

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

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Original Proceeding Pursuant to § 1-40-107(2),
C.R.S. (2013)

Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and
Submission Clause for Proposed Initiative 2013-
2014 #94 (“Duties of the Independent Ethics
Commission”)

Petitioner:

Stacy Carpenter,

v.

Respondents:

Chris Forsyth and Laurie Forsyth

and

Title Board:

Suzanne Staiert, Daniel Domenico, and Jason
Gelender

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Case No. 2014SA102

ANSWER BRIEF OF THE TITLE BOARD

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).

It contains 2,211 words.

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

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.

/s/ Sueanna Johnson _____

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Suzanne Staiert, Daniel Domenico, and Jason Gelender, as members of the Ballot Title Setting Board (the “Title Board”), by and through undersigned counsel, hereby submit their Answer Brief.

STATEMENT OF THE CASE

The Title Board incorporates its Statement of the Case from its Opening Brief.

STATEMENT OF THE FACTS

The Title Board incorporates its Statement of the Facts from its Opening Brief.

SUMMARY OF THE ARGUMENT

The arguments raised by the Petitioner do not warrant reversal of the Title Board’s actions. This Court has determined that judicial discipline and judicial disability proceedings are a single subject. Consequently, because #94 seeks to transfer the duties and powers of the Judicial Commission on Discipline (“Judicial Commission”) to the Independent Ethics Commission (“Ethics Commission”), the measure likewise contains a single subject.

The title is also fair, clear, and accurate. The title accurately reflects the intent of the Proponents. By removing jurisdiction of

judicial disciplinary and disability cases, as well as rulemaking authority, from the oversight of the Supreme Court, the measure remedies what the Proponents perceive to be as a current conflict of interest.

ARGUMENT

I. The measure contains only one subject.

A. The standard of review and preservation of the issue on appeal.

The Title Board concurs with the standard of review set forth by the Petitioner and Proponents with supplementation of statements made in its own Opening Brief at 4-5. The Title Board agrees that the Petitioner preserved the issue for appeal.

B. Judicial discipline *and* judicial disability comprise a single subject.

The Petitioner raises two main arguments to support that #94 contains multiple subjects. First, the Petitioner argues that judicial discipline and judicial disability are decided under different standards and have different sanctions, thereby making them separate subjects.

Pet'r Opening Brief at 7-9. Second, the Petitioner argues “regulation of judicial conduct” is an “overreaching theme” that violates the single subject requirement. *Id.* at 10-12. These arguments should be rejected.

The fact that different standards or sanctions are available for judicial discipline as opposed to judicial disability cases is immaterial to whether #94 contains a single subject. The central issue is whether Colo. Const., art. VI, § 23 contains a single subject by addressing the retirement or removal of judges through either disciplinary or disability proceedings. The Petitioner assumes that because Art. VI, § 23 was passed prior to the single subject requirement contained in Colo. Const., art. V, § 1(5.5), it must contain multiple subjects. The Petitioner relies on *Bruce v. Hobbs (In re Title, Ballot Title & Submission Clause)*, 987 P.2d 243, 246 (Colo. 1999), which noted that any initiative that concerns a “broad portion” of TABOR contains multiple subjects, as TABOR contains multiple subjects and would have been unconstitutional if the single subject requirement had been in effect when it was proposed.

The Petitioner's assumption that judicial discipline and disability are separate subjects is incorrect. As relied on in the Title Board's Opening Brief, this Court has previously held that modifying the

composition and rules of the Judicial Commission comprise one distinct subject. *Aisenberg v. Campbell (In re Title)*, 8 P.3d 1194, 1196 (Colo. 2000). The initiative in *Aisenberg* sought to repeal and reenact several provisions of Colo. Const., art. VI, § 23. Of note, the measure would have transferred authority to promulgate procedures of the Judicial Commission to the General Assembly by repealing and reenacting the first two sentences in § 23(3)(h). That provision in the Constitution states: “The supreme court shall by rule provide *for procedures before the commission on judicial discipline, the masters, and the supreme court*. The rules shall also provide the standards and degree of proof *to be applied by the commission in its proceedings*.” (emphasis added). The measure in *Aisenberg* proposed to change that language as follows: “The General Assembly shall enact all section 23(3) procedures. A preponderance of the evidence shall be required for disciplinary action, but any commission finding other than a full exoneration shall compel a retention vote of the judicial officer on the next yearly state election date at least 90 days later.”

The initiative in *Aisenberg* was found to contain a single subject on grounds that the provisions of the measure, “all relate to the

selection, powers, and procedures of the Commission.” *Id.* at 1196. Had the *Aisenberg* measure passed, this Court would have been deprived of any rulemaking authority to establish procedures for the Judicial Commission. Consequently, this Court would have been unable to establish the procedures for judicial disability cases, as *all procedures* were to be established by the General Assembly. If judicial discipline *and* judicial disability comprise separate subjects, as advocated by the Petitioner, this Court could not have found that the measure in *Aisenberg* contained a single subject. Because this Court’s decision in *Aisenberg* controls, transferring the powers and duties of the Judicial Commission to the Ethics Commission does not contain two distinct purposes.

The Petitioner focuses on the fact that disciplinary proceedings involve the “intentional, documented, past conduct of a judge,” while a disability proceeding analyzes one’s inability to act in the intended manner. A judge’s diminished mental or physical capacity, however, may be the result of or the reason for a judge’s “willful misconduct in office.” Indeed, the current method or manner to remove or sanction a judge – whether due to a disciplinary or disability proceeding or both, as

may be the case – simply underscores that Colo. Const., art. VI, § 23 addresses the single subject encapsulated in #94, which is the “regulation of judicial conduct.” This is not an “overreaching theme,” as both discipline and disability relate to each other, and in some instances may be dependent upon the same facts raised in a complaint or discovered in an investigation. *See generally* C.R.J.D. 35(c) and 36(c) (disciplinary proceedings may be disposed of or the sanction may be the initiation of a disability proceeding).

Likewise, “regulation of judicial conduct” – whether due to discipline or disability – does not attempt to incorporate unrelated provisions concerning qualification, retention, or recall of judges. *Compare Aisenberg v. Campbell*, 960 P.2d 1192, 1199 (Colo. 1998) (the “judicial branch” is not considered a single subject, as incongruous provisions, such as nomination and retention of judges could be combined with provisions concerning the qualification and selection of Commission members and powers); *see also Aisenberg*, 8 P.3d at 1196 (the measure contained a single subject even though it contained a provision that absent a full exoneration by the Commission, a judge would be subject to retention at the next election). Instead, the purpose

of #94 is narrowly tailored to transferring the powers of the Judicial Commission to the Ethics Commission.

The Petitioner's argument that judicial disability cases are inappropriate to be assigned to the Ethics Commission is irrelevant to whether the measure contains a single subject. Whether the Ethics Commission is properly equipped to handle judicial disability cases concerns the merits and effect of the measure, and has no bearing on the single subject analysis. *Kemper v. Hamilton (In re Title, Ballot Title, and Submission Clause for 2011-2012 #45)*, 274 P.2d 576, 581, fn. 2 (Colo. 2012) (the Court refrains from analyzing the merits or potential effects of the measure, but confines its single subject review to the plain language of the measure). Accordingly, this Court should uphold the finding of the Title Board that #94 contains a single subject.

II. The title set by the Title Board for #94 is complete and accurate.

A. The standard of review and preservation of the issue on appeal.

The Title Board concurs with the standard of review set forth by the Petitioner and Proponents with supplementation of statements

made in its own Opening Brief at pp. 9-10. The Title Board agrees that the Petitioner preserved the issue for appeal.

B. The title set by the Title Board conveys the intent and purpose of the measure.

The Petitioner argues that the clear intent of the measure is not reflected in the title because #94 seeks to limit the role of the appellate courts to review matters involving judicial discipline and disability. The Petitioner raises two points from the initiative for her position: (1) the Ethics Commission is not bound by, nor owes deference to, the appellate courts and (2) if the recommendation by the Ethics Commission is supported by “substantial evidence,” the Supreme Court shall accept the recommended sanction or disposition. Pet’r Opening Brief at 14.

The arguments raised by the Petitioner are broader than set forth in her Petition for Review, as the advisory issue presented identified the first but not the second point. *Cf. Kelly v. Tancredo*, 913 P.2d 1127, 1130, n. 3 (Colo. 1996) (the Court will decline to review an issue not raised in a motion for rehearing). While the Petitioner raised the second issue in her motion for rehearing, the Title Board did not

address it in its Opening Brief due to its exclusion from the Petition for Review. Nonetheless, the Petitioner's argument should be rejected, as the limited role of the appellate courts is a potential effect of the measure that does not need to be stated in the title.

The intent of the measure, as expressed by Proponents in their response to the motion for rehearing ("Response"), was as follows: "[The measure] transfers jurisdiction over judicial discipline and disability, including rule-making authority, to the Independent Ethics Commission and by doing so removes the conflict of interest that is currently present in judicial disciplinary and disability proceedings." Response at 5 (attached as Exhibit A to the Title Board's Opening Brief). The Proponents believe that judicial disciplinary complaints are improvidently dismissed on reliance of C.R.J.D. 13(b) that grants the Judicial Commission or executive director authority to dismiss complaints that "are based on disputed rulings under the jurisdiction of the trial or appellate courts[.]" *Id.* The major concern of the Proponents is not necessarily reducing the appellate courts' role in judicial disciplinary matters, but rather allowing for the investigation of

judicial misconduct based on allegations arising from appealable orders, as well as taking away the Supreme Court's rulemaking authority.

In transferring jurisdiction of judicial discipline and judicial disability cases to the Ethics Commission, the measure specifies that the Ethics Commission may promulgate rules and procedures governing those proceedings. Additionally, the Ethics Commission owes no deference to the findings of an appellate court, and that if the Ethics Commission's recommendations are supported by "substantial evidence," the Supreme Court shall adopt the recommendations. Although these details will certainly have an effect on how judicial disciplinary and disability claims are handled in the future if this measure is passed, the voter need not know every detail of the proposed changes to the procedure or standard of review, as it is not material to the understanding of the measure. *In re Title*, 44 P.3d 222, (Colo. 2002) ("The title, standing alone, should be capable of being read and understood, and capable of informing the voter of the major import of the proposal, but need not include every detail.") (emphasis in original).

Similarly, the Petitioner's contention that the appellate courts role is limited by this measure is somewhat misleading, as district courts

and the court of appeals currently have no authority over judicial misconduct. *Cf. Higgins v. Owen*, 13 P.3d 837, 838 (Colo. App. 2000) (holding that the district court lacks jurisdiction to compel the Judicial Commission or its executive director to investigate a complaint alleging judicial misconduct); *see also* C.R.J.D. 40 (the Supreme Court issues the final decision upon the recommendation of the Judicial Commission for a sanction in a disciplinary proceeding). The Supreme Court under this measure certainly would have limited authority in its review of a recommendations for judicial disciplinary or disability proceedings from the Ethics Commission. But this is consistent with the central purpose of the measure, which is to transfer jurisdiction away from the Supreme Court to the Ethics Commission, as clearly expressed in the title set by the Title Board.

Similarly, the Petitioner's contention that the measure "totally insulates the IEC from being able to consider any precedent emanating from the state's appellate courts" is an overstatement. The measure indicates that the Ethics Commission is not bound by, nor owes deference to, the findings of an appellate court. The Ethics Commission, however, is authorized to promulgate rules and procedures

for judicial discipline and disability proceedings. It is not clear how the Ethics Commission will interpret or implement this provision, as the measure certainly does not *prohibit* or *bar* it from relying on or adopting judicial precedent. *See Paredes v. Corry (In re Title, Ballot Title, & Submission Clause 2007-2008 # 61*, 184 P.3d 747, 752 (Colo. 2008) (holding that the Title Board need not discuss every possible effect of the measure); *see also In re Title v. John Fielder*, 12 P.3d 246, 257 (Colo. 2000) (whether a measure has the intended effects the petitioners claims is beyond this Court's scope of review). Because the measure does not prohibit the Ethics Commission from relying on judicial precedent, it is not misleading to exclude this provision from the title. As such, the title set by the Title Board is fair, clear, and accurate, and should be upheld.

CONCLUSION

Based on the foregoing authorities and reasons, this Court should affirm the actions of the Title Board and approve the title for #94.

Respectfully submitted on 19th day of May, 2014.

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CERTIFICATE OF SERVICE

This is to certify that, on this 19th day of May, 2014, I duly served this **ANSWER BRIEF OF THE TITLE BOARD** on all parties via ICCES or overnight delivery, addressed as follows:

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