

Amendment 41 ruled unconstitutional

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Amendment 41 backers received dual blows this week when a “re-enactment” measure was deemed unacceptable for the 2007 ballot, and a Denver District Court judge ruled the controversial measure unconstitutional on the grounds that it violates the First Amendment. Denver District Court Judge Christina Habas wrote in her decision, released Thursday afternoon, “Because legislators rely heavily on information obtained from lobbyists, the accuracy of the information provided is paramount...The First Amendment does not only protect the giving of information, it protects the right to receive information. Amendment 41’s impact chills both sides of this equation.”

She further wrote, “Amendment 41, as originally drafted, does little to address the laudable purpose of avoiding government corruption beyond those statutes and laws that pre-existed Amendment 41. Rather, it creates far more confusion and uncertainty, which in turn has caused a significant chill on the exercise of the Plaintiffs’ rights to political expression.” The decision nullifies, at least for the time being, the central provision of Amendment 41, a ban on gifts to state employees of over \$50. It leaves intact the ethics commission created by Amendment 41, as well as the “revolving door” aspect that prohibits lawmakers from becoming lobbyists for a period of two years after they leave office.

Members of the First Amendment Council (FAC), a coalition of non-profit groups, private citizens, and public officials that had challenged the amendment in court, immediately breathed a collective sigh of relief. “Were elated. We’re relieved. We’re rejoicing. This is exactly what needed to happen,” said FAC treasurer and Colorado Auto Dealers Association Executive Director Tim Jackson. “We’re back to the good old days.” Jackson said Habas essentially agreed with exactly what the FAC had argued – that Amendment 41 stifled the ability of lobbyists and the public to communicate with their lawmakers. “When you eliminate all the interactive opportunities for legislators to network with their constituents, you’re cutting off dialogue between the public and the elected officials who serve them. That’s what the practical effect has been,” Jackson said.

The group’s attorney, Doug Friednash of the Fairfield and Woods law firm in Denver, said that the injunction Habas granted will take effect immediately and will only be overturned if a pending trial reverses the decision. No date for the trial has been set so far, but Habas indicated in her opinion that the injunction would most likely hold up and the FAC would be victorious. The next step for the state would be to appeal to the Supreme Court, which could overturn Habas’s decision. That may take as little as six months said Friednash, or over a year.

“The supreme court can do anything. We understand that they’re going to review this, and anything could happen,” Friednash said. “Time’s on our side at this point.” Additionally, Gov. Bill Ritter must decide whether to pursue the case after the trial. Nate Strauch, press secretary for Attorney General John Suthers, said the matter would be taken up soon. It is the Attorney General’s job to litigate on behalf of the voter-approved measures, such as Amendment 41.

Friednash called the decision a “huge victory for Coloradans,” and said it “sends a strong message to those who would recklessly amend our Constitution.” Jackson said now that Habas granted the injunction, the goal is to win at trial, fend off the expected Supreme Court challenge, and then introduce some sort of repeal in the legislature during the 2008 session for next year’s ballot. By that time, he hopes, Colorado voters will realize that Amendment 41 takes the wrong approach to fixing ethical dilemmas in government. Jackson said the proper recourse would be statutory, not by amending the state Constitution.

“We don’t believe it’s necessary for anything like this to be in the constitution. The constitution should be reserved for the basic framework of government. Ethics measures should be statutory so they could be tightened or loosened as needed,” Jackson said. Jackson also took a shot at Amendment 41 co-author Jared Polis, the self made multimillionaire activist, saying “Amendment 41 should never have been on the ballot to begin with. We shouldn’t leave public policy to a few gazillionaires who have more change and time on their hands than they should.”

Polis did not return any calls seeking comment, and no representative of the Amendment 41 backers could be reached late Thursday. Eric Sondermann, whose political consulting firm had been hired earlier to help usher Amendment 41 implementation legislation through the legislature, said he was no longer involved with the issue and referred calls to Mark Eddy, spokesman for the so-called coalition that Polis had assembled for the effort. Eddy, however, referred questions to attorney Mark Grueskin of the Denver law firm Isaacson and Rosenbaum, but Grueskin did not return phone calls as of press time.

The other defeat suffered recently was essentially a failsafe in case Habas wound up ruling as she did against Amendment 41. Initiative 21 was kicked off the '07 ballot when the title board reversed itself last Friday and ruled that the measure is in violation of the single-subject rule, which requires that any ballot measure pertain to only one subject so that voters aren’t forced to choose between an idea they support and an idea they dislike. Attorney Grueskin had argued before the board that the measure had a simple overarching thrust – to implement Amendment 41, which, he said, has not yet been accomplished by the legislature

“The entire point...is to implement provisions of Amendment 41,” Grueskin told the board. “It seems to me that it all winds up in the same big pot.” Representing the First Amendment Council, which also challenged Initiative 21, was attorney Jack Tanner of Fairfield and Woods who argued to the board that the measure was essentially an amendment to the Taxpayer’s Bill of Rights. He said it provided for an annual \$25 “lobbyist tax” and also permitted the general assembly to alter the amount year after year as they saw fit. Currently under TABOR, only a popular vote has the power to alter a tax.

Besides, Tanner said, “It’s not really a tax. It’s a fee. The only reason the proponents have labeled it that way is because it’s an odd-year election.” In other words, the measure’s backers tacked on the “lobbyist tax” because in odd-year elections only tax-related measures are allowed onto the ballot. He also suggested that the measure was multi-pronged because it dealt with both a change in substantive law (the infamous gift ban) and also the workings of the ethics commission created by Amendment 41. Those two entities, he said, are completely separate and should be written as such.

Grueskin disagreed with Tanner’s suggestion that the measure would alter TABOR in any way. “This does not change TABOR. It’s consistent with TABOR,” Grueskin said. Though it ultimately sided with Tanner, the board decided on a 2-1 vote that the measure’s so-called lobbyist tax was unrelated to a provision that ensures the enforcement of the original Amendment 41. “In my mind, the lobbyist tax is not dependent on the enforcement of Amendment 41. The fact that the tax is imposed on lobbyists did not meet that requirement because it doesn’t have to be spent on the commission required by Amendment 41. That’s where I was having a problem,” said board member Sharon Eubanks of state legislative services department. Deputy Secretary of State Bill Hobbs agreed with Eubanks, switching his position from an earlier vote to grant the measure a place on the ballot. Deputy Attorney General Jason Dunn was the lone dissenter.

Since the May 16 deadline for title hearings is past, it’s too late for a new measure to be rewritten and resubmitted, so if Polis wants to get the measure onto the ballot for this year, he’ll have to ask the State Supreme Court to hear the Initiative 21 case as well. That, however, will be a long shot. Even if the court chooses to hear the case and rules that the title board was wrong in its decision, it doesn’t necessarily mean it will order the measure placed on the ballot. They could just order the title board to revisit the subject in a special session before the election. Grueskin said the Supreme Court route is a possibility, but that no decisions have been made yet. “That’s in the mix, but just because that’s kind of the one avenue for dealing with it this year,” he said.