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Respondents Ernest L. Duran, Jr., and Bradley Johnston (correct spelling, rather than “Johnson” as in official caption), as the Proponents of Proposed Initiative 2007-2008 #96 (hereinafter “Proponents”), submit this Answer Brief in response to Petitioner Joseph B. Blake’s Opening Brief in support of his Petition for Review of Final Action of Ballot Title Setting Board Concerning Proposed Initiative 2007-2008 #96 (unofficially captioned by legislative staff for tracking purposes, “Cost-of-Living Wage Increase”) (the “Initiative”).<sup>1</sup>

## **I. Introduction**

Petitioner, as Objector, brought this original proceeding under C.R.S. § 1-40-107(2) (2007), to challenge the action of the ballot title setting board (the “Title Board” or “Board”), which set the title, ballot title and submission clause for the Initiative. If enacted, the Initiative would add section 124 to title 8, article 2 of the Colorado Revised Statutes. The measure would require employers to provide annual wage or salary increases to their employees to account for increases in the cost of living, as measured by the Consumer Price Index (“CPI”) referred to in

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<sup>1</sup> The Petition for Review listed Daniel Domenico as a member of the Title Board for the Initiative. However, the Title Board for the Initiative consisted of William Hobbs, Daniel Cartin, and Geoffrey Blue. In the caption of their opening brief, Petitioners correctly list the Title Board members.

Colo. Const. art. XVIII, § 15. Initiative, § 8-2-124(1).<sup>2</sup> The Initiative does not purport to amend or repeal any provision of the Colorado Constitution.

## II. Summary of the Argument

In his opening brief, Petitioner asserts that the actions of the Title Board should be reversed because the Initiative contains more than one subject in violation of the single subject requirement of Colo. Const. art. V, § 1 (5.5) and Colo. Rev. Stat. § 1-40-106.5 (2007). Petitioner argues that the Initiative contains two separate subjects in addition to providing for an annual wage or salary increase to account for an increase in the cost of living. First, he contends that the prohibition against an employer's reduction in wages or salaries due to a decrease in the CPI will not tend to carry out the general objective of the Initiative and thus is a separate subject. Second, he maintains that the Initiative's purported implicit repeal of the "constitutional right to contract" is another subject.<sup>3</sup>

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<sup>2</sup> A copy of the Initiative as submitted to the Title Board is attached to Proponents' opening brief as Appendix 1.

<sup>3</sup> Before the Title Board, Petitioner asserted that the inclusion of administrative and civil remedies also constitutes a separate subject. Motion for Rehearing attached to Petition for Review, at pp. 4-5. Petitioner does not advance that argument in his opening brief. As Proponents argued in their opening brief, at pp. 11-13, that contention is without merit. *See, In the Matter of the Title, Ballot Title and Submission Clause for 2007-2008 #57*, 2008 Colo. LEXIS 496 (Colo. May 23, 2008), at \*9-10 (neither the addition of civil penalties nor the enforcement Fn. continued on next page.

Proponents submit that the Initiative contains a single, easily identifiable subject: annual cost-of-living increases in employees' wages and salaries. All of the measure's sections whether involving definition, implementation, or enforcement relate to this single subject and carry out its central objective. Employers must provide an annual cost-of-living increase to their employees' wages or salaries, as measured by the CPI used by the Department of Labor and Employment in making adjustments to the state minimum wage rate pursuant to Colo. Const., art. XVIII, § 15. Initiative, § 8-2-124(1). The measure exempts wage or salary increases if the employer provides an annual increase equal to or greater than the increase required by the Initiative. Initiative, § 8-2-124(2). An employer may not reduce an employee's wages or salary due to a decrease in the CPI. Initiative, § 8-2-124(3). The measure specifies that the terms "employer" and "employee" shall have the same meanings set forth in section 8-4-101, C.R.S., and limits its application to employers who regularly employ ten or more employees in the state of Colorado. Initiative, § 8-2-124(4). The measure

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of those penalties through private rights of action constitute separate subjects); *In re the Matter of the Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #73*, 135 P.3d 736, 739 (Colo. 2006) (implementation or enforcement details directly tied to an initiative's single subject do not, in and of themselves, constitute a separate subject).

provides remedies to employees who do not receive the required cost-of-living increase. Initiative, § 8-2-124 (5) and (6).

Petitioner's speculative arguments about whether the Initiative will violate the prohibition against impairing the obligation of contracts found in both the Colorado and United States Constitutions essentially asks the Court to determine the Initiative's efficacy, construction, and future application. The Court cannot perform that task unless and until the voters approve the measure.

### **III. Analysis and Argument**

#### **A. Standard of review.**

A proposed initiative violates the single subject requirement when it (1) relates to more than one subject and (2) has at least two separate and distinct purposes that are not dependent upon or connected with each other. *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 2008 Colo. LEXIS 455 (Colo. May 16, 2008), at \*8; *In the Matter of the Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006). A proposed initiative that tends to achieve or carry out one general object or purpose constitutes a single subject. *In the Matter of the Title, Ballot Title and Submission Clause 2007-2008 #61*, 2008 Colo. LEXIS 454 (Colo. May 16, 2008), at \*7. Although an initiative may contain several purposes, they must be interrelated. *In*



*the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006). In examining an alleged single subject violation, the Court looks to whether the purposes of the measure are “distinct,” “separate,” or “unconnected.” *See, In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #258(A)*, 4 P.3d 1094, 1098 (Colo. 2000). A proposed initiative does not violate the single subject requirement just because the proposal may have different effects or makes policy choices that are not inevitably interconnected; it is enough that the provisions of a proposal are connected. *See, In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #256*, 12 P.3d 246, 254 (Colo. 2000) (internal citation omitted).

In reviewing the Title Board’s determination of whether an initiative complies with the single subject requirement, the Court does not address the merits or the future application of the proposed initiative. However, the Court must sufficiently examine the measure to discern whether the constitutional prohibition against multiple subjects has been violated. In its review, the Court must construe the single subject requirement liberally to avoid imposing undue restrictions on the initiative process. *In the Matter of the Title, Ballot Title and Submission Clause 2007-2008 #61*, 2008 Colo. LEXIS 454, at \*8 (internal citations omitted).

**B. The provision that an employer shall not reduce an employee's wages or salary because of a decrease in the CPI is not a separate subject. Instead, it is consistent with and carries out the one general purpose of the Initiative.**

The Initiative has but one general object or purpose: Employers who regularly employ more than ten employees in Colorado must provide annual cost-of-living increases to their employees' wages or salaries based on the specified CPI. The provision that an employer may not reduce an employee's wages or salary due to a decrease in the CPI is consistent with and connected to that purpose. The prohibition against reduction follows directly and logically from the central purpose of affording employees the benefit of annual cost-of-living wage or salary increases.

An obvious question to voters considering the Initiative is what happens if there is a decrease in the CPI. The Initiative answers that question by expressly stating that an employer may not reduce an employee's wages or salary in such an event. The prohibition on reducing wages or salary is not a separate, distinct, or unconnected subject, but a logical extension of the Initiative's central theme and purpose of providing covered employees with the benefit of cost-of-living increases in wages or salary. Without the prohibition against reduction, an employer arguably would be able to diminish that benefit upon the occurrence of decrease in the CPI. Even if the prohibition on reducing wages or salary because

of a decrease in the CPI is viewed as having a separate purpose or different effect than the requirement that covered employers must provide an annual cost-of-living wage or salary increase, both serve to advance the common objective of providing covered employees with the benefit of cost-of-living wage or salary increases.<sup>4</sup>

Moreover, the prohibition on reduction due to a decrease in the CPI will not surprise voters. The purpose of the single subject rule is to prevent surprise and fraud from being practiced upon voters. *See § 1-40-106.5(1)(e)(II), C.R.S. (2007; In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62, 2008 Colo. LEXIS 455, at \*9.* Here, the proposed Initiative is set forth on a single page, and the prohibition is expressly stated in the third of its six brief sections. Initiative, § 8-2-124(3). Likewise, the prohibition is clearly stated in the title and the ballot title and submission clause, as designated and fixed by the Title Board. *See, Appendix 3 to Proponents' Opening Brief, title and ballot title and submission clause ("Shall there be an amendment to the Colorado Revised Statutes concerning*

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<sup>4</sup> On the Motion for Rehearing, the Title Board heard and specifically considered Petitioner's argument that the prohibition against reduction due to a decrease in the CPI constitutes a separate subject. The Board unanimously rejected that argument, concluding that the prohibition is closely connected with the central purpose of providing annual cost of living wage or salary increases. Transcript of Title Board Hearing, May 21, 2008, Attachment 3 to Petitioner's Opening Brief, at p. 6, l. 6 to p. 7, l. 21; p. 9, l. 2 to p. 10, l. 10; p. 17, l. 6 to p. 18, l. 8; p. 18, l. 23 to p. 19, l. 8; p. 21, l. 6 to p. 23, l. 4.

annual cost of living increases in employees' wages and salaries, and in connection therewith, . . . prohibiting employers from reducing wages or salaries due to a decrease in the cost of living; . . . .”).

Accordingly, the provision that an employer may not reduce the wages or salary of an employee due to a decrease in the CPI does not constitute a separate subject. Instead, the Initiative tends to achieve and carry out one general purpose and thus contains a single subject.

**C. Whether the Initiative will violate the prohibition against impairing the obligation of contracts found in both the United States and Colorado constitutions cannot be determined unless and until the voters approve the measure. As a statutory amendment, the Initiative, if approved, does not and cannot repeal any provision of either constitution.**

Petitioner's contention that the Initiative will violate the prohibition against laws which impair the obligation of contracts found in both the Colorado and United States constitutions because it does not provide that it will not apply to any existing contract of employment is without merit.<sup>5</sup> The Court has consistently held

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<sup>5</sup> The Colorado Constitution provides that “No law . . . impairing the obligation of contracts shall be passed by the general assembly.” *Colo. Const. art. II, § 11*. The United States Constitution states that “No state shall . . . pass any . . . law impairing the obligation of contracts.” *U.S. Const. art I, § 10*. While these clauses are designed to protect vested contract rights from legislative intrusion, they are not an absolute bar to legislative regulation of contracts. In assessing an alleged contract clause violation, the inquiry is whether the change in law has operated as a substantial impairment of a contractual obligation. The answer to that inquiry  
Fn. continued on next page.

that in determining whether a proposed initiative comports with the single subject rule, the Court does not address the merits of a proposed measure, interpret it, or construe its future legal effects. Instead, these are matters for judicial determination in a proper case should the voters approve the initiative. *In the Matter of the Title, Ballot Title and Submission Clause for 2007-2008 #57*, 2008 Colo. LEXIS 496, at \*5-6 (internal citations omitted); *see also In the Matter of the Title, Ballot Title, and Submission Clause and Summary Pertaining to the Casino Gaming Initiative Adopted on April 21, 1982*, 649 P.2d 303, 309-310 (Colo. 1982) (judicial interpretation of the constitutionality of a proposed initiative must await adjudication in a specific factual context).

Petitioner's argument that the Initiative impliedly repeals United States Const., art. I, § 10 and Colo. Const., art. II, § 11 is also without merit. If enacted, the Initiative would add section 124 to title 8, article 2 of the Colorado Revised

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requires a court to consider three factors. First, the court must ascertain whether there is a contractual relationship; to show this, a party must demonstrate that the contract gave him a vested right. Second, the court must determine whether a change in the law impairs that contractual relationship. Third, the court must decide whether the impairment is substantial. *In the Matter of the Estate of DeWitt*, 54 P.3d 849, 858-59 (Colo. 2002) (internal citations and quotation marks omitted). A court cannot engage in this analysis absent a justiciable controversy. *See generally Bickel v. City of Boulder*, 885 P.2d 215, 234 (Colo. 1994) (courts may not issue advisory opinions over cases that are not yet ripe).

Statutes. It does not purport, expressly or by implication, to amend or repeal any provision of either the United States Constitution or the Colorado Constitution. Petitioner's suggestion that an initiative which proposes an amendment to the Colorado Revised Statutes can impliedly repeal a provision of either constitution is a novel proposition, wholly unsupported by the cases cited in Petitioner's opening brief. Petitioner's Opening Brief at 7-9. Each of the cited cases in which the Court addressed whether the implied repeal of an existing constitutional provision constituted a separate subject involved an initiative proposing an amendment to the Colorado Constitution, not an amendment to the Colorado Revised Statutes.

Although the Initiative, if approved, might be challenged on constitutional grounds in a proper case, it cannot be argued seriously that an amendment to the Colorado Revised Statutes trumps any provision of either the United States or the Colorado Constitution. It is elementary that a statute cannot amend or repeal any provision of either constitution. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 24, 105 L. Ed. 2d 1, 22, 109 S. Ct. 2273 (1989) (conc. opn. of Stevens, J.) ("A statute cannot amend the constitution."); *Convention Center Referendum Committee v. District of Columbia Bd. of Elections and Ethics*, 441 A.2d 889, 924 (D.C. App. 1981) ("It is not necessary to reiterate that a statute cannot materially amend a constitution."). Both the United States and Colorado constitutions set forth

specific requirements for amendment which do not include amendment by statute, whether through exercise of the legislative power vested in the congress or general assembly or, in the case of Colorado, through the reserved power of the people to propose laws. *U.S. Const. art. V; Colo. Const. arts. V and XIX; see also Nesbit v. People*, 36 P. 22, 226 (Colo. 1894) (constitutional provisions are generally to be considered mandatory rather than directory, and those regulating the mode of making amendments to the constitution must be strictly observed); *McNichols v. People ex rel. Cook*, 35 P.2d 863, 865 (Colo. 1934) (even grave emergencies cannot justify attempted amendment to the state constitution by a city charter, nor an amendment of a city charter by a mere ordinance).

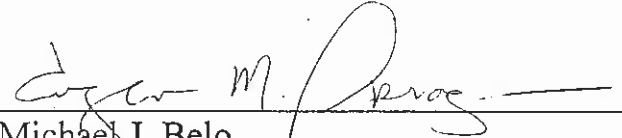
In sum, Petitioner's speculative arguments about whether the Initiative will violate constitutional prohibitions against impairing the obligation of contracts are insufficient grounds upon which to determine that the Initiative contains more than a single subject. Therefore, the Court should affirm the Title Board's determination that the Initiative contains a single subject.

#### **IV. Conclusion**

The Title Board correctly decided that the Initiative contains a single subject. The Court should affirm the Title Board's action.

DATED this 12<sup>th</sup> day of June, 2008.

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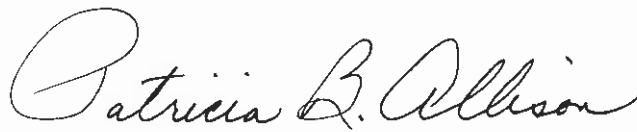


CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2008, a true and correct copy of Proponents' Answer Brief was served via hand delivery upon the following:

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