COLORADO TITLE SETTING BOARD

IN THE MATTER OF THE TITLE, BALLOT TITLE, AND SUBMISSION CLAUSE FOR INITIATIVE 2023-2024 #150

MOTION FOR REHEARING ON INITIATIVE 2023-2024 #150

Alethia Morgan ("Movant"), a registered elector of the City and County of Denver, through counsel, Ireland Stapleton Pryor & Pascoe, PC, hereby files this Motion for Rehearing on Initiative 2023-2024 #150 ("Initiative #150").

On March 6, 2024, the Title Board set the Title for Initiative #150 as follows:

> A change to the Colorado Revised Statutes allowing a person to recover the total amount of monetary damages awarded by a jury or judge in a lawsuit for catastrophic injury or wrongful death unless the lawsuit is against a ski area, server of alcohol beverages, or the State of Colorado, and, in connection therewith, eliminating the statutory limitations on monetary damages for catastrophic injury or wrongful death.

I. Summary

Initiative #150 packs multiple distinct and incongruous purposes under the guise of a measure that purports to create a vague new private right for a subset of Coloradans. Consequently, it is critical that the Board unpack and understand everything Initiative #150 does, because doing so reveals multiple subjects coiled in the folds of a deceptive measure. *In re Title & Ballot Title & Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278–79 (Colo. 2006), *as modified on denial of reh'g* (June 26, 2006) ("[T]his court has repeatedly stated it will, when necessary, characterize a proposal sufficiently to enable review of the Board's actions.") (citing authorities).[1]

Because of how Initiative #150 is constructed, it would be difficult for even a savvy personal injury attorney to identify and understand all the surprises baked within its provisions. For instance, in addition to eliminating all caps on damages across various separate and unidentified laws, Initiative #150: (1) removes the judiciary's oversight over a jury's punitive damages award; (2) overrides the Provision of Uniform Contribution Among Tortfeasors Act, thereby allowing plaintiffs to double dip on damages; (3) nullifies the Collateral Source Statute, further expanding double-dipping opportunities; (4) eliminates the doctrine of comparative negligence by precluding the judiciary from reducing damages awards according to proportional fault as set forth in statute; (5) decreases the burden of proof required for enhanced damages; and

[1] The recitation and explanation of the law on this issue in section II of the Motion for Rehearing on Initiative #149 is incorporated herein by this reference.

(6) surreptitiously creates a new cause of action for wrongful death, thereby overriding the 150-year-old Wrongful Death Act.

Accordingly, Initiative #150 is an example of sophisticated logrolling aimed at unwinding several different laws that have no single-subject correlation. As Proponents' counsel indicated at the initial hearing, the only thing holding the measure together is the extremely broad theme of "catastrophic injury or death", which is impermissibly broad when considering everything the measure does under this guise.[2]

Because of the various defects with the measure, it would be impossible to set a clear and accurate title that puts voters on notice of what #150 does. But instead of trying to accomplish this, the Title set by the Board unwittingly condones surreptitious omnibus measures by telling voters almost nothing of import. Voters looking at either the language of Initiative #150 or the Title would not have any clue of the extent to which the measure would dramatically shift Colorado to one of the most plaintiff-friendly jurisdictions in the Country. If the Board moves forward with setting a title, it needs to put voters on notice of what the measure actually does so voters can make an informed decision.

II. Initiative #150 Has Multiple Separate Subjects.

A. Initiative #150 Effectively Repeals Multiple Different Damage-Cap Laws that Were Separately Enacted for Different Policy Reasons.

An understanding of Initiative #150's broad sweep of other laws begins with the language of the measure itself:

> ***Notwithstanding any*** contrary limitation on ***any*** type of damages ***found in law***, an injured person or their family has the ***right to recover***, ***without limitation***, the total amount of damages awarded by a jury or judge in a claim involving catastrophic injury, including wrongful death.

Proposed C.R.S § 13-21-102.7(1) (emphasis added).

Under the broad heading of creating a "right to recover" all damages awarded, Initiative #150 does away with damages caps in the case of catastrophic injury, including wrongful death, regardless of the nature of the cap, the source of the law, or the rationale for the cap. Proponents' counsel was very clear on this point at the initial hearing. March 6 Hearing Audio at 3:28:10 (not identifying which damages laws are being changed, except for stating, "all of them"). Thus, Proponents concede that, despite framing the measure as an affirmative right, the measure repeals damages caps in every instance except for the few enumerated exceptions in the measure. Proposed C.R.S. § 13-21-102.7(4).

The question then becomes, which damages caps are repealed? The measure does not identify them, and it is doubtful whether Proponents could identify all of them, given that when asked where Initiative #150 would apply, Proponents counsel answered, "It applies everywhere."

[2] March 6 Hearing Audio at 3:27:45.

March 6 Hearing Audio at 3:29:20. That answer is not helpful to either this Board or to voters in understanding what Initiative #150 does.

Through independent research, which voters are not likely to undertake, Objector's counsel was able to identify the following non-exhaustive list of the damages-cap laws repealed, or at least potentially repealed, by Initiative #150 in any case involving catastrophic injury, including death:

- **General limitation on noneconomic damages**, C.R.S. § 13-21-102.5. This law limits non-economic damages in any civil action (except for medical malpractice) to $250,000, which, adjusted for inflation as required, is $729,790 for claims accruing after January 1, 2024.[3] Note, the jury cannot be instructed on these limits and therefore can award any amount of damages beyond this limit. *Id.* at 102.5(4).

- **The Health Care Availability Act**, C.R.S. § 13-64-302(1)(b). This law limits damages in tort actions against healthcare professionals to $1,000,000 total, and $300,000 for non-economic damages.

- **Construction Defect Action Reform Act**, C.R.S. § 13-20-806(4)(a). This law limits non-economic and derivative non-economic damages to $250,000 in actions for bodily injury as a result of a construction defect.

- **Wrongful Death Act,** C.R.S. § 13-21-203. This law limits noneconomic loss in wrongful death cases (except for medical malpractice cases, which are governed by C.R.S. § 13-64-302) to $250,000, which, adjusted for inflation as required, is $679,990 for claims accruing after January 1, 2024.[4] The jury cannot be instructed on these limits and therefore can award any amount of damages beyond this limit. C.R.S. §13-64-302(1)(b).

- **Bad Faith Breach of Insurance Contract**, C.R.S. § 10-3-1116. This statute limits first-party bad faith claims to "two times the covered benefit". The Board might wonder why insurance contract claims are in play for a measure that purports to be about "catastrophic injury, including wrongful death." The proponents have surreptitiously used the word "***involving***" in the phrase, "involving catastrophic injury, including wrongful death". Proposed C.R.S. § 13-21-102.7(1). By phrasing the measure this way, neither the claim nor the damages would need to be ***caused by*** catastrophic injury in order to be eligible for unlimited damages. Even the Board was fooled by this tactic in describing the measure in the Title as concerning "damages awarded by a jury or judge in a lawsuit ***for*** catastrophic injury or wrongful death." (Emphasis added). Similarly, the measure would eliminate non-economic damages caps for third-party common law bad faith claims that "involve" catastrophic injury, including death.

- **Recreational Use Statute**, C.R.S. § 33-41-101. This law limits the liability of

[3] *See* Certification of Adjusted Limitations on Damages, *available at:* https://www.sos.state.co.us/pubs/info_center/files/damages_new.pdf.

[4] *See* Certification of Adjusted Limitations on Damages, *available at:* https://www.sos.state.co.us/pubs/info_center/files/damages_new.pdf.

landowners who allow the public to use their land for recreational use, depending on the context the land is being used. For instance, where a landowner leases land to a public entity, damages against the landowner are limited to $350,000 for an injury to one person for one occurrence or $990,000 for an injury to two or more persons for one occurrence.

- **Punitive Damages in Non-Medical Tort Cases**, C.R.S. § 13-21-102. This law caps the amount of punitive damages a jury can award no more than the amount of actual damages awarded. Under the Colorado Jury Instructions, juries are not instructed on this cap in awarding punitive damages, meaning that the cap will be gutted.[5]

- **Punitive Damages Against Healthcare Professionals**, C.R.S. §13-64-302.5. This law limits punitive damages under the Health Care Availability Act in the same manner as in C.R.S. § 13-21-102.

These damages caps laws were put into effect based on separate and distinct policy grounds. For instance, the legislative declaration for the general economic damages cap at C.R.S. § 13-21-102.5 provides:

> The general assembly finds, determines, and declares that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state; therefore, for the protection of the public peace, health, and welfare, the general assembly enacts this section placing monetary limitations on such damages for noneconomic losses or injuries.

§ 13-21-102.5, C.R.S.

Notably, this law does not cap economic damages (making the Title's reference to "monetary damages" misleading), but only for non-economic damages for pain and suffering and mental damages. The General Assembly passed these caps to strike a balance between, on the one hand, the availability of this category of damages, and, on the hand, the economic, commercial, and personal welfare of citizens and businesses in Colorado that pay for home, auto, umbrella, and liability insurance in this state.

Separately, the medical malpractice limits were put in place squarely to address the cost and availability of healthcare:

> The general assembly determines and declares that it is in the best interests of the citizens of this state to assure the continued availability of adequate health-care services to the people of this state ***by containing the significantly increasing costs of malpractice insurance for medical care institutions and licensed medical care professionals, and that such is***

[5] *See* CJI:Civ 5.4, *available at:* *https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Civil_Jury_Instructions_Committee/2018/Chapter%205.pdf.*

> ***rationally related to a legitimate state interest***. To attain this goal and in recognition of the exodus of professionals from health-care practice or from certain portions or specialties thereof, ***the general assembly finds it necessary to enact this article limited to the area of medical malpractice to preserve the public peace, health, and welfare***.

C.R.S. § 13-64-102(1) (emphasis added).

Distinct from both of these statutes, the policy behind the Recreational Use Statute is to "encourage owners of land to make land and water areas available for recreational purposes by limiting their liability toward persons entering thereon for such purposes." C.R.S. § 33-41-101.

Most disparately of any of these policies is the cap on punitive damages. This form of damages is based on a completely different policy rationale than compensatory damages. The purpose of compensatory damages is to compensate a plaintiff for economic and/or non-economic harm. In contrast, punitive damages, whether in the context of general torts or torts against healthcare professionals, exist as a form of punishment and deterrence. C.R.S. § 13-64-302.5. Juries are instructed as much in awarding punitive damages. CJI:Civ 5:4 ("Punitive damages, if awarded, are to punish the defendant and to serve as an example to others.")

Because punitive damages are a punishment, caps are in place to ensure that punishment is wielded fairly and within certain bounds, whether by a judge or jury. *See Sky Fun 1 v. Schuttloffel*, 27 P.3d 361, 370 (Colo. 2001) ("There is no doubt that the purpose of [the punitive damages cap legislation] was to limit excessive punitive damages awards.")

Here, Proponents cannot use a vague measure about "expanding rights to damages" to repeal a swath of unidentified, separate laws that were passed for different reasons. There is no logical connection between, for example, eliminating guardrails on the level of punishment a jury can issue in the form of punitive damages, while at the same time eliminating liability limits under the Recreational Use Statute, thereby removing a critical incentive for putting private lands to public use.

This measure is a form of sophisticated and surreptitious logrolling built on an "expansion-of-rights" concept, when in fact it secretly pushes through dozens of critical policy changes that voters would never understand. For instance, a voter might understand and favor the repeal damages caps in medical malpractice cases based on the voter's own personal history. But that same voter might cherish private lands being put to public recreational use, and therefore be dismayed to find out that she voted for a measure that eliminates a policy promoting public use of private lands. Another voter might be strongly against compensatory damages caps on the theory that there should be no limit on actual damages suffered, regardless of the collective economic ramification. That same voter might be strongly in favor of limiting punitive damages because they are a form of punishment, yet have no idea the measure eliminates punitive damages caps.

These examples could go on and on—the point is, the single-subject requirement does not allow Proponents to brush these various policy changes under the rug of a vague, broad theme. *See, e.g., In re Title, Ballot Title & Submission Clause, for 2007-2008, #17*, 172 P.3d 871, 873 (Colo. 2007), *as modified on denial of reh'g* (Dec. 17, 2007) (analyzing measure creating

environmental conservation department to determine that the measure also created a "public trust standard", which was a second subject); *In re Title, Ballot Title, Submission Clause for 2009-2010 No. 91*, 235 P.3d 1071, 1080 (Colo. 2010) (analyzing measure with the broad stated purpose "to protect and preserve the waters of this state" to determine the measure had distinct purposes embedded within it).

B. Initiative #150 Nullifies a Host of Non-Cap Laws that Have Separate and Distinct Purposes.

By creating a "right" to all damages awarded, Initiative #150 cleverly nullifies a host of other laws in cases of so-called "catastrophic injury". Most of these laws have no relationship to damages caps and were enacted based on separate and distinct policy grounds. Consequently, the only thing tying them together is that they are unhelpful for plaintiffs in personal injury cases. The biggest problem is that these major policy changes are made without anyone (except sophisticated personal injury lawyers) knowing it.

First, Initiative #150 alters the powers of the judiciary by nullifying a judge's authority to reduce or disallow punitive damages awards. C.R.S. § 13-21-102(2) (empowering judges to reduce or disallow punitive damages in certain circumstances where the punishment issued is not justified). The purpose of this statute is to "provide for the trial court's supervisory role over a jury's exemplary damages award." Here, by purporting to create an absolute "right" to damages awarded, Initiative #150 directly undercuts the judiciary's role in ensuring an appropriate level of punishment in any case involving catastrophic injury, including death. In reading the measure (or the Title), voters would have no idea that Initiative #150 infringes on the power of the judiciary to perform this role, the ramifications of which are amplified several-fold by the elimination of all punitive damages' caps. Initiative #150's sneak-attack on all checks and balances on punitive damages award has no connection to ensuring that plaintiffs are adequately compensated for their losses. Instead, it is squarely aimed at opening the door to runaway jury verdicts in favor of a few and at the expense of all Coloradans.

Second, Initiative #150 overrides the Provision of Uniform Contribution Among Tortfeasors Act, thereby permitting plaintiffs to double dip on their damages in wrongful death cases. Pursuant to this Act, "a trial verdict shall be reduced by an amount equal to the cumulative percentage of fault attributed to settling nonparties." *Smith v. Zufelt*, 880 P.2d 1178, 1188 (Colo. 1994) (citing C.R.S. § 13-50.5-105).

Because this reduction is by the court post-verdict (purportedly not allowed by Initiative #150), the measure nullifies this statute and will permit a plaintiff to double-dip by recovering the full jury award while also having already collected a portion of her damages from settling parties that were also determined to be at fault. Guarding against double recovery has nothing to do with ensuring fair compensation to plaintiffs and again is aimed at maximizing jury verdicts even when nonsensical to do so. Voters would be very surprised to learn that Initiative #150 sanctions double recovery of damages.

Third, Initiative #150 nullifies the Collateral Source Statue, which provides, in pertinent part:

> In any action by any person or his legal representative to recover damages for a tort ***resulting in death or injury to person***. . . , the court, ***after the finder of fact has returned its verdict stating the amount of damages to be awarded***, shall reduce the amount of the verdict by the amount by which such person, his estate, or his personal representative has been or will be wholly or partially indemnified or compensated for his loss by any other person, corporation, insurance company, or fund in relation to the injury, damage, or death sustained.

C.R.S. § 13-21-111.6.

While the Collateral Source Statute makes an exception where a plaintiff paid for a contract that provides the collateral source payment, Initiative #150 would override any other application of the rule because the required reduction comes after damages are awarded by the jury. This is another example of Initiative #150 sanctioning double-dipping.

Fourth, Initiative #150 nullifies the Comparative Negligence Statute at C.R.S. § 13-21-111. This statute requires courts to reduce the amount of damages awarded by a jury in proportion to the plaintiff's own negligence. C.R.S. § 13-21-111 ("[T]he court shall reduce the amount of the verdict in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is made . . . ."); *Alhilo v. Kliem*, 2016 COA 142, ¶ 70 ("[C]omparative negligence ***reduces*** the amount of damages found by the trier of fact, to determine the amount recoverable by a plaintiff.") (emphasis added). As constructed, Initiative #150 could be interpreted as barring a court from reducing a jury's damages award because plaintiffs have a "right" to the amount awarded by the jury.

Each of these laws exists for separate policy reasons, none of which are intended to prevent damages to which a plaintiff is entitled. Voters, including those that are lawyers, would be surprised to learn that Initiative #150—which is couched as a plaintiff's "rights" measure—actually unwinds a host of laws aimed at ensuring plaintiffs are not ***unfairly*** compensated in personal injury and wrongful death cases.

C. Initiative #150 Lowers Existing Burdens of Proof for Enhanced Damages.

As the Board and Proponents' counsel recognized at the initial hearing, one of the many aspects of Initiative #150 is that it serves as an "enhancer" on damages. If a plaintiff can establish by a preponderance of the evidence that they suffered "catastrophic injury" as defined in the statute, then any possible damages caps are lifted. Proposed C.R.S. § 13-21-102.7. At the hearing, Proponents' counsel first recognized that this provision changed existing burdens of proof, but then counsel and the Board deflected to the position that this provision merely recognizes the standard burden of proof in civil cases for elements of a claim. Therefore, the board concluded that this provision does not create a second subject. March 6 Hearing Audio at3:32:45.

This analysis is incorrect. In multiple different contexts, Colorado law currently requires a heightened burden of proof for both the enhancement of damages and, in certain cases, even the

eligibility for non-economic damages. For instance, in the case of the general limitation on noneconomic damages (not including medical malpractice), Colorado law provides an enhancer up to two-times the damages cap, but only upon a showing of ***clear and convincing*** evidence. C.R.S. §13-21-102.5(3)(a).

Moreover, Colorado law requires a showing of clear and convincing evidence for any ***non-injured*** party (such as a family member) to be eligible for noneconomic damages for "derivative" injury. C.R.S. § 13-21-102.5(2)(a). These damages are capped at $250,000 (adjusted for inflation). *Id.* Initiative #150 eliminates this burden of proof by allowing "family" (as broadly defined in the measure) to recover unlimited damages on a preponderance of the evidence showing of "catastrophic injury".

Further, as discussed above, by using the phrase, "involving catastrophic injury", Initiative #150 captures claims where the catastrophic injury is not the cause of the harm, such as first-party breach of insurance contract claims. As a result, Initiative #150 would seemingly lower the burden of proof for recovery of noneconomic damages in first-party insurance contract cases. Colorado law currently requires that a plaintiff demonstrate "by clear and convincing evidence that the defendant committed willful and wanton breach of contract." C.R.S. § 13-21-102.5(6)(a)(I)(B).

Additionally, in the case of claims against healthcare providers, a court can choose to exceed the total cap on economic and noneconomic damages, but only on a showing of "good cause". C.R.S. §13-64-302(b).

All of these provisions demonstrate the General Assembly's intent to make enhanced damages available, but only on a heighted burden. Initiative #150 does away with these heightened burden requirements in any case "involving catastrophic injury, including wrongful death", and makes unlimited damages available on a preponderance of the evidence showing. As Mr. Morrison recognized, there is no reason why Initiative #150 has to both change burdens of proof while also eliminating caps on damages. The two concepts represent separate and distinct policy choices: the burden of proof is a liability issue, while caps are a damages issue. Again, the only connection is that both of these are disfavored by Proponents.

D. <u>Initiative #150 Furtively Creates a New Cause of Action for Wrongful Death, Thereby Overriding the 150-Year-Old Wrongful Death Act</u>.

This separate subject is Initiative #150's coup de grâce, representing the height of its deception and the ingenuity of its backers. When asked at the initial hearing whether Initiative #150 creates a new cause of action, Proponents' counsel paused, and then provided a non-answer, stating that the measure is a "new provision" that only applies to catastrophic injury or wrongful death. March 6, 2024 Hearing Audio at 3:25:45. This answer was vague because Initiative #150 is absolutely intended to create a separate cause of action for any tort "involving . . . wrongful death". This feature is buried in the measure because creating a new claim for cases involving wrongful death cases is undeniably a second subject aimed at usurping Colorado's Wrongful Death Act.

Since 1877, the Wrongful Death Act has provided the only cause of action in Colorado law for the death of another. *Steedle v. Sereff*, 167 P.3d 135, 140-141 (Colo. 2007); *Crownover v.*

Gleichman, 574 P.2d 497, 498 (Colo. 1977). The Act creates a single right of recovery, and strictly governs the class(es) of persons who can bring that claim. *See* C.R.S. § 13-21-201(1)(a), (b). In the first year after death, the decedent's spouse has the right, ***to the exclusion of all others***, to bring a wrongful death action. The right of any children to bring an action is wholly dependent upon the fact that there is either no spouse surviving, or that the spouse elected not to sue within the one-year period. *Howlett v. Greenberg*, 530 P.2d 1285, 1287 (Colo. App. 1974).

Critically, the "heirs" who have standing to bring a wrongful death claim is "narrowly defined" to include only lineal "children", ***not all those entitled to share in the estate of the decedent***. *Ablin v. Richard O'Brien Plastering Co.*, 885 P.2d 289, 290-91 (Colo. App. 1994). Thus, for example, siblings cannot bring a wrongful death claim. *Id.* at 291. The purpose of this narrow construction is to ensure that death benefits are limited "to those individuals most likely to suffer pecuniary loss upon the decedent's death." *Id.*

Turning back to Initiative #150, its "rights" in proposed sub-section 102.7(1) is not a model of clarity, but a careful reading of it and the strategic definition of "family" reveals the measure's intent to upend Colorado's 150-year-old Wrongful Death Act. Proposed sub-section 102.7(1) provides, in pertinent part:

> Notwithstanding any contrary limit on any type of damages found in law, an injured person or ***their family*** has ***the right*** to recover, without limitation, the total amount of damages awarded by a jury or judge ***in a claim involving*** catastrophic injury, including ***wrongful death***.

(Emphasis added).

A few things jump out. First, the term "family" is expressly defined to include as heirs not only lineal decedents, but rather "those individual legally permitted to inherit as set forth in sections" under Colorado's Probate Code. Proposed C.R.S. § 13-21-102.7(3)(b). This would include siblings, grandparents, nieces, nephews, and other relations who do not have standing to bring a claim under the Wrongful Death Act. C.R.S. § 15-11-103.

Second, when a statute uses "rights-creating language" that "explicitly confer[s] a right directly on a class of persons", the statute is generally construed as creating a private right of action. *See Smith v. Hickenlooper*, 164 F. Supp. 3d 1286, 1290 (D. Colo. 2016), *aff'd sub nom. Safe Streets All. v. Hickenlooper*, 859 F.3d 865 (10th Cir. 2017). Here, Initiative #150 does exactly this and conspicuously does not include any language disclaiming the intent to create a private right of action.

Third, and most importantly, both the private right ***and the definition of "family"*** are tied directly to "claims involving . . . ***wrongful death***". (Emphasis added). In fact, the definition of "family" is tied only to wrongful death (as opposed to catastrophic injury), and therefore can have no other purpose than to create a new cause of action because such persons have no right to bring a claim under existing law. The conclusion that Initiative #150 is intended to create a separate cause of action outside the Wrongful Death Act is cemented by the measure's use of the phrase "involving . . . wrongful death" instead of, for example, "claims for wrongful death" or "claims under the Wrongful Death Act", phrasing that would indicate an intent to simply overlay existing

law. Further, the definition of family is not limited to any single person and has no temporal limitations like the Wrongful Death Act***, thus allowing for multiple wrongful death claims from a wide class of plaintiffs***.

Accordingly, peeling back the various layers of Initiative #150 reveals a hidden and completely separate subject: The creation of a new cause of action for torts involving wrongful death, with a multitude of "family" members each having a right to assert the claim. None of these family members would be subject to any cap on damages. Therefore, Initiative #150 eliminates longstanding Colorado law providing for only a single cause of action for wrongful death, which can be brought only by one of a narrow class of heir(s).

Initiative #150's creation of a new cause of action has no relationship to damage awards and is flagrant second subject. This surreptitious logrolling epitomizes why sweeping measures under the guise a general theme must be carefully scrutinized to ensure that wily or unwitting Proponents do not sneak in a wholly unrelated subject that overturns century-old law. If Proponents do not intend to change create a new cause of action (or change any other laws flagged in Objector's Motions for Rehearing for that matter), they are free to state as much on the record at the rehearing. However, Initiative #150 ultimately says what it says, and Proponents' stated intent does not control the Board's single subject analysis.

E. Proponents Are Trying to Drastically Dilute the Single Subject Requirement.

As outlined above, Proponents are trying to make sweeping changes to separately enacted and unrelated Colorado laws through measures purporting to give a new private "right" to a certain subset of Coloradans. The Board should be extremely wary of this tactic, which is aimed at taking a huge step beyond the Colorado Supreme Court's holding in *In re Title, Ballot Title and Submission Clause for 2019–2020 #3*, 2019 CO 57. There, the court ruled that a measure that expressly and completely repeals a single constitutional provision (i.e., TABOR) has a single subject, even if the provision originally had multiple subjects when enacted. *Id.* at ¶ 17.

In so holding, the court reasoned that 2019-2020 #3 had a very narrow and transparent single subject: repealing TABOR. Further, the measure proposed a whole-sale repeal of a single provision of law, as opposed to repealing various individual provisions in a piecemeal fashion, such as in *In re Proposed Initiative 1996-4*, 916 P.2d 528, 533 (Colo. 1996). *See id.* at ¶¶ 22-26. Consequently, unlike the measure in #1996-4, the measure in 2019-2020 #3 proposed no risk of voter confusion because any voter could very clearly understand the measure was simply repealing TABOR. *See id.* Therefore, 2019-2020 #3, which was a one-line measure, "contain[ed] noting "surreptitious or hidden". *Id.* at ¶ 40.

Initiative #150 is the opposite of 2019-2020 #3. It surreptitiously repeals, nullifies, or overrides a host of separate and unrelated laws, all without identifying any of the laws being changed or, in some cases, even telling voters laws are being changed. In essence, Initiative #150 is a surreptitious omnibus measure containing multiple subjects vaguely disguised as an "expansion" or "creation" of a right. If such measures are permitted, the Board will open the door to deceptive measures aimed at attacking a host of legislatively created policies for the benefit of a subset of Coloradans.

In this case, it is doubtful that Proponents themselves could identify all the laws changed by Initiative #150. As a practical matter, voters (and the Board) would need a team of lawyers to determine what these types of surreptitious omnibus measures accomplish. And simply saying—as Proponents have here—that a measure changes "all of the laws" on a generic topic does not rectify the single-subject problem. Telling voters to go figure it out is not a solution. Unfortunately, that is exactly what the Title for Initiative #150 does.

In sum, allowing these types of measure past the single-subject threshold would go far beyond the Colorado Supreme Court's holding in 2019-2020 #3. If Proponents want to dilute the single subject requirement in this manner, they need to ask the Colorado Supreme Court to do so on appeal. The Board should therefore reverse its single-subject finding and refuse to set a title for Initiative #150.

III. The Title Is Unfair, Inaccurate, and Incomplete.

As set forth in the recitation of clear-title law in the Motion for Rehearing on Initiative #149 (which is incorporated by reference), ballot titles must inform voters of the effects of a "yes" vote. Like the title for Initiative #149, the Title set by the Board here highlights and exacerbates the problem with setting a ballot title for a measure that has multiple, distinct purposes hidden with its folds. While the Board is required to identify the laws affected by the measure, it is impossible to do so because Initiative #150 changes dozens of laws without ever identifying them. Even if the Board or Proponents could identify them, the Title would read like a novel.

The solution to this problem cannot be to give the voters a misleading title that tells them nothing. That result would condone these surreptitious omnibus measures. In fact, setting a title that simply mirrors the vague new "right" being created would unwittingly give proponents of such measures a huge and unfair lift at the ballot box.

In this case, the Board's laudable effort to set a short and clear title unfortunately backfired on multiple levels, by, for example:

- Generically couching the measure as only relating to damages awards and failing to identify the host of laws being changed as identified in sections II.A and II.B, above.

- Incorrectly stating that measure applies only to lawsuits "***for*** catastrophic injury or wrongful death" when the measure applies to damages awards in any action "involving" these things, a distinction that has significant hidden implications.

- Misleadingly focusing on "monetary" damages, which suggests to voters that economic damages are currently capped, and otherwise failing to distinguish in any way between economic, non-economic, and punitive damages caps.

- Failing to alert voters of the lowering of various burdens of proof for enhancing damages under current law.

- Adopting the measure's catchphrase, "catastrophic injury", rather than using the definition of the term, which includes any injury that "seriously limits activities of normal daily life."

- Failing to inform voters about the wide-ranging impacts on the powers of the judiciary, including removing the judiciary's oversight over punitive damages awards.

- Failing to identify that the measure creates a new and standalone cause of action that each of a host of "family" members could bring in any case involving wrongful death, thereby overriding the 150-year-old Wrongful Death Act.

Consequently, in addition to containing multiple subjects, Initiative #150's Title fails to comport with Colorado's clear-title requirements.

WHEREFORE, Movant respectfully requests that the Title Board reverse the title setting for Initiative #150 because it violates the single subject requirement, or, alternatively, correct the deficiencies with the Title.

Dated: March 13, 2024

Respectfully submitted,

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3075 S. Birch St.
Denver, CO 80222

CERTIFICATE OF SERVICE

I hereby affirm that a true and accurate copy of the foregoing **MOTION FOR REHEARING ON INITIATIVE 2023-2024 #150** was sent this 13th day of March, 2024, via first class U.S. mail, postage pre-paid or email to:

Evelyn Hammond
c/o Tierney Lawrence Stiles, LLC
225 E 16th Avenue, Suite 350
Denver, CO 80203

Lucas Granillo
13393 Mariposa Ct
Westminster, CO 80234-1019

/s/ Tanya S. Mundy
Tanya S. Mundy