Certification of Word Count: 2,217

SUPREME COURT OF COLORADO
2 East 14th Avenue 4th Floor
Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #62

Petitioner:
JOSEPH B. BLAKE,
Objector,

v.

Respondents:
JOANNE KING AND LARRY ELLINGSON,
Proponents,

and

Title Board:
WILLIAM A. HOBBS, DANIEL L. CARTIN, and DANIEL DOMENICO.

▲ **COURT USE ONLY** ▲

Case No. 08SA90

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ANSWER BRIEF TO RESPONDENTS

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1. Proposed Initiative 2007-2008 #76 ("Just Cause for Employment Discharge or Suspension")

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On behalf of Joseph B. Blake, a registered elector of the State of Colorado, the undersigned hereby files this Answer Brief to Respondents to appeal the Title Board's approval of the Title for Proposed Initiative 2007-2008 #62 ("Cause for Employee Suspension and Discharge") (hereinafter "Initiative").

ARGUMENT

I. Respondents Admit the Initiative Covers More than One Subject.

The drafter of this Initiative attempts to walk a very fine line of trying to persuade this Court that the measure contains a single subject, while avoiding any discussion of whether the measure conceals hidden purposes or buries unrelated provisions. Respondents do not even challenge Blake's arguments before the Title Board, but rather assert that, "conjecture about #62's legal effects does not amount to a second subject." (Resp. Op. Br., at 6).

Respondents simply claims that "there is no reason to presume" that the proposed constitutional amendment will be interpreted in the manner suggested by Blake. Nevertheless, it was enough of a concern to Respondents, that they proposed a new initiative in an attempt to address these issues. See Proposed Initiative 2007-2008 #76 ("Just Cause for Employee Discharge or Suspension").[1]

[1] #76 does not apply to governmental entities. #76 eliminates mediation and specifically provides that an employee who believes he or she has been discharged without just cause may file a civil action in the State district courts.

This Court has recognized, however, that it must sufficiently examine an initiative's central theme to determine whether or not it contains hidden purposes under a broad theme; therefore, violating the constitutional prohibition against initiative proposals containing multiple subjects. *In re Title, Ballot Title and Submission Clause 2007-2008, #17*, 172 P.3d 871, 875 (Colo. 2007); *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 443 (Colo. 2002). This Court cannot apply the single subject rule to voter initiatives to amend the constitution without some preliminary interpretation of the proposed initiative. *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.2d 273, 278 n.2 (Colo. 2006); *In re Proposed Initiative on Parental Rights*, 913 P.2d 1127, 1134 (Colo. 1996).

The Initiative's broad and sweeping substantive, procedural, and constitutional changes are hidden from the voters. Contrary to Respondents' position, the problems with the Initiative are not the result of "Blake's creativity," or his "legal prism," but rather a result of the plain language of the proposed constitutional amendment it drafted, but hopes this Court ignores.

One purpose of the Initiative is to repeal Colorado's longstanding employment at-will doctrine. 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. "Just cause" is defined by the Initiative to mean only:

(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) Simultaneous discharge or suspension of ten percent or more of the employer's workforce in Colorado.

Beyond the above-cited purposes, Respondents claim that there is "no reason" to presume that the Initiative will be interpreted in a way that fits Blake's legal conclusions. (Resp. Op. Br., p. 7).[2] First, this Court 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. Second, in this case the term "employee" is easily understood and must be given its ordinary

[2] Respondent cites *Submission of Interrogatories on SB 93-74*, 852 P.2d 1, 6 (Colo. 1993) for the proposition that constitutional amendments are typically interpreted in an manner that is consistent with existing provisions, and only where there is a direct conflict will the later adopted provisions be interpreted to limit earlier adopted ones. There, two constitutional amendments were simultaneously adopted and the court stated that when there is material conflict between two constitutional amendments at the same election, the one which received the greater number of votes shall prevail. It does not stand for the broader proposition cited by Respondents.

meaning. Accordingly, the Initiative clearly supersedes and impliedly repeals the Colorado's civil service system. Colo. Const. art. XII, § 13; C.R.S. § 24-50-125(3).

The Proposed Initiative also eliminates a person's fundamental right to contract as currently provided for under the United States and Colorado Constitution. United States Constitution, art. I, § 10.[3] Nothing in the Initiative provides that it shall not apply to any existing contract of employment or written collective bargaining agreement.[4]

This Court has found that initiatives that worked an implied repeal upon an already existing provision of the Constitution contained a second subject. *E.g., In re Title and Ballot and Submission Clause for 2005-2006 #55*, 138 P.2d 273 (Colo. 2006 (implied repeal of constitutional guarantee of a system of justice open to all persons and implied repeal of due process and habeas corpus guarantees constituted multiple subjects); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #104*, 987 P.2d 249, 256 (Colo.

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[3] Although not relevant for this analysis, the Objector notes that this provision is certainly unconstitutional under the Contracts Clause of the U. S. Constitution. The United States Constitution art. I, § 10 provides that contractual rights shall not be impaired. This is applicable to state action under the XIV Amendment.

[4] Initiative 76 does not apply to bona fide collective bargaining agreement which contain a provision that requires just cause for discharge and suspension from employment.

1999) (implied repeal of existing constitutional provision a second subject); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d at 264-265 (Colo. 2000) (implied repeal of existing constitutional provision a second subject); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #64*, 960 P.2d 1192, 1198 (Colo. 1998) (indirect repeal of existing constitutional provision a second subject).

A second, unrelated purpose of the Initiative is to impose mandatory, binding arbitration (falsely called "mediation" in the Initiative) on disputes involving the discharge or suspension of employees. The Initiative sets out a detailed process that is unlike any current procedure, and prevents any employee that believes he or she has been wronged from going to court immediately.

By way of a second example of this second purpose, certified state employees enjoy a constitutional property right in their 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. XII, § 13; C. R. S. § 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.[5] This is all overturned by the Initiative, which instead puts mandatory arbitration in place for all employment disputes.

Courts have acknowledged the difference between an initiative's seemingly procedural changes and its aspects that affect fundamental rights. This case is similar to Initiative 55 which 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. *See No. 55, supra.* This 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." 138 P.3d at 280.

Given its breadth, this measure and title is virtually certain to result in voter surprise and fraud. Initiatives that are drafted to encompass such hidden topics

[5] The proponents have also offered Proposed Initiative 2007-2008 #76 ("Initiative 76"), which exempts government employees from the Just Cause initiative. Thus, the proponents are cognizant of this effect.

cannot survive single subject scrutiny. *See* C.R.S. §1-40-106.5(1)(e)(II) (one goal of the single subject requirement was intended to prevent surreptitious measures); *In re the Matter of Title, Ballot Title and Submission Clause for Proposed Initiative, 1997-98 #30, 959* P.2d 822, 827 (Colo. 1998).

II. The Title, Ballot Title, and Submission Clause are Confusing, Misleading, Unclear, and Hide the Purpose and Effect of the Proposed Initiative.

The failure of the Title to say "Repeal of At-Will Employment" alone is grounds to reverse. This is not some simple "putative effect" (Resp. Op. Br., p. 9), but the very purpose of the Initiative. This staggering change to Colorado Law as it has existed since before Colorado was a State is hidden, and not in the Title.

The Ballot Title's use of the term "mediation" is misleading and its reference to the mediation process is confusing, unclear, and incomplete because what it is imposing is arbitration. Mediation is a non-binding dispute resolution process where an impartial third party facilitates communication and negotiation and promotes voluntary decision-making by the parties to a dispute. Conversely, arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision, known as an award.

In fact, Respondents admit this at page 9 of their brief ("it is clear mediation is not the functional equivalent of arbitration.") This admission that the two

processes are different is devastating to Respondents because the Initiative and the Title refer to the former, but the process to be required is the latter.

Respondents try to avoid this patent flaw by trying to persuade this Court that this is "hardly a central provision of the measure." (Resp. Op. Br., p. 10) Whether central or not, this is sweeping change to current law and one's access to the court's. Any attempt to minimize its impact on the judicial system is misleading.

Once this argument falls, Respondents then attempt to spin the effect of this term in the following passage at page ten of their brief:

> The mediator's decision is final but only in the context that neither employer nor employee can revisit that decision and prolong the expedited process provided for in the amendment.

If "neither employer nor employee can revisit the decision" then it is "final" in any context. If a process provides for any decision to be imposed upon, rather than agreed to by, a party, then that process is arbitration and not mediation. What might happen after that (whether it is "final" or "final subject to appeal") is red-herring that is irrelevant to the analysis as to whether the Title is misleading for referring to "mediation." It is.

The title, ballot title and submission clause fail to express the fact that the Initiative eliminates the rights of employees to enter into a written collective

bargaining agreement or a contract of employment. The Initiative also fails to express that it applies to all state employees and would replace and eliminate the civil service system. See discussion *supra*. Any one of these flaws is fatal.

III. The Terms "Mediation" and "Just Cause" are Prohibited Catch Phrases.

Mediation conveys a non-acrimonious alternative dispute resolution mechanism for resolving disputes. No voter is likely against that, yet that is not what the Initiative provides—it provides for arbitration.

Similarly, no one is likely to be against "just cause." It is a term that is designed to attract support without contributing understanding to the Initiative. *In re Ballot Title 1999-2000 #258(A)*, 4 P.3d 1094, 1100 (Colo. 2000). But by defining "just cause" narrowly and in a way different that typically used (for example, to exclude simply not enough work to keep the worker busy), both the Initiative and the Title are misleading.

Contrary to the Respondents' argument at page 11, Blake has presented evidence on both these points. Respondents simply cannot re-label "arbitration" as "mediation" and pretend that it will not affect voters—of course it will. The fact that they are so desperately trying to keep such language is ample evidence of its prejudicial effect. That is, if "arbitration" were as emotionally attractive as "mediation" then the Respondents would have correctly labeled the process they

propose "arbitration" in the Initiative. They did not because they know it is far less likely to succeed than "mediation."

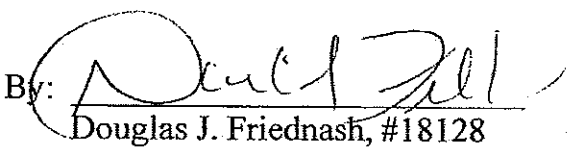
The initiative covers at least four subjects—eliminating at-will employment, defining "just cause" in a new way, requiring "just cause" for termination, and imposing arbitration on employment disputes. Further, the most important of these features is hidden from voters in the Initiative's misleading Title. The Title (and the Initiative itself) instead uses improper catch phrases to sway voters. The ruling of the Title Board must be reversed.

CONCLUSION

Petitioner respectfully requests that this Court reverse the State Title Board's action and to direct the Title Board to strike the title and return the Initiative to its proponents.

Respectfully submitted this 21st day of April, 2008.

FAIRFIELD AND WOODS, P.C.

By: 

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

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2008, a true and correct coy of the foregoing **ANSWER BRIEF TO RESPONDENTS** was hand delivered to the following:

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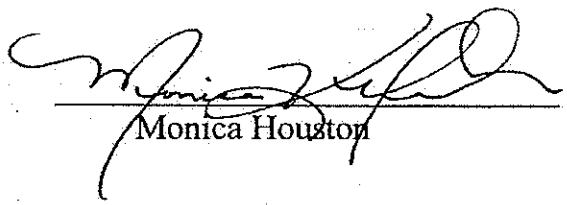

Monica Houston

Proposed Initiative
2007-2008
#76

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ELECTIONS
SECRETARY OF STATE

FINAL

Be it enacted by the People of the State of Colorado:

SECTION 1. Article XVIII of the constitution of the state of Colorado is amended BY THE ADDITION OF A NEW SECTION to read:

Section 13. Just cause for employee discharge or suspension. (1) AN EMPLOYEE MAY BE DISCHARGED OR SUSPENDED ONLY IF HIS OR HER EMPLOYER HAS FIRST ESTABLISHED JUST CAUSE FOR THE DISCHARGE OR SUSPENSION.

(2) FOR PURPOSES OF THIS SECTION:

(a) "JUST CAUSE" MEANS:

(I) INCOMPETENCE;
(II) SUBSTANDARD PERFORMANCE OF ASSIGNED JOB DUTIES;
(III) NEGLECT OF ASSIGNED JOB DUTIES;
(IV) REPEATED VIOLATIONS OF THE EMPLOYER'S WRITTEN POLICIES AND PROCEDURES RELATING TO JOB PERFORMANCE;
(V) GROSS INSUBORDINATION THAT AFFECTS JOB PERFORMANCE;
(VI) WILLFUL MISCONDUCT THAT AFFECTS JOB PERFORMANCE;
(VII) CONVICTION OF A CRIME INVOLVING MORAL TURPITUDE;
(VIII) FILING OF BANKRUPTCY BY THE EMPLOYER; OR
(IX) DISCHARGE OR SUSPENSION DUE TO SPECIFIC ECONOMIC CIRCUMSTANCES THAT DIRECTLY AND ADVERSELY AFFECT THE EMPLOYER AND ARE DOCUMENTED BY THE EMPLOYER, PURSUANT TO SUBSECTION (3) OF THIS SECTION.

(b) "EMPLOYEE" MEANS ANY NATURAL PERSON WHO:

(I) HAS WORKED AS A FULL-TIME EMPLOYEE FOR AT LEAST SIX CONSECUTIVE MONTHS FOR A PRIVATE SECTOR EMPLOYER; AND
(II) IS NOT COVERED BY A BONA FIDE COLLECTIVE BARGAINING AGREEMENT WHICH CONTAINS A PROVISION THAT REQUIRES JUST CAUSE FOR DISCHARGE AND SUSPENSION FROM EMPLOYMENT.

(c) "EMPLOYER" MEANS ANY BUSINESS ENTITY THAT EMPLOYS AT LEAST TWENTY FULL-TIME EMPLOYEES IN COLORADO. "EMPLOYER" EXCLUDES:

(I) ANY GOVERNMENTAL ENTITY; OR
(II) ANY NONPROFIT UNINCORPORATED ASSOCIATION OR ANY NONPROFIT CORPORATION, INCLUDING ANY CHARITABLE ORGANIZATION OR FOUNDATION EXEMPT FROM FEDERAL TAXATION UNDER SECTION 501(C) OF THE "INTERNAL REVENUE CODE OF 1986", AS AMENDED, THAT EMPLOYS LESS THAN ONE THOUSAND EMPLOYEES.

ATTACHMENT 1

(d) "GOVERNMENTAL ENTITY" MEANS ANY AGENCY OR DEPARTMENT OF FEDERAL, STATE, OR LOCAL GOVERNMENT, INCLUDING BUT NOT LIMITED TO ANY BOARD, COMMISSION, BUREAU, COMMITTEE, COUNCIL, AUTHORITY, INSTITUTION OF HIGHER EDUCATION, POLITICAL SUBDIVISION, OR OTHER UNIT OF THE EXECUTIVE, LEGISLATIVE, OR JUDICIAL BRANCHES OF THE STATE; ANY CITY, COUNTY, CITY AND COUNTY, TOWN, OR OTHER UNIT OF THE EXECUTIVE, LEGISLATIVE, OR JUDICIAL BRANCHES THEREOF; ANY SPECIAL DISTRICT, SCHOOL DISTRICT, LOCAL IMPROVEMENT DISTRICT, OR SPECIAL TAXING DISTRICT AT THE STATE OR LOCAL LEVELS OF GOVERNMENT; ANY "ENTERPRISE" AS DEFINED IN SECTION 20 OF ARTICLE X OF THE COLORADO CONSTITUTION; OR ANY OTHER KIND OF MUNICIPAL, PUBLIC, OR QUASI-PUBLIC CORPORATION.

(3) AN EMPLOYER SHALL PROVIDE AN EMPLOYEE WHO HAS BEEN DISCHARGED OR SUSPENDED WITH THE EMPLOYER'S WRITTEN DOCUMENTATION OF THE JUST CAUSE USED TO JUSTIFY SUCH DISCHARGE OR SUSPENSION.

(4) (a) ANY EMPLOYEE WHO BELIEVES HE OR SHE WAS DISCHARGED OR SUSPENDED WITHOUT JUST CAUSE MAY, WITHIN ONE HUNDRED EIGHTY DAYS AFTER NOTIFICATION OF THE DISCHARGE OR SUSPENSION, FILE A CIVIL ACTION IN STATE DISTRICT COURT. IF THE DISCHARGE OR SUSPENSION IS HELD TO HAVE BEEN WRONGFUL UNDER THE PROVISIONS OF THIS SECTION, THE COURT SHALL, AT ITS DISCRETION, AWARD THE EMPLOYEE REINSTATEMENT IN HIS OR HER FORMER JOB, BACK WAGES, DAMAGES, OR ANY COMBINATION THEREOF.

(b) IN ADDITION TO ANY AWARD MADE PURSUANT TO THIS SUBSECTION (4), THE COURT MAY ALSO AWARD ATTORNEY FEES TO THE PREVAILING PARTY.

(c) THE DECISION OF THE DISTRICT COURT MAY BE APPEALED TO THE COLORADO COURT OF APPEALS AND THE COLORADO SUPREME COURT AS PERMITTED UNDER THE COLORADO RULES OF CIVIL PROCEDURE.

(5) THE GENERAL ASSEMBLY MAY ENACT LEGISLATION TO FACILITATE THE PURPOSES OF THIS SECTION.

(6) THIS SECTION SHALL BECOME EFFECTIVE UPON PROCLAMATION OF THE GOVERNOR REGARDING THE VOTES CAST ON THIS AMENDMENT.

ISAACSON ROSENBAUM P.C.
Law . Client . Community®

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Direct Dial
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March 7, 2008

via **HAND DELIVERY**
Ms. Cesi Gomez
Colorado Secretary of State
Elections Division
1700 Broadway, Suite 270
Denver, Colorado 80290

Re: Initiative 2007-08 #76

Dear Ms. Gomez:

Attached please find the required draft of Initiative 2007-08 #76, which our office is filing on behalf of the Proponents for this measure.

Thank you very much.

Sincerely,

Amy Knight
Legal Assistant to Mark G. Grueskin

aak
enclosure
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Ballot Title Setting Board

Proposed Initiative 2007-2008 #76[1]

The title as designated and fixed by the Board is as follows:

An amendment to the Colorado constitution concerning cause for employee discharge or suspension, and, in connection therewith, requiring an employer to establish and document just cause for the discharge or suspension of a full-time employee; defining "just cause" to mean specified types of employee misconduct and substandard job performance, the filing of bankruptcy by the employer, or documented economic circumstances that directly and adversely affect the employer; exempting from the just cause requirement business entities that employ fewer than twenty employees, nonprofit organizations that employ fewer than one thousand employees, governmental entities, and employees who are covered by a collective bargaining agreement that requires just cause for discharge or suspension; allowing an employee who believes he or she was discharged or suspended without just cause to file a civil action in state district court; allowing a court that finds an employee's discharge or suspension to be in violation of this amendment to award reinstatement in the employee's former job, back wages, damages, or any combination thereof; and allowing the court to award attorneys fees to the prevailing party.

The ballot title and submission clause as designated and fixed by the Board is as follows:

Shall there be an amendment to the Colorado constitution concerning cause for employee discharge or suspension, and, in connection therewith, requiring an employer to establish and document just cause for the discharge or suspension of a full-time employee; defining "just cause" to mean specified types of employee misconduct and substandard job performance, the filing of bankruptcy by the employer, or documented economic circumstances that directly and adversely affect the employer; exempting from the just cause requirement business entities that employ fewer than twenty employees, nonprofit organizations that employ fewer than one thousand employees, governmental entities, and employees who are covered by a collective bargaining agreement that requires just cause for discharge or suspension; allowing an employee who believes he or she was discharged or suspended without just cause to file a civil action in state district court; allowing a court that finds an employee's discharge or suspension to be in violation of this amendment to award reinstatement in the employee's former job, back wages, damages, or any combination thereof; and allowing the court to award attorneys fees to the prevailing party?

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[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.

Hearing March 19, 2008:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 4:36 p.m.

Hearing April 2, 2008:
Motion for Rehearing granted in part to the extent Board amended titles; denied in all other respects.
Hearing adjourned 3:40 p.m.