

ORIGINAL

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SUPREME COURT, STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

**ORIGINAL PROCEEDINGS 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 GONZALEZ-ESTAY,**

Petitioner,

v.

**RICHARD D. LAMM, WALDO BENAVIDEZ
AND FRED ELBEL,
PROponents,
AND
WILLIAM HOBBS, ALLISON EID AND DAN
CARTIN,
TITLE BOARD**

Respondents.

**JOHN W. SUTHERS, Attorney General
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FILED IN THE
SUPREME COURT

MAR - 6 2006

OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

▲ **COURT USE ONLY** ▲

Case No.: 06SA20

ANSWER BRIEF OF TITLE BOARD

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William Hobbs, Allison Eid and Dan Cartin, as members of the Title Board (hereinafter "Board"), hereby submit their Answer Brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the doctrine of claim preclusion bars the objector from asserting the claim that the proposed initiative violates the single subject requirement?

Whether the proposed initiative violates the single subject requirement of Article V, § 1(5.5) of the Colorado Constitution?

STATEMENT OF THE CASE

In 2004, proponents Terry Paulson, William G. Herron and Marlene Guerro presented initiative 2003-04 #88 to the Board. The measure proposed to amend article V of the Colorado Constitution by adding section 51, "Restrictions on Non-Emergency Services". The measure provided:

(1) 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 of and aliens lawfully present in the United States of America.

(2) Any person lawfully residing in the State of Colorado shall have standing to sue the State of Colorado or any county, city or other political subdivision of the State of Colorado to enforce this section.

(a) Courts of record of the State of Colorado shall have jurisdiction to hear cases brought to enforce this section.

(b) The General Assembly may provide reasonable and appropriate limits on the time and manner of suits brought under this section.

(3) The General Assembly shall have the authority to implement this section by definitions and other appropriate legislation.

Exhibit A, attached hereto.

Two electors, Ramon Del Castillo and Manolo Gonzalez-Estay (hereinafter “objector”) filed a motion for rehearing. (Exhibit B, attached hereto). The objector argued that the proposed initiative contained multiple subjects and that the titles did not accurately reflect the content of the measure. The Board denied the motion, and the objector appealed to this Court. *In the Matter of the Title, Ballot Title and Submission Clause for 2003-04 #88, 04 SA 95. (#88)* The objector did not raise single subject concerns in the appeal. The objector argued only that the titles did not accurately reflect the measure. The Court affirmed the action of the Title Board.¹

On December 21, 2005, proponents William G. Herron and Janice Herron submitted a measure entitled “Restrictions on Non-Emergency Services”, initiative

¹ The Court may take judicial notice of the content of court records in a related proceeding. *People v. Sa'ra*, 117 P.3d 51, 56 (Colo. App. 2004).

2005-06 #55. The measure in this case repeats, with minor and immaterial changes, the provisions of #88. At the Board hearing on January 6, 2006, Richard D. Lamm, Waldo Benavidez and Fred Elbel were designated as the proponents. The Board set a title, and the objector then filed a motion for rehearing alleging that the proposed initiative violates the single subject rule. The Board denied the motion for rehearing, and the objector appealed.

SUMMARY OF THE ARGUMENT

Under the doctrine of claim preclusion, the objector is barred from bringing this action.

The measure contains a single subject: restricting non-emergency services to certain persons who are lawfully present in the United States.

ARGUMENT

I. This appeal is barred by claim preclusion.

Claim preclusion bars “relitigation of matters that have already been decided as well as matters that could have been raised in a prior proceeding but were not.”

Arbus Real Estate, Inc. v. E-470 Public Highway Authority, 109 P.3d 604, 608 (Colo. 2005) (*Arbus*). A claim in a second judicial proceeding will be barred if there is: (1) a final judgment in the first case, (2) identity of subject matter, (3)

identity of claims for relief, and (4) identity of parties or privity between the parties to the action. *Id.*

The first two criteria are not disputed. The judgment in #88 is final. The subject matter in #88 is identical with the subject matter in this matter. The measures contain virtually identical language, and the titles set by the Board are virtually identical.

The objector attempts to circumvent the identity of claims element by stating that the single subject issue was not raised in #88. The question of whether there exists identity of claims for relief is not dependent upon the specific claim asserted or the name given to the claim. *Arbus*, 109 P.3d at 608-09. "Instead, the 'same claim or cause of action requirement is bounded by the injury for which relief is demanded, and not by the legal theory on which the person asserting the claim relies'. (citation omitted)" *Id.* at 609. Claim preclusion bars relitigation of all claims decided and all claims that could have been decided if the claims are tied by the same injury. *Id.*

The injury in the context of the initiative process is harm to the rights of signers and voters. Proponents of a measure and voters should not be presented with a petition or a ballot measure that includes multiple subjects or unclear titles. In either case, the right of the signer and the voter to participate in the initiative

process is diminished if the measure or the title does not meet minimal constitutional or statutory requirements. Both the single subject claim and the unclear title claim are tied into the rights of the voter and signer to be presented with a petition that meets constitutional and statutory standards.

Finally, the Court must determine whether identity of parties exists. Both objector and the Board were parties in #88. The remaining question is whether the proponents in this case are in privity with the proponents in #88. Privity exists when a nonparty is related to a case in a manner that dictates that he or she should be regarded as a party. *Public Service Co. v. Osmose*, 813 P.2d 785, 788 (Colo. App. 1991). The courts will find privity when there is (1) a substantial identity of interests between the party and the nonparty and (2) a working or functional relationship in which the party presents and protects the nonparty's interests in litigation. *S.O.V. v. People in the Interest of M.C.*, 914 P.2d 355, 360 (Colo. 1996). The courts will also find privity when the right to act on behalf of another person exists by operation of law. 18 *Moore's Federal Practice*, § 131.40[3][e][i][A] p. 131-142.

Privity between the proponents in #88 and the proponents in this case exists by operation of law. State law requires proponents to designate two of their members to act on their behalf. Section 1-40-104, C.R.S. (2005) The

responsibilities and rights of these designated proponents devolve from state law and are imposed upon all persons who assume the responsibility as proponents to represent the interests of all proponents. The designated representatives receive notification of various activities involving the petition process, including but not limited to receiving various notices, commencing the petition circulation process and withdrawing petitions from consideration as ballot issues. Sections 1-40-104 and -134, C.R.S. (2005).

Even if privity does not emanate from the operation of law, there is a substantial identity of interests among all of the representatives of the proponents. Each has the same statutory responsibility. Each is interested in complying with applicable laws, gathering signatures and placing the measure on the ballot. Each of the proponents, on behalf of all of the measure's supporters, defends the measure against legal challenges to the titles.

The case of *Ferris v. Cuevas*, 118 F.3d 122 (2d Cir. 1997) provides guidance. Plaintiffs filed an action in New York State courts seeking to have a campaign reform petition declared valid. The plaintiffs did not raise any constitutional issues. The petition was denied. A new complaint was filed in district court by a different set of named plaintiffs who were represented by an attorney who was a plaintiff in the state court action. The federal court complaint

alleged constitutional violations. The federal court found that the complaint was barred by claim preclusion. The federal plaintiffs were in privity with the state plaintiffs because the attorney in the federal court litigation controlled both the state and federal court actions. *Id.* at 128-29.

Judge Kearse, in a concurring opinion, provided an even stronger rationale. She concluded that signers of initiative petitions held joint rights because any right of any individual signer to have a measure placed on the ballot is a collective right. No measure could be placed on the ballot unless its proponents obtained the minimum number of signatures. As such, the rights of the plaintiffs were contingent upon the exercise of rights by their fellow petitioner signers. *Id.* at 131; *Herrington v. Cuevas*, 1997 WL 703392 *6 (S.D.N.Y. 1997). Because the exercise of rights was so intertwined, privity existed.

Judge Kearse's analysis is applicable in this case. The right to place a measure on the ballot is a right that belongs to individuals who collectively must gather the legally required minimum number of signatures. Thus, the right to place a measure on the ballot is a right shared by all signors. The designated proponents are doing nothing more than helping to exercise these joint rights on behalf of all persons who desire to place the measure on the ballot. Because both §§ 88 and this

measure have the same content and the proponents of both measures work to place the measures on the ballot, there is privity between the proponents in the two cases.

This Court implicitly has recognized the need and applicability of claim preclusion in its analysis of the timing and content of motions for rehearing. *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #215*, 3 P.3d 447, 448-49 (Colo. 2000); *In the Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 219*, 999 P.3d 819, 821-22 (Colo. 2000). Any elector who either challenges a single subject finding or claims that the titles are unfair or misleading must file a single motion for rehearing. An elector cannot file motions for rehearing or split claims among multiple motions. Allowing numerous fragmented motions impairs the rights of proponents and imposes undue burdens on the judicial system. For the same reasons, the objector should not be allowed to raise claims that could have been raised in a prior proceeding involving the same parties.²

All four elements of claim preclusion are met. Therefore, the Court objector's appeal must be dismissed.

² The objector implicitly recognizes these concerns. He has not challenged the accuracy of the titles in this case because they mirror the titles approved by the Court in #88.

II. The measure includes only one subject: restricting non-emergency services to certain persons who are lawfully present in the United States.

The objector contends that the Board should not have set titles because the proposed measure contains two subjects and therefore violates Colo. Const. article V, section 1 (5.5), which states:

No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in the title; but if any subject shall be embraced in any measure which shall not be expressed in the title, such measure shall be void only as to so much thereof as shall not be so expressed. 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 and the measure shall not be submitted to the people for adoption or rejection at the polls.

A proposed initiative violates the single subject rule if 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 re Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and #22*, 44 P.3d 213, 215 (Colo. 2002) (quoting *In re Proposed Initiative “Public Rights In Water II”*, 898 P.2d 1076, 1078-79 (Colo. 1995)) (#21). A proposed initiative that “tends to effect or to carry out one general objective or purpose presents only one subject.”

In re Ballot Title 1999-2000 #25, 974 P.2d 458, 463 (Colo. 1999). The single subject rule both prevents the joinder of multiple subjects to secure the support of various factions and prevents voter fraud and surprise. *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002) (#43).

The Court will not address the merits of a proposed initiative, interpret a proposed initiative or construe the future legal effects of an initiative. #21, 44 P.3d at 215-16; #43, 46 P.3d at 443. The Court may engage in a limited inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. #21, 44 P.3d at 216. The single subject requirement must be liberally construed to avoid the imposition of undue restrictions on initiative proponents. *In re Title, Ballot Title and Submission Clause, and Summary for 1997-98 No. 74*, 962 P.2d 927, 929 (Colo. 1998).

The objector asserts that the term “non-emergency services by the state of Colorado” includes three rights involving access to courts (“right of access to courts”) and that these rights are a separate subject. The claim must be rejected.

First, the measure itself acknowledges that the scope of the phrase is uncertain and subject to limitation. Section 3 of the measure states, “The general

assembly shall have the authority to implement this section by definitions and other appropriate legislation.” The measure, if enacted, will delegate to the legislature the power to determine whether access to courts is a “non-emergency service” provided by the State. The General Assembly may determine that the term “non-emergency services” does not include access to courts.

Second, matters that are mandated by federal law are also excluded. Section 1 of the measure provides that the State must offer “non-emergency services” to illegal immigrants if such services are “mandated by federal law”. Both the First Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution afford persons the right of access to the courts. *White v. State of Colorado*, 157 F.3d 1226, 1233 (10th Cir. 1998). Thus, assuming that the right of access to courts is included within the measure, it is possible that federal law may require that illegal immigrants have access to the courts. *See, Fernandez-Lopez v. Jose Cervino, Inc.*, 671 A.2d 1051, 1054 (N.J. App. 1996). This analysis would require interpretation of federal law, a task that is inappropriate for this Court to undertake at this stage of the proceedings.

The proposed measure anticipates that the General Assembly will provide the appropriate definitions and that the courts will interpret federal law regarding

federal mandates affecting illegal immigrants. Therefore, the Court must refrain from engaging in such analyses at this time.

Finally, if the Court concludes that the right of access to courts is included within the proposed measure, then it must hold that the measure includes only one subject. The measure, if passed, would deny “non-emergency services” to illegal immigrants. The denial of access to courts, like all services deemed “non-essential”, relates only to illegal immigrants. Therefore, it is directly related to the subject of the measure.

The Court sustained a similarly broad measure against a single subject challenge. *In re Proposed Initiative on Parental Rights*, 913 P.3d 1127 (Colo. 1996). There, the proponents added a phrase to Colo. Const. art. II, section 3 declaring the inalienable right “of parents to direct and control the upbringing, education, values and discipline of their children.” This measure potentially affected all constitutional and statutory rights of children, including but not limited to the right to abortion, the right to seek emancipation and the right to govern educational choices. The Court found the measure contained only one subject even though it covered a broad range of rights. *Id.* at 1131.

The objector attempts to bring this case under the purview of *In the Matter of the Title, Ballot Title and Submission Clause for 2003-2004 #32 and #33*, 76 P.3d 460 (Colo. 2003). There, the court found that the measure included two subjects: procedural changes to the petition system and a substantive prohibition against participation by attorneys in the title setting process. In the present case, there is no dichotomy between procedural and substantive rights. The prohibition would be substantive in nature. In essence, it would remove any property or liberty interest that an illegal immigrant may have in any non-emergency services. *See, Whiteside v. Smith*, 67 P.3d 1240, 1247 (Colo. 2003) (persons have property interest in government benefits).

For the above-state reasons, the Court must conclude that #55 does not violate the single subject rule.

CONCLUSION

The Court must dismiss the appeal on the ground that it is barred by the doctrine of claim preclusion. In the alternative, it must affirm the decision of the Board to set titles.

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Attorneys for Title Board

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AG ALPHA:
AG File:

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ANSWER BRIEF OF TITLE BOARD upon all parties herein by depositing copies of same in the United States mail, Express Mail postage prepaid, at Denver, Colorado, this 3rd day of March 2006 addressed as follows:

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Be it Enacted by the People of the State of Colorado:

SECTION 1. Article V of the Colorado constitution is amended BY THE ADDITION OF A NEW SECTION to read:

SECTION 51. Restrictions on Non-Emergency Services

- (1) 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 OF AND ALIENS LAWFULLY PRESENT IN THE UNITED STATES OF AMERICA.
- (2) ANY PERSON LAWFULLY RESIDING IN THE STATE OF COLORADO SHALL HAVE STANDING TO SUE THE STATE OF COLORADO OR ANY COUNTY, CITY, OR OTHER POLITICAL SUBDIVISION OF THE STATE OF COLORADO, TO ENFORCE THIS SECTION.
 - (a) COURTS OF RECORD OF THE STATE OF COLORADO SHALL HAVE JURISDICTION TO HEAR CASES BROUGHT TO ENFORCE THIS SECTION.
 - (b) THE GENERAL ASSEMBLY MAY PROVIDE REASONABLE AND APPROPRIATE LIMITS ON THE TIME AND MANNER OF SUITS BROUGHT UNDER THIS SECTION.
- (3) THE GENERAL ASSEMBLY SHALL HAVE THE AUTHORITY TO IMPLEMENT THIS SECTION BY DEFINITIONS AND OTHER APPROPRIATE LEGISLATION.

SECTION 2. Effective date - applicability. THIS SECTION SHALL TAKE EFFECT THIRTY DAYS FROM THE DATE OF ADJOURNMENT OF THE REGULAR SESSION OF THE GENERAL ASSEMBLY FOLLOWING THE PROCLAMATION OF THE VOTE BY THE GOVERNOR, AND SHALL APPLY TO CAUSES OF ACTION ACCRUING ON OR AFTER SAID DATE.

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RECEIVED

FEB 20 2004

ELECTIONS / LICENSING
SECRETARY OF STATE

*via Email #88 final
2:59 p.m.
Kam wee*

A

Proposed Initiative 2003-2004 #88

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning the restriction of non-emergency government services to certain persons who are lawfully present in the United States, and, in connection therewith, restricting the provision of non-emergency services by the State and local governments to United States citizens and aliens lawfully present in the United States, except as mandated by federal law; and providing for the implementation and enforcement of this restriction.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning the restriction of non-emergency government services to certain persons who are lawfully present in the United States, and, in connection therewith, restricting the provision of non-emergency services by the State and local governments to United States citizens and aliens lawfully present in the United States, except as mandated by federal law; and providing for the implementation and enforcement of this restriction?

Hearing March 3, 2004:

At the request of proponents, technical corrections allowed in text of measure. (In the caption for section 51, inserted a space between "51." and "Restrictions"; in section 51, subsection 3, changed "DEFINITIONS" to "DEFINITIONS".)

Single subject approved; staff draft amended; titles set.

Hearing adjourned 3:32 p.m.

Hearing March 17, 2004:

Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.

Hearing adjourned 2:42 p.m.

* Unofficially captioned "Restrictions on State Services" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

RECEIVED

MAR 10 2004

CH 3:30 P.M.

COLORADO TITLE SETTING BOARD

ELECTIONS / LICENSING
SECRETARY OF STATE

In re Title and Ballot Title and Summary Set For Initiative 2003-04 #88 ("Restrictions on State Services")

MOTION FOR REHEARING

On behalf of Ramon Del Castillo and Manolo Gonzalez-Estay, both of whom are registered electors of the State of Colorado, the undersigned hereby files a Motion for Rehearing in connection with the title, ballot title and summary set for Initiative 2004-04 #88 ("Restrictions on State Services") at the Title Board hearing held on March 3, 2004. Specifically, Petitioners allege as follows:

A. The Title Board lacked jurisdiction because the measure is comprised of multiple subjects, as it amends or repeals multiple, unrelated provisions of the Constitution that otherwise assure access to certain "non-emergency services" and such multiple changes violated Article V, sec. 1(5.5) of the Colorado Constitution. The multiple subjects include the repeal or amendment of various statutory provisions and constitutional guarantees, including:

1. Article II, sec. 6 ("Courts of justice shall be open to every person...");
2. Article II, sec. 16 ("the accused shall have the right to appear and defend... by counsel;... to have process to compel the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed);
3. Article II, sec. 17 (For any person who is imprisoned to provide testimony and who cannot give the required security, "his deposition shall be taken by some judge of the supreme, district or county court.... If he has no counsel, the judge shall assign him one in his behalf only.");
4. Article V, sec. 50 (use of public funds acceptable for "those medical services necessary to prevent the death of either a pregnant woman or her unborn child under circumstances where every reasonable effort is made to preserve the life of each");
5. Article IX, sec. 2 ("thorough and uniform system of free public schools throughout the state, wherein all residents of the state, between the ages of six and twenty-one years, may be educated gratuitously");
6. Article XVIII, sec. 14 (registry of "any person" who is a patient with a debilitating medical condition with the state health agency).

B

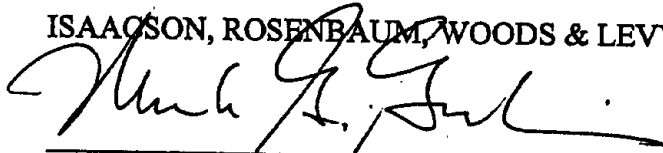
B. The title set by the Board is misleading or inaccurate because it does not state, among other things, that:

1. the measure applies to citizens and legal aliens;
2. the legislature has authority to define all terms;
3. the measure's enforcement is judicial in nature;
4. the measure expands the jurisdiction of the state district courts;
5. the legislature may pass "appropriate legislation;"
6. standing is conferred on any person lawfully residing in Colorado;
7. actions may be filed against any public entity in Colorado;
8. the legislature may place limits on timing and manner of bringing such actions;
9. the measure's effective date is delayed;
10. all political subdivisions of the state are covered by measure.

Please set a rehearing in this matter for the next Title Board meeting.

Respectfully submitted this 10th day of March, 2004.

ISAACSON, ROSENBAUM, WOODS & LEVY, P.C.



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