COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 # 92 ("**Employers to Provide Health Insurance** "[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 #92 ("Employers to Provide Health Insurance," hereinafter described as the "Initiative") which the Title Board ("Board") heard on May 7, 2008.

A. The Initiative Violates the Single Subject Requirement.

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. *See In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000) ("Implementing provisions that are directly tied to an initiative's central focus are not separate subjects.") The purpose of the single-subject requirement for ballot initiatives is two-fold: to forbid the treatment of incongruous subjects in order to gather support by enlisting the help of advocates of each of an initiative's numerous measures and "to prevent surprise and fraud from being practiced upon voters." *See* C.R.S. § 1-40-106.5(e)(I, II).

[1] Unofficially captioned **"Employers to Provide Health Insurance"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

An initiative with multiple subjects may not be offered as a single subject by stating the subject in broad terms. *See In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873–74 (Colo. 2007) (holding measure violated single subject requirement in creating department of environmental conservation and mandating a public trust standard); *see also, In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, *supra*, 4 P.3d at 1097 (holding that elimination of school boards' powers to require bilingual education not separate subject; Titles and summary materially defective in failing to summarize provision that no school district or school could be required to offer bilingual education program; and Titles contained improper catch phrase).

"Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement." *In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996) (citing *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X*, 900 P.2d 121, 124–25 (Colo. 1995).

"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) (holding that there were "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").

"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, supra*, 172 P.3d at 875. In light of the foregoing, this Court stated, "We must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme." *Id.*

This Board may engage in an inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *See id.* ("While we do not determine an initiative's efficacy, construction, or future application, we must examine the proposal sufficiently to enable review of the Title Board's action."); *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 443 (Colo. 2002) ("[W]e must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.").

The proposed measure contains at least five separate subjects:

1. Section 16(1) requires every employer in the State of Colorado that employs twenty or more employees to provide major medical health care coverage for its employees or dependents.

2. Section 16(4) requires the State of Colorado to establish a health insurance authority (the "Authority") to provide an indirect means for employers to provide health insurance for its employees by paying premiums to the Authority in such amounts as determined by the Authority to fulfill the requirements of this section.

3. Section 16(2) requires the Authority to administer the provisions of the Initiative.

4. The Initiative is predicated upon the employers' responsibility to provide major medical health insurance coverage for its employees. The Initiative provides in section 16(4) however, that the General Assembly shall not be precluded from using sources of revenue other than the General Fund to pay for the costs of administering the Authority or providing the health care coverage mandated by this section.

5. The Initiative mandates in Section 16(6) that the General Assembly enact such laws to implement the requirement for health insurance coverage provided in this section. This includes defining terms that are not defined in this section, such as the required components of health care coverage and for the administration of the Authority. The effective date of the Initiative is delayed until the General Assembly fills in the void.

This Initiative is similar to the one that this Court rejected in *Waters Rights II.* There, an initiative sought to add a "strong public trust doctrine regarding Colorado waters, that water conservancy and water districts hold elections to change their boundaries or discontinue their existence, that the districts also hold elections for directors and that there be dedication of water right use to the public." *See id.* at 1077. The Court held that the initiative violated the single subject provision because there was no connection between the two district election requirements paragraphs and the two public trust water rights paragraphs. The common characteristic that the paragraphs all involved water was too general and too broad to constitute a single subject. The Court observed:

> The public trust water rights paragraphs of the Initiative impose obligations on the state of Colorado to recognize and protect public ownership of water. The water conservancy or conservation districts have little or no power over the administration of the public water rights or the development of a statewide public trust doctrine because such rights must be administered and defended by the state and not by the local district.

Id. at 1080.

B. The Title Set by the Title Board is Misleading, Unfair and Unclear.

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 title 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. *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 more than one subject and confusing).

1. The cornerstone of the Initiative requires covered employers to provide "major medical health care coverage" to its employees. The measure does not only fail to define this term, but further provides that it cannot be implemented until the General Assembly defines the

scope of this term. Legislative Council Staff and the Office of Legislative Legal Services asked the proponents whether they would consider clarifying what was meant by this term:

> "Do the proponents mean 'major" to refer to cost (that is, more complicated or frequent health care procedures)? Or, do the proponents mean frequent health care procedures? Or do they refer to routine or basic health care services (such as emergency care)? If the latter, what types of services, procedures, and treatments would fall within the scope of coverage? What would fall outside?

The proponents failed to modify this. Clearly, the concept of "major" medical health care coverage means different things to virtually everyone. The Title fails to state that this term will be defined in the future by the General Assembly.

2. The Title fails to mention that the effective date of the Initiative is delayed until the General Assembly has an opportunity to enact appropriate legislation to implement the Initiative. This includes, by way of example only, providing for the administration of the authority and defining terms.

3. The Title fails to mention that "major medical health coverage" is not defined by the Initiative and that is for the General Assembly to define.

4. The Title fails to disclose that the Authority will administer the provisions of health care coverage.

5. The Title does not disclose that the scope of the Authority must be created and defined by the General Assembly.

6. The Title does not disclose that the General Assembly is required to find the source of revenue to pay for care coverage mandated by this section in the event that employers cannot meet the obligations imposed under the Initiative.

7. The Title does not explicitly provide that the Authority will administer the program.

8. The Initiative does not indicate whether nonprofit corporations are included as employers.

9. The Initiative is misleading, unfair and unclear where it provides that it "require[s] employers that regularly employ twenty or more employees to provide major medical health coverage to their employees." The Initiative clearly provides that it is not merely employers who bear this responsibility. Rather, under the Initiative, the State carries this burden as well and is ultimately liable to finance the costs of administering the program as well as the costs of providing insurance.

C. The Title Includes an Impermissible Catch Phrase

The phrase "major medical health care coverage" in the title is an impermissible catch phrase. The measure does not define this term, but rather leaves it up to the General Assembly to do so. Nevertheless, this point is noticeably absent in the title itself. In the context of the contemporary legal debate, this term will be used as a campaign slogan and is clearly a catch phrase being used improperly in light of the foregoing.

"It is helpful to recall that voters place primary, if not absolute, reliance upon the board's product when deciding whether to support or oppose proposed initiatives...Recognizing the profound influence such language could have on voters, this court has steadfastly prohibited the use of 'catch phrases' when words chosen by the board in drafting Titles have suggested particular meanings of a proposal rather than merely summarizing its contents." *In re Proposed*

Initiative Concerning Drinking Age in Colo., 691 P.2d 1127, 1134 (Colo. 1984) (Kirshbaum, J. dissenting).

"A 'catch phrase' consists of 'words which could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated constitutional amendment.'" *In re Proposed Initiative Designated "Governmental Business"*, 875 P.2d 871, 876 (Colo. 1994). "Evaluating whether particular words constitute a slogan or catch phrase must be made in the context of contemporary public debate." *Id.* (citing *In re Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993)).

Governmental Business disallowed the inclusion of the catch phrases "consumer protection" and "open government," in spite of that fact that those phrases were included in the Initiative itself. The Court concluded that they could form the basis of slogans for use in a campaign favoring the Initiative, which imposed tort liability on governmental business activities intended for consumer protection, tax liability on governmental business activities, and restriction of governmental lobbying. *See id.* at 875.

In considering the phrases, the Court decided that:

> [g]iven the negative implication of "closed government," it is clear that the phrase "open government" could be used as a slogan for proponents of the Initiative. . . . Similarly, the phrase 'consumer protection' could be used as a slogan by those supporting the Initiative. As used in contemporary public debate, 'consumer protection' encompasses issues pertaining to the safety of goods and services, the assurance that those goods and services comport with governmental standards, and the absence of fraud in labeling and advertising.

Id. at 876; *see also*, *Matter of Title, Ballot Title, Submission Clause, and Summary, Adopted April 4th, 1990, Pertaining to the Proposed Initiative on Surface Mining*, 797 P.2d 1275, 1281 (Colo. 1990) (holding that the Title, which included words surface mining project "may scar the

land," was fair and accurate because repeated operative language of proposed amendment). The catchphrase "major medical health care coverage" should be excluded from the Initiative and replaced by a definition of the scope of coverage that the Initiative requires.

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

Respectfully submitted this 14th day of May, 2008.

FAIRFIELD AND WOODS, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 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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Monica Houston