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ELECTIONS  
SECRETARY OF STATE

COLORADO TITLE SETTING BOARD

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In re Proposed Initiative 2007-2008 # 93 (“**Safe Workplace**”<sup>1</sup>)

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**MOTION FOR REHEARING**

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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 #93 (“Safe Workplace”, 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).

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<sup>1</sup> Unofficially captioned “**Safe Workplace**” 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.*

The proposed measure contains three separate subjects:

1. The Initiative provides that it is the policy of this State that every employee should work in a safe and healthy work environment. Accordingly, it requires employers that regularly employ ten or more employees in Colorado, to provide a safe and healthy workplace for its employees. Thus, the ostensible single subject of the Initiative is to provide “safe and healthy workplace.”

2. Separately, the Initiative provides a new civil remedy for an employee that is injured because the employer failed to provide a safe and healthy workplace. Specifically, the Initiative allows the injured employee to file a civil action in district court with a right to a jury trial. There, the injured employee may seek compensatory and punitive damages, including damages for past and future pecuniary losses, pain and suffering, emotional distress, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses. Most of the damages provided by the Initiative are barred by the Act. For example, an injured worker

has no claim for pain and suffering, or punitive damages under the Act.<sup>2</sup> This is a subject that is separate from simply requiring employers to provide such an environment.

3. The Initiative provides this right of action in addition to any rights the employee may have under the Workers Compensation Act (the “Act”). This is a radical departure from existing Colorado law and is hidden from the voters. Specifically, the Act is the exclusive remedy to a covered employee for injuries incurred in the course of or arising out of the employment relationship. A cornerstone of the effective functioning of the Act is the statutory provision that declares that an employer who has complied with the provision of the Act shall not be subject to any other liability for death of, or personal injury to, any employee, and **“all causes of action, actions at law, suits in equity, proceedings, and statutory and common law rights and remedies for and on account of such death of or personal injury to any such employee and accruing to any person are abolished except as provided”** in the Act. Colo. Rev. Stat. § 8-41-102 (emphasis supplied).

The exclusivity provisions of the Act “constitute part of the *quid pro quo* of the workmen’s compensation schemes, under which the employer assumes liability for work-related injuries irrespective of fault, and in return, employees are precluded from bringing actions at common law.” *Kandt v. Evans*, 645 P.2d 1300, 1302 (Colo. 1982). In return for the “no fault” statutory scheme, the worker’s remedies are statutorily limited to medical benefits, temporary wage replacement benefits, and awards for disfigurement and permanent disability. These benefits and awards are strictly defined and limited under the Act. The exclusive remedy

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<sup>2</sup> The Initiative provides that the employee shall not be entitled to a double recovery for the same losses for which the employee has already been compensated under the Act. The language is unclear as to whether this would allow an employee to recover compensation in the District Court for those injuries barred by the Act, such as punitive damages, or pain and suffering.

provision of the Act not only bars a worker's access to district court for claims of personal injury, disease, or death arising out of the employment relationship, but the Act also defines the exclusive and comprehensive remedies available to the worker within the workers' compensation system. *Travelers Ins. Co. v. Savio*, 706 P.2d 1258, 1264-1265 (Colo. 1985). This radical departure is inconsistent with Colorado law, and a completely separate subject.

B. The Initiative's Ambiguous Provisions Make it Impossible for the Title Board to Set an Accurate and Complete Title.

The Initiative provides that "every employer in this State shall provide a safe and healthy workplace for its employees". The terms "safe" and "healthy" are undefined. Nor does the Initiative instruct the General Assembly to define these terms. The language is broad and confusing, as recognized by Legislative Council staff and Office of Legislative Legal Services. Similarly, the Initiative fails to define the term "workplace". The intended scope of the term is unknown. Cf. Colo. Rev. Stat. § 25-14-203 and § 8-40-201.

C. The Initiative Fails to Express the Initiative's True Intent and Meaning.

In addition to the separate, distinct, and unrelated subjects and purposes within the Initiative, the Initiative's Title fails to fully express its true intent and meaning. Colo. Rev. Stat. §1-40-102(10) provides that the title should be a "brief statement that fairly and accurately represents the true meaning and intent of the proposed text of the initiative." Further, in setting a title, the Board "shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes' or 'no' vote will be unclear. The title for the proposed law or constitutional amendment, which shall correctly and fairly express the true intent and meaning thereof..."

Here, the title fails to inform the voters that the measure would eliminate the exclusivity provisions provided by the Act. This is a dramatic change in the law. Colorado enacted one of the first "no fault" workers compensation acts in the country. In fact, the statutory scheme enacted in 1919 essentially remains the same today. The Initiative changes the original jurisdiction for the Division of Workers' Compensation to hear and decide all issues under the Act. The intent is clearly designed to replace the workers compensation system with the expanded and virtually unlimited damages provided by the Initiative, taking Colorado back to a system that was in place prior to 1919.

The Initiative does not contemplate, nor can the voters, what other laws and regulations may also have been turned on its head by the Initiative. This includes those under the Act as well as the current federal regulations contained in the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, *et seq.*).

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

Respectfully submitted this 14<sup>th</sup> day of May, 2008.

FAIRFIELD AND WOODS, P.C.

By: 

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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