COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 ("Amendment 62 Cause for Employee Suspension and Discharge"[1])

MOTION FOR REHEARING

On behalf of Joseph B. Blake, a registered elector of the State of Colorado, the undersigned hereby files this Motion for Rehearing in connection with the Proposed Initiative 2007–2008 #62 ("Cause for Employee Suspension and Discharge", hereinafter described as the "Initiative") which the Title Board heard on February 20, 2008.

1. The Board lacks jurisdiction to set a title for this Initiative as it contains multiple, unrelated, subjects in violation of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106.5. "An initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two distinct and separate purposes that are not dependent upon or connected with each other. *In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d 273, 277 (Colo. 2006). An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative. *In re Title, Ballot Title and Submission Clause 2007-2008, #17*, 172 P.3d 871, 875 (Colo. 2007), "We must examine sufficiently on initiatives central theme to determine whether it contains hidden purposes under a broad theme." *Id.*

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[1] Unofficially captioned **"Cause for Employee Suspension and Discharge"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Initiative 55 sought to prohibit government from providing non-emergency services to persons who were otherwise not lawfully present in the United States. Initiative 55 did not define "non-emergency" and "services", categorize the types of services to be restricted, or set forth the purpose or purposes of restricting non-emergency services. The Colorado Supreme Court rejected Initiative 55 under the single subject rule stating, "We identify at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits." *See In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55, supra*, 138 P.3d at 280; *see also, In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (proposal that has at least two distinct and separate purposes which are not dependent upon or connected with each other violates the State Constitution's single-subject requirement).

The Supreme Court rejected a proposed ballot initiative which sought to amend the Taxpayer Bill of Rights under the Colorado Constitution because it violated the constitution's single-subject requirement, where the proposed initiative created tax cut, imposed new criteria for voter approval of revenue and spending increases, and imposed likely reductions in state spending on state programs. *See In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 37*, 977 P.2d 845 (Colo. 1999) (citing Colo. Const. Art. V, § 1(5.5); Art. X, § 20).

In *In re Proposed Initiative for 1997-1998 #63,* 960 P.2d 1192, 1200-01 (Colo. 1998), the Court held that the Title Board erred by fixing the titles and summary of the initiative, entitled "Judicial Qualifications," because it contained provisions proposing to change the manner of

selection, powers and procedures of an independent constitutional body, which were unrelated to judicial qualifications. The Court recognized that the theme of the initiative—the entire judicial branch—therefore could not be considered a single subject.

Likewise, in *In re "Public Rights in Waters II"*, 898 P.2d 1076 (Colo. 1995), the Court held that grouping the distinct purposes of water conservation district elections and the "public trust doctrine" under the theme of water did not satisfy the single-subject requirement because such a connection was too broad and too general to make them part of the same subject.

The Colorado Supreme Court has found numerous other situations where the single subject rule was violated. *See e.g., In re the Title, Ballot Title, and Submission Clause for 2007-2008 #17, supra* (initiative sought to create an environmental conservation mission; however, a plain reading of the language also revealed the inclusion of a public trust standard for agency decision-making); *In re Title, Ballot Title and Submission Clause 1999-2000 #258(A)*, 4 P.3d 1094 (Colo. 2000) (elimination of school board's power to require bilingual education was not a separate subject so as to violate single-subject requirement); *In re Proposed Initiative for 1997-1998 #30*, 959 P.2d 822, 823 (Colo. 1998) (court disapproved of an initiative burying unrelated revenue and spending increases within tax cut language).

Therefore, the court must examine sufficiently the central theme as expressed in order to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme. *See In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55, supra.* Here, the Initiative's complexity and omnibus proportions are hidden from the voter. Initiative also contains multiple provisions:

(a) True purpose behind this initiative is to supersede and repeal at-will employment relationships in Colorado that applies to employer-employee relationships. The

doctrine of employment at will has deep roots in American law dating back at least to the nineteenth century. Employment at-will is an employment relationship that allows either the employer or employee to terminate employment for any cause or no cause, except for an illegal reason. The initiative replaces traditional employment laws by providing that employees may only be terminated for just cause. The purpose of the Initiative is hidden from signers of the petition and voters.

(b) The Initiative supersedes and impliedly repeals the State's civil service system. The Initiative's substantive, procedural, and administrative provisions apply not just to private employers, but government employees as well. Hence, the Initiative would eliminate the civil service system. By way of example only, certified state employees enjoy a constitutional property right in his or her employment and, therefore, are entitled to due process and a mandatory hearing before an Administrative Law Judge when that right is infringed. Colo. Const. Art. 12, Section 13; Colo. Rev. Stat. Section 24-50-125(3). A mandatory right to an evidentiary hearing exists when the agency takes disciplinary action against the employee that adversely affects the employee's current base pay, status or tenure. Due process includes the right to appeal an agency's decision through the court system.

(d) Eliminates employers' right to contract. The United States Constitution Article I, § 10 provides that contractual rights shall not be impaired. Nothing in the Initiative provides that it shall not apply to any contract of employment or written collective bargaining agreement.

(e) This Initiative proposes an unconstitutional impediment to ones access to court. This is hidden in the initiative. This is a separate and distinct issue from requiring just cause for employment termination. "Courts of justice shall be open to every person, and a

speedy remedy afforded for every injury to person, property or character, and the rights and justice should be administered without... denial or delay." Colo. Const. Art. 12, § 13; Colo. Rev. Stat. § 24-50-125(3) (State Personnel Disciplinary proceedings--appeals--hearings—procedure).

(f) Eliminates due process rights. The new statute provides no ability to appeal an adverse ruling by either private employers and individuals or governmental employees. Instead, the Mediator's decision is final. "No person shall be deprived of life, liberty or property without due process of law." Colo. Const. Art. II, § 25. "The essence of due process is a fair procedure," no particular procedure, so long as elements of opportunity for hearing and judicial review are present. *See Norton v. Colo. State Bd. of Med. Examiners,* 821 P.2d 897, 901 (Colo. 1991) (quoting *deKoevend v. Board of Education*, 688 P.2d 219 (Colo.1984)).

The Initiative would bring about a fundamental change in our system of government by denying fundamental rights that are basic to everyone. Voters ought to be able to consider these fundamental changes separately as they go to the core of our judicial system. Courts have acknowledged the difference between an initiative's seemingly procedural changes that affect fundamental rights. *See e.g., In re the Matter and Ballot Title and Submission Clause, 2005-2006 supra*; *In re the Matter of the Title, Ballot Title and Submission Clause for 2003-2004, #32 & #33*, 76 P.3d 460 (Colo. 2003).

2. The text of the Initiative is inherently unclear, inaccurate, incomplete, confusing and misleading as to its reach and purpose, such that the Board is precluded from setting a ballot title. *See In re Proposed Initiative 1999-2000 #37,* 977 P.2d 845, 846 (Colo. 1999) (holding that titles and summary may not be presented to voters because contained more than one subject and confusing). The Board's chosen language for the titles and summary must be fair, clear, and

accurate, and the language must not mislead the voters. *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1094, 1098 (Colo. 2000). "In fixing titles and summary, the Board's duty is 'to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice." *Id.* (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)). *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (initiative's "not to exceed" language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity).

This requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant, provision that was obfuscated by other elements of the proposal. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002). Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. *Id.*; *see also*, *In re Ballot Title 1997-1998 #62*, 961 P.2d at 1082. The Board is not precluded from adopting language which explains to the signers of a petition and the voter how the initiative fits in the context of existing law, even though the specific language is not found in the text of the proposed initiative. *In re Title Pertaining to Sale of Table Wine in Grocery Stores*, 646 P.2d 916 (Colo. 1982).

In *258(A)* the titles were materially defective for failure to include a key feature of the initiative that resulted in misleading and confusing the voters. The title board failed to articulate in the titles that school districts and schools cannot be required to offer bilingual programs. Voters could assume that parents of non-English speaking students will have a meaningful choice between an English immersion program and a bilingual program and thus favor the proposal as assuring both programs.

In re Matter of Title, Ballot Title and Submission Clause for Proposed Initiatives 2001-2002 #21 and 22, 44 P.3d 213 (Colo. 2002), the court held that initiatives were misleading because they did not express creation of a new constitutional duty on the part of the state to provide all children with an education to become productive members of society, fairly express goal of eliminating bilingual education, did not reference parental waiver process, and intent to remove English language instruction from local to state control.

3. The Initiative is misleading, incomplete, confusing and inaccurate for the following reasons:

(a) Fails to express the initiative's purpose and effect of superseding and impliedly repealing the at-will employment relationship.

(b) Fails to express that the employment at-will relationship is being replaced with a new legal standard for terminating and suspending employees.

(c) Fails to express that the initiative would replace and eliminate the civil service system.

(d) Fails to express that it applies to all employment relationships in the State of Colorado, not just private employment relationships.

(e) Fails to clearly express that employers may be liable for damages despite having a legitimate reason for suspension or termination of employment.

(f) Fails to express that it eliminates fundamental rights to ones access to the court and that due process rights are also eliminated by the Initiative.

(g) The Initiative fails to express the fact that it eliminates the rights of employees to enter into a written collective bargaining agreement or a contract of employment. The Fourteenth Amendment to the United States Constitution prohibits the states from entering

laws which impair obligations of contract. *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). In determining whether the law violates the contracts clause, a multi-step analysis is followed. First, the court must determine if the law has the effect on impairing contracts. If so, the court must determine if it is impairing a state's own obligation or impairing a private contract. A state may enact a law which impairs its own existing contracts only if it is a reasonable and necessary to serve an important public purpose. *See id.*

(h) Use of the term "mediation" is a misnomer and will mislead voters into think the process in non-binding, when it is in fact binding arbitration.

(i) Fails to express that the mediator's decision is final.

The Initiative also improperly uses catch phrases such as "mediation" and "just cause". "It is well established that the use of catch phrase or slogans in the title, ballot title and submission clause, and summary should be carefully avoided by the Board." *In re Ballot Title 1999-20000 #258(A), supra,* 4 P.3d at 1100; *see also, In re Amend Tabor No. 32*, 908 P.2d 125, 130 (Colo. 1995). This rule recognizes that the particular words chosen by the Title Board should not prejudice electors to vote for or against the proposed initiative merely by virtue of those words' appeal to emotion. *Id.; see also, In Re Ballot Title 1999-2000 # 215,* 3 P.3d 11, 14 (Colo. 2000). Catch phrases are words that work to a proposal's favor without contributing to voter understanding. By drawing attention to themselves and triggering a favorable response, catch phrases generate support for a proposal that hinges not on the content of the proposal itself, but merely on the wording of each phrase. 4 P.3d at 1100.

Catch phrases may also form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment, thus further prejudicing voter understanding of the issues actually presented. Slogans are catch phrases tailored for

political campaigns-brief striking phrases for use in advertising or promotion. They encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposals merits. *Id.* (*i.e.*, be taught English "as rapidly and effectively as possible"). They mask the policy question.

4. Proponents substantively amended the title without submitting it to the directors of the Legislative Council and Office of Legislative Legal Services.

The proponents submitted an amended title to the title board at the February 20, 2008 Title Board Hearing without having first submitted it to the directors of the Legislative Council and Office of Legislative Legal Services. Because the proponents made substantive changes to the title, these bodies must be given a new opportunity to review the title. "The requirement that the original draft be submitted to the legislative council and office of legislative legal services permits the proponents to benefit from the experience of experts in constitutional and legislative drafting, and allows the public to understand the implications of a proposed initiative at an early stage in the process." *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, 12 P.3d 246 (Colo. 2000) (citing *See In re Proposed Initiated Constitutional Amend. Concerning Limited Gaming in the Town of Idaho Springs*, 830 P.2d 963, 966 (Colo. 1992)).

The original text that the proponents submitted to the directors defined "just cause" to include:

> (2) For purposes of this section, "just cause" means:
> (A) Incompetence;
> (B) Substandard Performance of assigned job duties;
> (C) Neglect of assigned job duties;
> (D) Repeated violations of the employer's written policies and procedures relating to job performance;
> (E) Gross insubordination that affects job performance;
> (F) Willful misconduct that affects job performance; or,
> (G) Conviction of a crime involving moral turpitude.

In the initiative submitted to the Title Board, this provision was augmented to include new provisions:

> (H) Filing of bankruptcy by the employer; or,
> (I) Simultaneous discharge or suspension of ten percent or more of the employer's workforce in Colorado.

The directors of the Legislative Council and Office of Legislative Legal Services had not seen or commented on these new subsections within the definition of the central term in the initiative. Nonetheless, this became the final text for the Title. The original six involve the actions of the employee. The new additions concern employer actions or events. Because (H) and (I) add new opportunities for "just cause" to occur, the changes are substantive. Because (H) and (I) were added after the note and comment hearing, the proponents must be required to resubmit their initiative for further review.

Had the Legislative Council and Office of Legislative Legal Services directed the proponents to make this material change in the draft, it might have been proper. *In re Title, Ballot Title and Submission Clause, and Summary for 1999-00 #256*, *supra*, 12 P.3d at 251. The directors did not give such an instruction, however. Therefore, it was error on the part of the Title Board to set the title for this initiative. The proponents should be required to resubmit their initiative for the review of staff.

Please set a rehearing in this matter for the next Title Board Meeting.

Respectfully submitted this 27th day of February, 2008.

FAIRFIELD AND WOODS, P.C.

By: *Original signature of Douglas J. Friednash on file*
Douglas J. Friednash, #18128
John M. Tanner, # 16233
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was Hand Delivered and sent U.S. Mail as follows to:

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s/ Monica Houston
Monica Houston