *after the hearing procedures are initiated.*

IV. The Court inadvertently read the clause "bona fide residents" in Article 2, Section 27 of the Colorado Constitution as referring to illegal aliens.

In support of its decision that #55 sets forth a separate subject by "denying access to administrative services" (Slip Op. at 19), the Court cites Article 2, Section 27 of the Colorado Constitution which provides that "Aliens or who may hereafter become bona fide residents of this state, may acquire... property...." Although the plain language of this provision only purports to give the right to

acquire and transfer property to "bona fide" residents (or those who may become such, presumably by undergoing the legal process of citizenship or permanent residency), the Court apparently inadvertently read "bona fide resident" as referring to illegal aliens. However, Webster's New Collegiate Dictionary defines "bona fide" as "made in good faith without fraud or deceit", and "neither specious nor counterfeit". It is submitted therefore that there exists no applicable authority defining those who enter the U.S. illegally as "bona fide" residents, and indeed the Court cited none.

Certainly, it would have been a simple matter for the drafters of Article 2, Section 27 to insert the word "illegal" before the word "aliens" if in fact the drafters indeed wished to provide substantial benefits to those found guilty of violating state or federal law.

V. The Court inadvertently relied upon evidence inappropriately presented for the first time in petitioner's reply brief, thereby depriving respondents of the right both the right to due process and to rebut or respond.

By relying on *evidence* set forth *for the first time* in Petitioner's Reply Brief (including extrinsic evidence that a certain website sponsored by a group supporting #55 set forth as a possible consequence of passage that some taxpayer expenditures might be reduced), the Court deprived Respondents of the right to rebut or to respond to that extrinsic evidence.

For example, if a website dedicated to the passage of an Equal Rights Amendment were to state on their website that one reason they supported the amendment was that it would require unisex restrooms, and thereby so antagonize the public so as cause it to reject all such equal rights measure in the future, the Court would be unlikely to use this *one* purpose stated by *one* group as the basis for finding that the amendment stated the separate subject of defeating future legislation to defend the rights of women.

Reliance on actual evidence presented for the first time by Petitioners in their reply brief not only deprives Respondents of their right to due process, but also serves to encourage future litigants to keep back evidence until such a stage in the proceedings that an opposing party will be powerless to rebut or respond.

CONCLUSION

In order to further the purposes of the amendment process, as well enfranchise Colorado voters on a matter of great public concern, it is respectfully requested that the Respondent Petition for Rehearing be granted for the reasons herein submitted.

Respectfully submitted the 20th day of June 2006

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of June, 2006 a true and correct copy of the foregoing Respondents' Petition for Rehearing was hand delivered to the following:

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