

SUPREME COURT, STATE OF
COLORADO

Two East 14th Avenue
Denver, CO 80203

Original Proceedings Pursuant To § 1-40-
107(2) C.R.S. (2006)

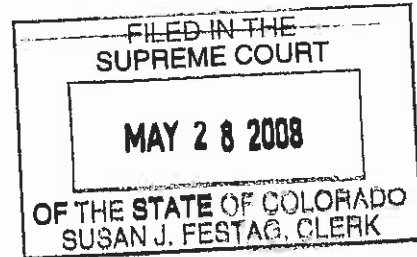
Appeal from the Ballot Title Board

Petitioner: JESSICA PECK CORRY, Opponent,
v.

Respondents: MARY PHILLIPS, CLARA
NEVAREZ, ANDREW PAREDES, Proponents.
and

Title Board: WILLIAM A. HOBBS, DANIEL L.
CARTON, and DANIEL DOMENCIO.

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Case Number: 08SA163

OPENING BRIEF OF PETITIONER

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INTRODUCTION

Much of the law governing this Court's review of titles set by the Title Board is judge-made. There is, however, little case law addressing the situation presented here where the proponents of a measure have intentionally borrowed language from a measure already approved for the ballot, and then added their own language that is designed to undermine much of what the other measure is intended to accomplish. In fact, such a tactic appears to be unprecedented in Colorado.

The General Assembly, however, has provided the Title Board and this Court a clear directive: "Ballot titles . . . shall not conflict with those selected for any petition previously filed for the same election . . ." C.R.S. § 1-40-106(3)(b). With all due respect to the majority in In re Proposed Initiative 2007-2008 #61, ___ P.3d ___, 2008 WL 2081574 (Colo. May 16, 2008), the ballot titles set for both Initiative ##61 and 82 "conflict with those selected for [a] petition previously filed for the same election."¹ The voters of this State are entitled to have the important distinguishing features of the measures pointed out to them in clear, understandable terms in the titles themselves.

¹ Petitioner, Jessica Peck Corry, was the Opponent in Initiative #61. She is filing a petition for rehearing in that case asking the Court to remand the case back to the Title Board to allow the Title Board to set a title adequately distinguishing between the title set for Initiative #61 and Amendment 46.

Petitioner's *Petition for Review* set forth three issues for review. In light of the Court's opinion in Initiative #61, Petitioner hereby withdraws the first two issues for review. While Initiative #61 also addressed the issue of the conflict between ballot titles, Petitioner does not believe that determination is dispositive in this matter.

The title set for Initiative #82 conflicts with that set for Amendment 46 (previously known as Initiative #31). Because the title set for Initiative #82 conflicts with that set for Amendment 46, it fails to comply with C.R.S. § 1-40-106(3)(b) and must be remanded to the Title Board.

STATEMENT OF ISSUES

Objector now raises one issue for review: Does the title, ballot title, and submission clause set by the Title Board for Proposed Initiative 2007-2008 #82 conflict with the title, ballot title, and submission clause set for Amendment 46 (previously known as Proposed Initiative 2007-2008 #31) in violation of C.R.S. § 1-40-106(3)(b)?

STATEMENT OF THE CASE

This is an appeal from a decision of the Title Board. On March 31, 2008 the Proponents filed Initiative #82 to amend the Colorado Constitution. The substantive portion of the Initiative provided that:

The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting. "Preferential treatment" means adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin.

On April 16, 2008, the Title Board set the ballot title for the Initiative. The Objector sought and received a rehearing. On May 7, 2008 the Title Board made certain minor changes to the Title but otherwise denied the motion for rehearing. The Objector subsequently filed this appeal.

SUMMARY OF ARGUMENT

Initiative #82 is a proposed amendment to the Colorado Constitution to constitutionalize and clarify existing laws prohibiting certain forms of discrimination and preferential treatment while preserving the authority of the State to implement programs designed to remedy past discrimination. The Title Board set a title, ballot title, and submission clause ("Title") for the Initiative that is virtually identical to those set for Amendment 46. This Title fails to distinguish the Initiative from Amendment 46 as required by C.R.S. § 1-40-106(3)(b) and will likely lead to voter confusion. It is thus deficient and must be remanded to the Title Board.

STANDARD OF REVIEW

The decisions of the Title Board are presumptively valid, but must be reversed if it is clear that the Title Board erred. In re Petition on Campaign and Political Finance, 877 P.2d 311, 313 (Colo. 1994) (holding that “in clear cases... [the court] will invalidate the title, ballot title and submission clause, or summary prepared by the Board”).

ARGUMENT

Initiative #82 is integrally related to Amendment 46. It addresses the same subject as Amendment 46, and uses extremely similar language. However, it aims to accomplish a very different goal than that of Amendment 46. The proponents of Initiative #82 have been clear that the Initiative is intended to offer voters an alternative to Amendment 46.

When two initiatives address the same topic, the Board must select a title that allows voters to clearly distinguish between them. C.R.S. § 1-40-106(3)(b) (“ballot titles shall not conflict with those selected for any petition previously filed for the same election”); In re Proposed Initiated Constitutional Amendment Concerning Fair Treatment II, 877 P.2d 329, 332 (Colo. 1994) (“What is prohibited are conflicting ballot titles **which fail to distinguish** between overlapping **or conflicting** proposals”) (emphasis added). The Court recently

reaffirmed this principle, holding that it “will reject the Board’s language . . . if it is so inaccurate as to clearly mislead the electorate.” In re Proposed Initiative 2007-2008 #61, 2008 WL 2081574, at *5. A conflict between ballot titles exists when “the title fails to accurately reflect the distinctions between the measures, and voters comparing the titles would not be able to distinguish between the two proposed measures.” Id (internal quotation omitted).

While the Colorado Supreme Court has not frequently ruled on the standard applicable to titles for competing initiatives, the Court has been clear in other contexts that “the Board must act with utmost dedication to the goal of producing documents which will enable the electorate, whether familiar or unfamiliar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose” an initiative. Matter of Proposed Initiative on Parental Notification of Abortions for Minors, 794 P.2d 238, 242 (Colo. 1990) (internal quotation omitted). A title which fails to clearly distinguish between competing initiatives fails to meet this standard.

The Title presently set by the Board fails to distinguish between Amendment 46 and Initiative #82 in a way that would allow voters unfamiliar with the two initiatives to easily ascertain the major differences between the two. The title is thus fatally flawed. In addition, the titles set for Initiative #82 and Amendment 46

contain virtually identical single subject statements which are likely to cause actual confusion for most voters and thus mislead the electorate.

I. The Title Set by the Board Fail to Adequately Distinguish Between Amendment 46 and Initiative #82

Amendment 46 and Initiative #82 use the same phrase, “preferential treatment,” in very different ways, and the true purpose of each measure is also significantly different as well. Preferential treatment is limited in Initiative #82 to “adopting quotas or awarding points solely on the basis of race, sex, color, ethnicity, or national origin.” (Initiative #82 ¶ 1) In contrast, Amendment 46 would apply to the full range of preferential treatment. This distinction radically reduces the scope of Initiative #82 when compared with Amendment 46, but is not apparent from the single subject statements of the respective titles. The single subject statements must highlight rather than conceal this critical distinction between the initiatives. See Matter of Proposed Initiative on Parental Notification of Abortions for Minors, 794 P.2d at 242 (holding that when a proposed initiative involves a new and controversial legal standard, “the voters are entitled to know of this new standard”).

II. The Single Subject Statement of Proposed Initiative #82 Must Be Sufficiently Distinct from That of Amendment 46 to Avoid Misleading the Electorate

The use of a distinctive single subject statement is necessary because Initiative #82 and Amendment 46 address different subjects and treat discrimination and preferential treatment in radically different ways. Amendment 46 is concerned with prohibiting the State from engaging in discrimination and preferential treatment. Initiative #82, in contrast, is concerned with constitutionalizing and clarifying existing laws prohibiting certain forms of discrimination and preferential treatment while preserving the authority of the State to continue current programs designed to remedy past discrimination. The single subject statement must make this distinction clear.²

The Colorado Supreme Court has repeatedly found that unclear titles lead to voter confusion. See In re Proposed Initiatives 2001-2002 #21 and #22, 44 P.3d 213, 221 (Colo. 2002) (holding that “the titles in this case create confusion and are misleading because they do not sufficiently inform the voters”); Matter of Title, Ballot Title and Submission Clause, and Summary Approved Feb. 12, 1992,

² In In re Proposed Initiative 2007-2008 #61, 2008 WL 2081574, at *5, the court held that “although the first clause of both titles is the same, the subsequent clauses are different.” Petitioner respectfully submits that this observation does not rise to the level of a holding that identical or nearly identical opening clauses in ballot titles do not have the potential to lead to voter confusion.

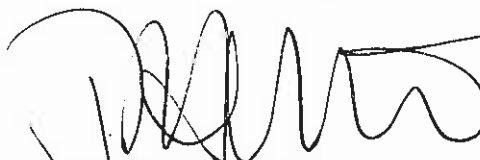
830 P.2d 963, 970 (Colo. 1992) (“if the Board’s choice of language is inaccurate or misleading with respect to the meaning and intent of a proposed initiative, thus inevitably inviting voter confusion, the Board’s choice of language cannot stand”). Here too voter confusion will be caused by the extremely similar single subject statements.

CONCLUSION

The title set for Initiative #82 fails to identify the significant difference between Initiative #82 and Amendment 46. In addition, it contains language so similar to that used in Amendment 46 that all but the most careful voters are likely to have difficulty distinguishing between the measures. The title must thus be remanded to the Title Board with instructions to clarify the manner in which Initiative #82 differs from Amendment 46 so that voters can make an informed choice when voting on both measures this fall.

Respectfully submitted May 28, 2008

HALE FRIESEN, LLP



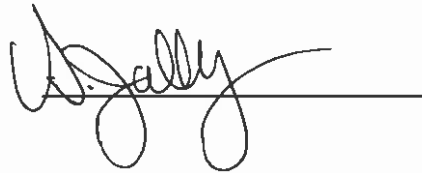
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CERTIFICATE OF SERVICE

I certify that on this 28th day of May, 2008, the foregoing **OPENING BRIEF OF PETITIONER** was served on all parties via overnight delivery service, postage pre-paid, addressed to the following:

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A handwritten signature in black ink, appearing to read "W. Kelly", is written over a horizontal line. The signature is stylized and cursive.