

SUPREME COURT, STATE OF COLORADO
Two East 14th Avenue
Denver, CO 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2007)

IN THE MATTER OF THE TITLE, BALLOT TITLE
AND SUBMISSION CLAUSE FOR 2007-2008, #93
("Safe Workplace")

Petitioner:

JOSEPH B. BLAKE, Objector,

v.

Respondents:

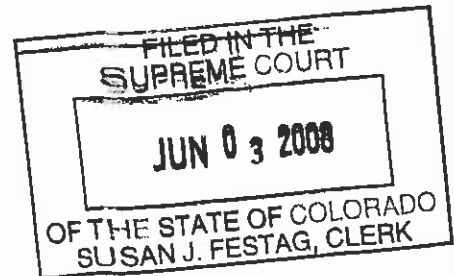
ERNEST L. DURAN, JR. and BRADLEY JOHNSON,
Proponents,

and

Title Board:

WILLIAM A. HOBBS, DANIEL L. CARTIN, and
DANIEL DOMENICO.

Attorneys for Proponents:
Michael J. Belo, No. 8198
Eugene M. Sprague, No. 7680
BERENBAUM, WEINSHIENK & EASON, P.C.
Address: 370 17th Street, Suite 4800
Denver, Colorado 80202
Phone Number: (303) 825-0800
FAX Number: (303) 629-7610
E-mail: mbelo@bw-legal.com
esprague@bw-legal.com



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Case No. 08SA180

OPENING BRIEF OF PROPONENTS

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Ernest L. Duran, Jr., and Bradley Johnston (correct spelling, rather than “Johnson” as in official caption), the Proponents of Proposed Initiative 2007-2008 #93, submit this Opening Brief in response to the Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2007-2008 #93 (“Safe Workplace”), filed by the Petitioner, Joseph B. Blake.¹

I. Introduction

Petitioner, as Objector, brought this original proceeding under C.R.S. § 1-40-107(2), to challenge the action of the ballot title setting board (“Title Board” or “Board”), which set the title, ballot title and submission clause (collectively “title”) for proposed Ballot Initiative 2007-2008 #93 (unofficially captioned by legislative staff as, and herein called, the “Safe Workplace” initiative). Initiative #93 seeks to amend the Colorado Revised Statutes by requiring employers to provide safe and healthy workplaces and enabling employees who are injured because of an employer’s violation of this requirement to file suit in district court for compensatory, exemplary, and other damages, but prohibiting injured employees from recovering any damages for which they have already been compensated pursuant to the Worker’s Compensation Act.

¹ The Petition to Review incorrectly lists Daniel Domenico as the third member of the Title Board for this initiative. The Title Board herein consisted of William Hobbs, Daniel Cartin, and Jeffrey Blue.

Petitioner contends that the Initiative violates the single subject requirement of article V, section 1(5.5) of the Colorado Constitution and that the title is misleading, confusing, unclear, and fails to reflect the Initiative's true meaning and intent. The Proponents respond that, as the Title Board held initially and reiterated upon Petitioner's motion for rehearing to the Board, the Initiative covers a single subject of requiring a Safe Workplace and accompanying provisions directly related to implementation of that requirement. Moreover, the title set by the Board is clear and captures the true meaning of the Initiative and its significant provisions.

II. Facts and Procedural History

The Safe Workplace initiative proposes to amend title 8, article 4, of the Colorado Revised Statutes by adding a section requiring employers to provide a safe and healthy workplace for their employees.² It applies to employers, excluding the state and its political subdivisions, who regularly employ ten or more employees in the state of Colorado. It provides that an employee who is injured by the failure to provide a safe and healthy workplace may file suit in state district court against his or her employer, in addition to any rights the employee may have under the Workers' Compensation Act of Colorado, C.R.S. § 8-40-101 *et seq.* The

² A copy of the Initiative as submitted to the Title Board is attached for reference as Appendix 1.

injured employee would have the right to a jury trial and could recover compensatory and exemplary damages, including damages for past and future pecuniary losses, pain and suffering, emotional distress, inconvenience, and other nonpecuniary losses. The Initiative states, however, that an employee would not be entitled to a double recovery for the same losses for which he or she has already been compensated under the Workers' Compensation Act.

On May 7, 2008, the Title Board found that the Initiative contained a single subject and set the title. Petitioner, Joseph Blake, filed a motion for rehearing, alleging that the Initiative does not contain a single subject and that the title failed to express the Initiative's true intent and meaning. On May 21, 2008, the Title Board rejected the Petitioner's contentions and denied the motion for rehearing.³

III. Analysis and Argument

The single subject requirement is contained in article V, section 1(5.5) of the Colorado Constitution, which provides, in pertinent part: "No measure shall be proposed by petition containing more than one subject, which shall be clearly expressed in its title." This Court has interpreted and applied this requirement in numerous cases, including most recently *In the Matter of the Title, Ballot Title and Submission Clause 2007-2008 #61*, Case No. 08SA89, 2008 Colo. LEXIS 454

³ A copy of the title, ballot title and submission clause is attached for reference as Appendix 2.

(Colo. May 16, 2008), and *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, Case No. 08SA90, 2008 Colo. LEXIS 455 (Colo. May 16, 2008).

An initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two separate and distinct purposes that are not dependent upon or connected with each other. *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 2008 Colo. LEXIS 455, at *8; *In the Matter of the Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006). If the initiative tends to achieve or to carry out one general object or purpose, it constitutes a single subject. *In the Matter of the Title, Ballot Title and Submission Clause 2007-2008 #61*, 2008 Colo. LEXIS 454, at *7. Although an initiative may contain several purposes, they must be interrelated. *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006).

The purpose of the single subject requirement is twofold. First, it ensures that each initiative depends upon its own merits for passage, which prevents the proponents from “joining multiple subjects into a single initiative in the hope of attracting support from various factions which may have different or conflicting interests.” *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-*

2008 #62, 2008 Colo. LEXIS 455, at *9 – 10 (internal citation omitted). Second, it guards against “surreptitious measures . . . [so as] to prevent surprise and fraud from being practiced upon voters.” *Id.* (citation omitted). Thus, an initiative may not hide purposes unrelated to its central theme, a rule that avoids the practice of enticing voters to support a measure because of popular or favorable provisions, while not realizing that less favorable provisions are buried in the measure. *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006* #55, 138 P.3d at 277.

The Court construes the single subject requirement liberally to avoid imposing undue restrictions on the initiative process. *In the Matter of the Title, Ballot Title and Submission Clause 2007-2008* #61, 2008 Colo. LEXIS 454, at *8. Moreover, the Court’s review of Title Board actions is limited and deferential.

Our review of actions taken by the Title Board is of a limited scope. For example, we "will not rewrite the titles or submission clause for the Board, and we will reverse the Board's action in preparing them only if they contain a material and significant omission, misstatement, or misrepresentation." **This prohibition requires us to engage all legitimate presumptions in favor of the propriety of the Title Board's actions when reviewing proposed initiatives.** Therefore, when determining whether a proposed initiative comports with the single-subject/clear title requirement, we may "not address the merits of a proposed initiative, nor [may] we interpret its language or predict its application if adopted by the electorate." **Our inquiry is limited to determining whether the constitutional prohibition against multiple subjects and unclear titles has been violated.**

In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62, 2008 Colo. LEXIS 455, at *14 – 15 (citations omitted) (emphasis added).

With these well-established principles in mind, we turn to an examination of the Petitioner's challenges to the Safe Workplace initiative.

1. The Safe Workplace initiative contains a single, clearly defined subject, and its other provisions are closely related to its subject.

The purpose of Initiative #93 can be summed up in one sentence:

Employers shall provide a safe and healthy workplace, and employees who are injured because of the failure to provide such a workplace shall be entitled to file suit in state district court, in addition to any remedies they may have under the Workers' Compensation Act.

Petitioner appears to be doing no more than superficially parsing the Initiative into its constituent provisions, and then claiming that they are separate subjects. In his motion for rehearing before the Title Board, Petitioner contended that the Initiative contains three separate subjects: (1) Every employer, as defined in the Initiative, must provide a safe and healthy workplace; (2) an employee injured by the employer's failure to provide a safe and healthy workplace shall have the right to file a civil action in district court; and (3) the right of civil action would be in addition to rights the employee may have under the Workers'

Compensation Act. (Motion for Rehearing, attached to Petition for Review, at 3 - 4.)

As the Court said in *In re Proposed Initiative for 1997-1998* #74, 962 P.2d 927, 929 (Colo. 1998), quoted favorably in *In the Matter of the Title, Ballot Title and Submission Clause 2007-2008* #61, 2008 Colo. LEXIS 454, at *8 – 9, “Multiple ideas might well be parsed from even the simplest proposal by applying ever more exacting levels of analytic abstraction until an initiative measure has been broken into pieces. Such analysis, however, is neither required by the single subject requirement nor compatible with the right to propose initiatives guaranteed by Colorado’s constitution.”

The Title Board correctly rejected Petitioner’s effort to derive separate subjects out of a simple, tightly interrelated initiative. The Initiative has but one purpose: to provide an employee injured by an unsafe workplace with the remedy of a civil action in district court, in addition to the employee’s rights under the Workers’ Compensation Act. Moreover, the Initiative and the title set by the Board clearly inform the prospective voter that the employee would not be entitled to a double recovery for damages for which he or she has received compensation under the Act.

This Court has made clear that “mere implementation or enforcement details directly tied to the initiative’s single subject will not, in and of themselves, constitute a separate subject.” *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 2005-2006* #73, 135 P.3d 736, 739 (Colo. 2006); *In the Matter of the Title, Ballot Title and Submission Clause for 2005-2006* #74, 136 P.3d at 239. The Safe Workplace initiative provides that, as the remedy for failing to provide a safe workplace, an injured employee may bring a civil action in addition to his or her remedies under workers’ compensation. The remedy is directly dependent upon and closely related to its subject of requiring a safe workplace. In this respect, the Initiative is analogous to, but simpler and more straightforward than, the “just cause” initiative considered in *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008* #62, 2008 Colo. LEXIS 455. There, the Court readily disposed of a challenge by the same Objector, Joseph Blake, holding that “each provision relates to creating, implementing, or enforcing a just cause standard in the employment setting.” *Id.*

Much of Petitioner’s argument to the Title Board related to the desirability of eliminating the “exclusivity” of workers’ compensation as the remedy for on-the-job injuries. (Motion for Rehearing, at 4 – 5.) This argument is better addressed to the voters, because neither the Title Board nor the Court at this stage

consider the merits of proposed measures or predict their application if adopted by voters. *Id.* at *14.

In summary, the Safe Workplace initiative complies with the single subject requirement. Therefore, the Court should affirm the Title Board's finding on this issue.

2. The title set by the Title Board clearly and accurately captures the purpose and provisions of the Initiative.

The Court employs a deferential standard in reviewing the title set by the Board:

While titles must be fair, clear, accurate, and complete, the Title Board is not required to set out every detail of an initiative. In addition, the Title Board may not speculate as to the measure's efficacy, or its practical or legal effects. We give great deference to the Title Board in the exercise of its drafting authority, and will reverse the Title Board's decision only if the titles are insufficient, unfair or misleading.

In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62, 2008 Colo. LEXIS 455, at *19.

The Title Board set the ballot title and submission clause for the Safe Workplace initiative as follows:

Shall there be an amendment to the Colorado Revised Statutes concerning a safe workplace for employees, and, in connection therewith, requiring employers to provide safe and healthy workplaces for their employees; restricting such requirement to employers

regularly employing ten or more employees in the state; and enabling employees who are injured because of an employer's violation of this requirement to file suit in district court, with the right to a jury trial, to recover compensatory and exemplary damages, actual past or future pecuniary losses, and noneconomic losses including pain and suffering, emotional distress, inconvenience, mental anguish, and loss of enjoyment of life, but prohibiting injured employees from recovering any damages for which the employee already received compensation pursuant to the "Workers' Compensation Act of Colorado"?

Before the Title Board, Petitioner claimed that the title and ballot title and submission clause are misleading because they allegedly fail to inform voters that the measure would eliminate the exclusivity provisions of the Workers' Compensation Act. (Motion for Rehearing, at 5 – 6.) First, the word “exclusivity” is a lawyer’s term, not a laymen’s word, and it is not even used in the Workers’ Compensation statute, C.R.S. § 8-41-102. It is probable that if the word were used in the title of the Initiative, the voter would be less likely to understand the title.

Second, the title set by the Board accurately and fairly captures the true meaning of the Initiative. The title states that an injured employee may file suit in district court and recover damages, but would be prohibited from recovering any damages for which the employee already received compensation pursuant to the Workers’ Compensation Act. Thus, the title informs the prospective voter that the employee’s right to civil damages would be in addition to his remedies under the Act.

The Court recently disposed of a similar contention that an initiative failed to inform voters of a purported effect of the initiative argued by the opponents:

[I]t is not our role to rephrase the language adopted by the Board to obtain the most precise and exact title. Rather, we will uphold the Board's choice of language if it "clearly and concisely reflects the central features of the initiative." Accordingly, **the Board is not required to provide explanations of the measure or discuss its every possible effect.** Therefore, we will reject the Board's language only if it is so inaccurate as to clearly mislead the electorate.

*In the Matter of the Title, Ballot Title and Submission Clause 2007-2008 #61, 2008 Colo. LEXIS 454, at *14 – 15 (citations omitted) (emphasis added).*

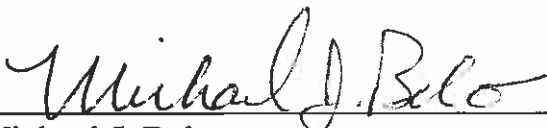
Here, the title accurately informs the electorate that employees injured by their employer's failure to provide a safe and health workplace shall be entitled to file suit in district court to recover compensatory and exemplary damages. It accurately informs the electorate that injured employees shall be prohibited from recovering any damages for which they have already received compensation under the Workers' Compensation Act. The title informs voters in plain English, rather than resorting to terms of the lawyer's art such as "exclusivity." Therefore, the title set by the Board correctly and fairly expresses the true intent and meaning of Initiative #93.

IV. Conclusion

The Title Board was correct in finding that Initiative #93 contains a single subject. The title set by the Board accurately expresses the subject and true meaning of the Initiative. Therefore, the Proponents request the Court to affirm the action of the Title Board.

DATED this 3rd day of June, 2008.

BERENBAUM, WEINSHIENK & EASON, P.C.



Michael J. Belo
Eugene M. Sprague

Attorneys for Proponents

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2008, a true and correct copy of the foregoing document was served via hand delivery upon the Petitioner's attorneys at the following address:

Douglas J. Friednash, Esq.
John M. Tanner, Esq.
Susan F. Fisher, Esq.
FAIRFIELD AND WOODS, P.C.
1700 Lincoln Street, Suite 2400
Denver, CO 80203
Phone: (303) 830-2400
Facsimile: (303) 830-1033

A handwritten signature in cursive script that reads "Patricia B. Allison". The signature is written in black ink and is positioned above a horizontal line.

Patricia B. Allison
Legal Assistant to Michael J. Belo, Esq.

*Proposed Initiative
93
Final Text*

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

Part 1 of article 2 of title 8, Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SECTION to read:

8-2-124. Safe workplace. (1) IT IS THE POLICY OF THIS STATE THAT EVERY EMPLOYEE SHOULD WORK IN A SAFE AND HEALTHY WORK ENVIRONMENT.

(2) EVERY EMPLOYER IN THIS STATE SHALL PROVIDE A SAFE AND HEALTHY WORKPLACE FOR ITS EMPLOYEES.

(3) FAILURE OF AN EMPLOYER TO COMPLY WITH ITS OBLIGATIONS UNDER THIS SECTION SHALL BE ACTIONABLE BY AN INJURED EMPLOYEE IN DISTRICT COURT IN ADDITION TO ANY RIGHTS THE EMPLOYEE MAY HAVE UNDER THE WORKERS' COMPENSATION ACT OF COLORADO, ARTICLES 40 TO 47 OF THIS TITLE. THE INJURED EMPLOYEE SHALL HAVE A RIGHT TO A JURY TRIAL ON ALL ISSUES OF FACT, IF DEMANDED IN ACCORDANCE WITH THE COLORADO RULES OF CIVIL PROCEDURE. THE COURT OR JURY MAY AWARD THE INJURED EMPLOYEE COMPENSATORY AND EXEMPLARY 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, PROVIDED 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 WORKERS' COMPENSATION ACT.

(4) "EMPLOYER" AND "EMPLOYEE" SHALL HAVE THE MEANINGS SET FORTH IN SECTION 8-4-101, EXCEPT THAT THIS SECTION SHALL APPLY ONLY TO EMPLOYERS THAT REGULARLY EMPLOY TEN OR MORE EMPLOYEES IN THE STATE OF COLORADO.

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ELECTIONS
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**RESPONDENTS'
APPENDIX 1
Case 08SA180
Colo. Supreme Court**

Ballot Title Setting Board

Proposed Initiative 2007-2008 #93¹

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

An amendment to the Colorado Revised Statutes concerning a safe workplace for employees, and, in connection therewith, requiring employers to provide safe and healthy workplaces for their employees; restricting such requirement to employers regularly employing ten or more employees in the state; and enabling employees who are injured because of an employer's violation of this requirement to file suit in district court, with the right to a jury trial, to recover compensatory and exemplary damages, actual past or future pecuniary losses, and noneconomic losses including pain and suffering, emotional distress, inconvenience, mental anguish, and loss of enjoyment of life, but prohibiting injured employees from recovering any damages for which the employee already received compensation pursuant to the "Workers' Compensation Act of Colorado".

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

Shall there be an amendment to the Colorado Revised Statutes concerning a safe workplace for employees, and, in connection therewith, requiring employers to provide safe and healthy workplaces for their employees; restricting such requirement to employers regularly employing ten or more employees in the state; and enabling employees who are injured because of an employer's violation of this requirement to file suit in district court, with the right to a jury trial, to recover compensatory and exemplary damages, actual past or future pecuniary losses, and noneconomic losses including pain and suffering, emotional distress, inconvenience, mental anguish, and loss of enjoyment of life, but prohibiting injured employees from recovering any damages for which the employee already received compensation pursuant to the "Workers' Compensation Act of Colorado"?

Hearing May 7, 2008:

Single subject approved; staff draft adopted; titles set.

Hearing adjourned 10:55 a.m.

**RESPONDENTS'
APPENDIX 2
Case 08SA180
Colo. Supreme Court**

¹ Unofficially captioned "Safe Workplace" by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.