Certification of Word Count: 2,023

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** ▲

Attorneys for Petitioner:
Douglas J. Friednash, #18128
John M. Tanner #16233
Susan F. Fisher, #33174
Fairfield and Woods, P.C.
1700 Lincoln Street, Suite 2400
Denver, Colorado 80203
Phone: (303) 830-2400
Facsimile: (303) 830-1033

Case No. 08SA90

PETITIONER'S ANSWER BRIEF TO OPENING BRIEF OF TITLE BOARD

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CONSTITUTIONAL PROVISIONS

On behalf of Joseph B. Blake, a registered elector of the State of Colorado, by and through his attorneys, Fairfield and Woods, P.C., hereby files this Answer Brief to Title Board's Opening Brief concerning the Title Board's approval of the Title for Proposed Initiative 2007-2008 #62 ("Cause for Employee Suspension and Discharge") (hereinafter "Initiative").

ARGUMENT

I. The Title Board Admits That It Is Impossible For A Voter To Be Informed As To The Consequences of His or Her Vote.

For example, since the measure does not define "employee" the question of whether state employees are covered is unclear (Op. Br. at p. 6).[1] "Likewise, the effect on employer-employee contracts is uncertain" *Id.*

The Title Board maintains that the Initiative is impossible to understand. This facial vagueness not only complicates this Court's attempt to understand the Initiative's subjects, but results in items being concealed within a complex proposal as prohibited by the single subject rule.

The Title Board's position is dispositive of this claim. An "Initiative's failure to specify any definitions, services, effects or purposes makes it impossible

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[1] The general rule of constitutional construction is that the language of the Constitution, so far as possible, must be given its ordinary meaning, and the words therefore their common interpretation. *In re Submission of Interrogatories on House Bill 1999-1325*, 979 P.2d 549 (Colo. 1999).

for a voter to be informed as to the consequences of his or her vote." *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006). There, this Court recognized:

> This facial vagueness not only complicates this court's attempt to understand the Initiative's subjects, but results in items being concealed within a complex proposal as required by the single subject rule.

Id.

As the Title Board recognizes, 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. (Op. Br. at p. 4). *See also, In re Title, Ballot Title and Submission Clause 2007-2008,* #17, 172 P.3d 871, 875 (Colo. 2007) ("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) (stating "we must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated").

Indeed, this Court "has repeatedly stated it will, when necessary, characterize a proposal sufficiently to enable review of the Board's actions." *In re*

Title and Ballot Title and Submission Clause for 2005-2006 #55, *supra*, 138 P.3d at 278. This Court characterizes proposals to determine unstated purposes and their relationship to the central theme of an initiative. *See id.* Thus, this Court must examine sufficiently the Initiative to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme. *See id.* at 279.

Once this court examines sufficiently the Initiatives' central theme under that standard, it will see that it violates the single subject requirement. For example, the plain language of the Initiative refers to "employees." The definition is commonly understood. The proponents have not limited this to any type of classification (*e.g.*, public or private, full-time or part-time).

As such, it would clearly include state employees and thereby implicitly repeal the state civil service system, something that is inevitable from the language of the Initiative, although not obvious on simple reading. The Title Board's attempt to claim that court construction might exclude state employees is a remarkable stretch (Op. Br. at p. 6), which makes matters worse, not better, because that is also hidden.

Similarly, the Initiative overrides existing contracts, including private contracts and collective bargaining agreements. Again, these results are inevitable from the Initiative but not plain from simply reading it.

In that way, the Initiative is similar to *2001-2002 #43, supra.* There, the Initiative simply wanted to preclude the repeal of TABOR, something that could easily be considered a single subject. This Court rejected that argument, however, because to do so effectively meant that several different existing doctrines had to be affected:

> At the hearing before the Title Board for # 43, one of the proponents conceded that the intended effect of this provision is to prevent the repeal of TABOR. Not only is this the epitome of a surreptitious measure, it is also intended to secure the support of various factions which may have different or even conflicting interests. Those voters in favor of repealing TABOR may vote for this initiative believing that it will permit just this. Only later will they discover that an obscure line in the initiative for which they voted exempts TABOR from the provision apparently permitting its repeal.

Id. at 447.

The same analysis applies here—the voter may believe that "just cause" for termination is a good thing, without realizing the Initiative also eliminates the state civil service, collective bargaining agreements, and private contracts. Clearly, voters will be surprised to find out that these results are coiled up in the subtly-worded Initiative.

Further, the Title Board's position is undercut by the Proponents submission of a different version of this Initiative. See Proposed Initiative 2007-2008 #76 ("Just Cause for Employee Discharge or Suspension"). In 2007-2008 #76 "Just Cause for Employee Discharge or Suspension," the term "employee" is defined to exclude those under a collective bargaining agreement and "employer" is defined to exclude "any governmental entity." The re-filing of this measure with a more limited focus evidences that this Initiative's scope is broader than the Title Board admits.

Currently, 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; Colo. Rev. Stat. § 24-50-125(3). The Initiative changes this by requiring that the employee/employer dispute to be "mediated" by a process that is in fact binding arbitration. This impact is hidden from the voters who will be surprised to learn that by voting for this standard they are eliminating constitutional due process rights now enjoyed by state employees.

In fact, the Title Board acknowledges that the Initiative is unclear and confusing by asserting (Op. Br. at p.6) that the measure does not state whether it intends to eliminate employer-employee contracts or whether this constitutional

provision becomes part of such contracts. If these matters are unclear to the Title Board, they are certainly unclear to the voter.

Similarly, the Title Board acknowledges the lack of clarity regarding the right of access to courts and due process once a "mediator's" decision is made. In fact, the Initiative unquestionably imposes mandatory, binding arbitration (falsely called "mediation") on disputes involving the discharge or suspension of employees. This change in procedure is a completely different subject than the change in substance (requiring just cause for termination).

In *Water Rights II*, 898 P.2d 1076, 1079–80 (Colo. 1995), a proposed constitutional amendment sought to adopt a public trust doctrine for state's waters and require water conservancy and conservation districts to hold elections for certain actions, and all paragraphs of the proposed amendment involved water. The court held that there was no necessary connection between the sections of constitutional amendment dealing with election procedure and the substantive paragraphs dealing with public trust water rights. The common characteristic that the paragraphs all involved water was too general and too broad to constitute a single subject.

In *In re Matter of the Title, Ballot Title and Submission Clause for 2003-2004, #32 and #33*, 76 P.3d 460, 461 (Colo. 2003), the initiative that both

implemented procedural changes in the petition system and prohibited lawyers from participating in the process of setting ballot titles violated the single-subject requirement. Likewise, in *In re Proposed Initiative for 1997-98 #63,* 960 P.2d 1192, 1200–01 (Colo. 1998), the Court held that the Board erred by fixing the titles and summary of the initiative entitled "Judicial Qualifications" because it contained provisions proposing to change the composition, 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—would not be considered a single subject.

The Title Board admits, repeatedly, that multiple subjects are covered in the Initiative. The strained attempt to gather them all under the title of "just cause for termination" fails. *E.g., In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996) ("Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement."); *In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873–74 (Colo. 2007 (initiative violative of the single-subject requirement by creating department of environmental conservation and mandating a public trust standard for that department). The Initiative must be stricken.

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

While arguing that it is impossible to discern the impact of the proposed constitutional amendment at page six, the Title Board nevertheless claims that the titles are fair, clear, accurate, and complete at page seven. These two conditions cannot exist simultaneously: if no one can tell what the Initiative means, then the Initiative cannot be fairly described in the proposed Title.

The Ballot Title is misleading as it suggests that "just cause" is already an applicable standard under Colorado law and further hides the primary purpose of the initiative to repeal the employment at-will doctrine.

The Ballot Title's use of the term "mediation" is misleading. In fact, what the Initiative refers to is binding arbitration, something completely different than mediation.

The title fails 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.

Given its breadth, this measure and title is certain to result in voter surprise and fraud. The Title Board admits (Op. Br. at p. 6) that the impact of this measure "cannot be determined" now—but that makes the Petitioner's point. Given this admission, voters will not be able to discern the far-reaching implications of this

proposed constitutional amendment if they vote "yes." *See In re Ballot Title 1999-2000 No. 29,* 972 P.2d 257, 267 (Colo. 1999) (proposed initiative was either ambiguous or contained a concealed intent; voters could not understand the effect of a "yes" or "no" vote). This alone is reason enough to strike the Initiative.

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

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, advertising, or promotion. They encourage prejudice in favor of the issue and, thereby, distract voters from consideration of the proposals merits. *In re Ballot Title 1999-2000 #258(A),* 4 P.3d at 1100 (Colo. 2000), ("as rapidly and effectively as possible" improper catch phrase because it draws attention to itself, triggers a favorable response, and generates support that hinges not on the content of the proposal itself, but merely on the wording of each phrase).

Mediation conveys a non-acrimonious alternative dispute resolution mechanism for resolving disputes. It is used to suggest that employment disputes can be resolved amicably and outside of the court system. No one is likely ever to

be against mediation, thus it constitutes an improper catch phrase because the Initiative requires arbitration, not mediation. *Id.*

"Just cause" is such a good slogan that it already has been used as one: "Operation Just Cause" was the official name of the U.S. military operation in Panama in 1989 that deposed Manuel Noriega. *See www.globalsecurity.org /military/ops/just_cause.htm.* By defining "just cause" in its own terms, however, the Initiative does not put the public's idea of just cause into place, thus making "just cause" a mere catch phrase.

No voter is likely to vote against either "mediation" or "just cause." The Initiative, however, does not put true mediation or just cause into place. They are improper catch phrases, and the Initiative must be stricken.

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 **PETITIONER'S ANSWER BRIEF TO OPENING BRIEF OF TITLE BOARD** was hand delivered to the following:

Mark G. Grueskin, Esq.
Isaacson Rosenbaum P.C.
633 17th Street, Suite 2200
Denver, Colorado 80202

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203

Monica Houston

Proposed Initiative 2007-2008 #76

RECEIVED
MAR 07 2008 (4:35 PM)
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®

Mark G. Grueskin
mgrueskin@ir-law.com

Direct Dial
303.256.3941

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
1768878_1.doc

633 17th Street, Suite 2200 Denver, Colorado 80202
303.292.5656 Fax 303.292.3152 www.ir-law.com

Joanne King
8306 Katherine Way
Denver, Colorado 80221
303-429-2191

Larry Ellingson
8517 Bluegrass Circle
Parker, Colorado 80134
720-530-5592

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.