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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, #57

Petitioner:
JOSEPH B. BLAKE,
Objector,

v.

Respondents:
JOANNE KING AND LARRY ELLINGSON,
Proponents,

and

Title Board:
WILLIAM A. HOBBS, DANIEL L. CARTIN, and DANIEL DOMENICO.

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Case No. 08SA91

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ANSWER BRIEF TO RESPONDENTS

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On behalf of Joseph B. Blake, a registered elector of the state of Colorado, the undersigned hereby files this Answer Brief to Respondents to appeal the Title Board's approval of the Title for Proposed Initiative 2007-2008 #57 ("Criminal and Civil Liability of Businesses and Individuals for Business Activities") (hereinafter "Initiative").

ARGUMENT

I. The Initiative Contains Multiple Subjects

Despite Respondents' best efforts to cast the legal authority in a light most favorable to them as well as limit and downplay the plain language of the Initiative, Respondents cannot persuasively demonstrate that this Initiative contains a single subject.

Contrary to the arguments of Respondents, this Court 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 In re Title, Ballot Title and Submission Clause 2007-2008 #17*, 172 P.3d 871, 875 (Colo. 2007) ("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").

Indeed, this Court "has repeatedly stated it will, when necessary, characterize a proposal sufficiently to enable review of the Board's actions." *In re Title and Ballot Title and Submission Clause for 2005-2006 #55*, 138 P.3d 273, 278 (Colo. 2006). This Court characterizes proposals to determine unstated purposes and their relationship to the central theme of an initiative. *See id.* Thus, this Court must examine sufficiently the Initiative to determine whether it contains incongruous or hidden purposes or bundles incongruous measures under a broad theme. *See id.* at 279.

Numerous additional subjects have been added to the single subject of extending criminal liability, which will not tend to carry out the general object of the Initiative. *See Waters Rights II*, 898 P.2d 1076, 1079 (Colo. 1995). These subjects have at least two distinct and separate purposes which are not dependent upon or connected with each other. *Id.*

Once this court examines sufficiently the Initiative's central theme under that standard, it will see that this Initiative clearly violates the single subject requirement. For example, allowing residents to seek civil damages based upon

existing or expanded criminal conduct does not necessarily follow from making conduct criminal in the first place. Most criminal statutes do not carry with them private causes of action. *See, e.g. Hurtado v. Brady*, 165 P.3d 871, 875 (Colo. App. 2007) ("Where a statute does not provide for a private cause of action, a plaintiff may not pursue a claim for relief based upon the statute (citing *Silverstein v. Sisters of Charity,* 38 Colo. App. 286, 288, 559 P.2d 716, 718 (1976); *Shaw v. Neece,* 727 F.2d 947, 949 (10th Cir.1984) (holding claims under 18 U.S.C. §§ 241, 242 and 1503 were properly dismissed by trial court because a plaintiff cannot recover civil damages for alleged violation of criminal statute)).

Second, providing civil claims for relief on behalf of the state of Colorado, who then receives the damages, regardless of who brought and prosecuted the action, is unrelated to the typical private claim for relief for criminal actions. This is particularly true, where, as here, the state of Colorado is not even involved in the lawsuit as a party.

Third, the damages from these civil actions are exempted from TABOR. The Proponents contend that "de-Brucing" the initiative is a necessity for all post-TABOR measures that create revenue streams for the government, Resp. Op. Br., p. 13, but this is simply not true. The revenue stream could be covered by TABOR or it could not. Deciding whether or not it is covered by TABOR is a separate

topic from the rest of the Initiative, and one voters should be allowed to decide separately.

Fourth, the Initiative creates a new concept: it provides a "complete affirmative defense" to any person who, prior to being charged in a criminal or civil action, notifies the attorney general of all facts it is aware of. In other words, all criminal conduct becomes immune from liability as long as after one commits a crime, they absolve themselves by notifying the attorney general. This "get out of jail free card" is a separate and distinct subject.

This Initiative is dissimilar from the examples raised by the Proponents. *In re Initiative for 2005-2006 #73*, 135 P.3d 736 (Colo. 2006), concluded that the enforcement provision was directly tied to the initiative's purpose of eliminating pay-to-play contributions and therefore was not a separate subject. *Id.* at 739 (revenues collected must be refunded to taxpayers). This Initiative goes beyond supplying enforcement provisions for the extension of criminal liabilities of business entities to individuals. It applies civil remedies to crimes and actually creates an entirely new category of crimes.

Respondents discuss at length *In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000) ("Initiative 200A") in support of its proposition that this Court has held even complex and wide-ranging measures as constituting single

subjects. The enforcement mechanisms that applied to the physician and the government agencies that Respondents discuss in their opening brief were not at issue in #200A, however. The #200A Court was asked to determine whether the initiative violated the multiple subject prohibition because there was no reasonable or necessary connection between a woman's right to informed consent prior to an abortion and the collection of statistical data of that communication. *See id.* at 29. The Court held that it did not. *Id.* Thus, the various penalties discussed by Respondents were not a part of the single subject challenge. This case should not be relied upon to support the contention that the provision of penalties does not violate the single subject rule.

In re Initiative for 1997-98 #113, 962 P.2d 970 (Colo. 1998), also relied on by Respondents, held that the single-subject was not violated because the controversy concerned two beneficial effects of the regulation of swine operations—the reduction of both air and water pollution. *Id.* at 971–72. Here, the Initiative extends criminal liability to individuals. Then it expands it to provide for the State's recovery of civil damages to a criminal statute that had none prior to the "extension," and then exempts the matter from TABOR. None of these items is necessarily beneficial and each should be debated and voted upon on its own merits.

In summarizing the initiative in *In re Initiative 1997-98 #112*, 962 P.2d 255 (Colo. 1998) (affirmation of the Title Board without opinion), the Court noted that the initiative provided that any state law or regulation that did not conform to the provisions of the initiative would be unconstitutional. *Id.* at 256. This should not be read as an endorsement by this Court of negating all previous state law and regulations that run counter to an initiative; rather it is an endorsement of specific language which makes an initiative's breadth and depth clear to the voters.

In re Initiative 2005-2006 # 55, 138 P.3d 273 (Colo. 2006) is much closer to this case than the authorities relied upon by Respondents. This case raised concerns that the measure's restriction of "non-emergency services" to some residents of Colorado would extend well beyond denying such services as non-emergency medical services and social services to forbidding civil liberties such as every person's right to access to our courts. *See id.*

Here, as in *In re Initiative #55*, the Title and Initiative raise the concern that voters will not understand that the extension of criminal liability to individuals encompasses more than current crimes but includes the failure to perform "duties that are required by law," civil remedies for crimes, and a change to constitutional budgetary provisions. The multiple levels on which this measure could be

understood and applied is likely to be a surprise to the voters; thereby violating the single subject requirement.

Waters Rights II considered an initiative that sought to add a "strong public trust doctrine regarding Colorado waters, that water conservancy and water districts hold elections to change their boundaries or discontinue their existence, that the districts also hold elections for directors and that there be dedication of water right use to the public." *See id.* at 1077. The Court held that the initiative violated the single subject provision because there was no connection between the two district election requirements paragraphs and the two public trust water rights paragraphs. The Court observed:

> The public trust water rights paragraphs of the Initiative impose obligations on the state of Colorado to recognize and protect public ownership of water. 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).

The Initiative has similar flaws to the initiative considered in *Waters Rights II*). It not only extends criminal liability to individuals and provides a civil remedy to criminal acts, it provides that the damages, once received by the State, are exempt from TABOR. This is certainly a broader "topic" than that rejected by this

Court in *Water Rights II*). Consistent with *Water Rights II*), the criminal, civil, remedial, and budgetary aspects of the Initiative contain "no necessary connection." These provisions are not details that can be "directly tied" to the Initiative's "central focus" of extending criminal liability of business entities to individual employees, officers, directors and agents. They are separate subjects. *See In re Initiative for 1999-2000 #200A*, 992 P.2d 27, 30 (Colo. 2000).

Another multiple subject problem arises because the Initiative transforms torts into crimes under the guise of the alleged single subject of "liability for criminal conduct caused by business entities." Resp. Op. Br., p. 3; *see* Proposed C.R.S. § 18-1-606(1)(a) & (b). The plain language of the title criminalizes the failure "to perform duties required by law."[1]

"Duties that are required by law" include civil duties, which, when breached are torts. *See* 7 Colorado Methods of Practice § 10.36 (comparing torts, which arise from duties imposed by law, to contractual obligations, which arise from the parties' mutual promises). By way of example, typical business torts might include the breach of a corporation's duty to maintain certain records, *see* C.R.S. § 7-116-101; a corporation's duty to maintain records for inspection by shareholders,

[1] The Title further provides for violations where "management engages in, authorizes, solicits, requests, commands or knowingly tolerates the business's criminal conduct."

see C.R.S. § 7-116-102; and a corporation's duty to provide annual reports to the secretary of state, *see* C.R.S. § 7-116-107(5).

"[A] 'tort,' broadly speaking, 'is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages.'" *Resolution Trust Corp. v. Heiserman*, 898 P.2d 1049, 1054 (Colo. 1995) (quoting 1 W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 2 (5th ed. 1984)); *accord* BLACK'S LAW DICTIONARY 1496 (7th ed. 1999).

Thus, pursuant to the Initiative, the breach of legal duties such as the maintenance of corporate records and filing of reports, or the breach of the duties of fidelity, of good-faith, of loyalty, of prudence, to give warning of a dangerous condition, to act, and of supervision, and the fiduciary duty could acquire the status of crimes, when committed by business entities and their employees.

Were extending criminal liability of businesses to their employees the sole purpose of the Initiative, the voters would not be at risk of surprise based on multiple subjects. This is not the sole subject of the Initiative, however. It creates new claims, allows for private attorneys general, provides a new income stream for the state, and then exempts that income stream from TABOR.

II. The Title is Confusing, Unfair, Misleading, and Likely to Surprise the Voters in Hiding Key Provisions and Using a Catch Phrase

Although a title need not catalog the potential effects of an initiative, it cannot simply not mention or hide its central features. *c.f.*, *In re Amendment to Art. XVI, Sect. 6, Colorado Const., Entitled "W.A.T.E.R."*, 875 P.2d 861, 864-65 (Colo. 1994). The language of this Initiative's titles and summary do not strike that balance. Rather, the titles and summary are confusing, unfair, misleading, and likely to surprise the voters after the election with the effects of implementation of the Initiative. Mr. Blake's concerns regarding what is excluded from the Title are central to the meaning of the Initiative, and not mere conjecture as asserted by the Respondents.

First, the Title does not reveal that the Initiative actually concerns both criminal and civil liability. Second, the Title and submission clause do not inform the voters that in order for a defendant to avail himself of the affirmative defense, he must make his full disclosure to the attorney general, prior to being charged or a complaint being filed.

Third, the Title does not reveal that the measure provides complete immunity to any crime or civil wrongdoing as long as one reports the criminal conduct prior to being charged. *See, e.g.*, *In re Regan*, 151 P.3d 1281, n.3 (Colo. 2007) (full payment by homeowner a complete affirmative defense to a lien).

Fourth, the Title language suggests that if a business is guilty of an action, then each and every one of its employees is guilty of the action, unless each and every one of those employees has secured his affirmative defense by reporting the action to the attorney general. Title at ll. 10–12.

Fifth, the Title and Initiative are unclear in failing to define important terms. The Title states that it allows "any Colorado resident to bring an action for civil damages." Title at ll. 6–8. It does not define "resident," which could include any person residing in Colorado—an individual citizen, a business entity, a legal alien, or an illegal alien. Meanwhile, the Initiative says that "[a]ny individual residing in Colorado may seek civil damages." *Id.* at subsection 5(a). The wording raises a question: may a resident bring an action or must the resident also be an individual? Who is eligible to file a complaint for civil damages is central to the purpose of the Initiative.

Sixth, the Title provides that any Colorado resident may "bring an action for civil damages." *See* Title at ll. 6–7. Colorado residents are likely to conclude that they will be able to collect damages from actions that they bring under the proposed statute. This is misleading because the plaintiff cannot collect damages. Any damages must be paid to the general fund of the state. *See* Proposed C.R.S. § 18-1-606(5)(e); Title at ll. 8–9.

Seventh, once the damages have been placed in the general fund, they will be exempted from constitutionally required revenue and spending limits (*e.g.* C.R.S. § 24-75-201). *See* Proposed C.R.S. § 18-1-606(5)(b) and (d). This is not mentioned in the Title; hiding the fact that the Initiative creates a new revenue source for the state that is free from the limits of previously passed legislation and initiatives. *See id.*

Eighth, the Title hides the fact that not just any resident of Colorado can be awarded attorneys' fees and costs. Only a successful citizen-plaintiff who resides in Colorado is permitted an award of attorney fees and costs. *Id.* at 5(e).

Ninth, individuals and business entities of all kinds can be sued for actions or inactions on behalf of a company. The Title does not disclose that there are no actual penalties that these alleged wrongdoers can suffer, however. Only an actual "corporation" is subject to any fines set forth Colo. Rev. Stat. § 18-1-606. This excludes limited liability companies, partnerships, or sole proprietorships.

Respondents' excuse for all this is that if the Title actually disclosed what was in the Initiative it would be "a wordy exercise." Resp. Op. Br., p. 14. This just confirms that the Initiative is confusing—if any Title that accurately conveys its meaning is "wordy," then the Initiative itself is flawed.

III. The Title, Ballot Title and Submission Clause Contain an Impermissible Catch Phrase, "Criminal Conduct"

The Title uses the impermissible catch phrase of "criminal conduct" that is likely to mislead the voters because it has an accepted meaning that does not reflect the content of the Initiative. All Covered Persons in Colorado business entities—whether one person companies or large, publicly traded companies—risk criminal liability for failures to make administrative reports or for negligent acts of the company. The words "criminal conduct" provoke thoughts of what most voters would consider "real crimes" rather than unidentified "duties that are required by law" that should continue to be considered civil wrongs.

"It is helpful to recall that voters place primary, if not absolute, reliance upon the board's product when deciding whether to support or oppose proposed initiatives. . . . . Recognizing the profound influence such language could have on voters, this court has steadfastly prohibited the use of 'catch phrases' when words chosen by the board in drafting titles have suggested particular meanings of a proposal rather than merely summarizing its contents." *In re Proposed Initiative Concerning Drinking Age in Colo.*, 691 P.2d 1127, 1134 (Colo. 1984) (Kirshbaum, J. dissenting).

"A 'catch phrase' consists of 'words which could form the basis of a slogan for use by those who expect to carry out a campaign for or against an initiated

constitutional amendment.'" *In re Proposed Initiative Designated "Governmental Business"*, 875 P.2d 871, 876 (Colo. 1994) ("*Governmental Business*"). "Evaluating whether particular words constitute a slogan or catch phrase must be made in the context of contemporary public debate." *Id.* (citing *In re Workers Comp Initiative*, 850 P.2d 144, 147 (Colo. 1993)).

Governmental Business disallowed the inclusion of the catch phrases "consumer protection" and "open government," in spite of that fact that those phrases were included in the Initiative itself. The Court concluded that they could form the basis of slogans for use in a campaign favoring the Initiative, which imposed tort liability on governmental business activities intended for consumer protection, tax liability on governmental business activities, and restriction of governmental lobbying. *See id.* at 875.

In considering the phrases, the Court decided that:

> [g]iven the negative implication of "closed government," it is clear that the phrase "open government" could be used as a slogan for proponents of the Initiative. . . . Similarly, the phrase 'consumer protection' could be used as a slogan by those supporting the Initiative. As used in contemporary public debate, 'consumer protection' encompasses issues pertaining to the safety of goods and services, the assurance that those goods and services comport with governmental standards, and the absence of fraud in labeling and advertising.

Id. at 876; *see also, Matter of Title, Ballot Title, Submission Clause, and Summary, Adopted April 4th, 1990, Pertaining to the Proposed Initiative on Surface Mining*, 797 P.2d 1275, 1281 (Colo. 1990) (holding that the title, which included words surface mining project "may scar the land," was fair and accurate because repeated operative language of proposed amendment).

Here, the Initiative does not include the words "criminal conduct." It uses the words "criminal liability for business" placing the emphasis on individual liability for failure to perform duties imposed on a business entity by law. *See* Proposed C.R.S. § 18-1-606(1)(a) and (b). On the other hand, the Title contains the words "criminal conduct" a total of eight times. The words "criminal conduct" are likely to work to the proposal's favor without contributing to voter understanding. *See* Title at l. 7; Submission Clause at ll. 6 & 7.

Criminal conduct is prominent in the minds of many Colorado voters in the wake of business scandals created by actual crimes committed by corporate officers at Enron, for example. Many employees and shareholders of US West are frustrated by the reversal and remand of Joe Nacchio's 2007 conviction by the Tenth Circuit Court of Appeals. *See U.S. v. Nacchio*, --- F.3d ---, 2008 WL 697382 (10th Cir. 2008). Even in today's heightened awareness of business crimes, contemporary public debate considers "criminal conduct" of businesses to

be acts like insider trading, embezzlement, fraud, and theft. "Criminal conduct" is unlikely to bring to mind civil wrongs, which the Initiative encompasses with "a specific duty of affirmative performance imposed on the business entity by law."

Unlike *In re Proposed Initiative 1999-2000 #256*, 12 P.3d 246, 257 (Colo. 2000) (holding "management of growth" neutral and not a catch phrase) (relied on by Respondents at page sixteen) there are not two camps of voters, some in favor of and some against "criminal conduct." The issue of criminalizing any breach of undefined "duties that are required by law" is complicated and worthy of serious discussion, rather than having voters pre-judge the issue based on a catch phrase.

IV. Referral Back to Legislative Staff for Subsequent Review and Comment Hearing Unnecessary

Mr. Blake does not assert that the Review Board did not have jurisdiction to approve the Title without resubmission to legislative staff after the proponents' deletion of their proposed definition of "associated person" and the use of the existing definition of "agent."

CONCLUSION

The actions of the Title Board should be reversed because the Title violates the single subject rule set forth in Colo. Rev. Stat. § 1-40-106.5 and the Title is unclear, inaccurate, incomplete, confusing, and misleading.

Respectfully submitted this 21st day of April 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April 2008, a true and correct coy of the foregoing **ANSWER BRIEF TO RESPONDENTS** was hand delivered to the following:

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