

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 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 Brief.

I. STATEMENT OF THE ISSUES

The issues in this case relating to the titles and summary are:

- (1) Whether the proposed measure contains only one subject which is clearly expressed in the title;
- (2) Whether the titles and summary correctly and fairly express the true intent and meaning of the proposal; and
- (3) Whether the titles and summary are likely to cause confusion and are misleading.

II. STATEMENT OF THE CASE

A. Nature of the Case

This action is brought pursuant to §1-40-107(2), C.R.S. for review of the action of the Ballot Title Setting Board ("Title Board") in determining and fixing the title, ballot title and submission clause, and summary for proposal 1999 – 2000 #255. The Title Board met on April 5, 2000 and fixed titles and summary for the proposal (Appendix A, p. 4). Petitioner filed a *pro se* request for rehearing on April 10, 2000 identifying numerous defects in the titles and summary (Appendix B) which was heard on April 19, 2000 (Appendix A, p. 4). At that hearing, the Title Board denied petitioner's request for a rehearing in its entirety but made changes in the titles and summary based on other requests for a rehearing (*Id.*). A petition for review was filed by Petitioner in this Court on April 24, 2000.

B. Statement of Facts

The proposal, which will create a new Article 26.1 to Title 12 of the Colorado Revised Statutes, was filed with the Secretary of State on March 24, 2000 (Appendix C). The Title Board met on April 5, 2000 and fixed titles and a summary for the proposal. Petitioner filed a motion for rehearing identifying numerous defects in the titles and summary which was heard on April 19, 2000. At that rehearing the Title Board denied petitioner's request in its entirety but made changes to the titles and summary based on the requests of other electors. A petition for review was filed with this Court on April 24, 2000. The Title Board provided Petitioner (but not his counsel) with a "corrected summary" on May 12, 2000, three days before this brief was due (and attached hereto as Appendix A).

The proposal contains the following express provisions that become effective on March 31, 2001:

- (1) Requires a gun show vendor, prior to the transfer or attempted transfer of a firearm, to require a background check on the prospective transferee and obtain approval for the transfer from the Colorado Bureau of Investigation if any part of the transaction occurs at a gun show;
- (2) Defines "gun show vendor," "gun show promoter," "licensed gun dealer," "gun show," "collection," and "firearm;"
- (3) Requires a gun show promoter to arrange for the services of one or more Federally licensed gun dealers to conduct background checks at a gun show;
- (4) Prohibits the transfer of a firearm, if any part of the transaction occurred at a gun show, if a background check had not been obtained by a Federally licensed gun dealer;
- (5) Requires record keeping and retention by Federally licensed gun dealers who obtain background checks;
- (6) Permits Federally licensed gun dealers to charge a fee of up to ten dollars for

conducting each back ground check at gun shows;

- (7) Requires gun show promoters to prominently post notice of the background check requirement;
- (8) Establishes criminal penalties for violations of these requirements;
- (9) Exempts transfers of certain antique firearms, relics, and curios from the background check requirement; and
- (10) Requires the appropriation of funds necessary to implement the measure.

These are the topics for which the Title Board found a single subject in the proposal, identifying it as “background checks”.

III. ARGUMENT

Summary of the Argument

The proposal contains more than one subject with provisions addressing topics other than background checks for the transfer of a firearm at a gun show. In particular, the proposal will operate to ban certain gun sales altogether, and will necessarily reduce state spending in other areas by virtue of its mandatory appropriation. The titles do not clearly express a singular principle of the proposal, in that they omit these additional, unrelated, subjects. The titles and summary of the proposal are inaccurate and do not fairly or correctly express the true intent and meaning of the proposal, in that they omit these additional, unrelated, subjects.

A. The proposals contain multiple subjects in violation of the constitutional requirement for a single subject; therefore, no titles or summary should have been fixed.

1. The initiative will ban sales by unlicensed persons at gun shows, in addition to, or instead of the background checks it purports to mandate.

Under the Colorado Constitution, initiatives must be limited to a single subject. See Colo. Const. art. V, § 1(5.5). This requirement, together with the requirement that such single subject

be “clearly expressed” in its title, is meant to prevent the voters from being deceived about the true purpose and effect of an initiative. See *Matter of Title, Ballot Title, Submission Clause, Summary for 1997-98 No. 84*, 961 P.2d 456, 458 (Colo. 1998).

The surface intent of the proposed initiative is to require a background check prior to the transfer of certain firearms (as firearm is defined in the proposed initiative) if any part of the transaction occurs at a gun show (as gun show is defined in the proposed initiative). However, the proposal addresses more than background checks, and is designed to, and will in conjunction with existing Federal law also operate to prohibit certain firearm transactions at, or originating at, gun shows altogether, by persons not licensed as dealers under Federal law. This outright prohibition, also perhaps not as politically popular as “closing the gun show loophole,” is a second, unrelated subject to the proposed initiative. This second purpose is nowhere mentioned in the title, ballot title, or summary prepared by the Title Board. As this proposal would not be enacted in a vacuum, but rather must be considered in the context of existing law, an overview of existing firearms regulation, both State and Federal is necessary to fully explain this.

Federal law currently requires that persons engaged in the business of dealing in firearms have a license to do so, and further requires that such licensed dealers conduct a background check on any proposed transferee, and obtain governmental approval (or wait for the expiration of three business days without any government response) before transferring a firearm. 18 U.S.C. § 922(t) requires that a Federal Firearm Licensee (FFL) (“licensed dealer”) conduct a background check using the National Instant Criminal Background Check System (“NICS”) prior to transferring a firearm to a non-licensed person. Colorado law (C.R.S. § 24-33.5-424, signed into law on March 7, 2000) provides that the Colorado Bureau of Investigation (“CBI”) will conduct its own background check

on a prospective firearm purchaser, as well as contacting NICS on behalf of the dealer (acting as a so called "Point of Contact" under Federal regulations), to enable the dealer to comply with the Federal requirement. The proposed initiative requires that the background check required for transactions covered by it also be performed by CBI, and also under the terms of C.R.S. § 24-33.5-424. Thus the proposed initiative requires that CBI contact NICS as part of performing a background check.

On the other hand, Federal law excludes persons who sell firearms, but are not engaged in the business of dealing in firearms, from all of its licensing and background check requirements. Whether a person selling firearms is required to be licensed as a dealer is a function of whether or not he is "engaged in the business." The term is defined by Federal law, in relevant part at 18 U.S.C. § 921(a)(21)(C):

21) The term "engaged in the business" means -

...

(C) as applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms; (Emphasis added).

The proposed initiative creates a requirement that at least one person holding a FFL must be present at any gun show that may include the transfer of a firearm from an unlicensed party, and that the FFL holder must contact CBI to conduct a background check on the recipient of the firearm, on behalf of the unlicensed seller.

However, such an activity by a FFL holder is prohibited by Federal law. As the background

check mandated by the proposed initiative is impossible to accomplish, no firearm transfers by unlicensed persons could ever occur at a gun show.

Federal regulations governing the use of NICS by FFL holders, whether through a Point of Contact or not, 28 CFR § 25.6(a) state, “FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act. FFLs are strictly prohibited from initiating a NICS background check for any other purpose.” The proposed initiative would require that an FFL violate 28 CFR § 25.6(a) since they would not be transferring the firearm but conducting a NICS background check for another party’s transfer. Federal regulations also prohibit accessing the NICS system, even by CBI, for this purpose. 28 CFR § 25.6(j) states:

(j) Access to the NICS Index for purposes unrelated to NICS background checks required by the Brady Act. Access to the NICS Index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. § 922(t) shall be limited to uses for the purpose of:

(1) Providing information to Federal, state, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives; or

(2) Responding to an inquiry from the ATF in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53).

28 CFR § 25.11 provides that use of the NICS system by a state Point of Contact (CBI in this case) or by an FFL holder for purposes other than those authorized can result in a fine of up to \$10,000, as well as revocation of their NICS inquiry privileges. No FFL holder will risk such consequences, even for the \$10 he may charge for each transaction under the proposed initiative.

The proposed initiative also purports to require a background check prior to any firearm

transfer if any part of the transaction takes place at a gun show. This could cover two people who meet at a gun show and, for example, discuss swapping a firearm each owns over a cup of coffee at the food court. If, any time in the future, those two people, in a private residence, decide to transfer a firearm between themselves, they would be in violation of state law if they do not obtain a background check prior to the transfer. However, the proposed initiative makes no provision for obtaining a background check outside the venue of a gun show. Such transactions would also be effectively prohibited, a subject separate from conducting background checks at gun shows.

The proposed initiative contains multiple subjects; purporting to require background checks be conducted upon certain sales at guns shows, and then also setting up a system whereby all such sales will be prohibited. The disguised nature of this second, unrelated purpose also violates the Constitutional requirement that the subject of an initiative be clearly expressed in its title.

2. The initiative cuts state spending in other, unstated areas, by virtue of its mandatory appropriation requirement.

In addition, the proposed initiative contains a mandatory appropriation for implementation of the initiative. A mandatory appropriation has been found to be a second, unrelated subject. See *Matter of Title, Ballot Title, Submission Clause, Summary for 1997-98 No. 84*, 961 P.2d 456, 460-61 (Colo. 1998):

Initiative # 84 and Initiative # 85 still contain more than one subject. First, the initiatives provide for tax cuts. Second, the initiatives impose mandatory reductions in state spending on state programs. These two subjects are distinct and have separate purposes. While requiring the state to replace affected local revenue in itself sufficiently relates to a tax cut, requiring the state separately to reduce its spending on state programs is not "dependent upon and clearly related" to the tax cut. *In re Amend Tabor No. 32*, 908 P.2d at 129. The tax cuts and mandatory state spending reduction do not encompass "a single definite object or purpose." *Id.* The dual constitutional changes which would be enacted by these initiatives are

precisely the types of mischief which the single subject requirement was intended to prevent. . . . Voters would be surprised to learn that by voting for local tax cuts, they also had required the reduction, and possible eventual elimination, of state programs. (Emphasis added).

As the Court in *Matter of Title, Ballot Title, Submission Clause, Summary for 1997-98 No. 84*, pointed out, requiring that the state appropriate money for one thing (to make up the local revenues to be reduced by the tax cuts imposed by the initiative at issue in that case, to pay for the background check program in this case) necessarily requires the state to spend less money elsewhere, under the current process:

Given that the “within all tax and spending limits” provision of the initiatives now before us includes the spending and revenue limits imposed by Amendment 1, the state will be able to replace local revenues lost through tax cuts only if it reduces existing state spending on state programs. The initiatives require the state to dedicate a portion of the state's current revenues to replace lost local revenue. Because of the spending and revenue limitations contained in article X, section 20, however, the state cannot increase either its overall spending or revenue collection to maintain the current level of spending on state programs. As a result, the state must lower the amount it spends on state programs. Moreover, because the initiatives provide for increasing the amount of the tax cuts on an annual basis, the state must make ever greater reductions in its spending on state programs. (Emphasis added).

Matter of Title, Ballot Title, Submission Clause, Summary for 1997-98 No. 84, 961 P.2d 456, 460 (Colo. 1998). Like the initiative at issue in the above case, this initiative does not except its mandatory appropriation from the TABOR amendment, and thus it will necessarily require a reduction in spending on other state programs. Voters considering this initiative might also be surprised to learn that by voting for background checks at gun shows, they also had required the reduction, and possible eventual elimination, of state programs. Indeed, they should be even more surprised than the hypothetical voters in the above case - in that example it is at least reasonable to

think that tax cuts (the subject of that initiative) might lead to less government revenue, and thus less government spending. In this case the subject - background checks on sales of firearms at gun shows, has far less connection to a reduction in state spending on certain programs, a second, unrelated, subject of both Initiative No. 84, and this proposed initiative.

B. The title, ballot title and submission clause, and summary as fixed and determined for the proposal do not correctly and fairly express the true intent and meaning of the proposed addition to the Colorado Revised Statutes.

1. Omission of definition of “gun show” from title.

The Title Board included the definition of “gun show vendor” as defined in the proposed initiative, in the title and ballot title. However, the definition of gun show vendor necessarily includes the definition of “gun show” as found in the proposed initiative, and the Title Board omitted this critical piece of information from the title and ballot title. The definition of gun show as used in the proposed initiative is broader than the traditional meaning, an event at which a large or significant number of dealers and other persons gather to exhibit, buy and sell firearms and related items. Traditionally these events are put on by promoters who both charge the public an admission fee, and charge a fee to persons for the use of a table or space to exhibit their items. The proposed initiative recognizes this traditional arrangement, in its definition of “gun show promoter.” The exhibitors may be selling firearms, related items, or may be merely exhibiting firearms, or offering completely unrelated items for sale.

The proposed initiative defines a gun show as the entire premises at which either twenty five or more firearms are offered or exhibited for sale, transfer, or exchange, or premises where at least three persons exhibit, sell, offer for sale, transfer, or exchange firearms. This definition is far broader than a traditional gun show. Persons considering the proposed initiative on the title alone

will have no idea that a “gun show” includes virtually any gathering at all of persons interested in any type or sort of firearms. No promoter could get away with charging admission for a gun show which included only three vendors, or only twenty five firearms. The definition is meant to encompass much more than traditional gun shows - informal gatherings, like a meeting or shooting event at a shooting range, or a swap meet or flea market where firearms are a tiny percentage of the items offered for sale.

While the initiative uses the term “gun show” to encompass virtually any place where firearms transactions might occur, that is not its common meaning, and having the title include the term, and the definition of “gun show vendor” without also including the very broad definition of gun show as used in the proposed initiative is deceptive and misleading.

2. Omission of definition of firearm

The proposed initiative defines the term “firearm” in its broadest possible terms, including among other terms for various types of firearms, any instrument or device capable or intended to be capable of discharging bullets, cartridges or other explosive charges. While a little unclear, in that traditionally firearms discharge metallic projectiles, and not cartridges or explosive charges, this definition includes items which are not traditionally thought of as firearms, and which are not regulated as firearms under current Federal or state law, including muzzle loading firearms and antique firearms (those made in or before 1899). No Federal license is required to be in the business of dealing in such firearms, because Federal law excludes them from its coverage. No background check is required before a dealer, or anyone else, may transfer such a firearm.

While the proposed initiative exempts transactions in antique firearms, as well as curio or relic firearms from the requirements of the background check, the proposed initiative does not exclude

the presence of these otherwise exempted firearms from helping to define an event as a gun show. An event with both muzzle loading firearms and a few modern type firearms would be a gun show, even though modern firearms could very few in number, and the primary purpose of the event could have nothing to do with modern type firearms.

For example, a “rendezvous” is a gathering where persons interested in the tradition of the “mountain man” get together to live as the scouts, fur traders and similar persons did in the West of the 19th century. These events include eating food authentic to the time, dressing in period costume, and living in period accommodations. They also often include target shooting and other competition with period style muzzle loading firearms, and sometimes include vendors in period items, including muzzle loading firearms and supplies for them. If just one modern firearm were offered for sale, along with 24 muzzle loading firearms, the event would be covered by the proposed initiative, even though no background check would be required for the muzzle loading firearms. The sale of that one modern type firearm would require a background check, whether the seller was a FFL holder or not.

The failure to include the extremely broad definition of firearm in either the title, ballot title, or summary, is deceptive and misleading, failing to inform voters about the tremendously broad scope of the coverage of the proposed initiative.

C. The title, ballot title and submission clause, and summary as fixed and determined for the proposal are likely to cause confusion and are misleading as to the content and fiscal impact of the proposed addition to the Colorado Revised Statutes.

As already noted, the proposed initiative seeks to ban sales of firearms at gun shows by unlicensed persons, by creating an unworkable and unlawful scheme which must be complied with

before a sale may be lawfully completed. Nothing in the title, ballot title or summary mentions this.

Nothing in the title, ballot title, or summary mentions that the proposed initiative requires a background check on sales of firearms to FFL holders, by unlicensed persons. Currently, FFL holders are excluded from the background check requirements of Federal and State law - they are only applicable to sales by FFL holders to unlicensed persons.

This initiative will be judged by an electorate unfamiliar with traditional gun shows, existing firearms regulation, and told over and over by the media and by the proponents of this initiative that existing law permits felons and other undesirables to obtain whatever firearms they want with no questions asked at these open air gun bazaars, and that this initiative will end that. The facts, as is often the case, are lost in the public discourse.

IV. CONCLUSION

WHEREFORE, petitioner William Bernard Herpin, Jr. 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, or 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 title and summary fixed for the proposal do not clearly, accurately, and fairly express the subject of the proposal and that they fail to inform the electorate whether to support or oppose the proposal even if it did contain a single subject. 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 15th day of May, 2000:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 15th day of May, 2000, I hand-delivered a true and correct copy of the foregoing Petitioner's 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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