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

Original Proceeding
Pursuant to §1-40-107(2), C.R.S. (2017)
Appeal from the Ballot Title Board

In the Matter of the Title, Ballot Title, and Submission Clause for Proposed Initiative 2023-2024 # 150 ("Damages Involving Catastrophic Injury or Wrongful Death")

Petitioner: Alethia Morgan

v.

Respondents: Evelyn Hammond and Lucas Granillo

and

Title Board: Theresa Conley, Jeremiah Barry, and Kurt Morrison

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Supreme Court Case No.: 2024SA92

PETITIONER'S OPENING BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) because it contains 5,814 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A), because it contains under a separate heading before the discussion of the issue, as applicable, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

By: */s/ Benjamin J. Larson*
Benjamin J. Larson, #42540

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Petitioner Alethia Morgan ("Petitioner"), registered elector of the State of Colorado, through counsel, IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submits her Opening Brief in opposition to the title, ballot title, and submission clause (the "Title(s)") set for Proposed Initiative 2023-2024 #150 ("Initiative #150").

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether Initiative #150 violates the single subject requirement when, in cases involving catastrophic injury or wrongful death, the measure, among other things: (a) removes all damages caps across different state laws that were put in place for different policy reasons; (b) nullifies a host of other non-cap laws, including the judiciary's oversight over the jury as it relates to damages; and (c) decreases the burden of proof required for enhanced damages.
2. If the Title Board had jurisdiction to set a title, whether the Titles violate clear-title requirements because they:
    a. Fail to identify the host of damages-related laws changed by the measure;

b. Fail to alert voters of the lowering of various burdens of proof for the availability and enhancement of certain damages under current law;

c. Fail to inform voters about the impacts on the powers of the judiciary, including removing the judiciary's oversight over punitive damages awards; and

d. Adopt 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".

STATEMENT OF CASE

I. Nature of the Case and Proceedings before the Title Board.

This is an original proceeding pursuant to C.R.S. § 1-40-107(2) of the title setting for Initiative #150. Proponents Evelyn Hammond and Lucas Granillo filed Initiative #150 with the Secretary of State on February 9, 2024. The Title Board, on behalf of the Secretary of State, held a title hearing on March 6, 2024, finding that Initiative #150 contains a single subject and setting the Titles. R., p. 5.[1]

Petitioner timely filed a motion for rehearing ("Motion for Rehearing"). R., pp. 9-22. The rehearing was held on March 20, 2024, at which the Title Board granted the Motion for Rehearing as to certain clear title issues but denied it as to

[1] Record citations are to the electronic page number.

single subject issues by a 2-1 vote. R., p. 7. On March 27, 2024, Petitioner petitioned this Court pursuant to section 1-40-107(2), C.R.S., seeking review of the single subject determination or, alternatively, the Titles set by the Title Board. Petition for Review, p. 4.

II. Statement of Relevant Facts.

Under the broad heading of creating a "right to recover" all damages awarded by a judge or jury, 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. R., p. 3, Proposed C.R.S. § 13-21-102.7(1).[2] Thus, despite being framed as an affirmative right, the measure repeals damages caps in every instance except for the few enumerated exceptions in the measure. R., p. 3, Proposed C.R.S. § 13-21-102.7(4).

Additionally, by creating a "right" to all damages awarded by a jury, Initiative #150 cleverly nullifies the judiciary's authority to oversee damages awards, including the ability to reduce or disallow punitive damages awards.

[2] Proponents' counsel was very clear on this point at the initial hearing for Initiative #150. March 6 Hearing Audio at 3:28:10 (not identifying which damages laws are being changed, except for stating, "all of them"), *available at:* *https://csos.granicus.com/player/clip/434?view_id=1&redirect=true*.

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).

Finally, Initiative #150 lowers the burden of proof to enhance damages. If a plaintiff can establish by a "preponderance of the evidence" that they suffered "catastrophic injury" as defined in the statute, then any applicable damages caps are lifted. R., p. 3, Proposed C.R.S. § 13-21-102.7. In contrast, 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. C.R.S. §13-21-102.5(3)(a) (requiring a showing of clear and convincing evidence to enhance damages up to two-times the damages cap for non-economic damages); C.R.S. § 13-21-102.5(2)(a); C.R.S. § 13-21-102.5(2)(a) (requiring 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).

SUMMARY OF ARGUMENT

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. 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. 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.[3]

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 Titles set by the Board unwittingly condone surreptitious omnibus measures by telling voters almost nothing of import. Voters looking at either the language of Initiative #150 or the Titles 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 Court finds that the Initiative #150 has a single subject, the Titles should be modified to put voters on notice of what the measure actually does so voters can make an informed decision.

[3] March 6 Hearing Audio at 3:27:45, *available at:* *https://csos.granicus.com/player/clip/434?view_id=1&redirect=true*.

ARGUMENT

I. Initiative #150 Contains Multiple Subjects.

A. Standard of Review; Preservation of Issues on Appeal.

While the Court employs all legitimate presumptions in favor of the propriety of the Title Board's actions, it will overturn the Title Board where it has clearly erred. *In re Title, Ballot Title & Submission Clause for 2013-2014 #76, 2014 CO 52*, ¶ 8. Pursuant to article V, section 1(5.5) of the Colorado Constitution and section 1-40-106.5(1)(a), C.R.S., ballot initiatives must contain a single subject. "If a measure contains more than one subject, such that a ballot title cannot be fixed that clearly expresses a single subject, no title shall be set and the measure shall not be submitted to the people for adoption or rejection at the polls." Colo. Const. article V, § 1(5.5).

The single subject requirement forbids the joining of "incongruous subjects in the same measure," and thereby ensures "each proposal depends on its own merits for passage." *In re Title, Ballot Title & Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 441 (Colo. 2002) (quoting *In re Proposed Initiative on "Public Rights in Water II"*, 898 P.2d 1076, 1078 (Colo.1995)) (internal quotations omitted). Accordingly, a measure has multiple subjects if it has "two distinct and separate purposes which are not dependent upon or

connected with each other." *Id.* (quoting *Public Rights in Water II*, 898 P.2d at 1078-79) (internal quotations omitted).

The purpose of the single subject requirement is twofold. First, it prevents the enactment of combined, unrelated measures that would fail on their individual merits. *In re Title, Ballot Title, & Submission Clause for 2013-2014 #89*, 328 P.3d 172, 177 (Colo. 2014). Second, it protects against voter surprise by the inadvertent passage of surreptitious provisions hidden within a complex initiative that has multiple, unconnected purposes. *Id.* at 177-78.

The single subject issues raised by Petitioner on appeal were preserved below in her Motion for Rehearing. R., pp. 9-23.

B. The Court Must Sufficiently Examine Initiative #150 to Determine Whether It Has Multiple Subjects.

Because Initiative #150 is constructed as a generic "right" to receive all damages awarded by a factfinder, it is impossible to tell from the face of the measure all the laws being changed.[4] Before the Title Board, Proponents

[4] March 6 Hearing Audio at 3:28:10 (not identifying which damages laws are being changed, except for stating, "all of them"), *available at,* *https://csos.granicus.com/player/clip/434?view_id=1&redirect=true; see also* March 20 Hearing Audio at 11:05:09 (discussion with Proponents' counsel about all the laws being changed by the measure).

contended that these changes to the law are merely "effects" that cannot be considered as part of the single-subject inquiry.

However, understanding what the measure actually does, as opposed to speculating about its effects, are two very different things. This Court will sufficiently examine and analyze a measure to "determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme." *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). In making this assessment, the Court applies the usual rules of statutory construction, including the requirement that terms be given their plain meaning. *In re Title, Ballot Title 1997-98 #30*, 959 P.2d 822, 825 (Colo. 1998).

The rationale for sufficiently analyzing a measure is that "[a]n evaluation of whether the component parts of a proposed initiative are connected and are germane to one another, so as to comprise one subject, simply cannot be undertaken in a vacuum." *Id.* at 278, n.2 (quoting Justice Mullarkey's concurrence in *In re Proposed Initiative on Parental Rights*, 913 P.2d 1127, 1134 (Colo.1996)). Thus, for example, in *2005-2006 #55*, the Colorado Supreme Court examined a

measure that, at first blush, appeared to have a straightforward central theme of "restricting non-emergency services". The court "explore[d] the purposes effected by restricting all non-emergency services . . . and identified two distinct, unrelated purposes", and therefore reversed the Title Board's title setting. 138 P.3d at 280-82. As part of its analysis, the court assessed how and why non-emergency services are provided by state and local governments to determine whether there were multiple purposes behind banning them in certain circumstances. *See id*.

Determining what a measure actually does is particularly important where the measure makes sweeping changes to existing law under the guise of a broad theme, thereby presenting risks of "logrolling". *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).

Here, in addition to eliminating all caps on damages across various separate and unidentified laws, Initiative #150: (1) removes the judiciary's oversight of damages awards, including its ability to reduce punitive damages awards; (2) overrides the Provision of the 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; and (5) decreases the burden of proof required for enhanced damages. Consequently, Initiative #150 has multiple incongruous purposes as outlined below.

C. 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.

R., p. 3, 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. Additionally, by surreptitiously using the word "***involving***" in the phrase, "involving catastrophic injury, including wrongful death", neither the claim nor the damages need to be ***caused by*** catastrophic injury in order to be eligible for unlimited damages. R., p. 3, Proposed C.R.S. § 13-21-102.7(1). Thus, for example, the measure would eliminate all damages caps for any common law bad-faith breach of insurance claims that "involve" catastrophic injury, including death. Accordingly, the measure repeals damages caps in every instance except for the few enumerated exceptions in the measure. R., p. 3, 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 neither could the Title Board or the Proponents. At the initial hearing, Proponents' counsel simply stated, "It applies everywhere."[5] That answer is not helpful to voters in understanding what Initiative #150 does.

[5] March 6 Hearing Audio at 3:28:10 (not identifying which damages laws are being changed, except for stating, "all of them"), *available at,* *https://csos.granicus.com/player/clip/434?view_id=1&redirect=true; see also* March 20 Hearing Audio at 11:05:09 (discussion with Proponents' counsel about all the laws being changed by the measure).

Through independent research, which voters are not likely to undertake, Petitioner'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.[6]
- **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.

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

- **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.[7]
- **Recreational Use Statute**, C.R.S. § 33-41-101. This law limits the liability of 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(1)(a). This law caps the amount of punitive damages a plaintiff can recover to 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, and thus can award an amount in

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

excess of actual damages, with courts then reducing the judgment to the statutory limit.[8]

- **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(1)(a).

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.

C.R.S. § 13-21-102.5.

Notably, this law does not cap economic damages, but only 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

[8] *See* CJI:Civ 5:4, n.13 ("Because the amount of punitive damages determined by the jury may be increased or decreased as the court may decide, the jury is not instructed about the effect of their determination . . . . " (citing § 13-31-102.5 (4)).

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 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, 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 therefore 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 will not understand. For instance, a voter might understand and favor the repeal of 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).

D. 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. The biggest problem is that these major policy changes are made without the average voter knowing it.

First, because Initiative #150 provides a "right" to all damages awarded by a jury, the measure significantly alters the judiciary's oversight over damages awards. For instance, the measure nullifies the trial court'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." *Sky Fun 1 v. Schuttloffel*, 27 P.3d 361, 370 (Colo. 2001).

Further, the measure eliminates a trial court's ability to order a new trial in the event the court finds the jury verdict is tainted by bias, prejudice, and passion

or juror misconduct. *See Marks v. District Court*, 643 P.2d 741, 744-45 (Colo. 1982). It likewise removes a court's ability to reduce an excessive verdict through remittitur. *See Burns v. McGraw-Hill*, 659 P.2d 1351, 1356 (Colo. 1983); *Ochoa v. Vered*, 212 P.2d 963, 972-73 (Colo. App. 2009).

Thus, by purporting to create an absolute "right" to all damages awarded, Initiative #150 directly undercuts the judiciary's role in ensuring an appropriate level of damages in any case involving catastrophic injury, including death. In reading the measure (or the Titles), voters would have no idea that Initiative #150 infringes on the power of the judiciary to perform this oversight, the ramifications of which are amplified several-fold by the elimination of all caps. Initiative #150's sneak-attack on all checks and balances on damages awards 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 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.

E. Initiative #150 Lowers Existing Burdens of Proof for Enhanced Damages and Eliminates the Requirement that Courts, as Opposed to Juries, Must Find Enhanced Damages Are Warranted.

Under Initiative #150, if a plaintiff can establish by a preponderance of the evidence that they suffered "catastrophic injury" as defined in the statute, then all applicable damages caps are lifted. R, p. 3, 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.[9]

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-

[9] March 6 Hearing Audio at 3:32:45, *available at available at: https://csos.granicus.com/player/clip/434?view_id=1&redirect=true*.

times the damages cap, but only if ***the court*** finds justification for doing so upon a showing of ***clear and convincing*** evidence. C.R.S. §13-21-102.5(3)(a).

Moreover, Colorado law requires ***the court*** to find justification by clear and convincing evidence to award any ***non-injured*** party (such as a family member) to "derivative" noneconomic damages. C.R.S. § 13-21-102.5(3)(b). These damages are capped at $250,000 (adjusted for inflation). *Id.* Initiative #150 eliminates this burden of proof—***and who must make the finding (court vs. jury)—***by allowing any "family" (as broadly defined in the measure) to recover unlimited damages awarded by a jury on a preponderance of the evidence showing of "catastrophic injury".

Similarly, in the case of claims against healthcare providers, a court can choose to exceed the total cap on economic and noneconomic damages, but only if ***the court*** finds "good cause". C.R.S. § 13-64-302(1)(b).

All of these provisions demonstrate the General Assembly's intent to make enhanced damages available, but only if ***courts*** find that a heightened burden is satisfied. Initiative #150 does away with these heightened burden requirements in any case "involving catastrophic injury, including wrongful death", and makes unlimited damages available if a jury finds a catastrophic injury by preponderance of the evidence. As Title Board member Kurt 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 are disfavored by the plaintiffs' bar advancing the measure.

F. 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 a measure purporting to give a new private "right" to a certain subset of Coloradans. This tactic is aimed at taking a giant leap beyond this 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 wholesale 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] nothing "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 Title 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 Titles for Initiative #150 do.

In sum, allowing these types of measure past the single-subject threshold would go far beyond this Court's holding in 2019-2020 #3. The Court should therefore reverse the Title Board's single-subject finding.

II. The Titles Are Unfair, Inaccurate, and Incomplete.

Ballot titles must clearly express a measure's single subject. Colo. Const. art. V, § 1; C.R.S. § 1-40-106.5. Titles must also:

> allow voters, whether or not they are familiar with the subject matter of a particular proposal, to determine intelligently whether to support or oppose the proposal. Thus, in setting a title, the title board shall consider the public confusion that might be caused by misleading titles and shall, whenever practicable, avoid titles for which the general understanding of the effect of a 'yes/for' or 'no/against' vote will be unclear.

Matter of Title, Ballot Title & Submission Clause for 2015-2016 #73, 2016 CO 24, ¶ 22. In a similar case, this Court said, "the titles in this case create confusion and are misleading because they do not sufficiently inform the voters of the parental-waiver process and its virtual elimination of bilingual education as a viable parental and school district option. . . . Contrary to the title board's and proponents' position, we need not engage in the prediction of doubtful future

effects to reach that conclusion." *In re Ballot Titles 2001-2002 #21 & #22*, 44 P.3d 213 (Colo. 2002).

Here, the Titles set by the Board highlight and exacerbate the problem with setting ballot titles for a measure that has multiple, distinct purposes hidden with its folds. While the Board is required to identify the laws changed by the measure, it is impossible to do so because Initiative #150 changes dozens of laws without ever identifying them. Even if one could identify all of the laws changed, the Titles 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:

a. Failing to identify the host of separate and distinct damages caps that are being repealed and other damages-related laws being changed.

b. Failing to recognize that the burden of proof under existing law is being changed to enhance damages and for damages to be available in the case of derivative damages.

c. Failing to inform voters about the wide-ranging impacts on the powers of the judiciary, including removing the judiciary's oversight over damages awards and eliminating the judiciary's role in finding whether enhanced damages are warranted.

d. 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."

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

CONCLUSION

WHEREFORE, Petitioner respectfully requests this Court find that Initiative #150 contains multiple subjects and should be returned to Proponents. Alternatively, if the Court finds that Initiative #150 contains a single subject, the Titles should be

remanded to the Board with instructions to address the clear-title issues set forth above.

Respectfully submitted this 10th day of April, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of April, 2024, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was duly filed with the Court and served via CCEF and/or email upon the following:

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