COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 # 76 ("**Just Cause for Employee Discharge or Suspension**"[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 #76 ("Just Cause for Employee Discharge or Suspension", hereinafter described as the "Initiative") which the Title Board ("Board") heard on March 19, 2008.

1. The title and submission clause is confusing and misleading.

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*

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

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).

Here, the ballot title is unfair, unclear, inaccurate and misleading. The ballot title's first sentence provides in part for "An amendment to the Colorado constitution concerning a requirement that an employer first establish just cause before discharging or suspending an employee. . . ." The first sentence suggests that the "just cause" doctrine is already current law. The language completely ignores the very purpose of the Initiative: to repeal the employment at-will doctrine. The title does not inform the voters that they are taking action on creating a new prohibition. The language fails to express that the employment at-will relationship is being replaced with a prohibition from discharging or suspending employees without just cause as defined by the constitutional amendment. The title as approved does not adequately inform the voter on what he or she is voting. The title should clearly articulate that it creates a new requirement that the covered employer first establish just cause before discharging or suspending a covered employee.

The title misleads voters as to the scope of what employees are covered by this constitutional amendment. While the title does indicate that government employees are not covered, it misleads voters into thinking that most other private employment relationships are

covered by this doctrine. Thus, the title misleads the voter by failing to indicate that labor unions (i.e., bona fide collective bargaining agreements which contain a provision that requires just cause for discharge and suspension from employment) are exempted from the application of this Initiative. The title fails to advise voters that it only applies to full-time employees, too.

The first sentence and the unofficial title reference "just cause". The title also provides a short explanation of just cause and intimates that it applies to various situations. The use of "just cause" is a catch phrase and fails to clearly express that employers may be liable for damages despite having a legitimate reason for suspension or termination of employment. "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. *See In re Ballot Title 1999-2000 #258(A)*, *supra*, 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 proposal's merits. *Id.* (*i.e.*, be taught English "as rapidly and effectively as possible"). They mask the policy question.

In Ballot Title 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 *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.

2. The Initiative violates the single subject rule.

In the aftermath of TABOR, Colorado voters approved a single-subject rule by referendum in 1994. Consequently, TABOR became the last ballot measure to re-work multiple constitutional provisions indirectly and without the clarity that a single subject provides. *See* Colo. Const. art. V, § 1, and Colo. Const. art. XIX, § 2(3).

An initiative violates the single subject requirement when it relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or

connected with each other. At first glance, the concept of a single subject requirement appears straightforward; however, an initiative with multiple subjects may be improperly offered as a single subject by stating the subject in broad terms. *In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873-74 (Colo. 2007); *In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000). Grouping provisions of a proposed initiative to amend the State Constitution under a broad concept that potentially misleads voters will not satisfy single subject requirement. *See In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996).

"The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative. *In the Matter of the Title and Ballot Title and Submission Clause for 2005–2006 #55*, 138 P.3d 273, 282 (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).

Therefore, this Court "must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme." *Id.* While this Court cannot address the relative merits of the proposal, it may evaluate the substance of an initiative to determine whether it complies with single subject requirement. *See In re the Matter of Title, Ballot Title and Submission Clause for Proposed Initiative, 1997-98 #30*, 959 P.2d 822, 825 (Colo. 1998).

According to the proponents, the purpose of the Initiative is to repeal the employment at will doctrine. 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 is not governed by an individual contract of employment, collectively bargained agreement, or statute. *See generally*, *Wisehart v. Meganck*, 66 P.3d 124 (Colo. App. 2002). Either party may terminate the employment relationship for any cause or no cause, except for an illegal reason. *See id.* The purpose of the Initiative is hidden from signers of the petition and voters. Indeed, voters will be surprised to learn that the Initiative eliminates the employment at will doctrine in Colorado.

Under the proposed constitutional amendment, no employee can be discharged or suspended unless the employer has first established just cause for the discharge or suspension. An employer must provide an employee who has been discharged or suspended with written documentation of the just cause used to justify the action. 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;
(G) Conviction of a crime involving moral turpitude;
(H) Filing of bankruptcy by the employer; or,
(I) Discharge or suspension due to specific economic circumstances that directly or adversely affect the employer and are documented by the employer.

Any covered employee who believes that he or she was discharged without just cause, may file an action in state district court within 180 days after notification of suspension or termination. The Initiative would bring about sweeping constitutional changes in our system of government and deny fundamental rights that are basic to everyone.

Voters will also be surprised to learn that this measure only applies to full-time employees who have worked for more than six months with a particular business entity. Voters will be surprised to learn that labor unions that have bona fide collective bargaining agreements are exempt from its coverage, as well.

The Initiative eliminates a person's fundamental right to contract. Unlike labor unions and private employers, the Initiative does not allow employers and employees to enter into employment contracts. The United States Constitution Article I, § 10 provides that contractual rights shall not be impaired. Courts have acknowledged the difference between a Proposed Initiative's seemingly procedural changes and its aspects 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).

There, an initiative both implemented procedural changes in the petition system and prohibited lawyers from participating in the process of setting ballot titles. The prohibition on lawyers serving in that role was a substantive change, not a procedural one. "By foreclosing any possibility that an attorney could serve on the title board, these initiatives restrict the political rights of all attorneys. Under our prior decisions, this exclusion from the political process is a substantive matter, not a procedural change to the petitions process." *Id.* at 462 (citing *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993), *cert. denied*, 510 U.S. 959 (1993)). Because it was a substantive change to the rights guaranteed by our Constitution, the court found this admittedly narrow restriction on a fundamental right to be unrelated to tweaking the timelines for petition submission and comparable requirement. *In re Title, Ballot Title and Submission Clause, &*

Summary for 2001-02 #43, 46 P.3d 438, 448 (Colo. 2002) (impairing fundamental right of referendum at local level was a substantive amendment that was unrelated to reform of the petition process).

Initiative 55 sought to prohibit government from providing non-emergency services to persons who were otherwise not lawfully present in the United States. *See In re Proposed Initiative for 2005-2006 # 55*, 138 P.3d 273, 279 (Colo.1995). Initiative 55 did not define "non-emergency" and "services", nor did it categorize the types of services to be restricted, nor 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). There, the complexity and omnibus provisions were hidden from the voter. In failing to describe non-emergency services by defining, categorizing, or identifying subjects or purposes, the Initiative failed to inform voters of the services the passage would affect.

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 a 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 "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*, 172 P.3d 871 (Colo. 2007) (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).

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

Respectfully submitted this 26th day of March, 2008.

FAIRFIELD AND WOODS, P.C.

By: Susan F. Fisher
Douglas J. Friednash, #18128
John M. Tanner, # 16233
Susan F. Fisher, #33174

Petitioner's Address:

1445 Market Street.
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of March 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was Hand Delivered and sent U.S. Mail as follows to:

Mark G. Grueskin
Isaacson Rosenbaum P.C.
633 Seventeenth St., Suite 2200
Denver, CO 80202

Monica Houston