

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER COLORADO</p> <p>Address: City and County Building 1437 Bannock Street Denver, CO 80202</p> <hr/> <p>DEVELOPMENTAL PATHWAYS, a Colorado Not-For-Profit corporation; EDWARD H. STAMMEL, an individual; NORMA ANDERSON, an individual; VIRGINIA BUCZEK, an individual; DOUGLAS ABRAHAM, an individual; ADAMS COUNTY ECONOMIC DEVELOPMENT, INC., a Colorado Not-For-Profit corporation; SUSAN K. RUSCH, an individual; ANN L. MCGIHON, an individual; and DANIEL E. WILLIAMS, an individual;</p> <p>Plaintiffs,</p> <p>vs.</p> <p>BILL RITTER, as Governor of the State of Colorado,</p> <p>Defendant.</p>	<p>COURT USE ONLY</p> <p>Case No. 07CV1353</p> <p>Courtroom: 1</p>
<p align="center">ORDER</p>	

THIS MATTER comes before the Court on Defendant’s Motion to Dismiss. The Court has reviewed the Motion, as well as Plaintiffs’ Response, has reviewed relevant portions of the Court’s file and relevant authority, and is fully advised in the premises.

INTRODUCTION

This matter relates to a challenge raised to Amendment 41, entitled “Ethics in Government”, passed by the voters of Colorado on November 7, 2006, now codified as Colo. Const. art XXIX. By operation of Colo. Const. art. V, § 1(4), C.R.S. § 1-40-123, and the Governor’s proclamation, this provision took effect on December 31, 2006.

In part, this provision prohibits public officials and government employees from accepting money or other things of a given value except under specifically defined circumstances. § 3(1), (2). It also prohibits lobbyists from making gifts of a certain value to those officials and employees. § 3(4). Finally, it places requirements on the time any officeholders must wait before leaving office and later representing any person or entity for compensation. §4.

This provision mandates the appointment of a five-member Commission, charged with investigating complaints of conduct under the provision, conducting hearings, imposing penalties and issuing advisory opinions. §5(1), (4). The Commission members are to be appointed in the following order: the first, by the Colorado Senate; the second by the Colorado House of Representatives; the third by the Governor; the fourth by the Chief Justice of the Colorado Supreme Court; and the fifth by an agreement of three of the four previous appointees. § 5(2).

The Commission may “hear complaints, issue findings, assess penalties . . . “ and issue advisory opinions as to any complaint about conduct occurring after the effective date of the amendment, December 31, 2006. § 5(1). The Commission may investigate any conduct within the prior 12 months of any complaint filed. § 5(3)(a).

STANDARD OF REVIEW

Defendant has filed a Motion to Dismiss both under C.R.C.P. 12(b)(1), alleging a lack of subject matter jurisdiction, and also C.R.C.P. 12(b)(5), claiming that Plaintiffs’ Complaint fails to state a claim upon which relief may be granted insofar as Defendant is not the proper party to this action.

As to Defendant’s subject matter jurisdiction claims, to the extent the Motion turns on factual issues, any factual dispute upon which the existence of jurisdiction may turn is for the court to resolve. Trinity Broadcasting of Denver, Inc. v. City of Westminster, 838 P.2d 916, 924 (Colo. 1993). Plaintiffs in this suit bear the burden of establishing jurisdiction. Id. at 925. Where there are factual issues, the court is empowered to resolve any factual issues and make factual findings. Ibid. The court is required to hold an evidentiary hearing in the event of factual disputes, but if there is no dispute as to the operative facts, the issue is one of law, and the court may rule without a hearing. Padilla, ex rel. Padilla v. School Dist. No. 1 in City and County of Denver, 25 P.3d 1176, 1180 (Colo. 2001).

Subject matter jurisdiction is defined as a court’s power to resolve a dispute. Trans Shuttle, Inc. v. Pub. Utils. Comm’n, 58 P.3d 47, 49-50 (Colo. 2002). A court will have subject matter jurisdiction if the case is “one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority.” Horton v. Suthers, 43 P.3d 611, 615 (Colo. 2002). The facts alleged and the relief requested are determinative of the existence of subject matter jurisdiction. Trans Shuttle, Inc., supra. at 50, quoting City of Boulder v. Pub. Serv. Co., 996 P.2d 198, 203 (Colo.App. 1999). District Courts are courts of general jurisdiction, having general subject matter jurisdiction in civil cases. Colo. Const. art. VI, § 9. District Courts have the authority to consider questions of law and questions of equity, awarding both legal and equitable remedies. Paine, Webber, Jackson & Curtis, Inc. v. Adams, 718 P.2d 508, 513 (Colo. 1986).

Defendant makes three separate claims attacking subject matter jurisdiction: 1) that Plaintiffs lack standing; 2) that Plaintiffs' claims are not ripe; and 3) that Plaintiffs' claims are barred by operation of C.R.S. § 1-40-107 and art. V, § 1(5.5) of the Colorado Constitution.

Standing

In order for a court to have jurisdiction over a dispute, a plaintiff must have standing to bring the case. This presents a threshold issue of law for the court. Ainscough v. Owens, 90 P.3d 851, 855 (Colo. 2004); Corsentino v. Cordova, 4 P.3d 1082, 1087 (Colo. 2000). In order to establish standing, a plaintiff must have suffered an "injury-in-fact" and second, the harm alleged must be to a "legally protected interest". Ibid.

The first prong requires a "concrete adverseness which sharpens the presentation of issues that parties argue to the courts." City of Greenwood Village v. Petitioners for Proposed City of Centennial, 3 P.3d 427, 437 (Colo. 2000). The harm may either be tangible, or intangible, as in the case involving a claim for deprivation of civil liberties. Cloverleaf Kennel Club, Inc. v. Colo. Racing Comm'n, 620 P.2d 1051, 1058 (Colo. 1980).

Legally protected rights may include interests in free speech or expression, or the interest in having a government that acts within the boundaries of the state constitution. Nicholl v. E 470 Pub. Highway Auth., 896 P.2d 859, 866 (Colo. 1995). The "injury-in-fact" requirement allows the court to accept the allegations contained in a complaint as true. Dunlap v. Colo. Springs Cablevision, Inc., 829 P.2d 1286, 1289 (Colo. 1992). Moreover, Defendant makes no claim of a factual dispute relating to the allegations contained in the Complaint on the issue of standing.

Ripeness

As to ripeness issues, a court lacks subject matter jurisdiction to decide an issue that is not ripe for adjudication. Stell v. Boulder County Dept. of Social Serv., 92 P.3d 910, 914-15 (Colo. 2004). To be ripe, an issue must be "real, immediate, and fit for adjudication." Board of Directors v. Nat'l Union Fire Ins. Co., 105 P.3d 653, 656 (Colo. 2005). It must present an actual case or controversy. Beauprez v. Avalos, 42 P.3d 642, 648 (Colo. 2002).

Improper Defendant

The determination of whether this Defendant is a proper party presents a question of law for the court. Defendant agrees that this claim must be determined under C.R.C.P. 12(b)(5). In contrast to analysis of a claim under 12(b)(1), Motions to Dismiss under 12(b)(5) are viewed with disfavor. Dunlap v. Colorado Springs Cablevision, Inc., 829 P.2d 1286, 1290 (Colo. 1992). The court is required to accept all allegations in the complaint as true. Rosenthal v. Dean Witter Reynolds, Inc., 908 P.2d 1095, 1099 (Colo.

1995). Those facts are viewed in the light most favorable to the plaintiff. Bell v. Arnold, 175 Colo. 277, 281, 487 P.2d 545, 547 (1971). It is appropriate to grant the motion only if there is no set of facts that the plaintiff could prove upon which relief could be granted. McIntosh v. Bd. of Educ. of School Dist. No. 1, 999 P.2d 224, 227 (Colo.App. 2000). Motions under 12(b)(5) are “viewed with disfavor and are rarely granted under [Colorado’s] ‘notice pleadings.’” Davidson v. Dill, 180 Colo. 123, 131, 503 P.2d 157, 162 (1972).

A suit against a party named in their “official capacity” is merely another way of pleading an action against the entity of which that officer is an agent. Ainscough v. Owens, 90 P.3d 851, 858 (Colo. 2004). The Governor of the State of Colorado has been held to be the “supreme executive”, with the responsibility to ensure that the laws of the State are faithfully executed. Colo. Const. art. IV, § 2. When a plaintiff seeks to enjoin enforcement of any statute, it is both customary and appropriate for a plaintiff to name the body “ultimately responsible for enforcing” that law. Ainscough, at 858. Because the Governor is the chief executive of the state, the Governor, in his official capacity, is a proper defendant as the “embodiment of the state”. Ibid.

Single Subject

Plaintiffs’ Complaint contains allegations that Amendment 41 violates the requirement contained in Colo. Const. art. V, § 1(5.5) that the provision contain only a single subject. Defendant claims that exclusive jurisdiction to hear such a challenge is vested in the Title Board, and then only in a timely filed appeal before the Colorado Supreme Court.

Colo. Const. art. V, § 1(5.5) states in relevant part:

(5.5) No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title * * *

The legislature enacted C.R.S. §§ 1-40-101, *et seq.* to establish a “Title Board”. This Board is charged with the duty to ensure the compliance of any petition with the Colorado Constitution. Any person who is not satisfied with the decision of the Board, or who claims that the title is unfair or does not fairly express the true meaning and intent of the proposed constitutional amendment may file a Motion for Rehearing with the Secretary of State within seven days after a decision is made. C.R.S. § 1-40-107(1). A person dissatisfied with the decision of the Board on such a Motion may file an appeal with the Colorado Supreme Court within five days after the decision is made. C.R.S. § 1-40-107(2).

FINDINGS AND ANALYSIS

First as to the C.R.C.P. 12(b)(1) analysis, while the court is allowed to hold an evidentiary hearing to resolve any disputed jurisdictional facts, Defendant does not in the instant case raise any such disputes as to the factual allegations contained in the Complaint. Accordingly, the Court declines to hold an evidentiary hearing, and instead accepts the facts stated in the Complaint as true for the purposes of determining jurisdiction.

Standing

Colorado has a “tradition of conferring standing to a wide class of plaintiffs.” Ainscough v. Owens, 90 P.3d 851, 853 (Colo. 2004). Plaintiffs also benefit from a “relatively broad definition of standing.” Id. at 855. Plaintiff must meet the two-prong test to establish standing as set out in Ainscough, at 855.

As to the first prong, “injury-in-fact”, Plaintiffs have met this burden. They specifically allege that the ban and limits on gifts chills and severely burdens Plaintiffs’ exercise of their First Amendment right to engage in core political speech, receive information pertinent to their public duties, their exercise of their First Amendment rights to speak and associate with others, and that Amendment 41 has forced them to refrain from engaging in speech and associational activities. (Second Amended Complaint, ¶¶ 86, 87 and 88). Plaintiffs also allege that the Amendment unconstitutionally interferes with their rights to express affection for, and to associate with, family members who are government employees. (Second Amended Complaint, ¶ 89). Plaintiffs also claim that the Amendment prevents them from petitioning the government. (Second Amended Complaint, ¶ 93). There are additional claims of the unconstitutionality of the Amendment as well. (Second Amended Complaint, Third, Fourth and Fifth Claims for Relief). Plaintiffs therefore allege both injury to their interest in free speech and expression, and also their interest in ensuring that the government acts within the boundaries of the Constitution. Accordingly, the Court concludes that Plaintiffs have standing to bring their claims.

In determining the second prong of the standing test, the court looks not to the policy being challenged, but to the right that has alleged to have been injured. Id. at 857. Cases involving constitutional rights enjoy relaxed rules of standing. Lorenz v. State, 928 P.2d 1274, 1285 (Colo. 1996).

Plaintiffs allege¹ that it is not only the potential for investigation or the exercise of the Commission’s other powers in the future that Plaintiffs allege as injury, it is the immediate chilling effect that has already taken place. This is sufficient to establish that Plaintiffs have alleged harm to a legally protected right, and satisfies the second prong of the standing test.

¹ The Court cites to the Second Amended Complaint, filed March 2, 2007. Plaintiffs have filed a Third Amended Complaint, which was unopposed by Defendant.

Defendant's second standing argument hinges on the question of whether the Amendment is "self-executing". Defendant argues that Plaintiffs lack standing because no members of the Ethics Commission envisioned by the Amendment have been appointed, and therefore no action can be taken by that Commission. (Defendant's Motion, p. 4-8). Defendant therefore argues that because the Amendment is not self-executing, there can be no injury-in-fact, and therefore, no standing.

Constitutional provisions are presumed to be self-executing. Davidson v. Sandstrom, 83 P.3d 648, 658-59 (Colo. 2004). Provisions may be self-executing even though further legislation or action is required to facilitate the execution of the provision. Ibid. Although the Amendment in the instant case still awaits the appointment of a single member of the Commission, by its terms, the Amendment became effective on December 31, 2006 and allows the Commission to investigate and take action as to any complaint as to conduct occurring after that date, and for a period of time of 12 months before the date the complaint is actually filed. § 5(3)(a). The appointment of members of the Commission is merely a facilitation of the purposes of the Amendment.

Ripeness

The Declaratory Judgment statute found at C.R.S. § 13-51-102 allows the courts to grant relief from "uncertainty and insecurity with respect to rights, status and other legal relations." Board of Directors, Metro Wastewater Reclamation District v. Nat'l Union Fire Ins. Co., 105 P.3d 653, 656 (Colo. 2005). Plaintiffs' allegations that their core political speech has been chilled by this Amendment satisfies the ripeness requirement in this case.

Proper Defendant

Defendant has taken the extraordinary position that the Governor, in his official capacity, is not the proper party defendant in this suit, because it would ultimately be the Ethics Commission appointed under the authority of Amendment 41 that would be charged with enforcing the terms of that Amendment. (Defendant's Motion, p. 9-11).² Given the long-standing custom and policy in the State of Colorado relating to the Governor in his official capacity, the Court concludes that Governor Ritter is, indeed, a properly named defendant in this suit.

² In the two previously filed suits relating to Amendment 41, Defendant did not challenge the propriety of his status as a party defendant. (See Denver District Court Case Number 07CV1131, Boettcher, et al. v. Ritter, et al.; Denver District Court Case Number 07CV1533, Daniels Fund v. Ritter). This Court rejects the notion that, so long as the Governor in his official capacity agrees with the position taken by a plaintiff, he is the proper named defendant in any suit, but in a suit where he takes a contrary position, he is not the proper party.

Single Subject

Defendant argues that a failure to comply with the rehearing and appeal requirements contained in C.R.S. § 1-40-107 precludes jurisdiction in the courts, citing Outcalt v. Schuck, 961 P.2d 1077, 1080 (Colo. 1998). However, that case does not stand expressly for this stark proposition. Outcalt instead related to a determination of how the five and seven day filing periods contained in the statute were to be calculated.

No authority has been cited, nor has the Court located any authority, to support the proposition that this statute reflects the exclusive remedy relating to a claim that a proposed amendment violates the single subject rule. In fact, our Supreme Court has held that the statutory remedy is “not exclusive”. City of Glendale v. Buchanan, 578 P.2d 221, 226 (Colo. 1978). While the Court in that case took great care to identify policy arguments in favor of the heavy burden placed upon a challenge after an election has already occurred, the Court nonetheless concluded that the remedies available under that statute were not exclusive, and thus did not deprive the court of jurisdiction in a suit seeking to enjoin placing the issue on the ballot. Ibid. The Court expressly stated that allowing a suit to invalidate an amendment after an election would prove costly and disruptive, however noting that such a practice “could not be justified unless good cause is shown why no challenge was made before the election.” Ibid. This language leads this Court to conclude that the statutory procedure for challenging the single subject provision is not a jurisdictional issue, but instead should be analyzed under C.R.C.P. 12(b)(5) for a failure to state a claim. Thus, the facts alleged in the Complaint must be accepted as true, and reviewed in the light most favorable to the Plaintiffs. Under this standard, the Court concludes that because Plaintiffs have alleged that the language of the provision in its title and substance was misleading to the electorate, this is sufficient to support a claim upon which relief may be granted.

In the interest of a complete record, however, because there is some doubt as to whether this issue presents a jurisdictional claim under 12(b)(1) or a failure to state a claim under 12(b)(5), the Court will analyze the issue as a question of jurisdiction. The Supreme Court in City of Glendale v. Buchanan, 578 P.2d 221 (Colo. 1978) directs that every reasonable presumption is to be indulged in favor of a constitutional amendment which has been adopted by the people at a general election. Id. at 224. That opinion mandated that a reviewing court “must assume that the voters cast informed ballots”, unless convinced that voters have been misled. Id. at 225. Because the Supreme Court has given the courts the authority to review a case under this admittedly high standard, this presumes the existence of jurisdiction in the courts to review the issue, even after an election has occurred. At the eventual trial of this matter, Plaintiffs’ burden will be high indeed to establish that the voters were misled in casting their ballots in favor of this amendment. However, at this stage of the proceedings, the Court concludes that it has jurisdiction to hear this issue.

CONCLUSION

Accordingly, the Court DENIES Defendant's Motion to Dismiss in its entirety. This matter shall proceed to a hearing on Plaintiffs' Motion for Preliminary Injunction on May 7, 2007 at 8:30 a.m. and a Status Conference on April 26, 2007 at 8:00 a.m.

DATED: Wednesday, April 18, 2007.

BY THE COURT:

A handwritten signature in cursive script, reading "Christina M. Habas". The signature is written in black ink and is positioned above a horizontal line.

Christina M. Habas
District Court Judge