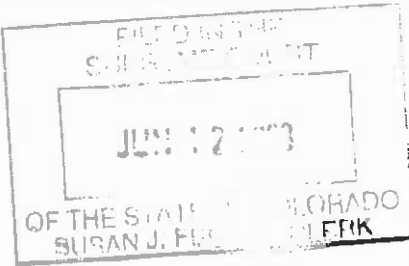


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| <p>SUPREME COURT, STATE OF COLORADO<br/>Two East 14<sup>th</sup> Avenue<br/>Denver, CO 80203</p>  |  |
| <p>ORIGINAL PROCEEDING PURSUANT TO<br/>§ 1-40-107(2), C.R.S. (2007)</p>   |   |
| <p>IN THE MATTER OF THE TITLE, BALLOT TITLE<br/>AND SUBMISSION CLAUSE FOR 2007-2008, #92<br/>("Employer Responsibility for Health Insurance")</p> <p><b>Petitioner:</b></p> <p>JOSEPH B. BLAKE, Objector,</p> <p>v.</p> <p><b>Respondents:</b></p> <p>ERNEST L. DURAN, JR. and IRENE GOODELL,<br/>Proponents,</p> <p>and</p> <p><b>Title Board:</b></p> <p>WILLIAM A. HOBBS, DANIEL L. CARTIN, and<br/>DANIEL DOMENICO.</p> | <p>▲ FOR COURT USE ONLY ▲</p>   |
| <p>Attorneys for Proponents:<br/>Michael J. Belo, No. 8198<br/>Eugene M. Sprague, No. 7680<br/>BERENBAUM, WEINSHIENK &amp; EASON, P.C.<br/>Address: 370 17th Street, Suite 4800<br/>Denver, Colorado 80202<br/>Phone Number: (303) 825-0800<br/>FAX Number: (303) 629-7610<br/>E-mail: <a href="mailto:mbelo@bw-legal.com">mbelo@bw-legal.com</a><br/><a href="mailto:esprague@bw-legal.com">esprague@bw-legal.com</a></p>  | <p>Case No. 08SA178</p>   |
| <p style="text-align: center;"><b>ANSWER BRIEF OF PROPONENTS</b></p>  |   |

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Respondents Ernest L. Duran, Jr., and Irene Goodell, the Proponents of Proposed Initiative 2007-2008 #92, submit this Answer Brief in response to Petitioner's Opening Brief.<sup>1</sup>

## **I. Introduction**

Petitioner brought this original proceeding under C.R.S. § 1-40-107(2)(2007), to challenge the action of the ballot title setting board (“Title Board” or “Board”), which set the title, ballot title and submission clause (collectively “title”) for proposed Ballot Initiative 2007-2008 #92 (unofficially captioned by legislative staff as “Employer Responsibility for Health Insurance”). Initiative #92 seeks to amend the Colorado Constitution by requiring employers with twenty or more employees to provide major medical health care coverage to employees. It would allow an employer to provide such coverage directly through an insurance carrier or by acting as a self-insurer or indirectly by paying premiums to a health insurance authority to be created pursuant to the Initiative.

## **II. Summary of Argument**

Initiative #92 proposes to amend article XVIII of the Colorado Constitution by requiring employers with twenty or more employees to provide major medical

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<sup>1</sup> The Petition for Review and Petitioner's Opening Brief incorrectly list the members of the Title Board for this initiative. The Title Board herein consisted of William Hobbs, Sharon Eubanks, and Geoffrey Blue.

health care coverage to their employees, either directly or indirectly.<sup>2</sup> All other provisions of the Initiative are directly connected with implementation of that purpose. Employers would provide such coverage directly through an insurance carrier or by acting as a self-insurer, or indirectly by paying premiums to a health insurance authority (“Health Insurance Authority” or “Authority”) created by the Initiative. The Authority would not provide such indirect coverage itself, but would contract with carriers to provide coverage. Employees would not be required to pay more than 20 percent of the premium for such coverage for themselves or more than 30 percent of the premium for coverage for their dependents. The costs of administering the Authority and health care coverage provided through the Authority would be financed by premiums paid by employers who do not provide coverage directly and, if necessary, revenue sources other than the state general fund as determined by the general assembly. The Initiative directs the general assembly to enact such laws as are necessary to implement the measure and sets the effective date of the measure no later than November 1, 2009.

. Petitioner contends that Initiative #92 violates the single subject requirement because it allegedly creates the Authority as a “super-agency designed to do much

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<sup>2</sup> A copy of the Initiative is attached to Proponents’ Opening Brief as Appendix 1 and a copy of the title, ballot title and submission clause is attached to that brief as Appendix 2.

more than deliver health insurance coverage.” (Petitioner’s Opening Brief, at 8.) He contends that the title for the Initiative is “confusing, unfair, and misleading” because it does not mention that the effective date of the Initiative would be delayed until the general assembly has an opportunity to enact appropriate legislation and does not disclose that the Initiative creates a “super-agency” to administer the provision of health care coverage.<sup>3</sup>

Proponents respond that the Authority was created expressly as the mechanism for implementing the Initiative’s requirement that employers provide health care coverage. Its functions would be limited to effectuating the purpose of the Initiative and would go no further. Moreover, the title prepared by the Board accurately, fairly, and concisely describes the central features of Initiative #92.

### **III. 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, Case*

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<sup>3</sup> Before the Title Board, Petitioner asserted that Initiative #92 contained at least five separate subjects. He listed nine reasons why the title was allegedly defective, several of which appeared redundant. (Motion for Rehearing, attached to Petition for Review.) Proponents responded to these issues in their opening brief.

No. 08SA90, 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*, Case No. 08SA89, 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 merely because the proposal may have different effects or may make policy choices that are not inevitably interconnected; it is enough that the provisions of a proposal are connected. *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).



This Court has made clear on many occasions that “[m]ere implementation or enforcement details directly tied to the initiative’s single subject will not, in and of themselves, constitute a separate subject.” *See, e.g., In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 2005-2006 #73*, 135 P.3d 736, 739 (Colo. 2006); *In the Matter of the Title, Ballot Title and Submission Clause for 2005-2006 #74*, 136 P.3d 237, 239 (Colo. 2006); *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #57*, Case No. 08SA91, 2008 Colo. LEXIS 496 (Colo. May 23, 2008), at \*9.

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. The Court must sufficiently examine the measure, however, to discern whether the constitutional prohibition against multiple subjects has been violated. In its review, the Court construes 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 health insurance authority created by Initiative #92 is directly and inextricably related to implementation of the Initiative’s single subject of requiring employers to provide health care coverage.**

As Petitioner admits, the subject of Initiative #92 is to require employers with twenty or more employees to provide employees with health care coverage, either directly or indirectly. (Petitioner’s Opening Brief, at 8.) The remaining provisions of the Initiative define and implement this mandate. The Initiative defines the meaning of “directly” and “indirectly” providing health care coverage. Initiative, § 16(4). It would create a Health Insurance Authority to administer the requirements of the Initiative—the Authority would not provide health care coverage itself, but would contract with carriers to provide it for employees of those employers who choose to provide coverage indirectly. Initiative, § 16(2). The Authority would be funded by the premiums paid by employers who do not provide coverage directly to employees. The general assembly would not be precluded, if necessary, from appropriating moneys from sources other than the general fund to pay for the costs of administering the Authority or providing for the health care coverage required by the measure. Initiative, § 16(3).

Although Petitioner refers to the Authority as a “super-agency” and describes it in ominous terms, the Authority’s sole purpose would be to administer

the requirement of health care coverage mandated by the Initiative. The Authority's scope and powers would be directly connected with the details of implementing the single subject of the Initiative, *e.g.*, contracting with insurance carriers to provide coverage for employees of employers who choose to provide coverage indirectly, setting premium rates for such employers, and administering generally the provision of health care coverage required by the Initiative.

In this respect, the Authority would be analogous to the gaming control commission created by the ballot initiative that established limited gambling in certain Colorado municipalities, now article XVIII, section 9 of the Colorado Constitution, which provided for the creation of the commission, the promulgation of necessary rules, and the definition of terms not otherwise defined, in a manner similar to Initiative #92:

The administration and regulation of this section 9 shall be under an appointed limited gaming control commission, referred to in this section 9 as the commission; said commission to be created under such official or department of government of the state of Colorado as the general assembly shall provide by May 1, 1991. Such official or the director of the department of government shall appoint the commission by July 1, 1991. The commission shall promulgate all necessary rules and regulations relating to the licensing of limited gaming by October 1, 1991, in the manner authorized by statute for the promulgation of administrative rules and regulations. Such rules and regulations shall include the necessary defining of terms that are not otherwise defined.

Colo. Const. art. XVIII, § 9(2).

As discussed fully in Proponents' Opening Brief, Petitioner erroneously relies upon *In the Matter of the Title, Ballot Title, Submission Clause, and Summary Adopted April 5, 1995, by the Title Board Pertaining to a Proposed Initiative "Public Rights in Waters II,"* 898 P.2d 1076 (Colo. 1995) (hereinafter "*Waters II*"). Unlike the instant case, there was no connection in *Waters II* between the two separate and distinct subjects of (1) creating a "strong public trust doctrine" regarding the public's right and ownership in Colorado waters, and (2) requiring elections to change the boundaries of water conservation districts and to elect directors of districts. As the Court stated, "The water conservancy or conservation districts have little or no power over the administration of the public water rights or the development of a statewide public trust doctrine because such rights must be administered and defended by the state and not by the local district." *Id.* at 1080. In contrast, here the Authority would be created for the sole purpose of administering the Initiative's requirement of health care coverage, and would be empowered to take the actions necessary to implement such requirement.

Similarly, Petitioner's position is not supported by *In the Matter of the Title and Ballot Title and Submission Clause for 2005-2006 #55,* 138 P.3d 273 (Colo. 2006) (hereinafter "*2005-2006 #55*"), which is inapposite to the issue of creating an agency to administer the requirements of an initiative, such as the Authority

herein or the gaming commission in article XVIII, section 9 of the constitution.

The initiative in 2005-2006 #55 had two distinct and unconnected purposes:

(1) decreasing taxpayer expenditures that benefit the welfare of persons not lawfully present in the United States and (2) denying access to other administrative services unrelated to the delivery of individual welfare benefits. *Id.* at 280.

Initiative #92 has a single, easily identifiable subject: requiring employers to provide health care coverage for employees, directly or indirectly. All of the Initiative's sections, "whether involving definition, implementation, or enforcement, relate to this single subject." *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #57*, 2008 Colo. LEXIS 496, at \*9. The Authority would be created exclusively for the purpose of administering the requirements of the Initiative, and its scope would extend no further than necessary to administer such requirements.<sup>4</sup>

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<sup>4</sup> Petitioner also cites *In the Matter of the Title, Ballot Title and Submission Clause, and Summary for 1999-2000 #37*, 977 P.2d. 845 (Colo. 1999). The Court, relying on three previous cases that were directly controlling, found three distinct and unconnected subjects of the initiative in question: it would have created a tax cut, imposed new criteria for voter approval of revenue and spending increases, and imposed reductions in state spending on programs. *Id.* at 846. Again, the measure did not deal with, and there was no issue about, the creation of an agency to administer or implement the measure. Hence, the case appears clearly inapposite to the issues herein.

In summary, Initiative #92 complies with the single subject requirement. The fact that it would create a Health Insurance Authority to administer the provision of health care coverage required by the Initiative does not result in a separate subject, because the Authority is directly and necessarily connected with implementing the subject of the Initiative. Therefore, the Court should affirm the Title Board's finding on this issue.

**C. The title set by the Title Board clearly and accurately captures the purpose and provisions of the Initiative.**

As discussed in Proponents' Opening Brief, the Court employs a deferential standard in reviewing the title set by the Board:

While titles must be fair, clear, accurate, and complete, the Title Board is not required to set out every detail of an initiative. In addition, the Title Board may not speculate as to the measure's efficacy, or its practical or legal effects. We give great deference to the Title Board in the exercise of its drafting authority, and will reverse the Title Board's decision only if the titles are insufficient, unfair or misleading.

*In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 2008 Colo. LEXIS 455, at \*19.

The Court has recognized that the Board "is given discretion in resolving the inter-related problems of length, complexity, and clarity in designating a title and a ballot title and submission clause. The Board's duty is merely to summarize the

central features, and not every feature, of the proposed initiative measure in drafting a title or ballot title and submission clause in a clear and concise manner.”

*In the Matter of the Title, Ballot Title and Submission Clause, and Summary for the Proposed Initiated Constitutional Amendment “Concerning Suits against Nongovernmental Employers Who Knowingly and Recklessly Maintain an Unsafe Work Environment*, 898 P.2d 1071, 1072 – 1073 (1995).

The summary prepared by the Board “should be a condensed, impartial statement. Its purpose is not to fully educate the voters on all aspects of the proposal.” *In the Matter of the Title, Ballot Title and Submission Clause, and Summary Approved February 5, 1992, for the Proposed Initiated Constitutional Amendment concerning Unsafe Workplace Environment*, 830 P.2d 1031, 1035 (Colo. 1992). Instead, the legislature requires publication of a “ballot information booklet” to provide voters with detailed information about ballot initiatives. C.R.S. § 1-40-124.5 (2007).

The Title Board set the ballot title and submission clause for the initiative as follows:

Shall there be an amendment to the Colorado Constitution concerning health care coverage for employees, and, in connection therewith, requiring employers that regularly employ twenty or more employees to provide major medical health care coverage to their employees; excluding the state and its political subdivisions from the definition of "employer"; allowing an employer to provide such health care

coverage either directly through a carrier, company, or organization or acting as a self insurer, or indirectly by paying premiums to a health insurance authority to be created pursuant to this measure that will contract with health insurance carriers, companies, and organizations to provide coverage to employees; providing that employees shall not be required to pay more than twenty percent of the premium for such coverage for themselves and more than thirty percent of such coverage for the employees' dependents; financing the costs of administering the health insurance authority and health care coverage provided through the authority with premiums paid by employers to the authority and, if necessary, such revenue sources other than the state general fund as determined by the general assembly; directing the general assembly to enact such laws as are necessary to implement the measure; and setting the effective date of the measure to be no later than November 1, 2009?

Petitioner claims that the Initiative is unclear about whether it requires the Authority to pay for an employee's portion of the health insurance coverage if the employee is unable to finance his or her portion. (Petitioner's Opening Brief, at 13.) To the contrary, the Initiative provides as follows:

To comply with this section, the health care coverage offered or provided by the employer shall not require the employee to pay more than twenty percent of the premium cost of such coverage for the employee and shall not require the employee to pay more than thirty percent of the premium cost of coverage for dependents of the employee. In the alternative, an employer shall provide health care coverage "indirectly" by paying premiums to the authority in such amounts as are determined by the Authority to fulfill the requirements of this section.

Initiative, § 16(4).



The title summarizes this provision accurately: “providing that employees shall not be required to pay more than twenty percent of the premium for such coverage for themselves and more than thirty percent of such coverage for the employees' dependents.” Hence, the Initiative would require employees, whether they receive indirect or direct coverage, to pay up to the specified percentages to receive such coverage. There is no language in either the Initiative or the title that raises the issue suggested by Petitioner. Instead, Petitioner resorts to speculation that this would even be an issue, and then condemns the Initiative for not explicitly addressing this speculative issue. The Title Board, however, is precluded from having “the titles state possible or speculative outcomes should the Initiative pass . . . . [T]he Title Board is neither obligated nor authorized to construe the future legal effects of an initiative as part of the ballot title.” *In the Matter of the Title, Ballot Title, and Submission Clause for 2007-2008 #62*, 2008 Colo. LEXIS 455, at \*20.

Petitioner also faults the title because it allegedly does not mention that the effective date of the Initiative would be delayed until the general assembly has an opportunity to enact appropriate legislation. (Petitioner’s Opening Brief, at 13.) The title expresses this provision fairly and accurately, however: “directing the general assembly to enact such laws as are necessary to implement the measure;

and setting the effective date of the measure to be no later than November 1, 2009.” Thus, the Title Board—resolving the interrelated problems of length, complexity, and clarity—described the central features of the Initiative.

The Court recently reiterated the standards for evaluating the title set by the Board:

[W]e will uphold the Board’s choice of language if it “clearly and concisely reflects the central features of the initiative.” Accordingly, the Board is not required to provide explanations of the measure or discuss its every possible effect. Therefore, **we will reject the Board’s language only if it is so inaccurate as to clearly mislead the electorate.**

*In the Matter of the Title, Ballot Title and Submission Clause 2007-2008 #61*, 2008 Colo. LEXIS 454, at \*14 – 15 (citations omitted) (emphasis added).

Here, the title accurately and concisely but comprehensively reflects the central features of the Initiative. The title is not misleading or confusing. Therefore, the title set by the Board expresses the true intent and meaning of Initiative #92.

#### **IV. Conclusion**

The Title Board was correct in finding that Initiative #92 contains a single subject—the creation of a Health Insurance Authority for the sole purpose of administering the requirements of the Initiative is directly and necessarily connected to implementing the Initiative. The title set by the Board accurately

expresses the subject and true meaning of the Initiative, and it is neither confusing nor misleading. Therefore, the Proponents request the Court to affirm the action of the Title Board.

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

BERENBAUM, WEINSHIENK & EASON, P.C.

A handwritten signature in cursive script that reads "Michael J. Belo". The signature is written in black ink and is positioned above a horizontal line.

Michael J. Belo  
Eugene M. Sprague

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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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