

SUPREME COURT, STATE OF COLORADO
CASE NO. 00 SA 147
ORIGINAL PROCEEDING PURSUANT TO § 1-40-107(2), C.R.S. (1999)
Appeal from the Ballot Title Setting Board

PETITIONER'S ANSWER BRIEF TO RESPONDENTS JOHN H. HEAD AND ARNOLD GROSSMAN'S BRIEF

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE, AND SUMMARY FOR PROPOSED INITIATIVE 1999 – 2000 #255 (BACKGROUND CHECKS - GUN SHOWS)

WILLIAM BERNARD HERPIN, JR.,

Petitioner,

v.

WILLIAM HOBBS, ALAN GILBERT, and CHARLES W. PIKE,

Title Board,

and

JOHN F. HEAD and ARNOLD GROSSMAN,

Respondents.

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COMES NOW James O. Bardwell, counsel for William Bernard Herpin, Jr. and presents Petitioner's Answer Brief to *Respondents John H. Head and Arnold Grossman's Brief in Support of Final Action of State Title Setting Board*, and, in connection therewith, answers as follows:

PROCEDURAL BACKGROUND

1. Petitioner filed a Petition for Review of Action of the Colorado State Ballot Title Setting Board ("Title Board") with this Court on April 24, 2000 concerning proposed initiative 1999 – 2000 #255 (Background Checks – Gun Shows) pursuant to § 1-40-107(2), Colorado Revised Statutes, as amended.

2. This Court set an expedited briefing schedule requiring all parties to file simultaneous briefs on or before May 15, 2000.

3. Respondents filed a Motion for More Definite Statement of Issues Presented on May 5, 2000.

4. On May 9, 2000, this Court ordered that any party may file an Answer Brief within five days of service of the Opening Brief.

5. Respondents filed an Opening Brief on May 15, 2000 which was served on counsel for the Petitioner on May 16, 2000 by overnight service.

ARGUMENT

A. Multiple Subjects in the Initiative.

6. Respondent's Opening Brief states in II.B (page 8), "Initiative #255 is limited to one subject: implementation of background checks at gun shows. . . . [The initiative] defines certain terms. . . . Not one of these provisions [of the initiative] relates to a subject other than background checks at guns shows." However, the proposed initiative broadens the commonly

accepted definition of a gun show to include “...the entire premises of an event or function, including but not limited to parking areas for the event or function, that is sponsored to foster, in whole or in part, the purchase, sale, offer for sale, or collection of firearms at which: (1) twenty-five or more firearms are offered or exhibited for sale, transfer, or exchange; or (2) not less than three gun show vendors exhibit, sell, offer for sale, transfer, or exchange firearms.” (Proposed § 12-26.1-106(d)) Therefore, not only does the proposed initiative require background checks for the private transfer of firearms at a gun show, it redefines and broadens the definition of a gun show to include any event or function where 25 or more firearms are offered or exhibited for sale, transfer, or exchange; or 3 or more persons have at least 1 firearm each offered or exhibited for sale, transfer, or exchange. This will include such events and functions as flea markets, garage sales, sport shooting matches where participants may arrange to sell or transfer a firearm, gun club meetings that may include a “swap session,” gathering of firearm collectors, and other non-traditional gun show events. Even in the case of a traditional gun show, this new definition would now include areas outside of the gun show proper such as parking lots. In addition, the provisions of the proposed initiative will apply even if the transfer takes place miles apart and days after (with no limit on distance or time) the gun show if any part of the transfer began at a gun show.

This expansion of the scope of a gun show goes well beyond the subject of requiring background checks at gun shows and constitutes an additional subject in violation subsection (5.5) of Section 1 of Article V of the State Constitution which requires that “[n]o measure shall be proposed by petition containing more than one subject.”

- B. Lack of Definitions of Terms in Title, Ballot Title and Summary is unclear and Misleading.

7. Respondent's Opening Brief states in IV.A (page 13), "...the Title Board is not required to include definitions of terms of an initiative unless such definitions 'adopt a new or controversial legal standard which would be of significance to all concerned' with the initiative.

Matter of Title, Ballot Title and Submission Clause and Summary Pertaining to Proposed Election Reform Amendment, 852 P.2d 28, 34 (Colo. 1993). Neither 'gun show vendor' nor 'gun show' adopt such a standard."

a. Gun Show Vendor: At the Ballot Title Setting Board on April 19, 2000, the Title Board modified the titles to include a partial definition of a "gun show vendor" from the proposed initiative: "DEFINING A 'GUN SHOW VENDOR' AS ANY PERSON WHO EXHIBITS, OFFERS FOR SALE, OR TRANSFERS A FIREARM AT A GUN SHOW." In § 12-26.1-106(d) of the proposed initiative, "gun show vendor" is defined as, "...any person who exhibits, sells, offers for sale, transfers, or exchanges, any firearm at a gun show, regardless of whether the person arranges with a gun show promoter for a fixed location from which to exhibit, sell, offer for sale, transfer, or exchange any firearm." (Underline indicates part of definition not placed in titles) By not including the full definition of gun show vendor, the titles obscure the fact that a gun show patron (individual) is also a gun show vendor if he offers a private firearm for sale or exchange by walking through the event with a "for sale" sign affixed to his firearm.

Common usage of the term "vendor" implies a business person engaged in vending (selling) and not a customer. The stated intent of the proposed initiative is expressed in an article

titled “Why Close the Gun Show Loophole?” found on the SAFE Colorado Web Site:

Why are gun shows so popular with criminals? Since passage of the Brady Law, federally licensed firearms dealers (FFLs) must conduct background checks and observe waiting periods, even for guns sold at gun shows. However, because of a significant loophole included in the 1993 Brady Act, unlicensed dealers and so-called "private collectors" are currently allowed to sell firearms at gun shows and other public markets without conducting any criminal background checks on purchasers. As a result, gun shows and flea markets have become one-stop firearm shopping markets for criminals, gun traffickers, militia members and juveniles who want to skirt federal gun laws and sell guns on a cash-and-carry, no-questions-asked basis.

(See Appendix A, found at <http://www.safecolorado.org/pages/gunloop.html>)

In this context, vendor is clearly expressed as “unlicensed dealers” and “private collectors” not patrons offering a single firearm for sale or exchange.

By expanding the definition of “gun show vendor” to include gun show patrons (individuals) who are not operating from a fixed, rented space, the standard established by this Court in *Matter of Title, Ballot Title and Submission Clause and Summary Pertaining to Proposed Election Reform Amendment*, 852 P.2d 28 (Colo. 1993) requires that the full definition of gun show vendor be included in the titles to correctly and fairly express the true intent and meaning of the proposed initiative since the proposed definition adopts a new and controversial legal standard which would be of significance to all concerned.

b. Gun Show: In § 12-26.1-106(b) of the proposed initiative, “gun show” is defined as “...the entire premises of an event or function, including but not limited to parking areas for the event or function, that is sponsored to foster, in whole or in part, the purchase, sale, offer for sale, or collection of firearms at which: (1) twenty-five or more firearms are offered or exhibited for sale, transfer, or exchange; or (2) not less than three gun show vendors exhibit, sell, offer for sale, transfer, or exchange firearms.” The commonly accepted

definition of gun show is an event organized by a promoter in which vendors operating from a rented, fixed space offer firearms and related items for sale and the general public (patrons) are charged an admission fee. Federal law, 27 CFR § 178.100(b) defines a “gun show” as “A gun show or an event is a function sponsored by any national, State, or local organization, devoted to the collection, competitive use, or other sporting use of firearms, or an organization or association that sponsors functions devoted to the collection, competitive use, or other sporting use of firearms in the community.”

If the proposed initiative is adopted, the commonly accepted definition of gun show is expanded to include any event at which 25 or more firearms are exhibited, sold, offered for sale, transferred, or exchanged or 3 or more persons exhibit, sell, offer for sale, transfer, or exchange firearms. This would turn, for example, the following events into gun shows subjecting the participants to criminal penalties if they fail to follow the provisions of the proposed initiative:

(1) Estate Sale: In a case where a husband owns 25 or more firearms and passes away, the widow, in liquidating her husband’s firearm collection from her home, would be conducting a gun show.

(2) Private Residence: Three friends are sitting around the kitchen table in a private residence discussing the firearms each own. If they decide to exchange firearms among themselves, they would now meet the definition of a gun show.

(3) Firearm Museum: Since the proposed definition of a gun show includes a “collection of firearms,” a museum which includes at least 25 firearms would be subject to the provisions of the proposed initiative if they were to offer a firearm out of their collection to another museum or collector.

These examples, and many others, clearly show that the commonly accepted definition of a gun show has been expanded and, in so doing, adopts a new and controversial legal standard which would be of significance to all concerned; and therefore, meets the standard set by this Court in *Matter of Title, Ballot Title and Submission Clause and Summary Pertaining to Proposed Election Reform Amendment*, 852 P.2d 28 (Colo. 1993). This new definition must be included in the titles to avoid confusion with the voter and to correctly and fairly express the true intent and meaning of the proposed initiative.

c. Firearm: The proponents of the initiative contend, at page 13 of their Brief, that the initiative's definition of "firearm" is one found at C.R.S. § 18-1-901(h), defining terms for Title 18 of C.R.S., the Colorado criminal code. Thus, they argue, the term is not novel or technical, citing this Court's decision in *Matter of Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 215 (Prohibiting Certain Open-Pit Mining*, No. 00 SA 65 ((May 1, 2000).

Firearm is defined at several locations in Colorado law, not just in Title 18. It is also defined at C.R.S. § 12-26-101(1)(a), a statute which requires certain record keeping of retail dealers in such items as "a pistol, revolver, or other weapon of any description, loaded or unloaded, from which any shot, bullet, or other missile can be discharged, the length of the barrel of which, not including any revolving, detachable, or magazine breech, does not exceed twelve inches." Paragraph (b) of C.R.S. § 12-26-101(1) excludes "firearms, as defined in paragraph (a) of this subsection (1), for which ammunition is not sold or which there is reasonable ground for believing are not capable of being effectually used." Indeed, given that this definition is found in Title 12, the same location at which the initiative proponents would place their new statute, it

would make more sense for this definition to be the applicable one, not the definition found in another title of Colorado Revised Statutes. However, the proponents have resisted the suggestion that their proposed initiative more properly belongs with the rest of Colorado's criminal code, in Title 18.

A third definition is found at C.R.S. § 30-15-301, pertaining to regulation of discharge of firearms in unincorporated areas. It defines firearm as "any pistol, revolver, rifle, or other weapon of any description from which any shot, projectile, or bullet may be discharged." Thus there are (by Petitioner's research) three different definitions of "firearm" to choose from in Colorado law, depending on the context of the statute which uses the term.

In the *Open Pit Mining* case, the initiative used the term "open mining" without further defining it. The term was already defined in only one place in existing statutory law, and this Court said there was no confusion or ambiguity about the term because it was already defined. In this case, the definition of firearm is created by the proposed initiative - the initiative does not take it from existing law, but defines the term itself. In addition, the definition is not the one found in Title 12, C.R.S., which is the Title amended by the proposed initiative, but rather a duplicate of one found elsewhere in, Title 18. Finally, Colorado law already has multiple definitions of the term, and not just one as was the case in the *Open Pit Mining* case.

The existence of three different definitions of "firearm" in Colorado law (this initiative would add a fourth), together with markedly different definitions in Federal law (see, for example, 18 U.S.C. § 921(a)(3) and 26 U.S.C. § 5845(a)) show that the term is quite technical, and has no common or ordinary meaning. The Title Board erred in not including the definition in either the title, ballot title or summary.

WHEREFORE, petitioner requests that this Court find that the proposal contains more than one subject in violation of Subsection (5.5) of Section 1 of Article V of the State Constitution and that no title, ballot title and submission clause, and summary should have been fixed for the proposal. He further requests that the proposal be remanded to the Title Board with directions to return it to the proponents.

Further, petitioner requests that this Court hold that the titles and summary fixed for the proposal do not clearly, accurately, and fairly express the subject of the proposal without including the complete definitions of “gun show vendor,” “gun show,” or “firearm” in the titles or summary. He, therefore, requests that this Court remand said titles to the Title Board with directions to strike the titles and return the proposal to the proponents.

Respectfully submitted this 22nd day of May, 2000:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 22nd day of May, 2000, I hand-delivered a true and correct copy of the foregoing Answer Brief in the matter of the Title, Ballot Title and Submission Clause, and Summary for Proposed Initiative 1999 - 2000 #255, addressed to:

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