

SUPREME COURT OF COLORADO
2 East 14th Avenue
Denver, CO 80203

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Original Proceeding
Pursuant to Colo. Rev. Stat. § 1-40-
107(2)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title,
and Submission Clause for Proposed
Initiative 2013-2014 #75 (“Right to
Local Self-Government”)

▲ COURT USE ONLY ▲

**Petitioners: MIZRAIM S.
CORDERO AND SCOTT
PRESTIDGE**

v.

**Respondents: CLIFTON
WILLMENG AND LOTUS**

and

**Title Board: SUZANNE STAIERT;
DANIEL DOMENICO; and JASON
GELENDER**

Attorneys for Petitioners:

Case No. 2014SA100

Chantell Taylor, No. 33059
Elizabeth H. Titus, No. 38070
Hogan Lovells US LLP
1200 Seventeenth Street, Suite 1500
Denver, Colorado 80202
Phone: (303) 899-7300
Fax: (303) 899-7333

PETITIONERS' ANSWER BRIEF

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

- It contains words_____.
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The brief complies with C.A.R. 28(k).

For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R. , p.), not to an entire document, where the issue was raised and ruled on.

For the party responding to the issue:

It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

s/Chantell Taylor _____

SUMMARY OF ARGUMENTS

The Opening Briefs of the Proponents and the Title Board fail to demonstrate that proposed Initiative 2013-2014 #75 (herein after “#75” or the “Initiative”) contains a single subject, or that the title is fair and accurate. As to single subject, both argue that the additional subjects of the measure are merely implementing provisions of #75’s core focus on the right to local self-government. This argument fails, however, because (1) the rights enumerated in the constitutional bill of rights are self-executing and therefore do not require legislative implementation; and (2) the additional subjects are not necessarily connected or directly related to the central focus of the measure. Given #75’s multiple subjects, it follows that the title is irreconcilably confusing and misleading. Moreover, the title as drafted fails to inform voters of the Initiative’s full reach.

Petitioners’ Answer will address certain disputed points arising from the Opening Briefs. Arguments from Petitioners’ Opening Brief not addressed herein are not conceded; rather, Petitioners elect not to restate those legal arguments but specifically incorporate them by reference.

ARGUMENT

I. The Initiative Impermissibly Contains Multiple Subjects.

A. Standard of Review

The Petitioners agree with the standard of review as set forth in the briefs of the Proponents and the Title Board.

B. The Multiple Subjects of the Initiative Do Not Qualify as Implementing Provisions.

Both the Proponents and the Title Board argue that the multiple subjects contained in the initiative are merely implementing provisions of its central purpose. This argument is not supported in law or fact and should be summarily rejected. By the Title Board's own admission, the additional provisions "expand," "reverse" and "shift" governmental powers (Title Board Opening Brief, p. 5-6.) and, thus are separate and distinct subjects.

1. Fundamental rights are self-executing and do not require implementing legislation.

As a threshold matter, rights enumerated in the constitution are self-executing and therefore do not require implementing legislation to effectuate their purpose. Although Petitioners raised this argument at the Rehearing (*See* Motion for Rehearing at 2; Tr. of April 2, 2014 rehearing, attached to Petitioner's Opening Brief as Exhibit E, at 9[18] – 13[8]), neither the Title Board nor the Proponents addressed it in their Opening Briefs.

It is well established that the rights contained in a constitution's Bill of Rights are "self-executing," and therefore "do not depend upon legislative action in order to become operative." *Medina v. People*, 387 P.2d 733, 736 (Colo. 1963) (emphasis added).

The Initiative would add a new "right" in the Bill of Rights, article II of the Colorado constitution granting "the people... an inherent and inalienable right to local self-government, in each county, city, town and other municipality." *See* #75 (1), attached to Petitioner's Opening Brief as Exhibit A. Contrary to the arguments of both the Proponents and the Title Board, this "right" would be operative standing alone, without any implementing provisions. Were it not, the rights to religious freedom, due process, free speech, and the like, would require the same implementation to be legally operative. In other words, by Proponents' standard, if it were "impossible" to exercise the rights established by Colorado's Bill of Rights without a corollary law granting government *carte blanche* authority to enact laws protecting those rights, then such rights are meaningless because they lack such provisions.

The purpose of establishing a right with the Colorado Constitution is to protect such right from government intrusion, and individuals need not rely on implementing provisions for those rights to take effect. If the voters adopted a version of #75 that was properly limited to the single subject of establishing a

people’s right to local self-government, their rights would be legally operative and entitled to protection upon adoption and certification, without more. As written, #75 contains several subjects that are extraneous to its central focus and, therefore, the Title Board lacked jurisdiction to set title.

2. The enhancement of local government powers is not implementing because it is not directly tied to the central purpose of the initiative.

Even if the new “right” established by #75 was not self-executing, the additional provisions in the measure cannot be properly characterized as simple details or procedural mechanics to implement that right as the Proponents and the Title Board suggest.

This Court has held that an initiative with a single, distinct subject does not violate the single-subject requirement simply because it spells out details relating to its implementation, so long as the procedures or mechanics specified in the measure have a necessary and proper relationship to the substance of the initiative. *See In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 No. 74*, 962 P. 2d 927, 929 (Colo. 1998) (herein after “#74”). An initiative containing two or more provisions with no necessary connection, however, “offends the single-subject requirement even if all parts of the initiative address the same general area of law.” *Id.* at 928.

In support of their argument that the multiple subjects are merely implementing provisions, Proponents cite *In the Matter of Submission Clause for 2009-2010 No. 45*, 234 P.3d 642 (Colo. 2010) (herein after #45). That case, however, is entirely distinguishable and in fact supports Petitioners' arguments on appeal. In #45, the initiative proposed adding a new "right" to the Colorado constitution entitled "Right to health care choice." *Id.* at 644. Following a general statement in the initiative that "[a]ll persons shall have the right to health care choice," the initiative further provided:

No statute, regulation, resolution or policy adopted or enforced by the State of Colorado, its departments and agencies, independently or at the instance of the United States shall:

(a) Require any person directly or indirectly to participate in any public or private health insurance plan, health coverage plan, health benefit plan, or similar plan; or

(b) Deny, restrict, or penalize the right or ability of any person to make or receive direct payments for lawful health care services.

Id. at 645 (with added emphasis).

Petitioners in that case argued that subsections (a) and (b) constituted separate subjects. The Court rejected this argument and found instead that:

To the contrary, both provisions are directly connected and related to the initiative's purpose of protecting individuals' rights to choose their own health care arrangements. Without the first provision, the General Assembly or state administrative agencies could mandate that individuals participate in health care plans. Without the second provision, the state could attempt to circumvent the first provision by requiring individuals to indirectly pay for health care services, thereby

limiting individuals' ability to manage their own health care arrangements. Therefore, both provisions seek to achieve the central purpose of the initiative.

Id.

The additional provisions at issue in #45 directly impacted a person's ability to make their own health care choices, and were therefore necessary to effectuate the central purpose of the measure.

In stark contrast, the additional provisions at issue here go far beyond simple details or mechanics. By the Title Board's own admission, they "expand," reverse" and "shift" governmental powers. *See* Title Board Opening Brief, p. 5-6. In its brief, the Title Board described the single subject as establishing "the explicit recognition of an inalienable right of persons to self-government...." Title Board Opening Brief, p. 5. The Title Board further recognized that #75 also "expand[s] legislative powers of local governments" to enact laws that "protect the 'health safety and welfare' through the establishment of 'the fundamental rights of individuals...." *Id.* at p. 2.

For several reasons (in addition to the fact that rights are self-executing), this provision cannot be necessary to implement the purported single subject. First, local governments already have the authority to enact laws protecting "health safety and welfare" through well-established police powers. *See e.g., Board of County Com'rs of Larimer County v. Conder*, 927 P.2d 1339 (Colo. 1996) ("The

power to plan for and regulate the use of land is an outgrowth of the police powers afforded to local governments by the state in order to promote the public health, safety and welfare and to encourage and facilitate orderly growth.”)

Second, granting local governments *carte blanche* authority to enact laws establishing additional, undefined “fundamental rights of individuals...” is neither necessary for nor congruous with the central focus of the measure to recognize the individual’s right to self-government. Moreover, the Title Board selectively omitted the full sentence of the provision, which actually states that local governments would be authorized to establish additional “fundamental rights of individuals, communities and nature.” #75, § 2 (emphasis added); Title Board Opening Brief, p. 5. Clearly, the rights that local governments might choose to establish for “communities and nature” have no relevance, connectivity, or necessary relationship to the individual right to self-government. Thus, unlike #45, the additional provisions go far beyond procedural or mechanical terms and, therefore, cannot be qualified as merely implementing a single subject.

In fact, in all cases where this Court rejected single-subject arguments based on a finding that the additional provisions were merely implementing language, there is an obvious and necessary connection between the two. For example, in *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #255*, 4 P. 3d 485, 496 (Colo. 2000) (herein after “#255”), the Court

determined that the single-subject requirement was not violated by inclusion of a mandatory appropriation provision in an initiative to require background checks at gun shows. The Court reasoned that the provision was directly related to the initiative's central propose because state agencies could not conduct background checks without appropriated funds, and the provision did not mandate reduction of funding for any other state program. Further, the fee related directly to making a background check practical and to making it more likely that they would be performed.

The facts in #74 are also illustrative here. The initiative proposed assessing "school impact fees" on newly constructed housing. #74, 962 P.2d at 928. In addition to this central provision, the initiative specified how payments and exemptions from the fees would be resolved. *Id.* The Court concluded that the additional provisions, "which simply provide[d] a mechanism to administer the details of the impact fee proposal," did not constitute additional subjects.

Unlike in #45, #255 and #74, where the additional provisions unmistakably relate to the initiatives' central focus, the additional provision here granting sweeping new authority to local governments extends far beyond the self-executing, individual right to self-government and offers nothing specific in terms of mechanical or procedural implementing details. The action of the Title Board

should therefore be reversed with directions to strike the title and return the initiative to the Proponents.

3. Reversing preemption powers is neither necessary nor related to #75's central purpose.

In its Opening Brief, the Title Board acknowledges that, under current law, state and federal laws preempt local laws when the laws conflict and that “75 reverses that relationship by eliminating the preemptive power of these entities, thereby preventing state, federal or international entities from usurping local government powers and giving to local governments the power to preempt laws promulgated by these governmental entities.” Title Board Opening Brief, p. 6 (emphasis added). The Title Board and the Proponents have failed to explain how such a sweeping change to the doctrine of preemption and the dramatic reallocation of governmental power is necessary to make a people’s right to local self-government legally operative. In fact, it is not.

The reallocation of governmental authority and control from one political subdivision to another is a separate subject. This Court has previously held that when provisions seeking to accomplish one purpose are coupled with provisions proposing a change in governmental powers that bear no necessary or proper connection to the central purpose of the initiative, the initiative violates the single-subject requirement. *See In the Matter of the Title, Ballot Title and Submission Clause for 2009-2010 #91*, 235 P.3d 1071, 1077 (Colo. 2010) (herein after “#91”);

see also, In the Matter of Title, Ballot Title & Submission Clause, & Summary for 1997-1998 No. 64, 960 P.2d 1192, 1198 (Colo. 1998) (herein after “#64”)
(proposed initiative regarding “qualifications of persons for judicial office” violated the single-subject requirement because it also resulted in the repeal of the City and County of Denver’s home-rule authority over the appointment of Denver county court judges and the reallocation of government authority regarding Denver county court judgeships did not “share a unifying or common objective with those provisions changing the qualifications of judicial officers.”).

Under the theme of a people’s inalienable right to local self-government, #75 curtails the authority of the federal and state governments and fundamentally changes the nature of government. Therefore, this is a separate and distinct subject and the action of the Title Board should be reversed.

4. Shifting power from state to local governments to eliminate corporate rights is not central to the individual right to local self-government.

With respect to #75’s provision granting local governments the power to enact local laws “defining, altering or eliminating the rights, powers and duties of corporations and other business entities,” the Title Board describes this provision as being “[r]elated to the enhancement of local government powers....” Title Board Opening Brief, p. 6. Petitioners agree; this provision does not relate to the

individual right to self-government and instead constitutes an additional subject that deprives the Title Board of jurisdiction.

According to their Opening Brief, the Title Board argues as follows:

Presently, the General Assembly has the power to establish the laws defining, altering or eliminating the rights, powers and duties of corporations and other business entities. The General Assembly has always had extensive authority to exercise the governmental police power in regulating corporate business.... The proposed initiative shifts this power to local governments.

Title Board Opening Brief, p. 7.

This shift in power from state to local control of corporate entities is not directly related to the exercise of an individual's right to self-government and, therefore, does not qualify as an implementing provision. This Court's holding in #91 is illustrative here. In that case, the Court considered an initiative to amend the state constitution so as to impose a beverage container tax and direct 80% of the revenue to Colorado's nine basin roundtables and the interbasin compact committee. #91, 235 P.3d at 1074. In addition, the initiative imposed a prohibition on legislative actions by the General Assembly that would alter related governing statutes or empower a state agency to supersede or usurp the authority of the roundtables or compact committee. *Id.* This Court determined that the initiative impermissibly contained two subjects: (1) creating the container tax, and (2) prohibiting legislative authority and ceding such authority to another body. *Id.* In reaching its conclusion, the Court reasoned as follows:

While many of Initiative #91's provisions relate to a beverage container tax and its administration, coiled in the folds of this initiative is a separate and distinct subject that would negate the power of the General Assembly to exercise legislative supervision over the basin roundtables and the interbasin compact committee, or create or empower any other agency to supersede or be superior to them, until the year 2015, while also embedding these entities into the water sections of the Colorado Constitution and vesting in them new authority over Colorado water matters.

Id. at 1077.

Citing its conclusion in #64, this Court noted that it has reversed the Title Board's action in setting titles for other such initiatives "affecting substantial rearrangement of existing governmental powers." *Id.* at 1078. #75 falls squarely within this category. Under the general theme of establishing a new, individual right to local self-government, coiled in the folds of this initiative are separate and distinct subjects that would reverse long-standing preemption standards and negate the power of the General Assembly. As with #64 and #91, the action of the Title Board should be reversed with directions to strike the title and return the initiative to the Proponents.

II. The Title and Submission Clause are Confusing, Misleading, and Do Not Reflect the Intent of the Proponents.

A. Standard of Review

The Petitioners agree with the standard of review as set forth in the briefs of the Proponents and the Title Board.

B. The Title Board Did Not Need to Interpret the Merits of the Initiative In Order to Set Clear Title.

Contrary to the arguments of both the Title Board and the Proponents, the Title Board did not need to interpret the measure in order to set a clear title. Rather, the Title Board needed only to adhere to representations made by the Proponents themselves and the plain language of the initiative.

As laid out in the Petitioners' Opening Brief, the Proponents specifically argued to the Title Board that that the intent of the measure is to establish an "individual right to local self-government" *not* a right that is held by local governments, and that removing the language "people's right" from the title was "removing an essential intent of this measure and placement in the bill of rights." Tr. of March 19, 2014 hearing, 25[20]-30 [5]. The Title Board flagrantly ignored Proponents' pleas and instead set the title as "a right" because, in their opinion, it more accurately reflected the effect of the measure (albeit not the intent). *Id.* In doing so, the Title Board set a defective title. Therefore, the Court should reverse the action of the Title Board and remand this matter with instructions.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Petitioners respectfully request that the Court find that the Initiative does not contain a single subject and remand this matter to the Title Board with direction to return the Initiative to Proponents. In the alternative, Petitioners request that the Court remand the matter

to the Title Board with the instructions to amend the title consistent with the concerns set forth above.

Respectfully submitted this 19th day of May, 2014.

HOGAN LOVELLS US LLP

s/ Chantell Taylor

Chantell Taylor, No. 33059

Elizabeth H. Titus, No. 38070

Hogan Lovells US LLP

1200 Seventeenth Street, Suite 1500

Denver, Colorado 80202

Phone: (303) 899-7300

Fax: (303) 899-7333

*Attorneys for Mizraim S. Cordero
and Scott Prestidge*

CERTIFICATE OF SERVICE

I certify that on this 19th day of May, 2014, a true and correct copy of the foregoing **PETITIONERS' ANSWER BRIEF** was served via ICCES upon:

Elizabeth Comeaux, Esq.
1663 Steele Street, Suite 901
Denver, CO 80206
Email: EAComeaux.Atty@outlook.com
Attorney for Respondents

Maurice G. Knaizer, Esq.
LeeAnn Morrill, Esq.
Office of the Colorado Attorney General
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203
Email: Maurice.Knaizer@state.co.us
LeeAnn.Morrill@state.co.us
Attorneys for the Ballot Title Setting Board

s/ D J McKune