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<p>SUPREME COURT, STATE OF COLORADO Court Address: Colorado State Judicial Building 2 E 14th Avenue, Suite 400 Denver, Colorado 80203</p>		
<p>ORIGINAL PROCEEDINGS PURSUANT TO C.R.S. § 1-40-107(2), Appeal from the Title Board</p>	<p>FILED IN THE SUPREME COURT</p> <p>FEB 14 2006</p> <p>OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK</p>	
<p>IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2005-2006 #55 MANOLO GANZALEZ-ESTAY,</p> <p>Petitioner,</p> <p>and</p> <p>RICHARD D. LAMM, WALDO BENAVIDEZ & FRED ELBEL,</p> <p>Proponents,</p> <p>and</p> <p>WILLIAM HOBBS, ALLISON EID, and DAN CARTIN,</p> <p>Respondents.</p>		<p>COURT USE ONLY</p>
<p>Attorney: Mark G. Grueskin; Kara Veitch Isaacson Rosenbaum P.C. Address: 633 Seventeenth Street, Suite 2200 Denver, Colorado 80202 Phone No.: (303) 292-5656 FAX No.: (303) 292-3152 E-mail: mgrueskin@ir-law.com; kveitch@ir- law.com Atty. Reg. #: 14621, 32227</p>		<p>Case No.: 06SA20</p>
<p>OPENING BRIEF</p>		

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Petitioner Manolo Gonzalez-Estay ("Petitioner"), through his counsel of record, hereby submits this Opening Brief in support of his Petition for Review of the final decision of the State Title Board in setting title for proposed Initiative 2005-06 #55 (the "Proposed Initiative").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Proposed Initiative violate the single subject requirement of Article V, § 1(5.5) of the Colorado Constitution by combining procedural changes and unprecedented restrictions on substantive rights for certain persons.

STATEMENT OF THE FACTS

The initiative text provides, "Except as mandated by federal law, the provision of non-emergency services by the State of Colorado or any city, county, or other political subdivision thereof is restricted to citizens and aliens lawfully present in the United States of America." Proposed Art. V, § 51(1). Any person lawfully residing in the U.S. may sue to enforce this provision in the state's courts of record. Proposed Art. V, § 51(2). The General Assembly is authorized to set reasonable limits on the time and manner of such suits, as well as to enact appropriate definitions and implementing legislation. Proposed Art. V, § 51(2), (3). The initiative would take effect 30 days after the governor's proclamation of the vote and apply to causes of action accruing on or after such date.

The Proposed Initiative is posed as a procedural matter, purporting to draw a line in the provision of government services between those who are, and those who are not, in the United States lawfully.

STATEMENT OF THE CASE

The Proposed Initiative was submitted to the Offices of Legislative Legal Council and Legislative Legal Services by William G. Herron and Janice M. Herron. On January 6, 2006, Richard D. Lamm, Waldo Benavidez and Fred Elbel were designated as the proponents after the Herrons resigned the same day. The Proposed Initiative is substantively identical to proposed Initiative 2003-2004 #88.¹

On November 10, 2005, a hearing was held at which the Directors of the Offices of Legislative Council and Legislative Legal Services address their concerns about the Proposed Initiative. At the hearing, Mr. Herron addressed the questions raised in a memorandum, dated November 7, 2005, and prepared by these offices.

¹ Initiative 2003-2004 #88 was reviewed by the Court in 2004. That measure's ballot title was questioned solely on the grounds that its ballot title was misleading, did not correctly and fairly express the true meaning of the initiative, did not unambiguously state the principle of the provision to be added to the Constitution, and would lead to voter confusion. No challenge was considered as to the measure's compliance with Article V, § 1(5.5), which prohibits initiatives from containing multiple subjects.

Thereafter, the Proponents submitted a final version of the Proposed Initiative to the Secretary of State. On January 4, 2006, a Title Board hearing was held, at which the Title Board set the title for the Proposed Initiative. Petitioner filed a Motion for Rehearing on January 11, 2006. On January 18, 2006, the Title Board denied Petitioner's request for a rehearing.

SUMMARY OF ARGUMENT

The Proposed Initiative violates Article V, § 1(5.5) of the Colorado Constitution because it modifies multiple subjects and amends unrelated provisions of the Colorado Constitution. Specifically, the Proposed Initiative would: (1) prohibit the State, and all political subdivisions thereof, from providing any non-emergency services to any individuals who are not lawful residents of the United States; and (2) eliminate certain substantive, fundamental rights that are constitutionally assured even to persons who are not lawful residents of the United States. This second subject is an attempt to accomplish indirectly something that could not be done, consistent with the single subject requirement, directly. It is obscured by the other themes within the amendment but is a violation of the single subject requirement nonetheless.

ARGUMENT

I. The Proposed Initiative must reflect a single subject.

After enacting Article X, sec. 20 of the Colorado Constitution ("TABOR") in 1992, the voters considered whether the requirements for referred and initiated ballot measures were stringent enough. TABOR's changes to various parts of the Constitution proved to include a number of unwanted surprises. As a result, in 1994, the people agreed that TABOR should be the last ballot measure to rework multiple constitutional provisions indirectly and without the clarity that a single subject provides. *See generally In re Title, Ballot Title and Submission Clause and Summary With Regard to Amend Tabor* 25, 900 P.2d 121, 125 (Colo. 1995).

An initiative violates the single subject requirement when it "relate[s] to more than one subject" and has "at least two distinct and separate purposes which are not dependent upon or connected with each other." *In the Matter of the Title, Ballot Title and Submission Clause for 2003-2004 #32 & #33*, 76 P.3d 460, 461 (Colo. 2003). The subject matter of an initiative must be "necessarily and properly connected" by something more than a broad "common characteristic." *In re Proposed Initiative for "Public Rights in Waters II"*, 898 P.2d 1076, 1080 (Colo. 1995). Neither the Title Board nor this Court may address the relative merits of a proposal, but they may both evaluate the substance of an initiative to determine

whether it complies with the single subject requirement. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 1997-98 #30*, 959 P.2d 822, 825 (Colo. 1998).

The acknowledged purpose of the single subject requirement is to forbid "the joining of incongruous subjects in the same measure thereby ensuring that each proposal depends on its own merits for passage." *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 441 (Colo. 2002) (*internal quotations omitted*). Properly applied, the single subject requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious but significant provision that was obfuscated by other elements of the proposal. *Id.* at 442.

The Title Board's jurisdiction is dependent upon finding that a proposed initiative contains a single subject. "If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set." COLO.CONST., art. V, § 1(5.5). Thus, where a measure contains more than one subject, the Title Board may not proceed as if the measure warranted a ballot title. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #25*, 974 P.2d 458, 467 (Colo. 1998).

II. The Proposed Initiative restricts government's provision of certain fundamental rights that otherwise apply to all persons.

The Proposed Initiative closes off all operations of government to persons who are not lawfully in the United States, unless they require an emergency service that government provides or unless federal law mandates the provision of that service. The initiative would bring about a major sea change in our system of government by denying rights that are so fundamental that we, as a society, accord them to every person who happens to be within our borders. Voters ought to consider that sea change separately from the denial of street sweeping services to illegal immigrants.

As noted before the Title Board,² this measure would curtail rights that are, by our Constitution, not conditioned on any aspect of one's status or condition. Some of these rights go to the core of our structure as a government and our status as a civilization.

- **"Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and just should be administered without sale, denial or delay." COLO.CONST., art. II, § 6 (emphasis added).**

² This issue was addressed in paragraph 1. of the Motion for Rehearing, submitted by Petitioner to the Title Board.

- **"The privilege of the writ of habeas corpus shall never be suspended,** unless when in case of rebellion or invasion, the public safety may require it." COLO.CONST., art. II, § 21 (emphasis added).
- **"No person shall be deprived of life, liberty or property, without due process of law."** COLO.CONST., art. II, § 25 (emphasis added).

Each of these rights – access to our system of justice, the privilege of *habeas corpus*, and the right of due process – involve agencies of government. They trigger basic, constitutionally assured rights, such as the ability to have fair treatment under the law. Whatever the rights at stake, the point is the same: these constitutional guarantees are only available by means of a government service, most notably, through the courts. Yet, these rights are circumscribed – and are intended to be circumscribed – by this initiative.

This Court has acknowledged the difference between an initiative's seemingly procedural change and its aspects that affect fundamental rights. In #32 & #33, *supra*, an initiative both implemented procedural changes in the petition system and prohibited lawyers from participating in the process of setting ballot titles. The prohibition on lawyers serving in that role was a substantive, not a procedural, change. "By foreclosing any possibility that an attorney could serve on the title board, these initiatives restrict the political rights of all attorneys. Under

our prior decisions, this exclusion from the political process is a substantive matter, not a procedural change to the petitions process." 76 P.3d at 462, *citing Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 510 U.S. 959 (1993). Because it was a substantive change to the rights guaranteed by our Constitution, the Court found this admittedly narrow restriction on a fundamental right to be unrelated to tweaking the timelines for petition submission and comparable requirements. 76 P.3d at 463. That combination of procedural and substantive changes reflects a violation of the single subject requirement. #43, *supra*, 46 P.3d at 448 (impairing fundamental right of referendum at local level was a substantive amendment that was unrelated to reform of petition procedures).

The immigration initiative is portrayed as a procedural one, imposing a limitation on the funding of certain services by all levels of government. Eliminating certain persons' access to the system by which personal liberty is preserved and legal rights are vindicated, however, is a substantive redirection of the workings of our legal structure. The right of access to the courts by one who is not lawfully in the United States is a substantive right that is not otherwise abridged by the Constitution.

As a general matter, "there is no prohibition against aliens having access to our courts." *Ferrara v. Auric Mining Co.*, 95 P. 952, 955 (Colo. 1908). This is so,

even though a person may have never been a resident of the state of Colorado or of the United States. *Id.* at 953. Access to the judicial process on the part of such individuals is equally applicable in criminal matters and civil matters. *See, e.g., People v. Antonio-Antimo*, 29 P.3d 298 (Colo. 2000) (illegal alien permitted access to state court system to challenge validity of plea agreement); *Le Grange v. District Court of County of Grand*, 657 P.2d 454 (Colo. 1983) (illegal alien sued to enforce promissory note to which she was a party); *Champion Auto Body v. Industrial Claim Appeals Office*, 950 P.2d 671, 673 (Colo.Ct.App. 1997) (illegal alien permitted access to court system to seek post-termination employment benefits).

Likewise, persons who are not citizens of the United States and who are not lawfully residing here have a fundamental right to seek *habeas corpus* review. *Le v. Greene*, 84 F.Supp.2d 1168, 1171 (D.Colo. 2000). And due process concerns append to the interests of illegal immigrants whose claims can be addressed through the judicial system. *Lopez v. U.S. Immigration and Naturalization Service*, 1983 U.S. Dist. LEXIS 13250 (D.Colo. 1983) (adjudicating due process of revocation of illegal immigrant's Colorado driver's license); *cf. Le*, 84 F.Supp.2d at 1172-73. Given the initiative's purported objective of eliminating public

expenditures on illegal immigrants, the curtailment of the fundamental guarantee of recourse to our courts is a single subject violation.

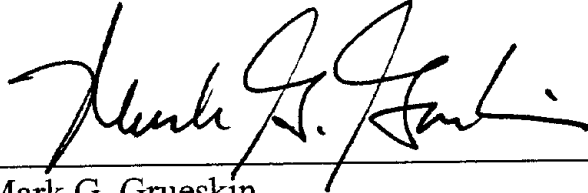
Petitioners acknowledge that restricting access to the justice system is achieved by the Proposed Initiative in an indirect manner. This defense, though, is no defense to single subject concerns. An initiative cannot indirectly accomplish a policy objective that would violate the single subject requirement if explicitly included in the measure. *In re Title, Ballot Title and Submission Clause and Summary for 1999-2000 #29*, 972 P.2d 257, 265 (Colo. 1999). One of the chief goals of the single subject requirement is, after all, preventing surprise and fraud from being practiced on the state's voters. § 1-40-106.5(1)(e)(II), C.R.S. Such surprise will be worked on the voters of Colorado if this ballot title is allowed to stand.

CONCLUSION

Petitioner respectfully requests that this Court reverse the State Title Board's action and to direct the Board to strike the title and return the Proposed Initiative to its proponents.

Dated this 14th day of February 2006.

ISAACSON ROSENBAUM P.C.

A handwritten signature in black ink, appearing to read "Mark G. Grueskin", written over a horizontal line.

Mark G. Grueskin

ATTORNEYS FOR PETITIONER

ADDRESS OF OBJECTOR:

Manolo Gonzalez-Estay
604 South Gilpin Street
Denver, Colorado 80209

CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of February 2006, a true and correct copy of the foregoing **OPENING BRIEF** was served via hand delivery or overnight delivery service, to the following:

Maurice G. Knaizer, Esq.
Office of the Attorney General
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Richard D. Lamm
Waldo Benavidez
Fred Elbel
P.O. Box 280289
Lakewood, Colorado 80228