

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,

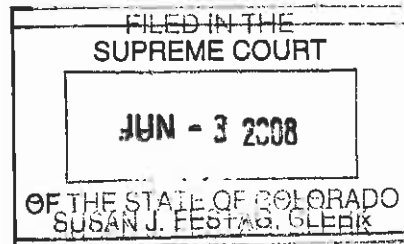
and

Title Board:

WILLIAM A. HOBBS, DANIEL L. CARTIN, and
GEOFFREY BLUE.

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

PETITIONER'S OPENING BRIEF

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1. Text for Proposed Initiative for 2007-2008 #93
2. Final Title for Proposed Initiative for 2007-2008 #93
3. Transcript of the Title Board Hearing, May 21, 2008 on Proposed Initiative for 2007-2008 #93

TABLE OF AUTHORITIES

CASES

<i>In re Matter of the Title, Ballot Title and Submission Clause For 1997-1998 #64, 960 P.2d 1192 (Colo. 1998)</i>	8, 9
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Joseph B. Blake, a registered elector of the State of Colorado, the undersigned hereby files this Opening Brief to appeal the Title Board's approval of the Title for Proposed Initiative 2007-2008 #96 (unofficially captioned by legislative staff for tracking purposes, "Cost of Living Wage Increase") (hereinafter "Initiative").

STATEMENT OF ISSUE PRESENTED FOR REVIEW

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.

STATEMENT OF THE CASE AND FACTS

A. Nature of the Case Course of Proceedings, and Disposition before the Title Board

On May 7, 2008, the Title Board conducted a public hearing on the Initiative pursuant to Colo. Rev. Stat. § 1-40-106(1). The Title Board designated and fixed a title, ballot title, and submission clause for the Initiative. Petitioner timely filed a Motion for Rehearing pursuant to Colo. Rev. Stat. § 1-40-108(1). On May 21, 2008, the Title Board denied the Motion for Rehearing. Thereafter, Petitioner initiated this original proceeding for review of the Title Board's action, pursuant to Colo. Rev. Stat. § 1-40-107(2).

B. Statement of the Facts.

The Initiative requires covered employers to provide its employees with 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. Initiative, § 8-2-124(1).

The Initiative also prohibits an employer from reducing wages or salary of an employee because of a decrease in the CPI. Initiative, § 8-2-124(3).

The Initiative creates new administrative and civil remedies. Any person may register a complaint with the Division of Labor that an employee has not received an annual wage or salary increase. Initiative, § 8-2-124(5). The Division of Labor must investigate the complaint and take all proceedings necessary to enforce the payment of such an increase. *Id.* An employee may also file a civil action seeking recovery of the increase, together with costs and reasonable attorney fees. Initiative, § 8-2-124(6).

SUMMARY OF ARGUMENT

The actions of the Title Board should be reversed because the title violates the single subject rule set forth in C.R.S. § 1-40-106.5. The single subject of the Initiative is “[a]n amendment to the Colorado Revised Statutes concerning annual cost of living

increases in employees' wages or salaries." *See* Final Title. In connection therewith, the first sentence of the title provides that the Initiative requires employers to provide annual wage or salary increases to their employees to adjust for increases in the cost-of-living. However, this is not the sole purpose of the Initiative. The Initiative also prohibits employers from decreasing wages or salaries if the CPI decreases. This is a much different purpose than providing wage and salary increases because of inflation.

Finally, the Initiative eliminates the fundamental right to contract as currently provided in the United States and Colorado Constitutions. *See* United States Constitution, art. I, § 10; Colo. Const., art. II, § 11 (prohibiting laws that impair existing contractual obligations). The actions of the Title Board should be reversed because the title has more than a single subject.

ARGUMENT

I. JUST AS INFLATION AND DEFLATION ARE SEPARATE AND DISTINCT CONCEPTS, MANDATING INCREASES IN WAGES OR SALARIES BASED UPON THE INCREASE IN THE COST OF LIVING, IS A DIFFERENT SUBJECT THAN PROHIBITING EMPLOYERS FROM DECREASING WAGES OR SALARIES WHEN THE COST OF LIVING DECLINES.

A. Standard of Review

The Colorado Constitution provides that the Title Board may not set the title of a proposed initiative, or submit it to the voters if the initiative contains multiple subjects

or purposes. *In re the Matter of the Title, Ballot Title and Submission Clause for 2007-2008 #62* (Colo. May 16, 2008). A proposal that has at least two distinct and separate purposes which are not dependent upon or connected with each other violates the single-subject requirement. *Id.*

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).

When analyzing whether an initiative meets the single subject requirement, this Court must characterize the proposal only insofar as necessary to conduct review for compliance with the constitutional or statutory provisions that apply to the initiative process. *In re Title, Ballot Title & Submission Clause, & Summary for 1997-1998 #*

30, 959 P.2d 822, 825 (Colo. 1998). In order to do so, this Court applies the general rules of statutory construction and gives the words of the initiative their plain and ordinary meaning. *In re Title, Ballot Title & Submission Clause & Summary for 2005-2006 #75*, 138 P.3d 267, 271 (Colo. 2006).

B. The Initiative has at least two distinct and separate purposes that are not dependent upon or connected with each other: providing a mandatory increase in wages or salaries for all employees is a much different purpose than prohibiting a decrease in wages or salaries when the cost of living decreases.

The single subject provided in the title is to require all employers to provide an annual wage or salary increase to account for 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 all of the national, regional and metropolitan CPI’s. The CPI is a measure of the average change over time in the prices paid by consumers for a market base of consumer goods and services. www.bls.gov.

Inflation is generally defined as the overall general upward price movement of goods and services in an economy. BLS defines inflation as a process of continuously rising prices, or equivalently, of a continuously falling value of money. www.bls.gov/bls/glossary.

Deflation is the opposite of inflation and is characterized by (1) increase in citizens' purchasing power due to the falling prices, (2) decrease in wages, or slowdown in their increase, due to falling levels of employment, (3) decrease in availability of credit due to higher interest rates and/or restricted money supply, and (4) decrease in imports due to lack of demand. www.businessdictionary.com.

The Initiative's stated purpose is for "an annual cost of living increase . . . to adjust for increases in the cost of living." Initiative, § 8-2-124(1)(emphasis added). This is also the stated single subject reflected in the ballot title. In other words, to provide adjustments in wages or salary commensurate to increases in the CPI. The proponents improperly add a distinct purpose under the umbrella of an annual cost of living increase by prohibiting employers from reducing wages or salaries due to a decrease in the cost of living.

If the measured cost of living were to decrease, the Initiative requires an employer to maintain wages and salaries, at a minimum, at the level of the last increase in response to a cost of living increase. In other words, should the cost of living actually decrease, employers cannot decrease wages or salaries. Hence, it is clear that at least two distinct purposes have been added, which will not tend to carry out the

general objective of the Initiative. *See Waters Rights II*, 898 P.2d 1076, 1079 (Colo. 1995).

In the Matter of the Title, Ballot Title and Submission Clause and Summary for 1999-2000 No. 29, 972 P.2d 257 (Colo. 1999) determined that a measure that included qualifications to serve as a judge and qualifications to serve on a judicial conduct commission, which had been previously determined to be independent of the judicial branch, contained more than a single subject.

Here, the proponents attempt to bootstrap a prohibition of a decrease of wages and salaries with a guaranteed, annual cost of living increase, in times of rising costs. The purpose of freezing wages and salaries to reflect an out-of-date, higher cost of living measurement is a distinguishable subject from a wage or salary increase, in response to an actual increase in the cost of living. The prevention of a decrease in wages in response to a decrease in measured economic conditions is a separate subject.

C. The Implicit Repeal of the Constitutional Right to Contract is Another Subject.

The Initiative eliminates a person's fundamental right to contract as currently provided for under the United States and Colorado Constitutions. United States Const., 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.

A proposed initiative contains multiple subjects not only when it proposes new provisions constituting multiple subjects, but also when it proposes to repeal multiple subjects. *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, p.9 (Colo. May 16, 2008)(emphasis in original).

This Court has repeatedly held that initiatives that worked an implied repeal upon an already existing provision of the Constitution contain 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) (same); *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).

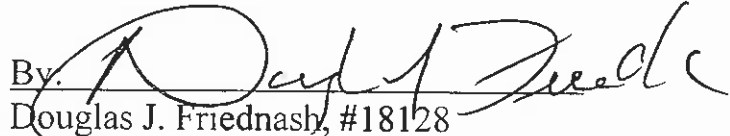
The Initiative impliedly repeals the current Colorado constitutional freedom of contract for employers and employees. Currently, an employer has the constitutional right to determine the proper wage or salary to pay its workers, based upon criteria it has established. The Initiative interferes with an existing contract right in violation of the Colorado Constitution and it implicitly repeals that constitutional right for the employer. *See generally, State Farm Mut. Auto. Ins. Co. v. Broadnax*, 827 P.2d 531 (Colo. 1992). The Initiative, therefore, works an implied repeal upon an already existing provision of the United States Constitution and the Colorado Constitution. United States Const., art. I, § 10; Colo. Const., art. II, § 11. As a result, it contains a second subject.

CONCLUSION

Petitioner requests the Court to reverse the actions of the Title Board and to direct it to strike the title, ballot title, and submission clause and return proposed Initiative for 2007-2008 #96 to its proponents.

Respectfully submitted this 3rd day of June, 2008.

FAIRFIELD AND WOODS, P.C.

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

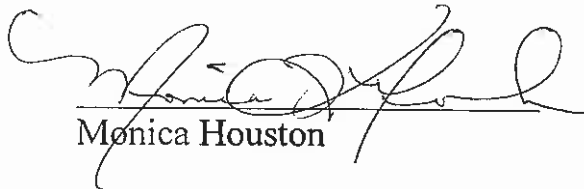
Petitioner's Address:
1445 Market Street
Denver, CO 80202

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of June, 2008, a true and correct copy of the foregoing **PETITIONER'S OPENING BRIEF** was hand delivered to the following:

Michael J. Belo
370 17th Street, Suite 4800
Denver, CO 80202

Maurice G. Knaizer, Esq.
Deputy Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, CO 80203



Monica Houston

*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

ELECTIONS
SECRETARY OF STATE

*1:25 p.m.
pf.
kw*



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

370 Seventeenth Street
Republic Plaza, Suite 4800
Denver, Colorado 80202-5698
Telephone: 303/825-0800
Facsimile: 303/629-7610

Michael J. Belo
Direct Dial: 303/592-8313
E-Mail: mbelo@bw-legal.com
www.bwelaw.com

April 25, 2008

RECEIVED

APR 25 2008

ELECTIONS
SECRETARY OF STATE

1:25 P.M.
DJB
W

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

Ballot Title Setting Board

Proposed Initiative 2007-2008 #96¹

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?

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.*

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Secretary of State's Rehearing
Before the Colorado Title Setting Board
Blue Spruce Conference Room
1700 Broadway, Suite 270
Denver, Colorado
Wednesday, May 21, 2008

8

9

10 Re: 2007-2008 No. 96 Cost-of-Living Wage
11 Increase - Rehearing

11

12

13 Title Board Appearances:

14 William A. Hobbs, Deputy Secretary of
15 State appearing on behalf of Secretary of
16 State Mike Coffman

16 Dan Cartin, Deputy Director of the Office of
17 Legislative Legal Services

17

Daniel Dominico, Esq., Solicitor General

18

Geoff Blue, Deputy Attorney General

19

Maurice Knaizer, Deputy Attorney General, representing
20 the Title Board

20

21 Ceci Gomez, Secretary of State's Office

22 Douglas Friednash, Esq., appearing on behalf of the
23 opponents

23

Michael Belo, Esq., appearing on behalf of the
24 proponents

24

25

1 CHAIRMAN: Good morning. Let's go ahead and
2 get started. This is a meeting of the Title Setting
3 Board pursuant to Article 40 of Title 1, Colorado
4 Revised Statutes. The time is 7:33 a.m. The date is
5 May 21st, 2008. And we're meeting the Secretary of
6 State's Blue Spruce Conference Room, 1700 Broadway,
7 Suite 270, Denver, Colorado.

8 The Title Setting Board today consists of
9 the following. My name is Bill Hobbs. I'm Deputy
10 Secretary of State. I'm here on behalf of Secretary
11 of State Mike Coffman. To my left is Dan Cartin,
12 Deputy Director of the Office of Legislative Legal
13 Services, who is the designee of the Director of the
14 Office of Legislative Legal Services, Charlie Pike.

15 Mr. Cartin will be sitting as the Director's
16 designee for this morning's agenda Items 1 through 11.
17 And then for this afternoon's agenda items the
18 Director's designee will be Sharon Eubanks, who is
19 also Deputy Director of the Office of Legislative
20 Legal Services.

21 To my right is Dan Dominico, Solicitor
22 General, who is the designee for Attorney General John
23 Suthers.

24 Also sitting in as the Attorney General's
25 designee on some agenda items will be Geoff Blue,

1 Deputy Attorney General.

2 To my far left is Maurice Knaizer, Deputy
3 Attorney General who represents the Title Board. And
4 to my far right is Ceci Gomez from the Secretary of
5 State's Office.

6 (CD starts at 4:02:15.)

7 CHAIRMAN: The next agenda item is 2007-2008
8 No. 96, Cost-of-Living Wage Increase. This is before
9 us on a Motion for Rehearing. Mr. Friednash, I think
10 this is your motion if you'd like to come forward.
11 Are you here?

12 MR. FRIEDNASH: Yes, I'm here.

13 CHAIRMAN: Sorry, there you are right there.
14 I was still looking in the back for you. In the
15 interest of time if you could just emphasize. We have
16 the benefit of a written brief.

17 MR. FRIEDNASH: Absolutely. I will say
18 today's calendar may be the strongest reason for
19 initiative reform in Colorado, not that that's related
20 to my subject, it's not.

21 The problem with this is, first of all, the
22 single purpose of this is to create a mandate on
23 employers that they provide a cost-of-living increase
24 based on the Consumer Price Index used for Colorado
25 for basically everyone in the State of Colorado based

1 on their wages or salaries. That's the stated single
2 purpose and it's also the single subject of this
3 initiative.

4 The problem is this. There is one basic
5 single-subject problem with this. In Subsection 3 it
6 has a much different purpose and that is it says,
7 employers, you are prohibited from decreasing wages or
8 salaries by the Consumer Price Index used for Colorado
9 and that is a completely incongruent separate subject
10 from cost-of-living increases based on an increase of
11 the Consumer Price Index.

12 If you had a depression in Colorado and were
13 probably in a recession, employers are prohibited from
14 decreasing wages. And there's also an interaction
15 between this and initiative No. 62 and No. 76 in the
16 Just Cause initiative in terms of what that does as
17 not being the grounds for -- potentially not being the
18 grounds for terminating or suspending employees.

19 So I think that is completely separate and
20 distinct and I think that can't be (inaudible) and
21 it's clearly unrelated.

22 I'm going to go real briefly in the interest
23 of time. I think you have my arguments and where my
24 other arguments are pretty much made. This adds a new
25 administrative remedy, which allows any person in the

1 State to basically file a complaint with the Division
2 of Labor, not necessarily aggrieved employee, but any
3 person. That was the language of the text. And then
4 the Division of Labor's charged to investigate and
5 enforce it. It eliminates the right to contract for
6 employers and I think that's tied to a decrease in
7 wages not just the increase in wages.

8 And then my overriding discussion, which I
9 won't go into detail about because I think I've done a
10 significant job and I already incorporated my comments
11 from the last hearing, is that I think it's an
12 impossible (inaudible) for something that bases itself
13 on a cost-of-living increase on this Consumer Price
14 Index used for Colorado that doesn't exist.

15 I don't think it matters that it references
16 another Amendment that is equally -- uses the same
17 language, which is equally problematic and doesn't
18 resolve the issue. So I don't know how you set a
19 title.

20 And clearly in looking at the single-subject
21 title of this initiative, it does more than just
22 concerns the annual cost-of-living increases in
23 employees wages or salaries.

24 So with that, unless there's questions, I
25 think I've been pretty succinct for the Title Board.

1 CHAIRMAN: Thank you, Mr. Friednash. And I
2 should have recognized at the beginning that now
3 sitting as the Attorney General's designee is Geoff
4 Blue, who is a Deputy Attorney General with the
5 Attorney General's Office. Mr. Blue.

6 MR. BLUE: Mr. Friednash -- and I'll again
7 state for the record for full disclosure that I used
8 to work with Mr. Friednash at Fairfield and Woods last
9 year up until the end of December.

10 First thing is your argument that the
11 prohibition against the decrease is a second subject,
12 isn't that just a clarification of the fact that this
13 has to do with increasing as opposed to decreasing
14 wages with the cost of living?

15 MR. FRIEDNASH: I don't think so because it
16 takes action and it takes action saying, employers,
17 you cannot decrease salaries or wages for employees.

18 MR. BLUE: But the title says that it's a --
19 it has to do with cost-of-living wage increases for
20 employees. There's nothing in there that would
21 suggest that it's a change based on cost of living.
22 It's just on increases. So, to some extent it seems
23 it's just a clarification to me. So I'm trying to
24 understand how this is a second subject.

25 MR. FRIEDNASH: I don't think so. I respect

1 your position or your question.

2 My concern is that the heading says this
3 deals with the cost-of-living increases. Single
4 subject, you're still in cost-of-living increases.
5 It's only dealing with increases and to try to deal
6 with employees who are dealing with rising costs based
7 on the cost of living, whatever the Consumer Price
8 Index that's being used is. It doesn't matter.

9 The point is that's separate and distinct
10 than saying we're going to tie employers hands and now
11 under no set of circumstances can you decrease wages
12 or salaries. I think that is different and I think
13 it's separate.

14 CHAIRMAN: Any other questions for Mr.
15 Friednash? Thank you.

16 MR. FRIEDNASH: Thank you.

17 CHAIRMAN: Mr. Belo, would you like to
18 respond on behalf of proponents?

19 MR. BELO: Good morning, or is it almost
20 afternoon? Michael Belo from Berenbaum, Weinshienk &
21 Eason, P.C. representing the proponents. I'd like to
22 try to briskly as I can cover the topics that are
23 raised by the opponents in their Motion for Rehearing.

24 First, the CPI argument is the same argument
25 that was previously rejected by the Title Board and

1 there's really nothing new added to that argument.
2 The opponents would apparently prefer that another
3 measure of the CPI might be used rather than the same
4 one used by the Colorado Division of Labor in
5 adjusting minimum wage under Article 18 Section 15.

6 And as the Board well knows, arguments
7 addressed to the merits of the measure are properly
8 addressed to the voters, not to the Title Board or the
9 Supreme Court at this stage of the initiative.

10 And second, we chose the language quote the
11 CPI used for Colorado for two very legitimate reasons.
12 First, it's the same language already used in the
13 Constitution regarding the adjustment of the minimum
14 wage, which is a closely-related subject.

15 And second, the proponents want the CPI to
16 be consistent. They wanted to ensure uniformity and
17 consistency in the administration of these two
18 complimentary and closely related laws.

19 So should the Division of Labor in the
20 future decide to use a different CPI, for example, if
21 the Bureau of Labor Statistics comes up with a CPI
22 that the Division deems to be more appropriate, even
23 more appropriate than the current one (inaudible)
24 used, then this initiative would allow them
25 (inaudible) them to use that CPI. This ensures

1 uniformity and consistency and avoids confusion.

2 Second point, the single-subject argument
3 that the opponents are making. It's very inventive to
4 come up with four subjects here, but it's quite wrong.
5 We think the subject can't be stated much more simply.
6 Covered employees -- excuse me, covered employers
7 shall grant an annual cost-of-living wage increase and
8 it will be determined by the CPI used for Colorado.

9 I think that's about as direct and
10 straightforward as any statement on the subject can
11 be. And the rest of the initiative is directly
12 related to the implementation and the remedies that
13 flow from this subject.

14 Pick the question, the employers cannot
15 reduce wages if the CPI goes down. I think that one
16 obvious question that any reasonable person, any
17 reasonable voter concerning the purpose of the
18 initiative would ask is what happens if the CPI goes
19 down? Well, this answers that question. It says they
20 are not permitted to reduce wages because the CPI goes
21 down.

22 And I take issue with a particular statement
23 that Mr. Friednash made just a few minutes ago saying
24 that this was tying the employers hands completely and
25 saying that they cannot reduce wages. This just says

1 they can't reduce wages if the CPI goes down. This
2 doesn't deal with other issues. This answers that
3 question in which we think would be quite present in
4 the mind of a reasonable voter and it's clearly
5 relating to.

6 The purpose of this is wage increase hinged
7 upon the CPI. Should the CPI go down, it says you
8 can't decrease wages. I think that is very closely
9 related and interdependent with the overall purpose of
10 the initiative.

11 Mind you, and I'm certainly not trying to
12 patronize the Board here, but to violate the
13 single-subject requirement initiative must relate to
14 more than one subject and must have at least two
15 distinct and separate purposes that are not depended
16 upon or connected with each other.

17 We respectfully submit that the opponents
18 haven't even gotten to the first premise here and
19 clearly haven't in our view reached the second premise
20 to show that these are not interdependent upon related
21 -- essentially the obligation to not decrease wages if
22 the CPI goes down is nearly two sides of the same
23 coin.

24 The impairment or the obligation of
25 contracts on the (inaudible) briefly.

1 This is the same argument, which used to be
2 used in the early part of the 20th century. The
3 freedom of contract argument was used initially with
4 some success in the 20th century to strike down
5 federal legislation, child labor laws, maximum hour
6 laws, so-called (inaudible) law school. The Supreme
7 Court ultimately rejected this discredited analysis
8 that laws impair the obligational contracts
9 (inaudible) contract argument.

10 The opponents here could just as easily
11 argue that the minimum wage law impairs the obligation
12 of the contract or pay an employee less than the
13 minimum wage.

14 But the key thing I think about the freedom
15 of contract argument is that only the court has
16 interpreted (inaudible) vested contractual rights.
17 The most specific example of that is pension.

18 Colorado Court of Appeal and the Supreme
19 Court have found that once the kind of contractual
20 right to receive a certain pension is vested you can't
21 take that away from the employee.

22 However, in the case of (inaudible), which
23 is 870 P.2d 521. The Colorado Court of Appeals
24 determined that while the legislation couldn't
25 decrease the pension benefits that are already vested,

1 it could increase taxes in the sense that the tax
2 exemption could change.

3 UNIDENTIFIED MALE: But, Mr. Belo, isn't
4 a -- if I have a contract with my employer today
5 that's written in writing that sets forth a three-year
6 term, I mean, isn't that a vested interest that I have
7 in that contract and isn't this telling me and the
8 employer that that contract is no longer valid as it
9 deals with wage increases?

10 MR. BELO: My response to that argument is,
11 I'm mean, you could have a contract that you are --
12 one of the cases that was dealt with here is that you
13 are an independent contractor, for example.

14 One of the cases that the report dealt with
15 is called (inaudible) Readiness. It's 728 P.2d 364
16 where the company said we have a contract with this
17 person. It says that he's an independent contractor.
18 As a result of the Worker's Compensation statute we're
19 now -- it's been determined that he's an employee and
20 we have to pay benefits to him. And the Court of
21 Appeals had no problem in getting over the impairment
22 of contract argument.

23 I think the short answer to that is that
24 that's not a vested right. There's no vested right in
25 a contract that says that in two years I will pay you,

1 let's see, a wage freeze. Let's say that.

2 (Inaudible) premise that you'll have a wage freeze for
3 three years. That's not a vested right. It hasn't
4 vested.

5 (Inaudible) analysis of the impairment of
6 contract depends upon whether you're being vested
7 (inaudible) contract right. That's why it's been
8 limited to questions such as the pension, for example.
9 There clearly is a vesting that occurs in certain
10 pension programs.

11 UNIDENTIFIED MALE: You're saying that if I
12 have a contract with somebody, it's not a vested
13 right?

14 MR. BELO: I'm saying that some contract
15 rights don't vest until a certain time. This law, of
16 course, would be (inaudible).

17 UNIDENTIFIED MALE: And we're not talking
18 about, you know, the contract I make tomorrow. We're
19 talking about the contract I made yesterday.

20 MR. BELO: Right. I'm saying that's not a
21 vested contract right as the Colorado Courts have
22 interpreted vested contract rights for purposes of the
23 impairment of contract analysis.

24 UNIDENTIFIED MALE: Did you say the citation
25 for that 728 P.2d 364?

1 MR. BELO: That's (inaudible) 728 P.2d 364
2 and I think they've got they (inaudible) 870 P.2d 521
3 (inaudible). The Court said potentially the
4 impairment of contract analysis could be used against
5 just about every piece of State legislation that
6 changes in some respect the law.

7 If the State were to pass a law requiring
8 health insurance, for example, which I'll be talking
9 about a little bit later on today, then this argument
10 could be trotted out and say that well, I have a
11 contract with my employee that says that I don't have
12 to pay health insurance. This impairs the obligation
13 of that contract.

14 The short answer to that is that's not a
15 vested right. You don't have a vested right when you
16 enter that contract that you're not going to pay
17 health insurance for three years. The Court
18 (inaudible) interpreted that (inaudible) such vested
19 rights.

20 Just as a pension recipient doesn't have a
21 vested right to maintain a particular tax exemption,
22 which is what happened in the (inaudible) case, then
23 an employer or I guess you could say an (inaudible)
24 employer doesn't have the vested right when they enter
25 into the contract not to pay what the minimum wage

1 requires or what this initiative would require from
2 cost-of-living increases for the future term of that
3 contract. It hasn't vested.

4 The final argument I'd like to go to, unless
5 of course there are questions, is a remedy. These
6 remedies directly implement the purpose of the
7 initiative. They're directly connected to it.

8 And again, the initiative directly answers
9 the question that a reasonable voter looking at this
10 provision might ask, which is what if the employer
11 doesn't pay a cost-of-living increase? What then?
12 What do we do?

13 And what we do is either you can make a
14 complaint to the Division of Labor to make an
15 investigation (inaudible) or you have a right to civil
16 action. This is taken directly from C.R.S. 86-118 and
17 C.R.S. 86-119. Those are the implanting provisions
18 for the minimum wage law.

19 Those actually preceded the minimum wage
20 amendment, but they deal with the general minimum wage
21 law of Colorado. Business is taken directly adapted
22 from those same remedies.

23 It's a closely (inaudible) statute and it
24 provides for either the recovery by the employee in a
25 suit or the investigation and law enforcement action

1 by the Division of Labor (inaudible) directly from
2 that. The remedies are exactly parallel.

3 Finally, the argument -- we think their
4 argument title set by the Board is misleading, their
5 final argument, it's almost frivolous. Let's say that
6 the amendments concerning -- the way this is stated it
7 captures all the elements. And let's keep in mind,
8 this is a relatively brief initiative here.

9 The purpose of the title setting in some of
10 the cases (inaudible) is to say things in clear
11 succinct language. And I think that the title that's
12 been set by the Board here does so and accurately
13 captures all the major components, probably all the
14 components in fact of this initiative. I think the
15 argument that that title is misleading is way off
16 base.

17 So it's our position that you were right in
18 the first place to title this initiative and to give
19 it the title that you did; that the arguments that the
20 opponents have raised are without merit and that we
21 encourage the Board to reject the Motion for Rehearing
22 (inaudible) maintain the title that they have already
23 issued.

24 CHAIRMAN: Thank you. Any further questions
25 for Mr. Belo?

1 (No audible response.)

2 Thank you. And, Mr. Friednash, we'll give
3 you a chance. I do want to emphasize that we've got
4 two more measures and we need to take a lunch break in
5 order to come back at 1:00. So, Mr. Friednash.

6 MR. FRIEDNASH: Thank you. And I'm not
7 going to cover all this. I've been very short and
8 succinct at the first time up. I will be brief this
9 time.

10 The problem is this is two unrelated
11 purposes. And take that sentence out about
12 prohibiting employers from decreasing wages or
13 salaries. It doesn't need to be in here. It doesn't
14 need to be in here. If it wasn't in here, what you
15 would have is a measure that does exactly what the
16 subject is (inaudible).

17 Instead we add it in here, which is a
18 separate purpose. We want to say something different
19 that just nothing -- if it wasn't in here, employers
20 and employees would be free to do whatever they want.

21 Because it's in here it's doing something
22 specific. It's creating an affirmative duty on
23 employers not to decrease wages or salaries due to a
24 decrease in the Consumer Price Index. That's a
25 fundamental flaw and it's a separate and distinct

1 purpose that has nothing to do with the cost-of-living
2 wage increase and that's the problem.

3 I'm not going to go into a discussion on
4 whether or not with respect to the ability to
5 contract, whether it's a fundamental right. I will
6 say though that there have been numerous cases that
7 have held these initiative process reviews that
8 implied repeals are a separate subject.

9 With respect to the last argument, I would
10 just say our fundamental basic problem with this is
11 twofold. One, it doesn't discuss the two things --
12 the two purposes of this proposed initiative in the
13 single-subject statement, number one.

14 And number two, there's no such thing as
15 Consumer Price Index used for Colorado. That's the
16 fundamental problem. Just referring it to another
17 initiative that has the same problem and has been
18 interpreted the only way the Division of Labor could
19 given the fact there's no such thing doesn't fix the
20 problem. Thank you.

21 CHAIRMAN: Thank you, Mr. Friednash.
22 Discussion by the Board? Mr. Belo, very briefly.

23 MR. BELO: I just wanted to address one
24 comment that Mr. Friednash made that if this
25 restriction on employer reducing wages that the CPI

1 should decrease were not in the initiative, it would
2 be -- it's not necessary he's saying.

3 Well, if it were not in the initiative, the
4 initiative would be ambiguous. That would be the
5 question that would be asked. We're trying to make
6 the -- we made it definite. So we think it is
7 essential (inaudible) closely related to the
8 (inaudible).

9 UNIDENTIFIED MALE: Actually, Mr. Belo, I'm
10 sorry. I'll be quick. I know we're trying to get
11 through this. I'm struggling with a problem here and
12 that is twofold. And the first piece is I'm not sure
13 it would be ambiguous without that statement because
14 it talks about increases and so, it doesn't talk about
15 decreases. So I think it's very clear that it is only
16 increases, so I'd you to address that.

17 The second piece is I'm wondering what
18 happens in a downturn. Say we have a recession, the
19 cost of living is negative increases, the COL -- the
20 (inaudible) is negative and a company decides to
21 decrease wages but does it not related to the
22 percentage of the cost of living. Is that permitted
23 by this?

24 MR. BELO: I'll answer that second question.
25 This is specific to not causing a decrease based on

1 (inaudible) a decrease in the cost of living.

2 UNIDENTIFIED MALE: So you're saying that a
3 lawsuit would be a factual-based question of, did they
4 do it because the cost of living went down or because
5 the economy soured?

6 MR. BELO: I think it could be like many
7 discrimination cases. The question is what was the
8 motivation. Is the motivation that they decreased it
9 because of the decrease in the cost of living?

10 Was the motivation because they decreased it
11 because they're losing money and they've shown that
12 they've lost money and they can't pay the wages?

13 It'd be like many other types of
14 discrimination or other suits where a motive is in
15 question and circumstantial evidence and other
16 evidence is considered in determining whether that was
17 improperly motivated.

18 UNIDENTIFIED MALE: Thank you.

19 MR. BELO: As to the first question, I
20 respectfully disagree that I think it would be more
21 ambiguous without this if this provision were in it.
22 But beyond that I think that the most important
23 question is that this is a closely related mechanism
24 or issue and that is what happens when the CPI
25 decreases.

1 So I think it's closely connected regardless
2 of whether the Board or I would view it to be maybe
3 more ambiguous or less ambiguous without it. It is
4 such a closely connected point that it is well within
5 a single-subject role.

6 CHAIRMAN: Okay, thank you. Discussion by
7 the Board? Mr. (inaudible).

8 UNIDENTIFIED MALE: Just really very briefly
9 I'm going to incorporate my kind of basis for wanting
10 that the measures (inaudible) last time and with all
11 due respect to Mr. Friednash I don't think it's -- I
12 think it is reasonable to find that the annual wages
13 salary increase is connected with the prohibition on
14 the reduction of wages or salaries due to a decrease
15 in the cost of living.

16 I don't think it's unreasonable to find -- I
17 do think there's a relationship there. I think you
18 can find a relationship there. I think that there is
19 a -- that they can be reasonably characterized as
20 necessarily connected. And so, I -- and I think the
21 title, as drafted the first time through, is a good
22 one.

23 CHAIRMAN: I agree. I mean, I'm not
24 persuaded that the measure has more than one subject
25 or that the title set by the Board last time were

1 unfair or misleading. So, I'd support a motion to
2 deny the Motion for Rehearing. Mr. Blue?

3 MR. BLUE: I have to say that after hearing
4 the arguments I would agree that this is a single
5 subject. Although, I think that the inclusion of the
6 language regarding the decrease in the CPI is
7 irrelevant, I think that it's still -- including it
8 doesn't make it a second subject because at the end of
9 the day I think they're closely connected.

10 As to the issue with the constitutional
11 repeal, I think that that's the whole point of this
12 measure is that it is addressing the right to contract
13 in employment.

14 And so, I think the -- I don't think that
15 the voters are going to be confused by that. I think
16 that it's not really something that they're not
17 expecting because that's what the whole point of this
18 measure is. So I don't think that that creates a
19 second subject. So I would be -- I will move to deny
20 the Motion for Rehearing.

21 UNIDENTIFIED MALE: Second.

22 CHAIRMAN: Any further discussion?

23 (No audible response.)

24 If not, all those in favor say aye.

25 (Aye responses heard.)

1 All those opposed, no.

2 (No audible response.)

3 That motion carries three to zero. That

4 concludes action on No. 96 and the time is 12:00 p.m.

5 (CD ends at 4:27:41.)

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REPORTER'S CERTIFICATE

STATE OF COLORADO)
) ss.
 COUNTY OF ADAMS)


I, Geneva T. Hansen, do hereby certify that I am a Professional Shorthand Reporter and Notary Public within the State of Colorado.

I further certify that the foregoing transcript constitutes a true and correct transcript to the best of my ability to hear and understand the tape recording.

I further certify that I am not related to, employed by, nor of counsel for any of the parties or attorneys herein, nor otherwise interested in the result of the within action.

IN WITNESS WHEREOF, I have affixed my signature and seal this 2nd day of June, 2008.

My commission expires 11-18-11


 Geneva T. Hansen

