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SUPREME COURT, STATE OF COLORADO

Case No. 2011SA198

Original Proceeding Pursuant To § 1-40-107(2), 1 C.R.S. (2011)

Appeal from the Ballot Title Setting Board

OF THE STATE OF COLORADO
Christopher T. Ryan, Clerk

OPENING BRIEF OF PETITIONER COREY DONAHUE

**IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE,
AND SUMMARY FOR PROPOSED INITIATIVE 2011-2012, #29,#30,#31,#32,#33,#34,#35
and #36.**

COREY DONAHUE,

Petitioner,

v.

WILLIAM A. HOBBS, DAN DOMENICO, and JASON GELENDER,

Title Board,

MASON TVERT, and BRIAN VICENTE,

Respondents.

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CASES

Case No.: 2001-CV-4632

PATIENT CAREGIVER RIGHTS LITIGATION

PROJECT, COLORADO PATIENTS' ALLIANCE, KATHLEEN CHIPPI, and RICO COLIBRI,

Plaintiffs,

v.

STATE OF COLORADO, JOHN HICKENLOOPER, GOVERNOR OF THE STATE OF COLORADO, BARBARA BROHL, EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF REVENUE, and MARTHA E. RUDOLPH, EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF HEALTH AND ENVIRONMENT, Defendants.

STATUTES

- 1-40-107(2), C.R.S. (2011)..... 1,2,5,13
- 12-43.3-101, C.R.S.(2010).....10,12
- C.R.S 18-18-102(18)(2009).....10

STATEMENT OF ISSUES PRESENTED

1. Whether the Ballot Title violates the Constitution of Colorado at Article X, section 20 (3)(c), the Taxpayer's Bill of Rights ("TABOR").
2. Whether the Initiative's title, ballot title, and submission clause are misleading, confusing, unclear, and fail to accurately and fairly reflect the Initiative's true meaning and intent, as required by Colo. Rev. Stat. § 1-40-107(2).

STATEMENT OF THE CASE

This case concerns the appeal of Petitioner, Corey Donahue, of the Title Board's Setting of a title for 2011-2012, #29 through #36.

On June 3, 2011, the proponents, Mason Tvert and Brian Vicente filed their proposed initiative with the Secretary of State. At the Title Board hearing on June 15, 2011, the subject of TABOR was discussed at length. The proponents argued that the ballot initiative wasn't required to have a TABOR-compliant ballot title because it was merely requiring the General Assembly to enact an excise tax, not enacting one directly through the amendment. Citizen Laura Kriho questioned this and also questioned the applicability of TABOR given that marijuana had never been a taxable product before. At the June 15 Title Board hearing, Kriho asked, "I'm curious as to why this ballot title isn't TABOR-compliant under the marijuana sales tax which has never existed before. This is a new tax, and under TABOR a new tax should have a TABOR-compliant ballot title." The Title Board set the titles and summary for the proposed initiative on June 15, 2011 over the objections of Ms. Kriho. The following week, the petitioner, Corey Donahue, filed a motion for rehearing on the grounds that the title set was misleading and did not communicate the true intent of the proponent's

initiative. Colo. Rev. Stat. § 1-40-107(2).

The Motions for Rehearing were heard at the next meeting of the Title Board on July 6, 2011.

In response to the Motions for Rehearing and oral argument, the Title Board revised the ballot title by striking the term, "similar to alcohol."

July 12, 2011 Corey Donahue timely filed his Petition for Review with this Court, pursuant to § 1-40-107(2), C.R.S. (1999).

SUMMARY OF ARGUMENT

The Title Board erred when it set a title which did not comply with Article X, section 20 (3)(c), the Taxpayer's Bill of Rights ("TABOR"). Furthermore, the title as set, belies the true intent of the initiative, as it is inaccurate and misleading and will cause confusion by the general public. Colo. Rev. Stat. § 1-40-107(2).

ARGUMENT

I. **THE TITLE BOARD ERRED WHEN IT SET A TITLE WHICH DID NOT COMPLY WITH ARTICLE X, SECTION 20 (3)(c), THE TAXPAYER'S BILL OF RIGHTS(TABOR)**

The Title Board erred in setting a title that did not comply Article X, section 20 (3)(c) the Taxpayer's Bill of Rights ("TABOR"). The Constitution clearly states:

Ballot titles for tax or bonded debt increases shall begin, "SHALL (DISTRICT) TAXES BE INCREASED (first, or if phased in, final, full fiscal year dollar increase) ANNUALLY...?" or "SHALL (DISTRICT) DEBT BE INCREASED (principal amount), WITH A REPAYMENT COST OF (maximum total district cost), ...?"

The Secretary of State has routinely followed this clause when setting titles that propose a tax increase on the people of Colorado. The Secretary of State followed "TABOR" earlier this year when they set a title for Proposed Initiative 2011-2012 #13:

Shall state taxes be increased \$1.482 billion annually in the first full fiscal year and by such amounts as are thereafter collected by an amendment to the Colorado constitution concerning state income taxes, and, in connection therewith, replacing the current single-rate income tax system for individuals, estates, and trusts with a graduated income tax, where those who earn higher incomes are taxed at higher rates; increasing the corporate income tax rate; requiring income tax revenues be used only for education, higher education, health care, and public safety; requiring at least ninety percent of income tax revenues be spent on services for Colorado residents and not administrative costs; requiring the general assembly to establish a citizen's oversight committee to review and report on state income tax revenue expenditures; requiring an annual legislative report on the amount of state income tax revenues received and how those revenues were expended; and specifying that the revenues raised by income taxes may be collected, kept, and spent notwithstanding any other limits in the constitution or law?

The title, as set, requires the General Assembly to enact a tax on the people of Colorado. This title does not comply with the "TABOR" amendment in the Constitution

of Colorado. The title does not inform, in capital letters and with the correct wording, the voter of the proposed tax increase. As such this title clearly does not comply with the letter, meaning and intent of the TABOR amendment in Constitution of Colorado. The non-compliant title reads:

“An amendment to the Colorado constitution concerning marijuana, and, in connection therewith, providing for the regulation of marijuana; permitting a person twenty-one years of age or older to consume or possess limited amounts of marijuana; providing for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores; permitting local governments to regulate or prohibit such facilities; requiring the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana; requiring that the first \$40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund; and requiring the general assembly to enact legislation governing the cultivation, processing, and sale of industrial hemp.”

The proponents have been quoted as saying that intent of this language is to raise taxes on the people of Colorado.

The initiative would enable the state to collect sales taxes on marijuana and also to levy an excise tax of up to 15 percent. Vicente said the first \$40 million raised annually from the excise tax will be earmarked for public school construction. “We estimate overall it will bring in about \$70 million a year including savings to law enforcement,” he said.

(<http://coloradoindependent.com/93279/marijuana-legalization-effort-launched-in-colorado-today>)

As the title as set by the Title Board is in clear conflict with the letter, meaning and intent of Article X, section 20 (3)(c) of the Taxpayer's Bill of Rights. Corey Donahue respectfully

requests that this Court remand the proposed initiative to the Title Board to set a title in accordance with the Constitution of Colorado.

II. THE TITLE BOARD ERRED AS THE TITLE WHICH WAS SET DID NOT ACCURATELY AND FAIRLY REFLECT THE INITIATIVE'S TRUE MEANING AND INTENT. AS REQUIRED BY COLO. REV. STAT § 1-40-107(2).

The true intent of this proposed amendment is not reflected in the title set by the State Title Board,

“An amendment to the Colorado constitution concerning marijuana, and, in connection therewith, providing for the regulation of marijuana; permitting a person twenty-one years of age or older to consume or possess limited amounts of marijuana; providing for the licensing of cultivation facilities, product manufacturing facilities, testing facilities, and retail stores; permitting local governments to regulate or prohibit such facilities; requiring the general assembly to enact an excise tax to be levied upon wholesale sales of marijuana; requiring that the first \$40 million in revenue raised annually by such tax be credited to the public school capital construction assistance fund; and requiring the general assembly to enact legislation governing the cultivation, processing, and sale of industrial hemp.”

A. Legalization

At the first Title Board hearing on June 15, the proponents clarified that their initiatives should not be considered "legalization" and argued successfully to have the word "legalization" removed from their ballot titles. “What we are doing is regulating marijuana. There is a significant legal difference. It would be inaccurate to call this legalization.”

Yet on the proponents website (<http://www.regulatemarijuana.org>) they clearly say that they

are legalizing marijuana,

KUSA NBC 9: Marijuana legalization may make it onto Colo. ballot

July 17th, 2011

Your Show

KUSA NBC 9

“It's a topic that has been before the voters in the past.

Now, next year, regulating and legalizing marijuana could appear - again - as an initiative on the Colorado ballot.

Chris Vanderveen asks your questions to one of the people behind the marijuana movement for YOUR SHOW.”

<http://www.regulatemarijuana.org/news/kusa-nbc-9-marijuana-legalization-may-make-it-colo-ballot>)

On the Facebook page the proponents once again state that they their Act would make the adult use of marijuana legal.

The Regulate Marijuana Like Alcohol Act of 2012 makes the adult use of marijuana legal, establishes a system in which marijuana is regulated and taxed similarly to alcohol, and allows for the cultivation of industrial hemp. Click here to read the full initiative language. Passage of this initiative will be historic, resulting in Colorado becoming the first state in the nation – and the first geographic area in the world – to make the possession, use, and regulated production and distribution of marijuana legal for adults. (Emphasis added)

http://www.facebook.com/coloradoMJinitiative2012#!/coloradoMJinitiative2012?v=info#info_edit_sections)

The other proponent sent out an email announcing to that they are launching a full-scale effort to legalize marijuana in Colorado in 2012.

Massive Campaign Launched to Regulate Marijuana for Adults in Colorado

This week, Sensible Colorado, along with a broad and growing coalition of organizations and supporters launched a full-scale effort to legalize marijuana in Colorado in 2012. In a matter of days, signature gatherers will be stationed around the state educating voters and gathering the

necessary support to place an initiative on the November 2012 ballot. The initiative will remove penalties for private marijuana possession and limited home growing, and establish a legal and regulated marijuana market for adults 21 and over.

To read the initiative and learn more about the effort check out the campaign's **BRAND NEW WEBSITE HERE**.

The campaign went through an exceptionally exhaustive five-plus-month process to produce the initiative language, which we believe is incredibly strong and presents the best route to ending marijuana prohibition here in Colorado. We coordinated with dozens of organizations, attorneys, activists, patients, marijuana business owners, and other stakeholders, both in Colorado and around the country. We also solicited comments from the public via our organizations' lists of thousands of Colorado reform supporters, magazine ads, and events around the state and incorporated much of this input.

Please get in touch today to volunteer or learn more!

And don't forget to **DONATE** to support this historic effort!

Sensible Colorado | PO Box 18768 | Denver CO 80218 (emphasis added)

Although the State Title Board and the proponents agreed this is not legalization, the proponents are stating to the people of Colorado that the intent of this proposed amendment is to make the possession, use, and regulated production and distribution of marijuana legal for adults. Making statements to the people of Colorado that are diametrically opposed to the statements the proponents made in front of the Title Board misleads the State and the people of Colorado as to the true intent of the proponents.

B. Similar to Alcohol

The proponents argued successfully on July 6 to have the words "similar to alcohol" removed

from the ballot title because it would be misleading to voters and contains an impermissible catch phrase. Given this, their continued use of the phrase in their marketing material is disingenuous and hides the true intent of the proponents.

The proponents reaffirmed that the use of the phrase "similar to alcohol" would be misleading to voters on July 27, 2011 when proponent Tvert said,

As one of the two formal proponents of the initiative, I can speak to all of this...

Actually, the phrase "similar to alcohol" was produced and included by the Title Board and very welcomed by the proponents. However, it is a catchphrase that would in all likelihood be shot down by the Colorado Supreme Court if challenged. The campaign did not want to have to go through a likely losing court challenge and get held up, so we simply accepted a complainant's argument that it should be removed.

(http://www.reddit.com/r/Denver/comments/izvht/denver_redditors_what_do_you_think_about_the/)

The proponent's website (<http://www.regulatemarijuana.org/>) also misleading and confuses the voter and hides the true intent of the proponents as the banner of the website reads, "Campaign to Regulate Marijuana Like Alcohol." Throughout the proponents website there are frequent references to "The Campaign to Regulate Marijuana Like Alcohol."

The Campaign to Regulate Marijuana Like Alcohol is the driving force behind a 2012 statewide ballot initiative to end marijuana prohibition in Colorado. It is a locally based effort being carried out by a broad and growing coalition of activists, organizations, businesses, and professionals throughout the state and across the nation.

The Regulate Marijuana Like Alcohol Act of 2012 makes the adult use of marijuana legal, establishes a system in which marijuana is regulated and

taxed similarly to alcohol, and allows for the cultivation of industrial hemp. Click here to read the full initiative language. Passage of this initiative will be historic, resulting in Colorado becoming the first state in the nation – and the first geographic area in the world – to make the possession, use, and regulated production and distribution of marijuana legal for adults.

(<http://www.regulatemarijuana.org/about>)

Although “similar to alcohol” is not used by the proponents the use of the phrase “like alcohol” would confuse and mislead voters and also hides the true intent of the initiative, as the words similar and like are interchangeable synonyms. The proponents agreed with the Title Board’s decision to remove the words “similar to alcohol,” yet the proponents continue to market their proposed amendment to the people of Colorado as The Regulate Marijuana Like Alcohol Act of 2012.

C. Regulation of a Controlled Substance.

For the state to regulate a market or substance the said market or substance must be legal. This argument is clearly spelled out in Attorney General John W. Suthers April 26, 2011 packet to Governor John Hickenlooper and Members of the Colorado General Assembly, RE: Federal Enforcement of Marijuana Laws.

(<http://www.scribd.com/doc/54054431/Colorado-Attorney-General-s-Office-package-for-HB-1043>)

As the state of Colorado cannot legally set up a regulatory scheme on a substance which will still be listed under C.R.S 18-18-102(18). The true intent of the proponents cannot be for the "Regulation of Marijuana," as that intent would be confusing and misleading to the people of Colorado.

D. MEDICAL MARIJUANA CODE

The proposed initiative makes reference to the article 12-43.3-101, C.R.S.(2010), (Medical Marijuana Code), ten times throughout the language. The references are made in sections,

(2) Definitions.

(a) "COLORADO MEDICAL MARIJUANA CODE" MEANS ARTICLE 43.3 OF TITLE 12, COLORADO REVISED STATUTES.

(m) "MEDICAL MARIJUANA CENTER" MEANS AN ENTITY LICENSED BY A STATE AGENCY TO SELL MARIJUANA AND MARIJUANA PRODUCTS PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE.

(5) Regulation of marijuana.

(a)(II) A SCHEDULE OF APPLICATION, LICENSING AND RENEWAL FEES, PROVIDED, APPLICATION FEES SHALL NOT EXCEED FIVE THOUSAND DOLLARS, WITH THIS UPPER LIMIT ADJUSTED ANNUALLY FOR INFLATION, UNLESS THE DEPARTMENT DETERMINES A GREATER FEE IS NECESSARY TO CARRY OUT ITS RESPONSIBILITIES UNDER THIS SECTION, AND PROVIDED FURTHER, AN ENTITY THAT IS LICENSED UNDER THE COLORADO MEDICAL MARIJUANA CODE TO CULTIVATE OR SELL MARIJUANA OR TO MANUFACTURE MARIJUANA PRODUCTS AT THE TIME THIS SECTION TAKES EFFECT AND THAT CHOOSES TO APPLY FOR A SEPARATE

MARIJUANA ESTABLISHMENT LICENSE SHALL NOT BE REQUIRED TO PAY AN APPLICATION FEE GREATER THAN FIVE HUNDRED DOLLARS TO APPLY FOR A LICENSE TO OPERATE A MARIJUANA ESTABLISHMENT IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION;

(b)(I) HAS PRIOR EXPERIENCE PRODUCING OR DISTRIBUTING MARIJUANA OR MARIJUANA PRODUCTS PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE IN THE LOCALITY IN WHICH THE APPLICANT SEEKS TO OPERATE A MARIJUANA ESTABLISHMENT; AND

(b)(II) HAS, DURING THE EXPERIENCE DESCRIBED IN SUBPARAGRAPH (I), COMPLIED CONSISTENTLY WITH SECTION 14 OF THIS ARTICLE, THE PROVISIONS OF THE COLORADO MEDICAL MARIJUANA CODE AND CONFORMING REGULATIONS.

(d) THE GENERAL ASSEMBLY SHALL ENACT AN EXCISE TAX TO BE LEVIED UPON MARIJUANA SOLD OR OTHERWISE TRANSFERRED BY A MARIJUANA CULTIVATION FACILITY TO A MARIJUANA PRODUCT MANUFACTURING FACILITY OR TO A RETAIL MARIJUANA STORE AT A RATE NOT TO EXCEED FIFTEEN PERCENT PRIOR TO JANUARY 1, 2017 AND AT A RATE TO BE DETERMINED BY THE GENERAL ASSEMBLY THEREAFTER, AND SHALL DIRECT THE DEPARTMENT TO ESTABLISH PROCEDURES FOR THE COLLECTION OF ALL TAXES LEVIED. PROVIDED, THE FIRST FORTY MILLION DOLLARS IN REVENUE RAISED ANNUALLY FROM ANY SUCH EXCISE TAX SHALL BE CREDITED TO THE PUBLIC SCHOOL CAPITAL CONSTRUCTION ASSISTANCE FUND CREATED BY ARTICLE 43.7 OF TITLE 22, C.R.S., OR ANY SUCCESSOR FUND DEDICATED TO A SIMILAR PURPOSE. PROVIDED FURTHER, NO SUCH EXCISE TAX SHALL BE LEVIED UPON MARIJUANA INTENDED FOR SALE AT MEDICAL MARIJUANA CENTERS PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE.

(7) Medical marijuana provisions unaffected. NOTHING IN THIS SECTION SHALL BE CONSTRUED: (a) TO LIMIT ANY

PRIVILEGES OR RIGHTS OF A MEDICAL MARIJUANA PATIENT, PRIMARY CAREGIVER, OR LICENSED ENTITY AS PROVIDED IN SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE;

(c) TO PERMIT A MEDICAL MARIJUANA CENTER TO PURCHASE MARIJUANA OR MARIJUANA PRODUCTS IN A MANNER OR FROM A SOURCE NOT AUTHORIZED UNDER THE COLORADO MEDICAL MARIJUANA CODE;

(d) TO PERMIT ANY MEDICAL MARIJUANA CENTER LICENSED PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE TO OPERATE ON THE SAME PREMISES AS A RETAIL MARIJUANA STORE.

TO DISCHARGE THE DEPARTMENT, THE COLORADO BOARD OF HEALTH, OR THE COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT FROM THEIR STATUTORY AND CONSTITUTIONAL DUTIES TO REGULATE MEDICAL MARIJUANA PURSUANT TO SECTION 14 OF THIS ARTICLE AND THE COLORADO MEDICAL MARIJUANA CODE.

The constant references to the Medical Marijuana Code in the proposed initiative show that the true intent of this initiative is to regulate marijuana like medical marijuana. As the voters of Colorado enacted Amendment 20, (0-4-287 - ARTICLE XVIII - Miscellaneous Art. XVIII – Miscellaneous) in 2000 and recently we have had the article 12-43.3-101, C.R.S.(2010) (Medical Marijuana Code) attempt to set a regulatory scheme on this constitutional amendment. The voters of Colorado need to know, in order to avoid confusion, how this proposed, “Regulate Marijuana,” constitutional amendment will be regulated. As the initiative clearly makes frequent references not to the Alcohol Code but rather the Medical Marijuana Code the initiatives true intent is to regulate marijuana like medical marijuana with enforcement primarily through the MMED as specified in the Medical Marijuana Code.

However, as there is currently a case in Denver District Court asking for a declaratory judgment regarding the constitutionality of the "Medical Marijuana Code" and the rules promulgated thereunder. It would be misleading, confusing and belie the true intent of this proposed initiative to have the title "Regulate Marijuana," as the intent of the initiative clearly is not the willful violation of the Constitutional rights of the people of Colorado, if it is determined that the Medical Marijuana Code is a violation of the constitutional rights of the people of Colorado. The relevant sections of 2011-CV-4632(V)(88) are as follows,

Plaintiffs seek the following disputed issues be resolved by the Court by ruling as a matter of law, and for the reasons set forth above, the following statutory provisions, and the agency regulations promulgated thereunder, are unconstitutional as they pertain to qualifying medical marijuana patients and to their care-givers, including but not limited to: C.R.S. §§ 12-43.3-102(2), 12-43.3-103(1), 12-43.3-103(2)(a), 12-43.3-104(8)-(12), 12-43.3-104(16), 12-43.3-106, 12-43.3-202, 12-43.3-301, 12-43.3-307, 12-43.3-310, 12-43.2-401(1), 12-43.3-402(5), 12-43.3-701, 12-43.3-901, 25-1.5-106(7), 25-1.5-106(9), 25-1.5-106(10)(a) through (d), 25-1.5-106(10)(e)(V), 25-1.5-106(10)(f), 25-1.5-106(11)(a), 25-1.5-106(12)(a), 25-1.5-106(12)(b)(I), (IV), and (V), and 25-1.5-106(13); CDPHE 5 C.C.R. 1006-2, Regulations 1(A)(2)(d), 1(A)(4), 2(B)(2), 2(C)(6), 2(D), 2(E), 2(G)(5), 2(I), 9, 10, 11, 12(C)(3-6), 12(E), 12(F), and 13; and C.D.O.R. Medical Marijuana Business Regulations, 1.100, 1.200, 10.400, and 13.100.

The title as set by the Title Board does not accurately and fairly reflect the initiatives true meaning and intent as required by COLO. REV. STAT § 1-40-107(2) and as wide swaths of the language in the initiative are currently under dispute as a possible violation of the people of Colorado's Constitutional rights, petitioner Corey Donahue respectfully requests that this Court return the proposed initiative to the Title Board with instructions to set the title in compliance

with TABOR and state that regulation of marijuana will primarily be enforced through the Department of Revenue and MMED in compliance with the Medical Marijuana Code as it stands after the constitutionality of the Medical Marijuana Code is determined.

CONCLUSION

WHEREFORE, Petitioner Corey Donahue respectfully requests that this Court review and reverse the decisions of the Title Board with respect to proposed initiative 2011-2012, #29 through #36 and instruct the Title Board to set a title accordance with Article X, section 20 (3)(c) of the Constitution of Colorado and set that title to read that regulation will be similar to medical marijuana with enforcement primarily through the DOR and MMED as specified in the Medical Marijuana Code.

DATED THIS 1ST DAY OF August, 2011.

RESPECTFULLY SUBMITTED,

By:



Corey Donahue
1536 MacArthur Dr
Boulder, Co 80303
(720) 340-9730



CERTIFICATE OF DELIVERY

I, the undersigned, do hereby certify that a true and correct copy of the foregoing, **OPENING BRIEF OF PETITIONER COREY DONAHUE** was duly delivered by The United States Postal Service, this 1st day of August, 2011, addressed to the following:

Secretary of State Scott Gessler

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