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SUPREME COURT OF COLORADO
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Denver, Colorado 80203

FILED IN THE SUPREME COURT
APR 21 2008
OF THE STATE OF COLORADO
SUSAN J. FESTAG, CLERK

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.

▲ **COURT USE ONLY** ▲

Case No. 08SA91

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Joseph B. Blake, a registered elector of the State of Colorado, by and through his attorneys, Fairfield and Woods, P.C., hereby files this Answer Brief to the Title Board's Opening Brief regarding Initiative 2007-2008 #57 ("Criminal and Civil Liability of Businesses and Individuals for Business Activities") (hereinafter "Initiative").

ARGUMENT

I. The Initiative Violates the Single-Subject Requirement

The Court need read no further than page 2 of the Title Board's brief to see that the Initiative covers more than one subject. The final paragraph on that page (carrying over to page 3) provides (bracketed numbering added):

> #57, if enacted, would amend § 18-1-606, C.R.S. (2007) ***[1]*** to extend criminal liability of business entities to include individuals who are agents or high managerial agents of the business. ***[2]*** An individual may avoid liability if, prior to being charged, the person reports to the office of the attorney general all facts which he or she was aware concerning the business entity's conduct that meets the criteria set forth in statute. The measure ***[3]*** also allows Colorado residents to seek civil damages against any business entity, agent or high managerial agent for specified offenses. ***[4]*** Any damages collected must be paid to the Colorado General Assembly. Any such damages are exempt from restrictions on state spending and appropriations established in § 24-75-201.1, C.R.S. (2007).

In its very next paragraph, the Title Board tries to group these four disparate points under the broad theme of "extension of liability for criminal conduct of a business to a business entity's directors, officers, employees and agents who

formulate a business's policies or supervise employees." This fails for two reasons.

First, an initiative with multiple subjects may be not be offered as a single subject by stating the subject in broad terms. "Grouping the provisions of a proposed initiative under a broad concept that potentially misleads voters will not satisfy the single subject requirement." *In re Proposed Initiative, 1996-4*, 916 P.2d 528 (Colo. 1996).

In the Matter of the Title, Ballot Title and Submission Clause, for 2007-2008 #17, 172 P.3d 871, 873–74 (Colo. 2007) held the initiative violative of the single-subject requirement by creating department of environmental conservation **and** mandating a public trust standard for that department. The Title Board argued that the creation of the department and the standards to be applied to it was a "single subject," but that argument was rejected by the Court.

Similarly, in the seminal *Water Rights II* case, 898 P.2d 1076, 1079-80 (Colo. 1995), this court held:

> The Board states:
>
> In order to insure that these bodies properly carry out their responsibilities, the measure requires that certain activities are subject to a vote of the people ... Elections merely ensure that the people have a more direct voice to ensure policies are implemented.
>
> We find this position unpersuasive.

> No necessary connection exists between the two district election requirements paragraphs and the two public trust water rights paragraphs. 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.

Here, the Initiative extends **and** expands criminal liability **and** provides a private cause of action **and** provides that damages awarded be paid to the state **and** provides those damages, once received by the State, are exempt from TABOR.

The Initiative further provides everyone in the state a "get out of jail free" card to all criminal and civil claims actionable under the Initiative. This is certainly a broader "topic" than that rejected by this Court in either *2007-2008 #17* or *Water Rights II*. Consistent with *Water Rights II*, the criminal, civil, remedial, and budgetary aspects of the Initiative contain "no necessary connection" between them.

Second, the final three numbered purposes do not even fall under the Title Board's claimed broad purpose. Allowing residents to seek civil damages against employees and businesses based upon alleged criminal conduct does not necessarily follow from making the conduct criminal in the first place, as the fact that many criminal statutes do not carry with them private causes of action shows.

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.' *Silverstein v. Sisters of Charity,* 38 Colo. App. 286, 288, 559 P.2d 716, 718 (1976)").[1]

Nor does requiring the state to receive the damages awarded, rather than the civil plaintiff, fall under the Title Board's own claimed stated "single-purpose." Civil remedies—in their entirety and regardless of who they are paid to—have nothing to do with "extending criminal conduct."

The final admitted subject—that the civil damages collected by the state are exempted form TABOR—is a state fiscal and budgetary issue that has nothing whatsoever to do with "extending criminal conduct."

But the Title Board's admitted four subjects do not even cover the magnitude of the Initiative. Fifth, the Initiative creates new crimes in criminalizing the "failure to perform duties required by law," including the "omission of a specific duty of affirmative performance imposed on the business entity by law." *Id.* at § 18-1-606 (1)(a). This is different than anything the state admits.

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[1] Practically admitting this point, the Title Board says at p. 6 that it is "not unusual" for a criminal statute to provide civil penalties. Regardless of whether that is true, if there is anything short of a universal connection between the two, then the Title Board has admitted they are distinct topics.

Sixth, and perhaps most remarkably, the Initiative also proposes a "get out of jail free"card. This separate subject provides a "complete affirmative defense for any individual charged" so long as prior to being charged he or she reported to the office of the attorney general all facts which he or she was aware concerning the business entity's conduct that met the criteria of subsection 1 of the Initiative. In other words, an employee who commits a crime is off the hook so long as they reported their criminal conduct to the attorney general before being charged. This applies to civil claims too.

Contrary to the argument of the Title Board that "the measure merely authorizes *qui tam* enforcement," (Op. Br. at p. 7) a review of the mechanics of a *qui tam* lawsuit which is brought under the False Claims Act, 31 U.S.C. §§3729-3733 (the "Act"), shows the two are quite different.

In general, the Act provides for liability of treble damages and a penalty ranging from $5,500 to $11,000 per claim for anyone who submits or causes the submission of a false or fraudulent claim to the United States. The person who brings the action (the "relator") receives a share of the total recovery of a favorable verdict or settlement. Here, the person bringing the civil action can only recover his or her attorney fees, with damages going to the State of Colorado.

Unlike the Initiative here, the Act has a very detailed process for the filing and pursuit of these claims. The *qui tam* complaint must, by law, be filed under seal, which means that all records relating to the case must be kept on a secret docket by the clerk of the court. The relator must also serve a disclosure statement to the United States Attorney, which contains all of the evidence in the relator's possession about the allegations in the complaint. Copies of the complaint and disclosure statement are given only to the United States Department of Justice, including the local United States Attorney, and to the assigned judge of the District Court.

A *qui tam* complaint is not served upon the defendant. Rather, the complaint, and all other filings in the case remain under seal for a period of at least sixty days or longer if requested the United States Attorney. Next, counsel for the government must diligently investigate the allegations of the False Claim Act. At the conclusion of the investigation the Department of Justice must choose one of the following options: (1) intervene in one or more counts of the pending qui tam action; (2) decline to intervene in one or all counts of the pending qui tam action; and, (3) move to dismiss the relator's complaint. In practice, two other options exist: (1) settle the pending action; or, (2) advise the relator that it intends to decline intervention.

The proposed right of action created buy the Initiative is nothing like *qui tam* enforcement. Here, the government is not involved in the civil action, except to the extent it collects damages as a result of the lawsuit. Instead, a resident on behalf of the State initiates the action, litigates the matter and can eventually even settle the matter without the State's knowledge or consent. Where legitimate claims lie, injured parties will compete with the State for damages.

More importantly, however, this argument misses the single-subject mark because whether or not it is consistent with current *qui tam* law has nothing to do with whether it covers multiple subjects. The "de-Brucing" provision, for example, is completely contrary to existing *qui tam* law and thus the Initiative covers multiple subjects.

The Initiative covers numerous topics which can only be brought together with an unconstitutionally-broad brush. The Initiative must be stricken.

II. The Initiative is Confusing, Unfair, Misleading, and Likely to Surprise the Voters

The discussion above underscores this second point—the Initiative's title is confusing because the Initiative itself does so many different things. Eliminating a key feature of the initiative from the title is a fatal defect if that omission may cause confusion and mislead voters about what the initiative actually proposes.

See In the Matter of the Title, Ballot Title and Submission Clause for Proposed Initiative 2001-02 #43, 46 P.3d 438, 442 (Colo. 2002).

In *In re Ballot Title 1999-2000 #258(A),* 4 P. 3d 1094, 1099(Colo. 2000) the titles were materially defective for failure to include a key feature of the initiative, which resulted in misleading and confusing the voters. The title was incredibly detailed, and provided:

SHALL THERE BE AN AMENDMENT TO THE COLORADO CONSTITUTION CONCERNING ENGLISH LANGUAGE EDUCATION, AND IN CONNECTION THEREWITH, REQUIRING ALL CHILDREN IN COLORADO PUBLIC SCHOOLS TO BE TAUGHT ENGLISH AS RAPIDLY AND EFFECTIVELY AS POSSIBLE; REQUIRING EVERY CHILD TO BE TAUGHT IN ENGLISH, EXCEPT FOR CERTAIN CHILDREN WHO PRIMARILY SPEAK A LANGUAGE OTHER THAN ENGLISH; REQUIRING SUCH CHILDREN TO BE EDUCATED THROUGH A SPECIFICALLY DESIGNED ENGLISH IMMERSION PROGRAM DURING A TEMPORARY TRANSITION PERIOD NOT NORMALLY INTENDED TO EXCEED ONE YEAR AND TO THEREAFTER TRANSFER SUCH CHILDREN WHO HAVE ACQUIRED A GOOD WORKING KNOWLEDGE OF ENGLISH TO AN ENGLISH LANGUAGE MAINSTREAM CLASSROOM; EXCEPTING CERTAIN CHILDREN WHO PRIMARILY SPEAK A LANGUAGE OTHER THAN ENGLISH FROM SUCH ENGLISH IMMERSION PROGRAM WHEN THE PARENT OR LEGAL GUARDIAN PROVIDES A WRITTEN INFORMED CONSENT WAIVER; ESTABLISHING THE PARENT OR LEGAL GUARDIAN'S LEGAL STANDING TO SUE FOR ENFORCEMENT OF THE MEASURE AND, IF SUCCESSFUL, TO COLLECT ATTORNEY'S FEES AND ACTUAL DAMAGES; ESTABLISHING THAT THE AMENDMENT SHALL NOT AFFECT ANY CHARTER SCHOOL; SPECIFYING THAT THE AMENDMENT SHALL NOT AFFECT ANY FOREIGN LANGUAGE INSTRUCTION PROGRAM, EXCEPT FOR NATIVE SPEAKERS OF ANOTHER LANGUAGE, WHO ARE LIMITED TO ONE CLASS PERIOD PER DAY WITHOUT A PARENTAL WAIVER; SPECIFYING THAT THE AMENDMENT SHALL NOT PREVENT ANY TEACHER OR AIDE FROM

PROVIDING SUPPLEMENTAL ASSISTANCE IN A NATIVE LANGUAGE TO A CHILD FOR TRANSLATION OR CLARIFICATION OR PREVENT ANY SCHOOL PERSONNEL FROM USING A LANGUAGE OTHER THAN ENGLISH FOR NON-INSTRUCTIONAL PURPOSES; AND CLARIFYING THAT THE AMENDMENT SHALL NOT BE CONSTRUED AS IMPOSING OR MANDATING ANY LIMITS ON THE AMOUNT OF TIME A CHILD MAY RECEIVE SPECIALIZED ASSISTANCE IN ORDER TO LEARN ENGLISH?

Despite this extraordinarily detailed title, the court determined that it "hid" the fact that school districts and schools could not be required to offer bilingual programs. *See id.* at 1099.

In this case, the Initiative's Title provides hides several key features, including:

- The Initiative reaches beyond "criminal conduct" by redefining actions or inactions that historically have been civil duties (such as the requirement of filing annual reports, keeping minutes of board meetings, and honoring the fiduciary duty) and making them criminal. The Initiative creates criminal conduct from the failure to perform these duties, but that is not revealed in the Title.

- The Title fails to properly reference the numerous new substantive crimes that apply to employees, officers, directors, high managerial agents, and those persons who are affiliated with the entity. Further, the language of the Initiative falsely leads the voter to believe that this criminal conduct is already

provided by law stating, that it is "extending criminal liability to a business entity's directors, officers, and employees. . . ." *Id.* at ll. 2–3 (emphasis added).

- The language also 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. *Id.* at ll. 10–12.

- The criminal component of the ballot title provides that it applies to "directors, officers, and employees and agents who formulate a business's policies or supervise employees." *Id.* at ll. 2–4. In contrast, the civil damages reference of the same ballot title merely provides that liability exists with respect to "a business or its agents." *Id.* at l. 7. This variance implies that the Initiative carries a more limited civil component than a criminal component, which is untrue. The choice of words and the implication are inaccurate and misleading.

- The Initiative's title and submission clause do not inform the voter of the requirements of the Initiative's affirmative defense; namely, that in order to avail himself of the Initiative's affirmative defense, a defendant must make a full disclosure to the attorney general, prior to any action against him. *See* Proposed C.R.S. § 18-1-606(4); *see also*, Title ll. 10–12 and Submission Clause ll. 10–12.

- The Initiative is confusing and unclear as to what specific type of conduct would violate applicable law. The initiative fails to define which "duties that are required by law" fall within the purview of this measure. Given the title, the voter would assume that it would be duties that are already defined as criminal, but the Initiative is much broader than that. Taking all of these factors into account, the voters are likely to be misled regarding the acts to which the proposed statute applies.

Finally, the Title Board relies heavily on *In re Proposed Initiatives 2001-2002 # 21 and # 22,* 44 P.3d 213 (Colo. 2002), and quotes snippet from that case. The full quote from that case, however, supports reversal here:

> The titles . . . . must allow the voter to understand the effect of a yes or no vote on the measure. When they do not, both the title board and this court fail in our respective functions.

In this case, the title does not inform the voter of the effect of a "yes" vote, but rather suggests a "yes" vote will have far more limited ramifications than it actually will.

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

The Initiative contains the words "criminal conduct," which 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; *see also, In re Ballot Title 1999-2000 #258(A), supra.*

In *Matter of Title, Ballot Title and Submission Clause, and Summary Pertaining to Proposed Initiative Designated "Governmental Business,"* 875 P.2d 871 (Colo. 1994), this court held:

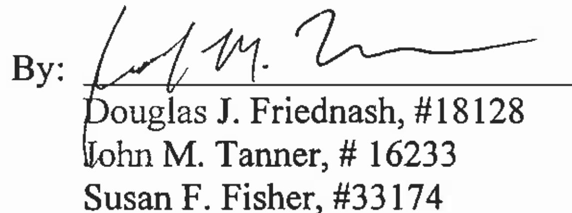
> We have little difficulty concluding that the phrases "consumer protection" and "open government" could form the basis of a slogan for use by those campaigning in favor of the Initiative. . . . the phrase "open government" deals with the accessibility of government information and the requirement that the formation of public policy be conducted under public scrutiny. Given this context, and 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. We have little doubt that characterizing an initiative as one intended to apply laws enacted for "consumer protection" constitutes a slogan or catch phrase that could be used by the Initiative's supporters.

The vast majority of voters, if not all voters, are against "criminal conduct in business." "Criminal conduct" provokes thoughts of such acts as murder, embezzlement, fraud, theft, and arson. These thoughts would trump consideration of lesser offences and whether unidentified "duties required by law"—which could conceivably such minor infractions has filing a form in duplicate that should be filed in triplicate—should be considered crimes.

The Initiative covers multiple subjects, its Title is not accurately reflective of it, and includes an improper "catch phrase" designed to gather positive votes based on terminology alone. The Title and Initiative should be stricken.

Respectfully submitted this 21st day of April, 2008.

FAIRFIELD AND WOODS, P.C.

By: 

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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 **PETITIONER'S ANSWER BRIEF TO OPENING BRIEF OF TITLE BOARD** was hand delivered to the following:

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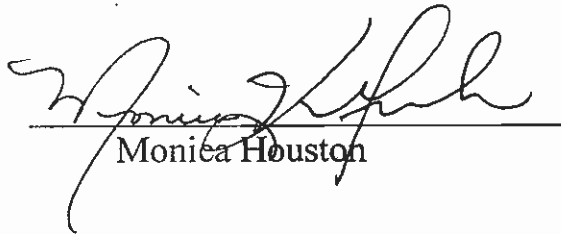

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