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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, #76

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.

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Case No. 08SA120

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PETITIONER'S ANSWER BRIEF TO OPENING BRIEF OF TITLE BOARD

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CONSTITUTIONAL PROVISIONS

Joseph B. Blake, a registered elector of the State of Colorado, hereby files this Answer Brief to the Title Board's Opening Brief concerning Proposed Initiative 2007-2008 #76 ("Just Cause for Employee Discharge or Suspension") ("Initiative"). The statement of the issues, statement of the case, statement of the facts, and summary of the arguments are set forth in Petitioner's Opening Brief.

I. THE TITLE'S FAILURE TO INFORM VOTERS THAT THE INITIATIVE REPEALS COLORADO'S LONGSTANDING EMPLOYMENT AT-WILL DOCTRINE IS A FATAL DEFECT.

The at-will employment doctrine has existed since before the United States was an independent country.[1] The purpose of the Initiative is to repeal the employment at-will doctrine and yet this historic transformation in law is concealed from the voters. The proponents have also ensured that covered persons cannot contract around the newly created "just cause" standard of the Initiative. As a consequence, the title fails to "unambiguously state the principle of the provision sought to be added, amended or repealed." *In re Title, Ballot and Submission Clause, and Summary for 1999-2000 # 258(A)*, 4 P.3d at 1098 (Colo.

[1] Employment at-will is an employment relationship that is not governed by an individual contract of employment, collectively bargained agreement, or statute. Either party may terminate the employment relationship for any cause or no cause, except for an illegal reason.

2000) (quoting *In re Ballot Title 1999-2000 # 104*, 987 P.2d 249, 254 (Colo. 1999)).

This Court has stated that it will "characterize the proposal sufficiently to enable review of the Title Board's action." *In re Initiative for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000) (citing *In re Ballot Title 1999-2000 # # 245(f) & 245(g)*, 1 P.3d 739, 743 (Colo. 2000)). Eliminating a key feature of the initiative from the title alone 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 1077, 1082 (Colo. 1998). 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).

Such a monumental change in Colorado law should be clearly revealed in the title. The failure of the title to say "elimination of at-will employment" alone is grounds to reverse. Under Proposed Initiative 2007-2008 #76, *Proposed Initiative 2001-02 #43*, 46 P.3d 438 (Colo. 2000) and *Ballot Title 1997-1998 #62*, 961 P.2d 1077 (Colo. 1998) the title fails because it does not reveal this key feature of the Initiative. This is not a mere detail or some fanciful, clever interpretation. It is the

purpose of the Initiative, as conceded by the Respondents. This is exacerbated by the language of the title, which does not explain to the voters that, in addition to repealing the employment at will doctrine, they are also creating a new and exclusive framework for the termination and suspension of covered employees.

II. THE TITLE IS MISLEADING.

The title fails to express the fact that the Initiative unconstitutionally affects existing contracts, eliminating the rights of employers to terminate existing employees for reasons sufficient to the employer, even if it is not "just cause" in the eyes of the labor unions promoting the Initiative. The Fourteenth Amendment to the United States Constitution prohibits the states from entering laws which impair obligations of contract. *See U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977).

Here, there is no exception under the Initiative for existing contracts for covered employees. That means the Initiative is affecting existing contracts in violation of existing constitutional rights of employers, but this is not revealed in the title. Again, under *Proposed Initiative 2001-02 #43*, and *Ballot Title 1997-1998 #62,* the title fails because it does not reveal this key feature of the Initiative.

The title misleads voters as to the Initiative's scope; specifically, of which employees are covered by this constitutional amendment. While the title explains

which employers are covered by the Initiative, it fails to explain which employees are covered by the Initiative. Specifically, the definition of "employee" provides that it applies to any natural person who has worked full-time for at least six consecutive months for a private sector employee. This is essential for the voter to know because it provides an important method by which employers can escape the provisions of the Initiative. In addition, it fails to point out that the Initiative applies to employees who are not covered by a bona fide collective bargaining agreement, which contains a provision that requires just cause for discharge or suspension from employment.

Furthermore, the first sentence suggests that the "just cause" doctrine is already current law. The title does not inform the voters that they are taking action on the creation of a new prohibition. As such, the title as approved does not adequately inform the voter as to what they are voting on.

The Title uses the impermissible catch phrase of "just cause." The phrase is likely to mislead the voters because it has an accepted meaning that does not reflect the content of the Initiative. "Just cause" has already been determined in this same context (grounds to terminate an employee) to include grossly immoral conduct, yet, this Initiative would not allow termination for that reason.

"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) ("*Governmental Business*"). "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 the 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).

Here, "just cause" is clearly such a catch phrase, designed to gather support without contributing to understanding. Had the proponents of the Initiative provided a neutral term for their newly-created limited grounds for termination or suspension, that might have been acceptable, but they did not. They instead used a

well-known term in a manner different than it is commonly understood. Certainly as many voters are likely to be as blindly in favor of "just cause" as would have been in favor of "consumer protection" and "open government."

III. THE INITIATIVE VIOLATES THE SINGLE SUBJECT REQUIREMENT BY GROUPING HIDDEN AND DISTINCT PURPOSES UNDER THE BROAD THEME OF REQUIRING JUST CAUSE FOR THE SUSPENSION OR DISCHARGE OF EMPLOYEES.

The Title Board asserts that the Initiative only has one subject: just cause for action against an employee by an employer. This assertion lacks merit.

Under the proposed constitutional amendment, no employee can be discharged or suspended unless the employer has first established the newly-created definition of "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" is defined in the text to mean:

(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 and adversely affect the employer and are documented by the employer, pursuant to subsection (3) of this section.

There are several problems with this definition. First, it does not merely modify the definition of "just cause," but modifies the common law definition of "just cause." For example, in *Ricci v. Davis*, 627 P.2d 1111 (Colo. 1981), a teacher was terminated for having inappropriate sexual contact with five female students. He appealed, claiming he could only be terminated for "just cause" under his contract. This Court upheld his dismissal, saying his conduct was "morally offensive." Thus, this Court has established that "morally offensive conduct" is "just cause" for termination. *See id.*

Yet, he could not have been fired under the Initiative.[2] He was not charged with, much less convicted of, a "crime involving moral turpitude." None of the other itemized lists of what constitutes "just cause" apply. Thus, Colorado common law has already defined "just cause" and has done so differently than the

[2] Mr. Blake recognizes that *Ricci* involved a teacher with a collective bargaining agreement, and thus would not come under the Initiative. The fact that the employee could only be terminated for "just cause" under his employment contract is what matters, however, the fact that the contract was a collective bargaining is irrelevant. That is, *Ricci* would have been analyzed exactly the same way if it had been a private contract (and therefore subject to the Initiative) rather than a union contract.

Initiative. This is a completely separate subject than doing away with at-will employment and is not addressed by the Initiative.

Second, the Initiative eliminates a covered person's fundamental right to contract as currently provided under the United States and Colorado Constitution. United States Constitution, art. I, § 10; Colo. Const. art. II, § 11 (prohibiting laws that impair existing contractual obligations).[3] Nothing in the Initiative provides that it shall not apply to any existing contract of employment.

This Court has repeatedly held 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. 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-*

[3] Although not relevant for this analysis, Petitioner 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.

2000 #29, 972 P.2d 257 at 264–65 (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).

Here, the Initiative impliedly repeals the current Colorado constitutional freedom of contract for employers. If an employer currently has more than twenty full-time, at-will employees, then the employer has the constitutional right to terminate them for any reason or no reason. Under the Initiative, however, the employer loses this right, and thus, the Initiative interferes with an existing contract right in violation of the Colorado Constitution, and implicitly repeals that constitutional right for the employer. Under the cases above, this is a separate subject. The Initiative therefore contains at least two subjects.

Finally, as explained above, the Initiative impliedly repeals Colorado's longstanding employment at-will doctrine.

Respectfully submitted this 19th day of May, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2008, a true and correct copy of the foregoing **PETITIONER'S ANSWER BRIEF TO OPENING BRIEF OF TITLE BOARD** was hand delivered as follows to:

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