SUPREME COURT OF COLORADO
2 East 14th Avenue 4th Floor
Denver, Colorado 80203

ORIGINAL PROCEEDING PURSUANT TO
§ 1-40-107(2), C.R.S. (2007)
Appeal from the Ballot Title Setting Board

IN THE MATTER OF THE TITLE, BALLOT TITLE AND SUBMISSION CLAUSE FOR 2007-2008, #96

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

▲ **COURT USE ONLY** ▲

Case No.
08SA179

PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-2008 #96 ("COST-OF-LIVING WAGE INCREASE")

Joseph B. Blake (the "Petitioner"), a registered elector of the State of Colorado, through his counsel, Fairfield and Woods, P.C., respectfully petitions this Court pursuant to section 1-40-107(2), C.R.S. (2007) to review the action of the Ballot Title Setting Board ("Title Board") with respect to the setting of the title, ballot title, and submission clause for Proposed Initiative 2007-2008 #96 (unofficially captioned by legislative staff, for tracking purposes, "Cost-of-Living Wage Increase").

I. Actions of the Ballot Title Setting Board

The Title Board conducted its initial public meeting and set title for Proposed Initiative 2007-2008 #96 on May 7, 2008. On May 14, 2008, Petitioner field a Motion for Rehearing (the "Motion"), pursuant to section 1-40-107(2). The Motion was denied on May 21, 2008. Petitioner seeks a review of the final action of the Title Board with regard to Proposed Initiative 2001-2008 #96 ("Cost-of-Living Wage Increase").

II. Issues Presented

1. Whether the proposed initiative violates the single subject requirement of Colo. Const. art. V, § 1(5.5) and Colo. Rev. Stat. § 1-40-106 and § 1-40-106.5.

III. Supporting Documentation

As required by section 1-40-107(2), a certified copy of the Petition, with the titles and submission clause of the proposed initiative, together with a certified copy of the Motion for Rehearing and the rulings thereon, are submitted with this Petition.

IV. Relief Requested

Petitioner respectfully requests this Court to reverse the actions of the Title Board with directions to decline to set a title and return the Proposed Initiative 2007-2008 #96 ("Cost-of-Living Wage Increase") to the proponents.

Respectfully submitted this 27th day of May, 2008.

FAIRFIELD AND WOODS, P.C.

By: _____
Douglas J. Friednash, #18128
John M. Tanner #16233
Susan F. Fisher, #33174

Petitioner's Address:
1445 Market Street
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2008, a true and correct coy of the foregoing **PETITION FOR REVIEW OF FINAL ACTION OF BALLOT TITLE SETTING BOARD CONCERNING PROPOSED INITIATIVE 2007-**

2008 #96 ("COST-OF-LIVING WAGE INCREASE") was placed in the United States mail, postage prepaid, to the following:

Michael J. Belo
370 Seventeenth Street
Republic Plaza, Suite 4800
Denver, Colorado 80202

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 6th Floor
Denver, CO 80203

Monica Houston

STATE OF COLORADO

DEPARTMENT OF STATE

CERTIFICATE

I, MIKE COFFMAN, Secretary of State of the State of Colorado, do hereby certify that:

the attached are true and exact copies of the text, motion for rehearing, titles, and the rulings thereon of the Title Board on Proposed Initiative "2007-2008 #96".

IN TESTIMONY WHEREOF I have unto set my hand and affixed the Great Seal of the State of Colorado, at the City of Denver this 23rd day of May, 2008.

SECRETARY OF STATE

Proposed Initiative #96 Final Text

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

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

8-2-124. Cost-of-living wage or salary increase. (1) ALL EMPLOYERS SHALL PROVIDE TO THEIR EMPLOYEES AN ANNUAL WAGE OR SALARY INCREASE TO ACCOUNT FOR AN INCREASE IN THE COST OF LIVING, AS MEASURED BY THE CONSUMER PRICE INDEX ("CPI") USED FOR COLORADO. THE CPI SHALL BE THE SAME INDEX USED BY THE DEPARTMENT OF LABOR AND EMPLOYMENT IN MAKING ADJUSTMENTS FOR INFLATION TO THE STATE MINIMUM WAGE RATE PURSUANT TO ARTICLE XVIII, SECTION 15, OF THE CONSTITUTION OF THE STATE OF COLORADO. THE WAGE OR SALARY INCREASE MAY BE BASED UPON A CALENDAR YEAR, ANNIVERSARY YEAR, FISCAL YEAR, OR OTHER BASIS, SO LONG AS IT IS PROVIDED AT AN ANNUAL INTERVAL.

(2) THIS SECTION DOES NOT REQUIRE AN ADDITIONAL WAGE OR SALARY INCREASE IF THE EMPLOYER, PURSUANT TO ITS POLICY OR PRACTICE, AGREEMENTS WITH EMPLOYEES OR LABOR ORGANIZATIONS, OR ANY OTHER REASON OR OTHER LAW, INCLUDING ARTICLE XVIII, SECTION 15, OF THE CONSTITUTION OF THE STATE OF COLORADO, PROVIDES ANNUAL WAGE OR SALARY INCREASES EQUAL TO OR GREATER THAN THE INCREASE REQUIRED BY THIS SECTION.

(3) IN NO EVENT SHALL AN EMPLOYER REDUCE THE WAGES OR SALARIES OF AN EMPLOYEE OR EMPLOYEES BECAUSE OF A DECREASE IN THE CPI.

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

(5) ANY PERSON MAY REGISTER A COMPLAINT WITH THE DIVISION OF LABOR IN THE DEPARTMENT OF LABOR AND EMPLOYMENT THAT AN EMPLOYEE OR EMPLOYEES HAVE NOT RECEIVED THE ANNUAL WAGE OR SALARY INCREASE REQUIRED BY THIS SECTION. THE DIRECTOR OF THE DIVISION SHALL INVESTIGATE THE COMPLAINT AND TAKE ALL PROCEEDINGS NECESSARY TO ENFORCE THE PAYMENT OF SUCH INCREASE.

(6) AN EMPLOYEE WHO DOES NOT RECEIVE THE ANNUAL WAGE OR SALARY INCREASE REQUIRED BY THIS SECTION IS ENTITLED TO RECOVER IN A CIVIL ACTION THE UNPAID BALANCE OF SUCH INCREASE, TOGETHER WITH THE COSTS OF SUIT AND REASONABLE ATTORNEY FEES IF THE EMPLOYEE PREVAILS, NOTWITHSTANDING ANY AGREEMENT TO WORK FOR A LESSER WAGE OR SALARY.

RECEIVED
APR 25 2008
1:25 P.M.
ELECTIONS
SECRETARY OF STATE

BWE
Berenbaum, Weinshienk & Eason P. C. *Attorneys at Law*

370 Seventeenth Street
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Michael J. Belo
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April 25, 2008

VIA HAND DELIVERY

Mike Coffman
Colorado Secretary of State
1700 Broadway, Suite 270
Denver, CO 80290

Re: **Proposed Initiative Measure 2007-2008 #96 concerning cost-of-living wage increases**

Dear Mr. Coffman:

On behalf of the proponents, I am submitting the attached initiative for the Title Board hearing which I understand is scheduled to take place on Wednesday, May 7, 2008. I will plan to be available then. In accordance with requirements, I am submitting (1) the original typed draft submitted to the Legislative Council for a review and comment hearing, (2) an amended typed draft with changes highlighted, and (3) a final typed draft for printing of the proposed initiative.

The proponents of this initiative are Ernest L. Duran, Jr., and Bradley Johnston. Their addresses and other information are as follows:

Ernest L. Duran, Jr., President
United Food & Commercial Workers, Local 7
7760 West 38th Avenue, Suite 400
Wheat Ridge, CO 80033
Telephone: (303) 425-0897
E-mail: eduran@ufcw7.com

Bradley Johnston
7047 South Davies Street
Littleton, CO 80120
Telephone: (303) 798-9638
E-mail: easbjohnston@msn.com

Please direct all correspondence related to this initiative to me. Thanks for your cooperation and consideration.

Sincerely,

BERENBAUM, WEINSHIENK & EASON, P.C.

Michael J. Belo

MJB:PBA
Enclosure: Proposed Initiative Measure 2007-2008 #96
cc: Ernest L. Duran, Jr.
Bradley Johnston

H:\Docs\Client\Labor\UFCW\Ballot Initiatives 2008\Sec of State\Cover letter (#96-COLA).doc (MJB) 4/25/2008

COLORADO TITLE SETTING BOARD

In re Proposed Initiative 2007-2008 # 96 ("**Cost-of-Living Wage Increase**"[1])

MOTION FOR REHEARING

On behalf of Joseph B. Blake, a registered elector of the State of Colorado, the undersigned hereby files this Motion for Rehearing in connection with the Proposed Initiative 2007–2008 #96 ("Cost-of-Living Wage Increase," hereinafter described as the "Initiative") which the Title Board ("Board") heard on May 7, 2008.

A. The Initiative's Cost-Of-Living Provision is Fatally Flawed Making it Impossible to Set a Title.

The Initiative creates an ambiguity that makes it impossible for the Board to set a title, which therefore divests this Board of jurisdiction. The measure provides that "all employees shall provide their employees an annual wage or salary increase to account for an increase in the cost of living, as measured by the Consumer Price Index ("CPI") used for Colorado."

The United States Department of Labor Bureau of Labor Statistics (the "BLS") publishes the CPI. The CPI is a measure of the average change over time in prices paid by urban consumers for a market basket of consumer goods and services. The BLS does not publish CPI data for the State of Colorado. Colorado is defined as part of the West Census Region for which the BLS publishes on a monthly basis. Within Colorado, the BLS publishes a metropolitan area index for the Denver-Boulder-Greeley metropolitan area on a semi-annual basis.

[1] Unofficially captioned **"Cost-of-Living Wage Increase"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Each local index has a smaller sample size than the national or regional indexes, and is, therefore subject to substantially more sampling and other measurement area. As a result, the BLS strongly urges users to consider adopting the national or regional CPI's for use in escalator clauses.

Article XVIII, Section 15 of the Colorado Constitution does not save the Initiative. This constitutional provision was created with Amendment 42 in November, 2006. There, Colorado's minimum wage is adjusted annually as "measured by the Consumer Price Index used for Colorado." In November 2007, the Department of Labor determined that it would use the CPI for Denver-Boulder-Greeley. The proponent's reliance on this amendment does not clarify, but rather further confuses the issue. Indeed, universally where CPI indexes are used in Constitution or Statute (except for the above two situations), references are made specifically to particular indexes.

B. The Initiative violates the Single Subject Requirement.

An initiative violates the single subject requirement when it relates to more than one subject and has at least two distinct and separate purposes which are not dependent upon or connected with each other. *See In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1097 (Colo. 2000) ("Implementing provisions that are directly tied to an initiative's central focus are not separate subjects."). The purpose of the single-subject requirement for ballot initiatives is two-fold: to forbid the treatment of incongruous subjects in order to gather support by enlisting the help of advocates of each of an initiative's numerous measures and "to prevent surprise and fraud from being practiced upon voters." *See* C.R.S. § 1-40-106.5(e)(I, II).

An initiative with multiple subjects may not be offered as a single subject by stating the subject in broad terms. *See In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17*, 172 P.3d 871, 873–74 (Colo. 2007) (holding measure violated single subject requirement in creating department of environmental conservation and mandating a public trust standard); *see also, In re Title, Ballot Title & Submission Clause & Summary for 1999-2000 #258(A)*, *supra*, 4 P.3d at 1097 (holding that elimination of school boards' powers to require bilingual education not separate subject; Titles and summary materially defective in failing to summarize provision that no school district or school could be required to offer bilingual education program; and Titles contained improper catch phrase).

"Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement." *In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996) (citing *In re Title, Ballot Title and Submission Clause, and Summary with Regard to a Proposed Petition for an Amendment to the Constitution to the State of Colorado Adding Subsection (10) to Section 20 of Article X*, 900 P.2d 121, 124–25 (Colo. 1995).

"The prohibition against multiple subjects serves to defeat voter surprise by prohibiting proponents from hiding effects in the body of an initiative." *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 282 (Colo. 2006) (holding that there were "at least two unrelated purposes grouped under the broad theme of restricting non-emergency government services: decreasing taxpayer expenditures that benefit the welfare of members of the targeted group and denying access to other administrative services that are unrelated to the delivery of individual welfare benefits").

"An initiative that joins multiple subjects poses the danger of voter surprise and fraud occasioned by the inadvertent passage of a surreptitious provision coiled up in the folds of a complex initiative." *In re Title, Ballot Title and Submission Clause 2007-2008, #17, supra*, 172 P.3d at 875. In light of the foregoing, this Court stated, "We must examine sufficiently an initiative's central theme to determine whether it contains hidden purposes under a broad theme." *Id.*

This Board may engage in an inquiry into the meaning of terms within a proposed measure if necessary to review an allegation that the measure violates the single subject rule. *See id.* ("While we do not determine an initiative's efficacy, construction, or future application, we must examine the proposal sufficiently to enable review of the Title Board's action."); *In re Title, Ballot Title and Submission Clause for Proposed Initiative 2001-2002 #43*, 46 P.3d 438, 443 (Colo. 2002) ("[W]e must sufficiently examine an initiative to determine whether or not the constitutional prohibition against initiative proposals containing multiple subjects has been violated.").

The proposed measure contains at least four separate subjects:

1. The Initiative requires covered employees to provide an annual wage or salary increase to account for an increase in the cost-of-living.

2. The Initiative prohibits an employer from reducing wages or salary of an employee because of a decrease in the CPI. This is a separate subject that has nothing to do with an increase in wages or salaries and should not be included in this measure.

3. The Initiative eliminates the fundamental right to contract as currently provided for

under the United States and Colorado Constitution. United States Constitution, art. I, § 10; Colo. Const. art. II, § 11 (prohibiting laws that impair existing contractual obligations). Nothing in the Initiative provides that it shall not apply to any existing contract of employment. This is hidden to the voter who will be surprised by its impact.

This Court has repeatedly held that initiatives that worked an implied repeal upon an already existing provision of the Constitution contained a second subject. *E.g.*, *In re Title and Ballot and Submission Clause for 2005-2006 #55*, 138 P.2d 273 (Colo. 2006) (implied repeal of constitutional guarantee of a system of justice open to all persons and implied repeal of due process and habeas corpus guarantees constituted multiple subjects); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #104*, 987 P.2d 249, 256 (Colo. 1999) (implied repeal of existing constitutional provision a second subject); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #29*, 972 P.2d 257 at 264-265 (Colo. 2000); *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1997-1998 #64*, 960 P.2d 1192, 1198 (Colo. 1998) (indirect repeal of existing constitutional provision a second subject).

4. The measure creates new administrative and civil remedies. Any person may register a complaint with the Division of Labor that they have not received an annual wage or salary increase. The Division is then required to investigate the complaint and take all proceedings necessary to enforce the payment of such an increase. Further, an employee may file a civil action seeking recovery of the increase together with costs and attorney fees.

C. The Title Set by the Title Board is Misleading, Unfair and Unclear.

The Board's chosen language for the titles and summary must be fair, clear, and accurate, and the language must not mislead the voters. *In re Ballot Title 1999-2000 #258(A),* 4 P.3d 1094, 1098 (Colo. 2000). "In fixing titles and summary, the Board's duty is to capture, in short form, the proposal in plain, understandable, accurate language enabling informed voter choice." *Id.* (quoting *In re Proposed Initiative for 1999-2000 No. 29*, 972 P.2d 257, 266 (Colo. 1999)). *In re Title, Ballot Title and Submission Clause, and Summary for 1999-2000 No. 104*, 987 P.2d 249 (Colo. 1999) (initiative's "not to exceed" language, repeated without explanation or analysis in summary, created unconstitutional confusion and ambiguity).

This requirement helps to ensure that voters are not surprised after an election to find that an initiative included a surreptitious, but significant provision that was obfuscated by other elements of the proposal. *In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43*, 46 P.3d 438, 442 (Colo. 2002). Eliminating a key feature of the initiative from the titles is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes. *Id.*; *see also*, *In re Ballot Title 1997-1998 #62*, 961 P.2d at 1082. *See In re Proposed Initiative 1999-2000 #37,* 977 P.2d 845, 846 (Colo. 1999) (holding that titles and summary may not be presented to voters because more than one subject and confusing).

For the reasons articulated above, the Title's references an increase for the cost of living that does not exist and then ambiguously references the changes to minimum wage, but provides no reference or relevant context.

Please set a rehearing in this matter for the next Title Board Meeting.

Respectfully submitted this 14th day of May, 2008.

FAIRFIELD AND WOODS, P.C.

By: _____
Douglas J. Friednash, #18128
John M. Tanner, # 16233
Susan F. Fisher, #33174

Petitioner's Address:

1445 Market Street
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May, 2008, a true and correct copy of the foregoing **MOTION FOR REHEARING** was Hand Delivered and sent U.S. Mail as follows to:

Michael J. Belo
370 Seventeenth Street
Republic Plaza, Suite 4800
Denver, Colorado 80202

_____
Monica Houston

Ballot Title Setting Board

Proposed Initiative 2007-2008 #96[1]

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

An amendment to the Colorado Revised Statutes concerning annual cost of living increases in employees' wages or salaries, and, in connection therewith, requiring employers to provide annual wage or salary increases to their employees to adjust for increases in the cost of living; restricting such requirement to employers who regularly employ ten or more persons; requiring that such increases shall be measured by the same consumer price index used for Colorado by the state department of labor and employment to make changes to the state minimum wage; specifying that the cost-of-living increase shall not apply for employees who receive annual wage or salary increases equal to or greater than the cost-of-living increases mandated by the measure; prohibiting employers from reducing wages or salaries due to a decrease in cost of living; enabling aggrieved employees to file complaints related to the cost-of-living increase with the state department of labor and employment and authorizing the director of that department to conduct investigations of such complaints and, if warranted, take action to enforce the payment of the cost-of-living increase; and enabling employees who did not receive the required cost-of-living increase to recover the amount of the adjustment owed, along with reasonable attorney fees, in a civil action.

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 annual cost of living increases in employees' wages or salaries, and, in connection therewith, requiring employers to provide annual wage or salary increases to their employees to adjust for increases in the cost of living; restricting such requirement to employers who regularly employ ten or more persons; requiring that such increases shall be measured by the same consumer price index used for Colorado by the state department of labor and employment to make changes to the state minimum wage; specifying that the cost-of-living increase shall not apply for employees who receive annual wage or salary increases equal to or greater than the cost-of-living increases mandated by the measure; prohibiting employers from reducing wages or salaries due to a decrease in cost of living; enabling aggrieved employees to file complaints related to the cost-of-living increase with the state department of labor and employment and authorizing the director of that department to conduct investigations of such complaints and, if warranted, take action to enforce the payment of the cost-of-living increase; and enabling employees who did not receive the required cost-of-living increase to recover the amount of the adjustment owed, along with reasonable attorney fees, in a civil action?

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[1] Unofficially captioned **"Cost-of-Living Wage Increase"** by legislative staff for tracking purposes. Such caption is not part of the titles set by the Board.

Hearing May 7, 2008:
Single subject approved; staff draft amended; titles set.
Hearing adjourned 11:57 a.m.

Hearing May 21, 2008:
Motion for Rehearing denied.
Hearing adjourned 12:12 p.m.